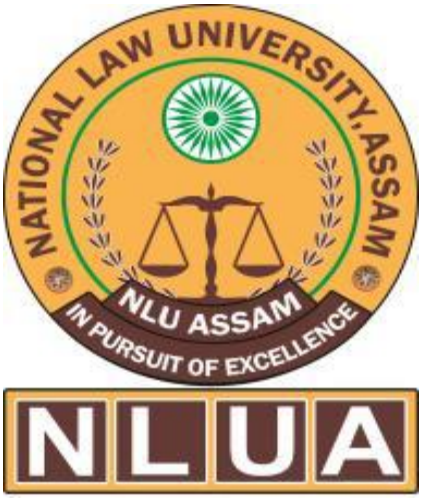
Capital Punishment in India: A Legal Analysis



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MASTER OF LAWS

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DECLARATION

I, Dasukshisha Lyngdoh Marshilong, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **"Capital Punishment in India: A Legal Analysis"** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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Preface

Capital Punishment is one of the oldest forms of punishment and was once accepted as necessary and inevitable in the society. For centuries nobody questioned its validity or its effect on reducing crimes in society. But now in the modern world where the welfare of the society, rational and sophisticated thinking, human dignity, liberty and equality are considered more important than ever before, capital punishment has started to lose its grounds, and many countries especially European Countries have abolished it.

However, death sentence still prevails in the judicial system of several countries in spite of strong opposition by numerous organizations across the world which considers capital punishment as barbaric and inhuman punishment and recommend for the complete abolition of death penalty. .

India is one of the retentionist countries. India has prescribed death penalty in twenty three legislation under relevant provisions ranging from the Indian Penal Code, 1860, Explosive Substance Act, 1908; the Narcotic Drugs and Psychotropic Substances, 1985; Schedule Caste and Schedule Tribes (Prevention of Atrocities)Act, 1989; the Criminal (Amendment)Act, 2013, Anti-Hijacking Act, 2018 and others. Though death penalty in India has been restrained to the doctrine of the "Rarest of the rare case", however its application is often arbitrary and vague which at times had lead to unjust imposition of death sentence. The objective of sentences have widen over the years and this call for proper observation of the results and the circumstances of each case, keeping them side by side with the penological development, especially with the choice of life imprisonment and death penalty.

However, even with internal and external opposition and pressure India has not abolished capital punishment. Keeping in view the circumstances existing today in India especially crimes against women the necessity of deterrent punishment like death penalty has been felt by the people of the society as well as Government and Indian Judicial System. The recommendation for abolition of death penalty has been disapproved by the Judicial System of India.

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1993 - The Protection of Human Rights Act

2012 - Protection of Children from Sexual offences

2013 - The Criminal Law (Amendment) Act

2016- The Anti-Hijacking Act

2018 - Criminal Amendment Ordinance

Table of Abbreviations

1.	AIR	All India Report
2.	AD	After Death
3.	Anr	Another
4.	ACHR	American Convention of Human Rights
5.	BC	Before Christ
6.	BBC	British Broadcasting Corporation
7.	CRC	The Convention on the Rights of Child
8.	CAT	Convention Against Torture
9.	Cr.PC	Code of Criminal Procdure
10.	Cri. L.J	Criminal Law Journal
11.	ECOSOC	The UN Economic and Social Council
12	E.U	European Union
13.	i.e.	that is
14.	ICCPR	The International Covenant on Civil and Political Rights
15.	ICESCR	The International Covenant on Economic, Social and Cultural Rights
16.	Inter-Am. C.H.R	Inter American Commission on Human Rights

17.	IPC	Indian Penal Code
18.	NCT	National Capital Territory
19.	Ors	Others
20.	OAS	Organisation of American States
21.	POSCO	Protection of Children from Sexual offences
22.	r/w	Read With
23.	RPC	Ranbir Penal Code
24.	Res.	Resolution
25.	SCC	Supreme Court Cases
26.	SCR	Supreme Court Reports
27.	TADA	Terrorist and Disruptive Activities (Prevention) Act
28.	UOI	Union Of India
29.	UP	Uttar Pradesh
30.	US	United States Report
31.	UN	United Nation

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Chapter 1

Introduction

"If I am Brutal and you use Brutal Method to overcome me, then you become brutal like me".

– Krishnamurti[1]

1.1 Introduction

Every wrongdoing is follow by some consequences of a kind of penalty or punishment. There are two opinions for the reason of imposing penalty. One of the opinion is that imposition of such punishment on the wrongdoer, will inflict on the minds of others fear and discouragement from committing the same crime, and that a person who has done wrong should pay for his own crime. Thus, capital punishment is also based on the same concept as any other punishment.[2]

Capital punishment has long past in history in every society when neither the existence of imprisonment, nor the value of expiation had been recognised or criminal and his crime were not look upon separately, the capital punishment was a sure and certain method for getting riddance of the offenders and his offensiveness. Moral and religious offences mostly attract capital punishment. During the middle ages, the offences against the king or kingdom was the highest offence and in modern time crime against the property, human body and the State are the highest offence which now also include trafficking, illegal drugs, hijacking the aeroplane, etc.

There has been many debates and discussion over the years in courts and parliament, literature and conferences and yet it still continues to be a confused and complex topic as support for capital punishment has no single theories but instead an accumulation of several different theories. Some of the prominent theories of capital punishment are preventive theory, deterrent theory, retributive theory and reformative theory. Deterrent theory and retributive theory are in favour of capital punishment while reformative theory is against it. So also arise two types of opinions for and against capital punishment, those who are for

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[1] Charles E. Glasscock, "Capital Punishment: A Model for Reform," 57 Ky. L.J. 508 (1968), p. 37 available at http://heinonline.org/HOL/License (27-05-2018)

[2] "Capital Punishment in India," Lok Sabha Secretariat, Parliament and Reference, Reserch, Documentation and Information Service No. 27/RN/Ref./October/2015, Available at http://164.100.47.193/intranet/CAPITAL_PUNISHMENT_IN_INDIA.pdf (27-05-2018)

capital punishment and want to retain it are called retentionists and who are against and support the abolition of capital punishment are called abolitionists.[3]

Retentionist claim that it is necessary to maintain capital punishment to secure peace and security in the society since it has a deterrent effect on likely offenders. On the other hand abolistionist point that capital punishment failed to have any efficacy on the same crime which still exist in society and furthermore they claim that it is an inhuman punishment arbitrarily on the minority and poor and illiterate.[4] Public opinion also plays a role in establishing the legality of such institution. Their favour moves back and forth and the prospect of consensus among people is always vague, however it is also argued that it is not a necessity to put anyone up for trial of capital punishment based on public opinion alone. The legitimacy of crimes and their heinous nature should be the based to attract death penalty.[5] Many acknowledge precedent on policies, laws and practices that are against human rights standards which were supported by majority of people, but were proven wrong and were ultimately banned or abolished. It is the duty of judges and the government to show "how deeply incompatible the death penalty is with human dignity."[6]

Many opinions exist where Capital punishment is seen as retributive and cruel both in the process of execution and for the convict continuously living in the shadow of death. There is a bleak difference between a common murderer and the actions of the State. However over the years, a total of 141 countries have come forward in abolishing death penalty or don't practice it in their State since 1976[7] especially being a member of the United Nations as against the principle of human rights in depriving citizen of their fundament right to life or against inhuman and degrading treatment of individuals under the Universal Declaration of Human Rights and other conventions. Capital punishment is the most primitive form of justifiable revenge killing by society which is cruel and hypocritical.[8]

Much have been done and said for the abolishing of capital punishment in the world over however India has been quite reluctant on its stance on capital punishment. The practice is as

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[3] Charles E. Glasscock, "Capital Punishment: A Model for Reform," 57 Ky. L.J. 508 (1968), p. 37 available at http://heinonline.org/HOL/License (27-05-2018)
[4] *Ibid.*
[5] Rakesh Bhatnagar, "Capital Punishment Violates Human Rights and the Constitution", Available at https://www.thequint.com/news/india/capital-punishment-violates-human-rights-and-the-constitution, (27-05-2018)
[6] *Ibid.*
[7] "Abolitionist and Retentionist Countries", Available at https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries, (27-05-2018)
[8] *Supra note 5*

old as in the Smriti period and invoked against moral turpitude. When the Muslim era came they introduced criminal laws and characterised crime in three categories, i.e., crimes against the sovereign, against God and against individual and in the categories of crimes against individual many offences were clubbed such as robbery, taxes, and murder, etc. When the British reign came little modification was made and their motive provided an imperative effect in capital offences rather than the manner or nature of committing such offences.

In 1946, the Law Commission provided for the first time the Indian Penal Code under the under the chairmanship Lord Macaulay which provided certain provisions which attract capital punishment such as, threat against the state (Section 121), abetting mutiny by an armed forces (s. 132), fabrication of false evidence for capital offences (s. 194), murder (s. 302, 303) abetting of suicide of a child or insane person (s. 305), dacoity with murder, (s. 396), attempted to murder actually causing hurt by a person already sentenced to life imprisonment, (s. 307). The Procedure of such execution is prescribed in the Code of Criminal Procedure. The Supreme of India had performed only 5 execution of death penalty since 1995 in "rarest to rare cases" as provided in ***Bachan Singh case***[9] and ***Machhi Singh case***[10]. However, execution is not exactly followed after the pronouncement of death penalty because if the possibility of commutating it to life imprisonment [11] is put into consideration. Since independence, the number of executions as claimed by the Government of India is only 52 cases, however the information given by the People's Union for Civil Liberties of 1967, stated that approximately 1,422 cases were executed in 16 States in India. India stayed strong in its stance on capital punishment when it voted against the United Nations General Assembly resolution on moratorium on death penalty in 2007 and again the draft resolution on death penalty in 2012.[12] India in its 25th Report of the Law Commission of India,[13] stated that it did not want to risk the consequences or prospect of abolishing capital punishment as it felt that India was not ready for such commitment.

[9] *Bachan Singh v. State of Punjab*, AIR 1980 SC 216
[10] *Macchi Singh v. State of Punjab*, (1977) 2 SCC 238; (1983) 3 SCC 470
[11] S.S Das and Keertika Singh, "Capital Punishment-A Brief Contemporary Study In Present Context", Available at , https://www.researchgate.net/publication/303702641
[12] *Ibid.*
[13] *Ibid.*

1.2 Statement of problems

It is evident in India throughout history that capital punishment has not been considered illegal. It is seen as a demand of justice for the offenders who commit heinous crime in the society[14]. The Constitution of India does provide protection of fundamental right to life and personal liberty under Article 21, however with an exception that such rights is subjected to the procedure prescribed by law.[15] When it comes to questioning the constitutionality of the act by the State, it is often a perplex situation that a brutal, inhumane act, degrading and cruel act can be justified for the state and not the common man. In ***Rajendra Prasad's case***[16], Krishna Iyer. J, stated that,

"*it is fair to mention that humanistic imperatives of Indian Constitution, as paramount to punitive strategy of Penal Code, have hardly been explored by courts in this field of 'life or death' at the hands of the law. The main focus of our judgement is on this poignant gap in 'human rights jurisprudence' within the limits of Penal Code, impregnated by the Constitution. To put it pithily, a world over voicing the worth of the human person, a cultural legacy charged with compassion an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interact with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19, and 21.*"[17] Still the Constitution of India says in Article 21, *"No person shall be deprived of his life or personal liberty except according to procedure established by law*".[18]

The scope of capital punishment is limited to the test of "rarest of the rare case" as has been given in the case of ***Bachan Singh***[19] which stands till today in the Indian judicial system. However, one must understand that the judgement assert that capital punishment as an exception, not a rule. This is again affirm in the case of ***Macchi Singh V. State of Punjab***[20]

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[14] S.S Das and Keertika Singh, "Capital Punishment-A Brief Contemporary Study In Present Context," Available at , https://www.researchgate.net/publication/303702641, (28-05-2018)

[15] O.P Jindal, "Should the Death Prnalty be abolished in India?, What effect will it have on our society if it is abolished?", Available at https://www.quora.com/in/Should-the-death-penalty-be-abolished-in-India-What-effects-will-it-have-on-our-society-if-it-is-abolished, (28-05-2018)

[16] *Rajendra Prasad v. State of Uttar Pradesh*, 1979 AIR 916, 1979 SCR (3) 78

[17] Sujato Bhadra, "Indian Judiciary and the Issue of Capital Punishment" , Available at https://cafedissensus.com/2014/01/01/indian-judiciary-and-the-issue-of-capital-punishment/, (28-05-2018)

[18] Constitution of India, 1950

[19] *Bachan Singh v. State Pujab*, of AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145

[20] *Macchi Singh v. State of Punjab*, 1983 AIR 957, 1983 SCR (3) 413

that there must be a balance sheet of mitigating and aggravating circumstances in factors and the court has exhausted all other alternatives before pronouncing such judgement.[21]

However, it is seen in many instances, that the doctrine of the "rarest of the rare" test is not consistently applied in many cases. The court in many occasion pronounce death penalty "without laying down any legal principle".[22] One problem that arises in case of Doctrine of rarest of rare cases is that the definition is itself vague and is not of a subjective element[23], thus the judges depend on their own perception of the case. Thus, although, Capital punishment is hardly use its existence in the criminal justice system it is also inconsistently applied at times. It has been seen that the same jurisdiction identical crimes by offenders attract prison or death terms differently and unpredictably, e.g. some cases are given mercy from the claw of capital punishment but at times the discretion of the court puts to death the poor, uneducated, weak members of the society.

The inconsistency of these judgements also depends on the criminal justice system as well. There have been many instances that the inability and flaw in the procedural and evidentiary system make a huge disparity in the end result of the court. The inadequacy of the magistrate and police machinery has created a huge loophole in the system for which many had paid a high price. The measure of the punishment must be based on the atrocity of the crime.[24] There are occasions where a simple murder case is convicted to the gallows of death while on the other hand there are some cases where the same kind of offence is committed or far more repulsive were left scot free as there is no strong evidence against such person. This reflects the poor deficiencies in the criminal justice system.

Another loophole also lies in the legal aid system in which there is low representation for the offender, even though right to counsel is given to the accused, one cannot afford the same, which leads them to the hands of government advocate who at times may not have much practice[25] and this leads to unsatisfactory result. This has adversely affected the poor and

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[21] Sujato Bhadra, "Indian Judiciary and the Issue of Capital Punishment" , Available at https://cafedissensus.com/2014/01/01/indian-judiciary-and-the-issue-of-capital-punishment/, (28-05-2018)
[21] Constitution of India, 1950
[22] *Ibid.*
[23] *Swamy Shraddananda* (2008) 13 SCC 767, *ibid.*
[24] "Capital Punishment in India", Shodhganga, Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/12841/7/07_chapter%201.pdf, (28-05-2018)
[25] Jahnavi Sen, "Most Former SC Judges Believe in Death Penalty, But Don't have Faith in Criminal Justice System: Report", Available at, https://thewire.in/law/former-supreme-court-judges-death-penalty-criminal-justice-system, (28-05-2018)

weak section of the society which mostly face death sentence. The legal aid system is a "farce" and its poor quality effect the legal system as a whole.

Another backdrop on death penalty is that the prisoners in the death row are given less protection and face harsh treatments. Even though constitutional safeguards and protections are given to prisoners they are not followed especially when prisoners are in custodial jail. The prisoners face torture and abuse and this often lead to fatal damage and suicide of the prisoners. There are often cases where the accused is forcibly asked to sign a blank paper and evidences are tampered with which later on makes it easy to prove the guilt of the accused.[26]

Even though the Constitution and as well as the guidelines in the Bachan Singh case provide for a reformation ground, it is often not given any chance and judges have failed to see any light in its concept saying that it is a myth and there is too little chance that such type of people will change.[27]

However, there is also little chance that the deterrence effect on death penalty will root out the social evil in the society. The same crime is still committed with or without the award of capital punishment at the end. It must be understood that executing the criminal will make it no difference to the crime justifying it in the name of law. Moreover, not all cases are correct and in the process of miss-judgement an innocent life is put to an end and such mishap cannot be revoked and hence it will be injustice to him.[28] The process all together is inhumane and dreadful thing to take another life in the thirst for vengeance and anger of the public.[29]

1.3 Research Aims

After identifying the research problems, the aims of this research work are drawn from the review of literature and selection of methodology. This work aims to provide a holistic approach on the long continuing act of capital punishment. Along with analysing the international and national framework on capital punishment, the researcher has also made an

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[26] "Samarth Bansal,Most on Death Row in India are First Time Offenders", 16 .May.2016, Available at http://www.thehindu.com/data/Most-on-death-row-in-India-are-first-time-offenders/article14304605.ece, (28-05-2018)

[27] Harish V. Nair, "Should Death Penalty be Abolish? Study present a Firm Argument", 10.12.2017, Available at https://www.indiatoday.in/mail-today/story/death-penalty-abolition-study-1104083-2017-12-10, (28-05-2018)

[28] "Debate on Death Penalty", Intelligent Legal Solution, 18.03.2016, Available at https://blog.ipleaders.in/debate-death-penalty/, (28-05-2018)

[29] "Ten Advantages and Disadvantages of Death Penalty, Future of Working", Available at https://futureofworking.com/10-advantages-and-disadvantages-of-the-death-penalty/, (28-05-2018)

attempt to study the concept, nature and issues involved with the practice of capital punishment.

1.4 Research Objectives

The objectives of this study are as follows-

Firstly, to study the concept, nature and circumstances of capital punishment in India.

Secondly, to examine the international and regional instruments relating to capital punishment.

Thirdly, to analyse the legal provision relating to capital punishment in India.

Lastly, to discuss the judicial pronouncements on capital punishment in India.

1.5 Scope and Limitation

The scope of the present study is confined to the discussion on the legal provisions relating to capital punishment in India. The study covers the nature and concept of the capital punishment and its effects on society and the concern of the public at large. It analyse the legal provision on death penalty both at the international and regional level. While analysing the national legal provisions pertaining to capital punishment the researcher due to paucity of time has limited the discourse only to certain specific legislations imposing death penalty in India. Judicial pronouncements which have elaborated upon the law on death penalty along with the abolitionist and retentionists approach towards capital punishment have also been dealt with in this study. The concept of right to life of the offender on death row and whether there is any other alternative to the present stand on capital punishment in India has also been looked into in the study.

1.6 Literature Review

There has been a continuous debate over morality of capital punishment, some of which are for it and some against it. In the "**Ethics of Capital punishment**", Kramer argued on the legitimacy of death penalty. It projects a crucial role in debunking the familiar rationales for capital punishment involving arguments in favour of death penalty and contemporary opinion on the penal action. It provides a general theory of punishing such appalling criminal for their crime with the justification of free standing. Its underlying principle, which has not been put forward in any current practical and philosophical discussion on death penalty, which

however is originated from a philosophical conception of the nature of evil and defilement. The book talks about the argument of those developments and contribute also to give heed to the standard norms of ethics with the understanding of the differences between deontological or consequential approaches to punishment. [30]

Dr. Subhash C. Gupta, in the book of "**Capital Punishment**" examined effectiveness of law in the existing judicial system with the legal aspects of capital punishment, dealt with the problem of its constitutionality vis-a-vis, its necessity or other aspects dealing with situation of crime. It defines the nature of crime and since it is a more psychological or social problem than legal, it becomes crucial to discuss the different aspects of the death sentences and to observe if retention is otherwise desirable. In this particular literature detail analysis of cases such as Jagmohan case which have come before the Supreme court of India, the history of capital punishment under Hindu law and Muslim law in India, its development under the international and national legal system. The legislative development and changes in the substantive and procedural law or by judicial activism, the judicial trend, and the various factors that affects the award of capital punishment and so also the different factors focusing on accused, victim, crime, society and judicial process have been analysed with the help of case laws in this book.[31]

The concept and context of capital punishment is described in detail in V. Raghuram book, and provides a compiled series of authoritative, thought provoking and relevant articles by renowned author and experts which strengthen the understanding of the subject matter and also open the mind of the reader to death penalty and it effects with the hope of changing the mind of the jurist to think twice before pronouncing capital punishment.[32]

"Race and Crime", is a book which open up the readers to another evil in society which is well associated in society and that is racism. This book it discusses the contemporary issues in all societies where there is diversity amongst the people in ethnic minority and racial group in which it has been found that huge amount of criminals are from such background. The study is mainly based in the United States but same features and factors are common in all criminal system in all countries. The weak sections of the society are the first to be targeted and are facing vast indiscrimination of justice. Even to this decade reported victimisation,

[30] Mathew H. Kramer, "THE ETHICS OF CAPITAL PUNISHMENT, A PHISOLOPHICAL INVESTICATION OF ITS EVIL AND CONSEQUENCES", First edition, 2011, p. 8
[31] Dr. Subhash C. Gupta, "CAPITAL PUNISHMENT,", First edition, 2000, p.17
[32] Veluri Raghuram, "CPITAL PUNISHMENT: CONCEPT AND CONTEXT", First Edition, 2007, p. 6

arrest and crime still exist and the incarceration rates continues to be a concern in the society. Chapter 7 of this book study the interconnection of race and death penalty, following an examination of the different cases, its history and the range of public opinion on death penalty. The contemporary issues on death penalty, the consequences of wrongful conviction and the moratorium movement on death penalty have also been dealt with in the book.[33]

Most European countries are on the quest of abolishing death penalty or already abolish it in most countries however most Asian countries want to retain it. The author in the book **Confronting Capital Punishment in Asia,** has made indepth study of the application and scope on death penalty. It focuses on countries like Japan, China, India and Singapore. It discusses the political reasons in these countries to remove death penalty from the statute books. Measures have been suggested for taking efforts in reducing the application of such harsh punishment. It also talks about clemency procedure that these countries might follow that might help in getting alternative ways against capital punishment, and that these procedures should be fair and transparent with conformity with the international norms.[34]

Dr. Arethi K. Kumari has discussed in her book about International Covenant on Civil and Political Rights, the scenario in countries which have not abolished death penalty, the enigma of capital punishment in most serious crimes. The author has also looked into the question whether capital punishment is an immoral act even is it deters murder, capital punishment in India and its statutory framework on capital punishment. An attempt has been made to discuss whether death row inmates are confined by the phenomenon of the process in the death row and the effect of juvenile execution, terrorist execution and the Supreme Court discretion to consider International Death Penalty Jurisprudence.[35]

"Crime, punishment and responsibility", is another book which explained the jurisprudence of crime and the measure of its punishment. The essays on this book are mostly concentrated on the act of criminalization and what conduct qualify as a criminal offence. It also examines the presuppositions to be followed as a primary rule for such penal, the

[33] Shaun L. Gabbidon and Helen Taylor Greene, "RACE AND CRIME", Third edition,2012, p. 16
[34] Roger Hood and Surva Deva, "CONFRONTING CAPITAL PUNISHMENT IN ASIA, HUMAN RIGHTS, POLITICS AND PUBLIC OPINION" , First Edition , 2013, p. 12
[35] Arethi Krishna Kumari, "DEATH PENALTY: A NEW DIMENSION", First Edition, 2007, p. 10, also available at http://www.apu.apus.edu/, (29-06-2018)

responsibility of the law and to hold people as criminal on determining their actions based on the principle of criminalisation.[36]

1.7 Research questions

i. What is the nature of capital punishment and whether capital punishment has a strong deterrent effect in society?
ii. What are different international and regional instruments dealing with capital punishment?
iii. What are the legal provisions pertaining to capital punishment in India?
iv. What is role of judiciary in India in dealing with capital punishment?
v. Whether there can be any alternate punishment to death penalty?
vi. Whether the doctrine of "rarest to rare case" be considered as a determining factor for imposition of death penalty by the Judiciary in India?

1.8 Research Methodology

The methodology adopted by the researcher in this research work, entitled, "***Capital Punishment in India: A Legal Analysis***", is analytical in nature. The researcher has adopted the doctrinal method on the basis of the data available on the present study. The researcher has referred to a great number of books, newspapers, journals, articles, and e-books in preparing the work. The research is analytical in nature as it analyses the national, regional and international perspective on capital punishment. The judicial decisions on capital punishment have also been analysed.

1.9 Research Design-

In the light of the objectives and research questions formulated by the researcher the study has been classified in the following chapters for the convenience of the study.

Chapter I- Introduction

In the first chapter, it provides a brief introduction to the entire subject-matter of the study wherein the researcher has highlighted the basic understanding of the topic in general. It

[36] Rowan Cruft, Mathew H. Kramer and Mark R. Reiff, "CRIME, PUNISHMENT, AND RESPONSIBILTY: THE JURISPRUDENCE OF ANTONY DUFF", First edition, 2011, p. 15

includes the detailed review of the existing literature on the area of capital punishment, aims and objectives of the study, research questions and research design.

Chapter II- Conceptual Study on Capital Punishment

This chapter provides the conceptual study on the nature of capital punishment and the theories which revolves around the subject that have been propounded by different scholars and jurist of all times. It also gives a brief history on the practices and approach of capital punishment in different countries of the world.

Chapter III- Capital Punishment: International and Regional Perspective

This chapter focuses on the international instruments pertaining to capital punishment. The researcher has also discussed the regional legal instruments of Europe and America which deal with capital punishment.

Chapter IV- National Legal Perspective on Capital Punishment

This chapter includes the Indian precept on capital punishment, the history of its practice in India. It also discusses about the changes and developments on the issue of capital punishment. Certain legislations in India which impose death penalty for the commissions of certain specific offences have been analysed in this chapter.

Chapter V- Capital Punishment: A Judicial Approach

This chapter deals with the role of judiciary in providing grounds and interpretations for imposition of capital punishment through different judicial decisions. It also provides the new trend and development in the judicial approach to capital punishment.

Chapter VI- Conclusion and Suggestions

Lastly, this chapter concludes the study on the subject matter of capital punishment and tries to give a general idea about the prevalence of the practice of capital punishment in India for dealing with heinous crimes such as rape and terrorism. After analysing the concept, nature and law on capital punishment few suggestions have been put forward by the researcher.

Chapter II

Conceptual Study on Capital Punishment

Punishment has been in society as far back as crime has, and it's difficult to trace the origin of punishment without corresponding to crime. Punishment is usually a primary or exclusive form of weapon to restrain criminal behaviour.[37] It is a justified "evil act inflicted to a wrongdoer, on behalf, and at the discretion of society in its corporate capacity on which he is a permanent or temporary member."[38] Punishment is a creation of annoyance, anger and irritation towards one who is said to be a hindrance to peace and security in the society. One individual emotions and grievances can trigger the whole society and punishment is a form of reaction to those who do not conform to the rules and laws of the society. This contributed with the feeling of self positivity as corresponding to cruelty, fear, and reparation, which all help making up propensity for punishing a common thing in society. Thus, punishment as define by Sir Walter Moberly, presupposes that punishment is an act *"Which is inflicted is ill, that is something unpleasant; it is a sequel to some act which is disapproved by authority; there is some corresponding to the act which has evoked it; punishment is inflicted, that it is imposed by someone's voluntary act; punishment is inflicted upon the criminal, or upon someone who is supposed to be answerable for him and for his wrong doings."*[39] Punishment became accepted in society and eventually took the form of social custom and conventions.

There are many types of punishment. Some of them came up during the ancient times, corresponding to the crimes committed, such as banishment, bastinado, stoning, garrotting, flogging, branding, mutilation, oubliette, hanging, or beheading, and there are some of the modern day punishment such as prison, electric shock, lethal injection, gas chamber[40]. Capital punishment is one of the oldest means of punishment. Capital Punishment is derives from the *latin* word "caput" which means "head", which refer death by The term Capital punishment is derived from the Latin word "caput" which means "head", which refers to death by beheading.[41] It is the execution of the offender of heinous crime in which it stands justified and which may cause grave danger to the society, such as murder, rape and waging war against the state. Capital punishment is seen as the most effective tool as a means to

[37] N.V Paranjape, "CRIME AND PENOLOGY", Fourteenth Edition, 2009, p. 51
[38] A. Warrent Sterns, "The Evolution of Punishment", Available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2635&context=jclc, (29-05-2018)
[39] N.V Paranjape, "CRIME AND PENOLOGY", Fourteenth Edition, 2009, p. 51
[40] Tim Lambert , "A Brief History of Punishment" , Available at http://www.localhistories.org/pun.html, (29-05-2018)
[41] Veluri Raghuram, "CAPITAL PUNISHMENT: CONCEPT AND CONTEXT", First Edition, 2007, p. 21

maintain social order in the society and as a retributive effect in society. It is believed that it is justified to take a person's life if he took the life of another, thus, the merit of capital punishment does include the elements of revenge as a form of justice, which includes reparatory satisfaction for an injured party and to the whole society. The fear of death is told to be the maximum deterrent effect which keeps people away from crime and criminal behaviour.[42] However, modes of capital punishment are often questioned in the society as it includes cruel and inhumane methods ranging from gunshot, electrocuting, hanging or beheading to lethal injection.

Therefore, some jurist have questioned the effectiveness of such cruel penalty as to whether the traditional form of punishment should stay in society as an exclusive tool to root out criminal behaviour or is there an alternative way to control or restrain criminal activities through more diverse or flexible methods of a curative and reformative approach. However, the concept of punishment has evolved and modified in the last few centuries along with opinion and values of people in time.[43] There are many jurists who have tried to bring out the concept of punishment and its factors in many theories which are for and against the capital punishment. Some of the main theories of punishment are Deterrent Theory, Retributive theory, Preventive Theory and Reformative Theory.

2.1Theories of Punishment-

2.1.1 Deterrent theory

To deter means to abstain from doing something and deterrent punishments are severe punishment with an objective to avert offenders from doing the same act again. The theory also aims on the concept of inflicting various punishment and penalties with a hope to deter the criminal activities in society. It creates a sense of fear and terror in the mind of the others that rigor punishment will follow from the consequences of their actions, and set as a warning to those who might be tempted to imitate such criminal activities keeping them away from crime.[44]

Jeremy Bentham was the founder of the deterrent theory, in which he stated that, "*General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has been, committed as an isolated fact, the like of which would*

[42] Arethi Krishna Kumari, "DEATH PENALTY: NEW DIMENSIONS", First Edition, 2007, p. 19
[43] N.V Paranjape, "CRIME AND PENOLOGY", Fourteenth Edition, 2009, p. 54
[44] "Theories of Punishment", Available at https://www.lawnotes.in/Theories_of_Punishment, (29-05-2018)

never recur, punishment would be useless. It would only be adding one evil to another. Bit when we consider that an unpunished crime leaves the path of crime open , not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual become a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety."[45]

Bentham being a preacher of the principle of utilitarian concept brought a profound view on the concept of punishment. The philosophy of utilitarian, emphasize on the use of maximum happiness and since punishment and crime are not consistent with the ideal of happiness it needs to be prevented or do away in society. However, there is no society free of crime and thus one can only kept it away or at a minimum in the society. The principle of utilitarian is "consequentialist" in nature and perceived that the crime has a consequence for both the society and the offender as well, and that it holds that "the total goods produced by the punishment should exceed the total evil". The laws under the utilitarian concept also stipulate punishment should be intended to deter the criminal activities in the future. There are two types of deterrence, general and specific. Punishment which should prevent the same people from performing the same crime are called specific deterrents punishment while the punishment which are suppose to prevent the other people from committing the said criminal act are called general deterrents punishment. General deterrence serves as an illustration or example to the people in general and put on alert the consequences that follow by committing such crime, while specific deterrence prevents a person from committing the same crime by putting the person in jail for a specific time period or disable him by an unpleasant designed manner that will inflict fear in the mind of the offender from repeating the same criminal act.[46] Bentham concept on this theory was mainly revolving on a hedonistic concept as would deter crime if penalty were swiftly, severely and certainly applied. But one has to keep in mind that punishment is an evil itself and this evil character of the punishment should not be

[45] Shaswatta Dutta, "Theories of Punishment: A socio-legal View", Available at http://www.legalserviceindia.com/articles/pun_theo.htm, (30-05-2018)

[46] "Punishment: Theories of Punishment- Utilitarian, Society and Criminal Theory", Available at <a href="http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html"> , (30-05-2018)

overwhelming as to surpass the evil of crime itself, and lose the main objective of the punishment.[47]

Deterrent theory of punishment stands on the concept that punishment is given to prevent people from committing the same offence. The supporters of capital punishment rely on this theory to back their arguments, that heinous crime which is accorded capital punishment does not have any value of a retributive or reformative effect.[48]

Deterrent punishment may provide a temporary solution to criminal under its hold but the crime in itself does not vanish by fear factors. It has been seen that there are ironical results to such methods, in which rather than deterring crime it hardens the criminals. The act is revengeful and immoral and the state is unjust to take the life of another person on any circumstances. Once life is taken there can be no turning back and the risk of error in the justice system is a challenge to the deterrent punishment especially like capital punishment, which means that innocent once maybe executed for the crime which they did not commit.[49]

2.1.2 Retributive theory

Another theory of punishment which supports capital punishment is the retributive theory of punishment. This theory of punishment has its historical roots since ancient times and appears side by side with the "Restorative principles of punishment" in law codes such as the "Code of Hammurabbi (*c.* 1750 BC) , "the Code of Ur- Nammu (*c.* 2050)" and "the Laws of Eshnunna (*c.* 2000 BC)" collectively known as the "Cuneiform law".[50] It is derived from the latin word "tribution" which means "I pay back" which is similar as to mean payment of a debt owed to someone. In retributive punishment justice is achieved only if the offender pays his debt to the sufferer and the society of the crimes and grievances he had caused. Therefore the essence of such type of punishment is based on the concept of "*lex talionis*" i.e. the rule of retaliation which is the direct and equal restitution[51] effect on the offenders, i.e. an "eye for an eye" and "tooth for a tooth", however, the crimes committed should be proportionate to

[47] Shaswatta Dutta, "Theories of Punishment: A socio-legal View, The Legal Service of India", Available at http://www.legalserviceindia.com/articles/pun_theo.htm, (30-05-2018)
[48] "Capital Punishment in India", Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/45012/9/09_chapter%204.pdf, (30-05-2018)
[49] S.G. Goudappanavar, "Critical Analysis of Theories of Punishment", Available at http://jsslawcollege.in/wp-content/uploads/2013/05/CRITICAL-ANALYSIS-OF-THEORIES-OF-PUNISHMENT1.pdf, (30-05-2018)
[50] Jon'a F. Meyer, Retributive Justice, Penology, Available at https://www.britannica.com/topic/retributive-justice, (30-05-2018)
[51] *Ibid.*

the punishment given.[52] In this philosophy of punishment, it is very important for the elements of *mensrea* i.e. guilty mind and *actus reus* i.e. guilty act to be present before any penalty is imposed upon the offender. It is necessary for the offender to be proved guilty along with the measure of crime for the penalty to be imposed.

This is opposite to the deterrent theory that imposes the same obligation and punishment to the innocent to create a balance and provide a reflection that crime is punished and detected and others are deterred from such crimes. Retributionists believe that only those who broke the law and commit the crime will face punishment to that of the same degree of the crime committed. Thus, they would prohibit the imposition of death penalty to the offenders who are insane or mentally disabled and who do not understand the nature of the crime even though they are responsible for the crime. In the act of accidental situation or in the act of self defence the retributionists will decrease the measure of punishment given to them on the bases that there is no criminal intention present while committing the crime and the act are completely based on the on lack of understanding or is an act of self defence.[53]

The main concept of retribution theory revolves around the "principle of desert" which correlates with the "principles of proportionality". The principle of desert stands that a person who commits a moral wrong to the society deserves to be punish as a justification to the victim and the family. This is because it believes that every human being has a will to do what is right and wrong and if they choose to do a moral wrong it will not only affect the victim but also the society as a whole, thus, it provides punishment for such wrong to maintain decorum. If the order is disturbed then the relationship between the society and the individual is lost and the aim of retributive theory is to bring about reconciliation to the society by making him or her "pay" for such crime. But the punishment should be to the extent to which he or she deserves according to the principle of proportionality and it is a core element to the retributive theory. This is because; "*severity of punishment should be commensurate with the seriousness of wrong, only grave wrong merits grave penalties, minor misdeeds deserve lenient punishment. Disproportionate penalties are undeserved- severe sanctions for minor wrongs or vice versa.*"[54] Thus, retributive theory tries to reinstate the

[52] Catherine. W, What is Retributive Justice, Definition and Example, Available at https://study.com/academy/lesson/what-is-retributive-justice-definition-examples.html, (30-05-2018)

[53] Veluri Raghuram, "Capital Punishment: Concept and Context", First Edition, 2007, p. 17, also see, sanjeev.sabhlokcity.com

[54] David A. Strakweather, "The Retributive Theory of "Just Desert" and Victim Participation in Plea Bargaining", Vol. 67: Iss. 3, Artile 9, Available at

relationship that was broken by the offender only to the degree which is necessary to weight of the crime committed and bring harmony to the society.[55]

"Desert" is analyzed in three ways, the link between the one who deserves something, what they deserves, and how much worth do they deserves, often known as desert subject, object and basis. The desert subject is the offender or wrong doer, but it must also establish what kind of wrong doer that person is, whether he is an insane person or a child or the corporation or the State itself. What claim of crime he or she has committed must also be established and then it must be ascertained what punishment is to the degree of what wrong, i.e., ascertaining the proportionality of the punishment which is desert object. One thing that is important to desert object is that the offenders have a right and that they should not be punish wrongly. It is essential to hold this right otherwise it will be absurd to hold that the State is wrong for pardoning the wrong doer. This is done so, as to give the same treatment to the person held responsible of the wrong rather than seeing him as a beast. The desert basis deals with the most essential part in establishing the wrong for the punishment. Here every person has the right to choose; however, if this right to free will to make our own choices deserves to be punished, then who is permitted to punish them. Moreover, desert need not necessarily be the only reasonable outcome for punishing them. Here we see find two kinds of desert, one which deals with right and the other which concern itself with the outcome of such basis. Retribuvists holds that punishment of the wrong doer is a good outcome as it brings back peace in the society and strongly believes that others have a certain reason or right to punish them and thus is justified to maintain that harmony in society.[56]

The principle of proportionality makes sure that one is not punished for more than what one deserves. In proportionality, the measure of wrong is to correspond to the gravity of crime that has been committed and there are two dimension of wrong, one is responsibility of the offender for risking it or bringing it and the degree of harm inflicted on someone. The main challenge is to bring these two dimensions in the same gravity. Thus, there are two senses to the principle of proportionality, i.e. ordinal and cardinal proportionality, in which the view

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https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1445&context=ilj, (30-05-2017)

[55] David A. Strakweather, "The Retributive Theory of "Just Desert" and Victim Participation in Plea Bargaining", Vol. 67: Iss. 3, Artile 9, Available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1445&context=ilj, (30-05-2017)

[56] Alex Wallen, "Retributive Justice", Available at https://plato.stanford.edu/entries/justice-retributive/#DesSub, (30-06-2018)

that only severe crime should be severely punish is called proportional ordinal and the view that fixed measure of punishment should be given to crime. The maxim ***lex talionis*** which means an eye for an eye is a traditional approach of punishment and lends more to the cardinal theory, however with its character it may either be too specific or too vague to be a likely reason for punishment. An ordinal approach also has its demerits as one has to rank the order of wrongs and provide the degree of punishment and its compensation would provide disproportionate value to all crimes. The prospect of bringing these two types of punishment together with its cardinal elements and then applying ordinal methods can fill up the gap of an acceptable proportional punishment.[57]

However, no theory is without a criticism, it has been argued that retributive theory is an old theory and is based on outdated philosophy. Moreover, it is still a theory that justify a revenge against the offenders.[58] The essential application of the principle of desert to punish the offenders is itself very hard to maintain. The subjection of morality itself is a difficult process and to make a basis for judgement of crime.[59] What is important for retributionist is desert of punishment rather than the punishment for the sake of society which is hard to determine the factors which will measure the desert for punishment.[60]

2.1.3 Preventive Theory

This theory is based on the idea of preventing the repetition of criminal act through methods and measures in disabling the criminal through forfeiture, imprisonment, and suspension of certain activities. It's motive is not to take revenge on crime but to prevent it, and view punishment as a social necessity and thus, by sending the offenders to jail or prison will act as a prevention of such crime if they have a hold on the offender and preventing him from committing more crime and thus protect the society by segregating them.[61] The utilitarian jurist supports the preventive theory of punishment because it has an influence of

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[57] Alex Wallen, "Retributive Justice", Available at https://plato.stanford.edu/entries/justice-retributive/#DesSub, (30-06-2018)

[58] Jon'a F. Meyer, "Retributive Justice: Penology", Available at https://www.britannica.com/topic/retributive-justice, (30-05-2017)

[59] Abhishek Mohanty, "Retributibe Theory of Punishment: A Critical Analysis", Available at https://www.lawctopus.com/academike/retributive-theory-of-punishment-a-critical-analysis/, (30-05-2018)

[60] *Ibid.*

[61] Shaswatta Dutta, "Theories of Punishment: A socio-legal View, The Legal Service of India", Available at http://www.legalserviceindia.com/articles/pun_theo.htm, (30-05-2018)

humanitarianism in penal laws, in which they feel that the institution and development of prison is a good outcome of criminal punishment.[62]

The socialist theories of punishment dominated the 20th century which viewed crime as a social hazard and punished criminals on the merits of just deserts. In the 1960s jurist assemble themselves with their theory and started asking why the such methods and theories could not stop people from committing crimes, and research were undertaken to identify certain reasons and to develop an alternative measure to prevent crime. In the 1970s, capitalist inequality and the judicial system completely changed the perspective of criminology and brought contradictory interest and again opened up with the socialist perception. In the 1980s, there was a shift of views from socialist to neo-classical which also provided a "rational choice theory", which focused on the "rationality" of crime in certain forms. The policy that came out of this was the "situational crime prevention" through police patrolling or CCTV or by the use of metal detector and so on. As a primary initiative, prevention is seen to envisage the social surrounding to be alert and providing "tertiary prevention" in the society. Another method also came up which centre around the effective and short term programmes relevant with the rational concept. Along with the concept of social probation and social work the development of policy and prison institution consistent with criminal justice system has played a better role in providing security and protection in the society.[63]

Since ancient times the main conception that punishment is most important and a necessity to root out crime and criminal from the society still prevail now. Prevention theory provides another measure as a form of punishment in bringing in the institution of prison as a dual benefit for punishment for the criminal and protecting the community. The confinement of the offender from the rest of the world is proven to have an immense result of preventing him from committing the same crime at least temporarily. This is done so with the belief that the seclusion with any sort of rigorous and scrupulous labour which will give a feeling of redemption which may change the motive and mindset of offenders. Imprisonment deprives him of all the personal liberty and values that a person has and thus, provides three intentions such as weakening the offenders without giving any cruel or inhumane treatment, depriving

[62] "Preventive Theory Law and Legal Definition", Available at https://definitions.uslegal.com/p/preventive-theory/, (30-05-2018)

[63] Ian Gough, "Understanding Prevention Policy: A Theoretical Approach", Prevention paper, 2013, Available at, http://eprints.lse.ac.uk/47951/1/Understanding%20prevention%20policy%20(lsero).pdf, (30-05-2108)

the liberty of that person as a punishment and protection of the society without hurting any one side. They believe that the most effective method is by pressurizing the criminals thus preventing them from committing more crimes.[64]

Another set of jurist believe that preventive theory have another perspective to it, first, they focus on the individual potential to grow and change from their criminal behaviour because they believe it might be some psychological or biological behaviour disorder or lack of economic resources which deprive them to reach out to people in the society, secondly, the realization that the main problem are the economic and social obligation that compel them to lead a delinquent life. The aim to remove the economic and social inequality and problems is the most difficult task in society which has been continuing for many decades and is still the major objectives for many social reformers and it is strongly believed that crime rate will reduce if those problems were reduced. It is important to consider that, when we think of individual responsibility, the nature of man is volatile and other factors also play their role in determining their personality.[65]

The preventive theory may have provided the best approach to punishment as it has a deterrent effect which comes along with preventive methods, it however also depends on the factors which will follow and the promptness of the whole process. This brings up many challenges such as the hindrance to the investigation process and the authority that may be a downfall of this theory. There is a debate as to how long should a person be restrained from the start of the investigation to the last verdict and the maximum amount of imprisonment for different punishment of crime and the bitter truth is that it is never absolute. When it comes to factors that may lead to the crime which provides a consideration for the act is never accurate as it is mostly based on human nature which is unpredictable. The philosophy is more or less like a rehabilitation centre and will not have effect on hardcore criminals rather it will just make them more harden their attitude to crime. The preventive measure may restrain them temporarily but will not guarantee that it will have any effect emotionally to make him a changed man that will not harm the society.[66]

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[64] Mohammad Imran, "Theories of Punishment with Special Reference to Preventive and Reformative Theories", Vol.3:Iss.2, ISSN 2455 4040 ,pp. 85-87, Available at http://ijsard.org/wp-content/uploads/2017/05/THEORIES-OF-PUNISHMENT-WITH-SPECIAL-REFERENCE-TO-PREVENTIVE-REFORMATIVE-THEORIES-By-Mohd-Imrancompilation-volume-3-issue-2.pdf, (1-05-2018)

[65] *Ibid.*

[66] "Critical Analysis of Theories of Punishment", Available at http://jsslawcollege.in/wp-content/uploads/2013/05/CRITICAL-ANALYSIS-OF-THEORIES-OF-PUNISHMENT1.pdf, (1-05-2018)

2.1.4 Reformative theory

The deterrent, retributive and preventive theory which profoundly emphasize on the importance of punishment to diminish crime in the society has found to be quite ineffective as crime still exist in society. In the 18th century another set of jurist came up to tackle the situation of reducing crime by a looking at new angle to the concept of punishment by taking punishment as a reformative approach in changing criminals and thus, introduced the reformative theory. This concept came after the humanist movement under thinkers like Bentham and Becearia. This theory emphasizes more on the criminal rather than the crimes he committed and seeks transform them in to law abiding citizen of the society. They see the criminal as a patient in need of help and his circumstances, and believe that it is psychological and physical weakness, which lead him to commit such crimes.[67]

Reformists believe that crime is committed as an outcome of conflicting motives and characters of the criminal. One commits a crime because of the reason that their character is weak and that they cannot resist the temptation of wrong intention. The reformative theory sees punishment as a form of curative foundation to help build up the character of man so that they will not become slave to their own temptation. They don't believe that killing is a solution to all crimes and their ultimate goal is to bring about a change in the character and personality of the wrongdoer so that he can have new beginning and be a new man in society.[68] Thus this theory revolves and emphasises on the individual development and change through different treatment, looking at the offender as a human being rather than a beast who need to be get rid of.

Reformist use methods that will help to understand the psychological and social aspect of criminal behaviour of the individual which includes using the prison as training centres' Probation for employment and parole are some of the methods used by reformative theory[69] and strictly prohibit the deterrent and retributive aspects of punishment which are against human consideration.

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[67] Marco Roscini, " The United Nation Security Council and The Enforcement of International Humanitarian Law", Available at https://poseidon01.ssrn.com/delivery.php, (2-05-2018)

[68] Rustam Singh Thakur, " An Eye for an Eye Will Turn the Whole World Blind- In Special Context to Reformative Theory of Punishment" , Available at http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=d4648720-96bb-4fab-8eca-32b16ce2dae1&txtsearch=Subject:%20Criminal, (1-05-2018)

[69] Akhanksha Arya, "Reformative Theory of Punishment: An Analysis", Vol.I: Iss. I , LIJCRL, pp. 11-13, Available at, https://lexkhoj.files.wordpress.com/2016/05/reformative-theory-of-punishment-an-analysis-by-akanksha-arya-lexkhoj.pdf, (1-05-2018)

This theory is based on a humanistic principles and thus even if the individual is a criminal, it does not diminish the fact that he is still a human being and this should be the main consideration and very effort should be taken to change him to be a better human being during his internment period. This theory recognises and upheld the dignity and worth of every human being whether be a criminal or not and to be willing to retrieve the wrong doer for his sake and not to exile him or get rid of him completely from society. This theory also provide a concept of educating and organising criminal in a rehabilitative approach through many activities and programmes with sufficient facilities and foundation to help encourage, or stimulate the criminals to help him change his mentality on crime.[70]

Since imprisonment is not taken as a punishment but as a rehabilitative centre to cure and reform the individual the setting for prisons are to be such that it has all the facilities such as asylum, health centres and working environment, and educational programmes and activities such as having a library or any activity which will mould the individual into a better person.[71] Through these methods it is believed that it will help and encourage the individual from abstaining from crime and criminal behaviour as far as possible and to venture into a better life both for his good and also the society.

This theory also provides a responsibility towards the society in which they should not insult or humiliate the criminals who have served their imprisonment, or those who come for probation or on parole. They should treat them as regular people and not excite them to do illegal acts or to increase their criminal behaviour in any way, otherwise they may cause a upheaval and harm the society itself. So also the government have a responsibility towards them as well. The government should make procedures and policies for offenders, and also provide the necessary finance and resources for the effective implementation of the programmes and activity for the improvement and development of delinquency without fail.[72]

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[70][70] Akhanksha Arya, "Reformative Theory of Punishment: An Analysis", Vol.I: Iss. I , LIJCRL, pp. 11-13, Available at, https://lexkhoj.files.wordpress.com/2016/05/reformative-theory-of-punishment-an-analysis-by-akanksha-arya-lexkhoj.pdf, (1-05-2018)

[71] *Ibid.*

[72] Prajwal Poojary, "Speech on The Reformative Theory of Punishment", Available at http://www.shareyouressays.com/knowledge/speech-on-the-reformative-theory-of-punishment/115818, (1-06-2018)

With the assistance of sociologist, psychiatrist, penologists and criminologist, etc. , these reformative aims and objectives are a life changing opportunity for may offenders especially to juveniles as they have to live their life and have so much more to give to society, thus the coming of " Probation for offenders" ad Juvenile Justice System" had made a lot of difference.[73]

The reformative theory does not have a strong opposition to it, however, even though ideologically it stands strong, it is criticised on the basis of its practical implication as many have pointed out that rather than effectively bringing restorative justice it is more based on a humanistic response. Another concern is that reform may not work on hard core criminals or habitual offenders. There is no guarantee that the offender will not go back to his old self and try to commit the same offence again. These people have an impossible mentality which is incurable and more over it not justified that the criminal should go unpunished while the grievances are caused.[74]

2.2 History of capital punishment

Capital punishment is one of the oldest and highest form of punishment given to an offender for serious or heinous crimes committed, as a sanction of death given by the state as an act of justice. It is practiced from ancient times as the fastest way to punish the wrong doer. It is recorded as early as 1700s B.C in the oldest legal documents the Babylonian "Code of Hummurabi" which have written laws for death penalty and twenty-five crimes under the Code which attracted capital punishment by the State included murder, aiding the slave to escape , adultery and many more.[75] In the fourteenth century to fifteenth century B.C, capital punishment was also found in the "Hittite Code" or the code of Nesilim and also in the Twelve Tablets of the Rome laws in the Fifth Century B.C and the "Code of Athens" by Greece which was a draconian law which prescribed death penalty for all kinds of offences in the 7th century B.C.[76]

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[73]Prajwal Poojary, "Speech on The Reformative Theory of Punishment", Available at http://www.shareyouressays.com/knowledge/speech-on-the-reformative-theory-of-punishment/115818, (1-06-2018)

[74] Tanu Priya, "Reformative Theory of Punishment", Available at https://www.lawctopus.com/academike/reformative-theory-of-punishment/, (1-06-2018)

[75] "History of Death Penalty", Available at https://deathpenalty.procon.org/view.timeline.php?timelineID=000025, (1-06-2018)

[76] "Intoduction to Death Penalty", Available at https://deathpenaltyinfo.org/part-i-history-death-penalty, (2-05-2018)

Capital punishment included cruel methods over the years such as burning alive, stoning, drowning, hang to death, impalement, crucifixion and many more. This was because it was believed that such criminals deserved to be tortured for their sins and thus severe suffering was intended in the process of executions.[77]

The trend eventually changed after the eleventh century AD when William the conqueror brought death penalty to an end except for the crimes such as murder and in times of war. Rather than putting the criminal to death William was of the view that such criminal should be subjected to agonising and unbearable cruel treatment. However, this was not follow for long as his son, Henry I in 1180, brought back death penalty with more crimes added and new different methods were also introduced. However, hanging was the most popular method followed in the United kingdom, other methods includes quartering a prisoner, boiling the prisoners alive and many more.[78] This continued till the 16th century in Great Britain.

During the Middle Ages, Great Britain greatly influenced the imposition of capital punishment by the State. When the European moved out to colonise many territories, they carried the concept of capital punishment along with them and left a huge impact on these other colonised countries. America being one which commonly practiced capital punishment and the first execution was recorded as far back as 1608, in Jamestown Colony of Virginia in which Captain George Kendall was executed. Later in 1612, the Virginia government enacted the "Divine, Moral and Martial Laws", which prescribed capital punishment for even minor crimes such as killing chickens, or stealing petty things and the worst which attracted death penalty was to have any trade relation with Indians. Again in 1665, the "Duke Laws" were introduced by New York which attracted capital punishment to anyone who "then the true God and his Attributes".[79] However, death penalty in United States of America differed from states to states. Some states like State of Michigan in 1846 was the first State to abolish capital punishment for all offences except for treason towards the State and later other states also followed like Rhodes Island and many more.[80]

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[77] Talal Al-khatib, "History of Death Penalty", Available at https://www.seeker.com/a-history-of-the-death-penalty-1768523159.html, (2-05-2018)
[78] *Ibid.*
[79] Talal Al-khatib, "History of Death Penalty", Available at https://www.seeker.com/a-history-of-the-death-penalty-1768523159.html, (2-05-2018)
[80] *Ibid.*

2.2.1 The Abolishment Movement

The flow of movement for abolition of death penalty began to take place around 1764 when Italian jurist Cesare Beccaria criticised the practice of death penalty and its effectiveness in eliminating crime. He was considered as the founder of modern abolition movement of death penalty which influenced many other jurists to take the same stand. He made a lot of contribution from his famous book "*Essays on Crimes and Punishment*" which was an 18th century study of the Europe criminal justice system and this has been considered as the first step in addressing the abolition of death penalty.[81]

Jurist like Dr. Benjamin Rush advocated for the abolition of capital punishment, and did not consider death penalty as a deterrent effect in society rather to his view it increased crime rate in society. He instead had a strong credence on the "brutalisation effect of punishment" like William the Conqueror. He gained a lot of support from then President Benjamin Franklin and William Bradford who was the then Attorney General of Philadelphia. In 1794 death penalty was abolished for all offences apart from murder.[82]

In the 1920s and 1940s, there was a revival of the practice of capital punishment through the writing of many criminologists who were of the opinion that was one of the best social measures against crime and thus, in the 1930s there was the highest rate of death penalty ever recorded in the American history. In the 1950s onwards after the World War had ended, a change of opinion arose in which many nations took a stand against death penalty and capital punishment in America subsequently decreased and some other States completely abolished it.[83]

In Europe many countries had reduced the use of capital punishment by 1861. In the 19th century many abolitionist such as Charles Dickens and the Quaker joined the movement in the stand against public execution.[84] By the 20th century murder was the only exception of capital punishment in Europe, and many restrictions were imposed on death penalty. The most important event that led to the change of mindset was the end of World War II, in which death penalty took a backseat and subsequently led to the abolishment of death penalty in

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[81] "History of Death Penalty", Available at https://deathpenalty.procon.org/view.timeline.php?timelineID=000025, (1-06-2018)

[82] "Intoduction to Death Penalty", Available at https://deathpenaltyinfo.org/part-i-history-death-penalty, (2-05-2018)

[83] *Ibid.*

[84] Julian B. Knowles, "The Abolition of Death Penalty in the United Kingdom", Available at http://www.deathpenaltyproject.org/wp-content/uploads/2015/11/DPP-50-Years-on-pp1-68-1.pdf, (2-05-2018)

Europe. With the introduction of the European Convention on Human Rights, 1950 many countries one by one abolished the practice of capital punishment in their country.

2.2.2 Scenario in Asia

Death penalty in Asia is also no exception. Asia, takes almost 60% of the world population and account for more than 90% of the executions practiced in the world.[85] In Asia, capital punishment is a common penalty practice which has been seen throughout centuries and has its roots from ancients' times. The historical practice in Asia shows that the political approach to capital punishment policy was a major weapon of the Government. The highest nations states are found in Asia ranging from China, Singapore, North Korea, Vietnam, who show the highest rate of capital execution, while there are other retentionist countries which show limited capital prosecution such as Indonesia, Japan, India and many more. There are also other countries that are moving forward to the *abolitionist de facto* such as Taiwan, Philippines and South Korea. The Middle Eastern nations, such as Malaysia, Bangladesh, Indonesia who are mostly Islamic nation are a strong retentionist because of their cultural influences. However, there have been recent decreases of capital prosecution from these Middle Eastern countries, as they have gone to a more secular concept rather than a religious approach, thus, proving that religion is not the main cause of death penalty.[86]

One of the main reasons for high rates of death penalty in Asia is public opinion and culture; however, this might not be the same for all Asian countries. For example, Lee Kuan Yew, strongman of Singapore, justified the state of high rate of prosecution by saying that is part of the "Asian values" and the voice of the collective interests of the society, but this might not apply to the whole of Asia. There is no doubt that serious and heinous crimes are supported by the public for capital penalty but the rate of execution occurs differently in many region of Asia. There are however, other parts of Asia which are like Japan which is one of the most developed nations in Asia, but the consistency of the rate of practice of death penalty may be because of political agenda and failure of its ruling party to control the government. Same circumstances in the Philippines were seen, where the shift of political power completely changed the scenario of the country on which the abolition of capital punishment was based.

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[85] David T. Johnson and Franklin E. Zimring, "Death Penalty Lesson From Asia", Vol. 7: Iss. 39, ASPJ, 2009, Avialable at, https://apjjf.org/-David-T.-Johnson/3228/article.html, (2-05-2018)
[86] *Ibid.*

Again, however, this does not mean that all Asian States are influenced by the political approach to death penalty, but most of them are.[87]

Mostly, death penalty is used as a crime control policy for the State and is the main reason of public support in this area. However, in many Asian countries, the State took advantage of this power in which, the state resorted to extra-judicial killing in which execution took place in police lookup or at time of attacking insurgent or killing someone without giving that individual a right to fair trial. This however, goes against the principle of due process of law and contravenes the personal liberty and dignity of the person. This is mostly common in China, South Korea and Taiwan.[88]

However, with the development and influence of Human rights in the international arena, the practice of capital punishment is slowly declining in which 21 out of the 57 countries in Asia have abolished capital punishment which includes Nepal, Cambodia, Bhutan, Philippines, Mongolia, Hong Kong, East Timor, Kiribati, Uzbekistan, Kyrgyzstan, Turkmenistan, and Macau. [89] But Capital punishment has still not lost its holds in the Asian nations which, is still the highest executioner in the world and these countries be include China, Pakistan, Saudi Arabia, Iraq and Iran. China has the highest rate of execution in the world with 1551 execution taking place in 2017[90], and about 87% together are seen from Iran, Iraq, Pakistan and Saudi Arabia. There was an increase of 82% in death sentences in 2015 and there are still many countries in Asia that are keeping the practice of capital punishment a secret. [91]

2.2.3 Capital Punishment in India

India has been familiar with capital punishment from the ancient times. The practice can be dated back to ancient Hindu civilization. The Indian epic that is, the *Ramayana* and the *Mahabharata* contain references to the practice of capital punishment such as *vadhadand* which meant the act of amputation of the human body. There existed at least fourteen known methods of amputation, in which the offenders were put to death. The concept of retention has its roots since these times, in which *King Dyumatsena* justified the act in his saying, "if the offenders were leniently let off, crimes were bound to multiply". He believed that ahimsa

[87] David T. Johnson and Franklin E. Zimring, "Death Penalty Lesson From Asia", Vol. 7: Iss. 39, ASPJ, 2009, Avialable at, https://apjjf.org/-David-T.-Johnson/3228/article.html, (2-05-2018)
[88] *Ibid.*
[89] "Capital Punishment by country", Available at https://en.wikipedia.org/wiki/Capital_punishment_by_country, (2-05-2018)
[90] *Ibid.*
[91] Amnesty International, "The Death Penalty in 2016: Facts and Figures", https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/, (2-05-2018)

was to be attained through execution of the guilty person. *Manu* also agreed with this view in which he also brought the concept of deterrent effect of inhabiting fear as an essential element of judicial process. To him, in order to maintain the harmony and refrain the people from doing criminal act capital punishment was a necessity through which the State could prevent the people from destroying each other. When the *Mughul era* came, capital punishment took the crudest form, especially in the Aurangzeb regime, some of the methods of punishment were by nailing the offenders to the walls and the cruellest form was that they were forced to wear a buffalo skin robe and then thrown to lie before the sun, the raw-hide slowly shrank and made their death painful and miserable. These laws were however, repealed by the British colonial rule in India.[92]

India's stance on Capital punishment has been consistent over the years; it has been a retentionist country and has a firm belief that it is necessary that the offender should be put to death as a requirement of justice and that the victim loss must be balanced with the life of the offender, otherwise, there will be injustice to victim and the agony and distress will stimulate public sentiments and the society will not be dispelled of such injustice. But however, with time and the rising awareness of human rights, the practice of death penalty is now questioned. Some are of the view that the deterrent concept of death penalty in India does have much effect on the level of crime rate in the society. Moreover such act is immoral in nature and goes against the right to life and personal dignity of the individual. The abolitionist argued that no individual is born a criminal and majority of the crimes are committed by emotional reasons like anger, jealousy and quarrel. Though, executions are normally avoided in India, in case of offenders not being legally insane but mentally insane, such as, psychosomatic disorders. Death sentences are pronounced only in cases of grave and hideous breaches or waging war against the state.

The debate on the issue of abolition and retention of death penalty in India has to be balanced on the strict arguments for or against death penalty. However, there is no clear ground and every argument show a vague stand. Even though India, is very well aware of the inhumane act and its humanitarian base for such practice, it is also felt that the crime scenario in India and the criminal tendency of mind has to be understood in which India is not willing to give up its hold on capital punishment. It is believed that there are person who by nature are readily excited to give in to natural criminal behaviour and act of violence. At the same time,

[92] N.V Paranjape, "CRIME AND PENOLOGY", Fourteenth Edition, 2009, p. 59

abolitionist believe that no one is born a criminal and that it is the circumstances and background that lead to such behaviour and that changes and reform should be made by the State.[93]

Though, the deterrent concept is sustained in India, there is no fixed generalisation that would suggest that the offender should be granted mercy or face execution, thus, it is mostly in the hand of judiciary and the judge discretion on each individual case with full weight to the matter keeping in mind the life and dignity of the individual. It has always been a riddle to the judiciary whether to repeal or retain the death penalty, however, most incidents would depend on the conscience of the judge and the pressure of public opinion which largely influence the judgement of the offender.[94]

Through this Chapter the study of some of the justice theories which are virtue-based can be directly link to the jurisprudence of Capital Punishment such as Utilitarianism, Egalitarianism and Libertarianism which had given rise to different theories such as deterrent, retributive, reformative and preventive. Utilitarian views are that death penalty should balance as a sacrifice of the total happiness of the society. Egalitarian are of the view that everyone is equal in caste, race, gender and those who violates this equality will be punished. Libertarian believed that everyone should value their life and no one has the right to take another's life, thus death penalty is a prime example on how to value their own life and the life of others in society. In death penalty there are three goals, i.e. retribution, incapacitation or deterrence which are the bases of different theories in support or against death penalty.[95] Even though death penalty has a long rooted history, the development and change in the world trend has brought up a new approach to death penalty and many countries have abolished it or are working towards the abolition of capital punishment.

[93] Veluri Raghuram, "CAPITAL PUNISHMENT: CONCEPT AND CONTEXT", First Edition, 2007, pp. 35-38
[94] *Ibid.*
[95] *Ibid.*

CHAPTER III

Capital Punishment: International and Regional Perspective

3.1 International Approach to Capital Punishment

Throughout human history, there has been a practice of ritual human sacrifice, physical torture, slavery which can no longer be acceptable in today's world. With the change in social evolution, countries and people have come to a consensus that certain historical practices which are against human dignity can no longer be tolerated. Although, some practices are still traceable even today it is a fact that we have turned our back against these practices. From 1986 to 2002, in almost 89 countries in the category of ordinary crimes, capital punishment was abolished. Later, 22 countries had put an end to death penalty making it a total of 111 countries.[96]

International Community is continuing to formalise treaties for all States making it easier to eradicate capital punishment worldwide.[97] In pursuant to this, the Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948.[98] It establishes the right of an individual from the deprivation of life. Therefore, it is clearly seen that capital punishment violates the most basic human right.[99]

Death penalty has no justification which would be considered favourable and more important than human rights grounds of completely abolishing it. With the lack of scientific evidence, it is a baseless argument to say that capital punishment is necessary to deter crime than any other punishments. Moreover, it wipes out the internationally accepted principle of rehabilitation.[100]

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[96] " United States of America on Death Penalty", Available at https://www.amnestyusa.org/*United States-of-America-:-The-Death-Penalty*-228 (23-05-2018)

[97] "International Standard on Abolition of Death Penalty", Available at http://www.amnestyusa.org/abolish/international-h-rstandards.html (23-05-2018)

[98] G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), Available at http://www.un.org/Overview/rights.html(23-05-2018)

[99] *Ibid.*

[100] *Ibid.*

Nations that refuses to accept international agreements and turn a blind eye to human rights treaties are positioning themselves as human rights violators regarding death penalty[101]. Sergio D'Elia a former left-wing terrorist with his first wife Mariateresa Di Lascia and Radical liberal leaders from Italy had formed 'Hands Off Cain' in Rome in 1993 to fight against death penalty and torture and launched the UN moratorium campaign in Italy.[102]

A remark made by Ban Ki-moon the former UN Secretary General reflected a historical global trend taking a turn away from capital punishment. Member states believe that human rights can only be enhanced and make progressive development if capital punishment is abolished or to establish a moratorium on the use of death penalty.[103]

With a mandate towards promotion and protection of all human rights, the Office of the High Commissioner for Human Rights had advocated the abolition of capital punishment and also argued for the position of including the fundamental and basic nature of the right to life, the wrongful execution of the innocent and the insupportable proof that death penalty aid as a deterrent to crime.[104]

The European Union (EU) in partnership with eight member States presented at Italy's insistence, the United Nations moratorium on capital punishment resolution in the pursuit of the suspension of death penalty. The resolution was twice affirmed on 15th November 2007 by the Third Committee and on 18th December 2007 by the UN General Assembly resolution 62/149. The Resolution called on States to put a restriction on offences and to also respect the rights of those accused on death row. Also, states that have put an end to capital punishment should not reintroduce it. The resolution is not binding on any States.

A global moratorium on the death penalty was proclaimed on December 18, 2007 where 104 to 54 voted in favour of a resolution ***A/RES/62/149***, with 29 abstentions.[105]Another resolution with 106 to 46, ***A/RES/63/168*** was adopted on December 18, 2008 reaffirming its previous

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[101] "Death penalty International Law and Human Rights", Available at http://digitalcommons.law.utulsa.edu/tjcil/vol11/iss2/6(23-05-2018)
[102] Available at http://ipsnews.net/news.asp?idnews=35043 (23-05-2018)
[103] "Death Penalty", Available at http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx , (23-05-2018)
[104] *Ibid.*
[105] " General Assembly Adopt Landmark Text calling for a Moratorium on Death Penalty", GA/10678, 54 Resolution, 12 Decision Recommended by the Third Committee, Available at https://www.un.org/News/Press/docs/2007/ga10678.doc.htm, (23-05-2018)

call in partnership with the European Union, New Zealand and Mexico was co-facilitators. On December 20, 2010, the 65th General Assembly adopted the third resolution, ***A/RES/63/168*** with 109 to 41 and 35 abstentions.[106]

The fourth resolution, ***A/RES/67/176*** where 111 voted in favour, 41 against was adopted on December 20, 2012. Again on December 18, 2014 the 69th General Assembly adoptedthe fifth resolution, ***A/RES/69/186 117*** to 38. December 19, 2016 adopted the sixth resolution, ***A/RES/71/187*** with 117 to 40 voted in favour.[107]

3.1.1 The General Assembly Adoption of International Instruments on Capital Punishment

The scope of Death Penalty has been narrowed down by strong restrictions developed in the international human rights standard. This can be seen by the actual practice in States that still impose capital punishment.

The United Nations General Assembly, in 1966 adopted the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by 149 nations and 8 more member states have signed the Covenant to indicate their intention of becoming a party.[108] It enforces two requirements which constrain the use of death penalty, i.e., firstly, due process requirements is placed strictly on the punishment and secondly, it puts a condition that the punishment cannot be inflicted upon offenders who are at the time of committing the crime below eighteen years of age.[109]Lastly, the ICCPR clearly states that no one should suffer a torturous, degrading, inhuman or cruel punishment.

The United Nations General Assembly passed a resolution in 1971 affirming that *"in order to fully guarantee the right to life, provided in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of*

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[106] Maria Donatelli, "World's Nations Calls for Execution Freeze", Available at http://www.worldcoalition.org/United-Nations-UN-General-Assembly-vote-moratorium-resolution.html, (23-05-2018)
[107] *Ibid.*
[108] G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), Available at http://www.un.org/Overview/rights.html, (23-05-2018)
[109] G.A. Res. 2200A, , Article 6, International Covenant on Civil and Political Rights, 1966

abolishing this punishment in all countries".[110]This was reiterated in 1977 (resolution 32/61 of 8 December 1977) by the General Assembly, in resolutions 1997/12 of 3 April 1997 and resolution 1998/8 of 3 April 1998 by the UN Commission on Human Rights and the EU Guidelines adopted in 1998, Policy towards Third Countries on Capital Punishment.[111]

The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2) adopted by the United Nations General Assembly in 1989 which was ratified by 49 nations has clearly defined the aims to abolish entirely the Death Penalty and believes in the spirit of the *Universal Declaration of Human Rights*.[112]

3.1.2 International Covenant on Civil and Political Rights (ICCPR)

The United Nations General Assembly, in 1966 adopted the International Covenant on Civil and Political Rights (Hence forth ICCPR) which has been ratified by 149 nations and 8 more member States have signed the Covenant to indicate their intention of becoming a party.

The International Covenant on Civil and Political Rights (ICCPR) is an enforceable treaty binding on all nations who signed and ratified the instrument. It sets restrictions on the use of death penalty by nations.[113]

Article 6 of the ICCPR states that, every person has an inborn or inalienable right to life, which is the duty of the State to protect. The right to life of every person in the society is protected by law and no one should be deprived of this rights. In those countries where death penalty have not been abolished, death sentence should be imposed only to the most serious crimes and according to the procedure established by law, and such procedure should not be contrary to the provisions of the Covenant or to the "Prevention and Punishment of the Crime of Genocide". Only after the final judgement of a competent court death penalty can be imposed. Amnesty must be provided in all cases, thus, if any person is sentenced to death, they shall have the right to appeal for commutation or pardon of such sentence. The Covenant

[110] Resolution 2857 (XXVI) of 20 December 1971 passed in the UN General Assembly, Available at http://www.un.org/documents-resolution.html, (23-05-2018)
[111] *Ibid.*
[112] G.A. Res. 441128, U.N. GAOR, 44th Sessions, U.N. Doc.A/44/49 (1989), *Ibid.*
[113] See, e.g., International Covenant on Civil and political rights,(ICCPR) Art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.") Available at https://heinonline.org/HOL/License (June 3, 2018)

also provides that death penalty should not be imposed to pregnant women and juvenile offenders, i.e. any person below 18 years. No State should invoke the provisions of the articles to cause delay or prevent the abolition of death penalty in their State.[114]

The ICCPR in Article 6 does not deny capital punishment, but reduces the imposition of a capital punishment to the most serious crime. Moreover, the pronouncement of capital punishment will only be upon conclusion of a trial where the guarantees of due process are observed under Article 14 of the ICCPR.[115] Like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights also recognise the Right to Life. As long as there is no arbitrary imposition it recognises the death penalty as an exception.[116] The International Covenant on Civil and Political Rights has also looked at it thoroughly and had contended that abolitionist States should not re-establish capital punishment as it stand in violation to the covenant and the objective of the relevant treaty it upholds.[117]

Under the International Covenant on Civil and Political Rights, there is a procedure available on the Monitoring Committee that monitors states compliance for their signature and ratification in reviewing their fulfilment of the obligations. Under the Optional Protocol to the International Covenant on Civil and Political Rights, 'individuals are given the right to petition the Human Rights Committee by alleging that the rights under the ICCPR has been breached by the States who are party to the Optional Protocol.'[118]

3.1.3 Second Optional Protocol to the International Covenant on Civil and Political Rights

When the United Nations in 1980 had in mind of drafting a new international treaty which aims at the abolition of death penalty, an agreement was made that it could take the form of a Protocol to the International Covenant on Civil and Political Rights. In August 1984, Belgian Professor, Marc Bossuyt was appointed Special Rapporteur to analyse the proposition

[114] International Covenant on Civil and political rights,(ICCPR , Article 6; Available at https://heinonline.org/HOL/License (June 3, 2018)
[115] International Law and the Abolition, P. 804, *Ibid.*
[116] International Covenant on Civil and Political Rights, 1966, Article 28(1), *Ibid.*
[117] *Ibid.*
[118] *Ibid.*

elaborating a Second Optional Protocol to the United Nations Covenant on Civil and Political Rights.[119]

With the growing trend of abolition movement in the 1970s, the international community considered to adopt an international treaty for the world for abolition of death penalty. Amnesty International had been a great influence on abolition of death penalty through international conference in Sweden. The Draft of the Optional Protocol to the ICCPR, " aiming at the ultimate abolition of death penalty" was firstly given to the UN General Assembly in 1980, which was sponsored by Federal Republic of Germany, Austria, Portugal, Italy, Sweden and Costa Rica.[120]

The draft of the protocol was inspired from the Sixth Protocol to the European Convention on Human Rights. Article 1 of the Protocol states that there should be an abolishment of death penalty and Article 2 provides an exception to permit enforcement of the death penalty in times of war in States where law provides.[121].

Throughout the 1980s the debate of abolition of capital punishment was considered by the States and in 1989, the Second Optional Protocol to the International Covenant on Civil and Political Rights which is exclusively provided for the abolition of death penalty was presented to the General Assembly. With 59 votes in favour, 26 votes against and 48 abstentions the Protocol was adopted by the General Assembly, in 1989. After the ratification of 10 states, in which New Zealand was the first State to ratify the protocol and in 1991 the Second Optional Protocol came into force.[122] Currently 85 States ratified and 38 are signatory States to the Protocol.[123]

By ratifying the Protocol, the States are bound by two important implications which they need to uphold, i.e. the signatory states are necessitated to ensure that no person should be exposed to the danger of risk of execution. Secondly, once death penalty has been abolished

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[119] "An international treaty on the abolition of the Death Penalty" Available at https://heinonline.org/HOL/License (03-06-2018)

[120] Michael Walton, "Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty", Available at www.nswccl.org.au, (05-07-2018)

[121] *Ibid.*

[122] Michael Walton, "Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty", Available at www.nswccl.org.au, (05-07-2018)

[123] United Nations Treaty Collection, " Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" Available at, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&lang=en, (05-07-2018)

in one's Country, it cannot be reintroduced or reinforced in that country or else it is violation of international laws.

The UN Human Rights Committee have also obligated the States not to expose persons to the risk of execution and again in 2003 it stated that the ICCPR also places the same obligation on the ratified States that have abolished death penalty.

This also extends to the laws of extradition, in which the signatory state has the duty to protect any person from the risk of execution and should not expose them to the same danger. If it is in their knowledge that the person is extradited to States which still practice death penalty and that such a person will be executed, State-party to the Protocol should refrain from such act. This is seen in the case of *ARJ v. Australia*[124], in which the Iranian national ARJ was convicted and jailed in Australia for illegal drug supply, however, after his jail term he was to be deported back to Iran. Iran is a retentionist State in which if deported, he could have to face death penalty. Thus, Mr. ARJ filed a complaint to the UN Human Rights Committee, and contented that it would violate his right to life if Australia deported him to Iran. Though the ICCPR and its Second optional Protocol are silent on the laws of extradition, it has provided ample safeguard for persons who might face violation of their rights to life. Thus, the Committee observed that Australia had ratified both the International Covenant on Civil and Political Rights, and its Second Optional Protocol, which imposes a broader obligation to not expose any person to any risk of death penalty if such is found for any offence in the act of extradition.

The Second Optional Protocol does not provide any withdrawal procedure or mechanism from the Protocol; ultimately it implies that there should not be any reintroduction of death penalty in the State. Other international treaties have provided altogether a detail clause procedure for withdrawing from such treaty. For example, the First Optional Protocol to the ICCPR provides in Article 12 the measure by which States can denounce the Protocol. However, no such procedure is provided in the Second Optional Protocol.

The States can take into other alternatives for withdrawal from any international treaty, to which the "Vienna Convention on the Law of Treaties" will apply. The Vienna Convention provides under Article 54 that if a State wants to withdraw, it must get the consent from all

[124] *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997, available at: http://www.refworld.org/cases,HRC,4028adfa7.html (7-07-2018)

the members States to the treaty.[125] Such procedures by the treaty are unlikely to be adhered and granted by States.

Article 56 of the Vienna Convention on the Law of Treaties, provides that, the States will have to prove in good faith that such denunciation is for a good cause. The purpose and object of Protocol stands for the abolition of death penalty, not to reintroduce it. The Special Rapporteur's which had drafted the Protocol did not find it necessary to provide provisions for withdrawal of the state ratification as it prohibits any State party to reintroduce the act of death penalty in their respective country. Article 56(1) (b), provides that "(b) a right of denunciation or withdrawal may be implied by the nature of the treaty". Nature of the Protocol is to completely abolishing death penalty which is contrary to reintroducing it after complete abolition of the act.

The individual right to life has been greatly emphasised in Article 1 of the Second Optional Protocol which states that, "no one shall be executed. The second paragraph adds a commitment on all State parties to put an end on the death penalty.[126] It is the duty of each State to provide measures to abolish death penalty.

The Protocol does not provide any admissibility for reservation and if States do want any reservation, then they have to state them at the time of ratification, which they have to inform to the Secretary-General of the United Nations. Such reservations are also limited to times of war.[127] It provides an exception for war time executions.

Marc Bossuyt, explains the reasons behind the exception for war time execution, keeping in mind those States that have abolished capital punishment for minor crimes but maintained it for crimes in war time or in military law.[128] Likewise, the European Protocol in Article 2 allows a State to make provisions in its law for capital punishment for acts committed at the time of war or of the imminent threat during the war.[129] In addition to important limitations on the given exception, there are a series of action that guarantees the protection of the

[125] Article 54, of the Vienna Convention on the Law of Treaties, 1969, Available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, (05-07-2018)
[126] *Ibid.*
[127] Article 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty, Resolution 44/128 of 15th December 1989, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx(2-07-2018)
[128] *Ibid.*
[129] *Ibid.*

individual. States must communicate on all relevant provisions of their legislations for reserving death penalty to be used during war times. Also, States must notify the United Nations Secretary- General the time of beginning and end of the state of war where the exception will be used.[130]

The obligations that have been given in the Protocol shall be supervised by the Human Rights Committee and shall be in accordance with the ICCPR. Thus, the Human Rights Committee shall also be responsible in collecting reports and complaints from State party to the Protocol if any state found that another state party is violating the provisions of the Protocol, and regarding optional procedures in reporting to the Secretary General of the United Nations by inter-state and individuals, unless there has been a declaration at the moment of ratification or accession, it will be applied to Protocol on death penalty.[131] The rights under this Protocol act as additional rights to those stated in the ICCPR. No rights and reservation under the Protocol should be subjected to any derogation under article 4 of the ICCPR.[132]

Signatures and ratifications are open to all States who have ratified the ICCPR and acceded to the Protocol. Such accession shall come into effect after the documents for ratification is send to the Secretary- General of the United Nations. Thereafter, the Secretary General will inform all the State-party to the Protocol, along with their reservations and communications stated in Article 2, statements under Article 4and 5, and the date of entry into force of the protocol.[133]

3.1.4 ECOSOC Safeguard-

The Economic and Social Council, in its resolution 1984/50 of 25 May 1984, approved a series of "Safeguards guaranteeing protection of the rights of those facing death penalty", and invited the seventh United Nations Congress on the Prevention of crime and the treatment of Offenders to consider them with a view to establishing an implementation mechanism. The

[130] Article 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty, Resolution 44/128 of 15th December 1989, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx(2-07-2018)
[131] Article 3, 4 and 6 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty, Resolution 44/128 of 15th December 1989, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx, (2-07-2018)
[132] Article 6 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty, Resolution 44/128 of 15th December 1989, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx, (2-07-2018)
[133] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty, Resolution 44/128 of 15th December 1989, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx, (2-07-2018)

Congress also requested the United Nations Secretary General to publicize them widely. Progress of the implementation of the safeguards is kept under review by the Economic and Social Council.[134]

ECOSOC, safeguards provide that, those countries where death penalty have not been abolished, should only use it on serious crimes, and that which is given under the statute laws, and if a alternative penalty is given other than the capital punishment to the same crime such penalty should be imposed. The safeguard also provides that death penalty should not be imposed on persons who are insane or are below the age of 18 years and pregnant women or a mother with a baby. The weight of evidence should be clarified and proved beyond doubt. All the rights given under Article 14, of the International Covenant on Civil and Political Rights, (ICCPR) should be adhered and legal assistance should be provided to the accused at all stages while on trial, they should be provided with the right to appeal to their respective jurisdiction and ask for pardon or clemency. The execution should be done only when all legal process is finished and given by a competent court. If such execution is entertained, it should not be done in a cruel and inhuman manner.[135]

Subsequently, the Economic and Social Council, introduced two more resolution, in 1989 and 1990, in which in the Resolution 1989/64 of 24 May 1989, it recommended to the State Parties that they should take practical step in implementation of the said Safeguards and requested the Secretary General, inter-alia, to include the question or the implementation of these safeguards in his periodic report on capital punishment. In its Resolution 1990/29 of 24 May 1990, the Council requested the Secretary General to draw on all available data, including current criminological research, in preparing future reports.[136]

Further progress in the tightening of the United Nations Safeguards on the death penalty was attained in July 1996 when ECOSOC adopted a resolution on "Safeguards Guaranteeing the Protection of the Rights of those facing Death Penalty." This resolution, originally proposed by Austria, was adopted by the United Nations Commission on Crime Prevention and Criminal Justice.[137]

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[134] Dr. Subhash C.Gupta, "CAPITAL PUNISHMENT", First Edition, p. 56
[135] *Ibid.*
[136] Dr. Subhash C.Gupta, "CAPITAL PUNISHMENT", First Edition, p. 57
[137] Resolution 1995/15, adopted on 23rd July 1996, Dr. Subhash C.Gupta, "CAPITAL PUNISHMENT", First Edition, New Delhi, p. 57

3.1.5 The United Nation Human Rights Council

The U.N Human Rights Council had made recent study on the basis of its report on the Human Rights of Children of Parents sentenced to Death penalty, in which it stated that there is " a negative impact of a parents' death sentence and his or her execution on his or her children"[138], and insist that States are to give those children all the required assistance and protection that are of necessary keeping in mind the "best interest" of the child.[139] In its study the Council found out that the "States with different legal system , traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use" and censured the reality that " the use of death penalty leads to violation of human rights of those facing the death penalty and any other affected persons."[140]

3.1.6 The Convention on the Right of Child, (CRC)

The Convention on the Rights of Child (CRC) was adopted on 1989, November, 20th, which requires State parties to adopt legislation, practices and policies to protect children and their rights and bring about an overall development, in all aspects of their social and cultural life. Thus, children should be protected against neglect; abuse and exploitation. Certain provision are laid down in the Convention which provides that every child should have a right to nationality and name, right to health and decent standard of living, and right to education. The Convention forbids inhuman and degrading or cruel treatment on children, discrimination of any kind and exploitation of children either sexual or physical. Exclusive provisions have also been provided for children with disabilities, or those who have been secluded from their parents or families and those who are in conflict with the law.[141]

The Convention of the Rights of the Child (CRC), just like the ICCPR also prohibits the State to impose death penalty to any individual under the age of 18 years. Article 37(a) of the Convention of the Rights of Child provides that it is the responsibility of the State to ensure that no child shall not be subjected to any form of punishment that are degrading or inhuman

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[138] "Human Rights Council, Panel on the Human rights of Children of parents sentence to the death penalty or executed", 15 March 2013, A/HRC/22/L.18, Law Commission of India, Report on Death Penalty, No. 262, August 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf (20-06-2016)

[139] *Ibid.*

[140] Human Rights Council, Question of the Death Penalty, 25th June 2014, A/HRC/26/L.8/Rev.1., Law Commission of India, Report on Death Penalty, No. 262, August 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (20-06-2016)

[141] Convention on the Rights of Child,1989, Available at https://www.hrw.org/news/2009/11/18/qa-convention-rights-child, (20-06-2016)

or cruel in nature. The Convention also prohibits the imposition of both life imprisonment and capital punishment to any person below the age of 18 years.[142]

The Committee of the Rights of Child further elucidate that it does not limit only to those person below age 18 years, but also consider the age of the person at the time of commission of crime notwithstanding the time he passed the said age while going on trial. The committee stated that , "death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction."[143]

3.1.7 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1983 by the U.N General Assembly, which was enforced from 1987. It is one of the most important developments in Human Rights Treaty that deal with torture and inhuman treatment. The Convention requires every State party to provide protection and prevention against cruel and inhuman torture or punishment which is degrading . To bring to justice to those who are responsible for such violation and to provide remedy of the same to the victim.[144]

This Convention have also denounced the practice of death penalty by the States and advocated for abolition of such punishment as it stresses that execution is inhumane and degrading punishment and violates the right to life and dignity of the individual. However, it does not explicitly say that it is against such punishment and as such the Convention's stand on this issue is very vague. However, the Committee against Torture does not make references on death penalty but it does follow the world wide trend on death penalty through

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[142] Article 37 (a), "States Parties shall ensure that: No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;" Convention on the Rights of Child, 1989, The United Nation Human Rights Offices of High Commissioner, Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx, (20-06-2016), also see lawcommissionofindia.nic.in, (20-06-2018)

[143] Committee on the Rights of the Child, General Comment 10: Children's rights in Juvenile Justice, 25th April, 2007, CRC/C/GC/10, available at http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf, also see, Law Commission of India, Report on Death Penalty, No. 262, August 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (20-06-2016)

[144] Convention Against Torture, American Civil Liberty Union Foundation, Available at https://www.aclu.org/other/faq-convention-against-torture, (20-06-2016)

the General Assembly ***Resolution A/RES/62/149*** which proclaimed a global moratorium on death penalty by different countries.[145]

3.1.8 International Criminal Law

The development of International Criminal law has contributed immensely to the abolition of death penalty in the international arena. After the Nuremberg Tribunal and Tokyo Tribunal death penalty was not practice by the international community. Therefore, in the Statutes of International Tribunal of Former Yugoslavia and Rwanda, and the statute of the Hybrid tribunal of Cambodia, Sierra Leone, and East- Timor all prohibited death penalty as a punishment and upheld life imprisonment as the highest form of punishment. Under the Rome Statute which establishes the International Criminal Court death penalty is not permitted, even in the most serious crimes such as war-crime, genocide and crimes against humanity.[146]

3.2 Regional Perspective

3.2.1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Since 1997, Europe has been a "*de facto death penalty free zone*". The constant deliberation by the council of Europe had open up in grounds for abolition of death penalty. In Europe, capital punishment is now regarded as an incompatible and unacceptable form of punishment against fundamental rights stated in the European Convention on Human rights formally known as Convention for the Protection of Human Rights and Fundamental Freedoms.[147]

The Council of Europe drafted the European Convention on Human Rights with the main aim of establishing a regional system for the protection of the basic rights of humans in Europe. The rights which the European Convention is looking forward to protect include the

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[145] Nicole Burli, "The Committee against Torture should take a Stronger Stance against Death Penalty", OMCT, Human Rights Adviser, Available at http://blog.omct.org/committee-torture-take-stronger-stance-death-penalty/, (20-06-2016)

[146] Law Commission of India, Report on Death Penalty, No. 262, August 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (20-06-2016)

[147] "Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014 Working Session 4: Rule of Law, Contribution of the Council of Europe" Available at https://www.osce.org/odihr/124116?download=true, (05-07-2018)

right to life, freedom from torture or inhuman or degrading treatment or punishment, the right to liberty and the security of persons, and other fundamental and civil rights.

When signatures were opened for the European Convention on Human Rights in 1950s, it also provided the possibility of abolishing of death penalty for all signatory States on the basis of Article 2 of the Convention, which states that all persons have a right to life and no persons shall be deprived of this right, and anyone who is convicted under any offences that attract capital punishment will be saved from execution.[148] The 1960s in Europe saw a wave of agreement on the harmony of States which were of the opinion that death penalty "serve no purpose in a civilised society governed by the rule of law and respect for human rights".[149]

The Council of Europe, in 1983 for the first time adopted the a legal binding regional instrument relating to abolition of death penalty in peace time under *Protocol 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty.* This Protocol provides that all States should abolish death penalty and no person should be executed[150] with an exception only in wartimes, in which States are required to make laws specifying the crimes and act to be followed in times of threat or in times of war[151]. As of 2014, 46 out of 47 States had ratified Protocol 6.[152]

Under Protocol 6, Article 3 and 4, provides that there should be no derogation to Article 15[153] of the Convention and no reservation will be entertained under Article 57[154] of the

[148] Article 2 of the European Convention states:
"1. Everyone's *right to life* shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Available at http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf
[149] "Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014 Working Session 4: Rule of Law, Contribution of the Council of Europe" Available at https://www.osce.org/odihr/124116?download=true, (05-07-2018)
[150] Article 1 of the Protocol 6 of the ECHR, Available at http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf
[151] Article 2, *Ibid.*
[152] "Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014 Working Session 4: Rule of Law, Contribution of the Council of Europe" Available at https://www.osce.org/odihr/124116?download=true, (05-07-2018)
[153] Article 15, states that, " Derogation in time of emergency: 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law; 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision; 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have

Convention. States may specify the territorial limit to which the Protocol will apply at the time of ratification of the Convention and accession to the Protocol. If states want to extend the limit of their territorial application of the Protocol, they can do so by addressing such notice to the Secretary General of the Council of Europe.[155] All member States to the Convention may be open for signature for the Protocol and it should come into force on the first day of the month after all the documents and instruments are submitted by the States.[156] Lastly, the provision 1 to 5 of Protocol acts as an additional right to the European Convention on Human Rights.[157]

After this Protocol, the Council of Europe has taken many steps to prohibit death penalty by States such as Resolution 1044 and Recommendation 1246, in 1994, Resolution 1097 and Recommendation 1302 of 1996, and lastly Resolution 1187 of 1999. The European Council continuously pressurised States to abolish capital punishment either through procedural means to fall in compliance with other member States and the Convention. Thus, all new signatory States are required to ratify Protocol 6 to the Convention or through a moratorium in death penalty to individual States.[158]

Another development took place in 2002, with the introduction of another Protocol by the Council of Europe, Protocol 13 which provides for abolition of death penalty in all circumstances, i.e. even in times of imminent threat to the State or in times of war, death penalty is prohibited. No Derogations or reservation to Article 15 and Article 57 of the European Convention on Human Rights is provided. And the same procedure to its ratification and territorial applications to that of Protocol 6 is provided. The Protocol 13 came into force on 1st July, 2003 after it had been ratified by four members States. Such ratification

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ceased to operate and the provisions of the Convention are again being fully executed", Available at http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf, (2-07-2018)

[154] Article 57, "Reservations:1.Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article; 2. Any reservation made under this Article shall contain a brief statement of the law concerned", *Ibid.*

[155] Article 5 of Protocol 6 of the ECHR, Available at http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf(05-07-2018)

[156] Article 7 and 8 of the Protocol 6, *Ibid.*

[157] Article 6, *Ibid.*

[158] "Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014 Working Session 4: Rule of Law, Contribution of the Council of Europe" Avialable at https://www.osce.org/odihr/124116?download=true, (05-07-2018)

on both the Protocol is irreversible in nature and States are not allowed to reintroduce death penalty.[159]

The European States are committed to make Europe a "death penalty free-zone", in which the Council of Europe consistently calls for a universal abolition of death penalty and to maintain the moratoria on execution of death penalty. The Committee of Ministers have worked hard to keep a check on States which practiced death penalty both party and non-party to the Convention and a lot of efforts are made by the Committee to spread awareness amongst States for abolition of death penalty and give assistance and advice to interested States. Europe has now reached a "de jure state on free death penalty zone", as the last executions took place in 2014. Belarus and Russia remain the two states who have not abolished capital punishment and Russia holds a moratorium on death penalty till this date.[160] European Union and the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights have been the greatest influence on the abolition of capital punishment to States around the world.

3.2.2 The Inter-American Convention on Human Rights (ACHR)

The Inter-American Human Rights System was established by the Organisation of American States (OAS), 1948 which consist of 35 members States. The Inter-American Convention on Human Rights of 1969 is based on the principles laid down by the Organisation of American States (OAS) Charter of 1948 and the American Declaration on the Rights and Duties of Man of 1948. The Convention came into force in 1978. It provides protection for the same civil and political rights as that mentioned in the declaration and promote states to work for measures to get full realization of the implicit rights of economic, social, cultural, educational, standards as has been prescribed in the OAS Charter.[161] Thus, it is the core human right system in the inter-American region, which imbibes all the principles of Human Rights.[162]

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[159] "Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014 Working Session 4: Rule of Law, Contribution of the Council of Europe" Avialable at https://www.osce.org/odihr/124116?download=true, (05-07-2018)

[160] *Ibid.*

[161] Cecillia Cristina Naddeo, "The Inter-American System of Human Rights: A Research Guide", Available at http://www.nyulawglobal.org/globalex/Inter_American_Human_Rights.html, (6-07-2018)

[162] "Human Rights Development and Cooperation; the Inter-American Human Rights System" , Available at https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/e-info-tool_the_abc_of_hr_for_dev_coop_the_interamerican_system.pdf, (6-07-2018)

The Inter- American Convention on Human Rights, have not prohibited the practice of capital punishment by retentionist States, but does provide certain limitation to its use under Article 4 of the Convention, which provides that, all individuals have a right to life which should be respected and protected by law. States which retain death penalty should only impose it for the "most serious crimes in pursuant to a final judgement rendered by the competent court in accordance with law", and this punishment should not extend to those offences to which death penalty was not applicable at the time the crime was committed. For offences of political nature and common offences, capital punishment should not be imposed. Capital punishment should not be inflicted for those crimes which are committed by persons who are under the age of 18 years, pregnant women and those persons above 70 years of age. All persons who are convicted under capital punishment should have the right to appeal for pardon or commutation and apply for amnesty, and if such petition is pending, no person should be executed. Lastly, States which have abolished death penalty are not allowed to reintroduce it in their States later on.[163]

Thus, three implications are made by the Convention for States who retain death penalty, firstly, such practice is subject to the strict compliance of certain procedural requirements which must be observed. Secondly, the imposition of capital punishment must be limited to only the most serious crimes and offences which are not political in nature. Thirdly, certain circumstances must considered before imposing such punishment.[164]

The American Declaration of the Rights and Duties of Man (American Declaration), expressly does not have any reference to capital punishment and neither prohibits such practice. However, under Article 1, the Declaration states that, "Every human being has the right to life, liberty and the security of his person"[165]. The Inter- American Commission on Human Rights imply that, " Article 1 of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment... it also includes failing to limit the penalty to crimes of exceptional gravity set forth in pre-existing law, the failure to provide strict due process guarantees, and the existence of

[163] Article 4 of the Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html (6-07-2018)

[164] "The Death Penalty in the Inter-American Human Rights System: From Restriction to Abolition", 2012 Available at http://https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf, (6-07-2018)

[165] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: http://www.refworld.org/docid/3ae6b3710.html, (6-07-2018)

demonstrably diverse practices that result in the inconsistent application of the penalty for the same crimes."[166]

With the recognition of the principle of right to life in both Article 4 of the American Convention and Article 1 of the American Declaration of the Rights and Duties of Man, the American States have considered the steps to abolish death penalty in the Inter-American region. After continuous debate, the OAS General Assembly on 8th June, 1990 at Paraguay, adopted the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 1990*, to help guarantee a more effective protection of the right to life under the Convention. The Protocol does not have a revocability nature and States which abolish death penalty are not allowed to reintroduce death penalty in their State.[167]

Under the Protocol 1990, to the American Convention on Human Rights, signatory States are not allowed to impose death penalty upon anyone in their jurisdiction. The Protocol does not provide any reservations. However, certain exceptions are provided through which States at the time of ratification can expressly declare certain reservation on the application of death penalty in times of war and for "extremely serious crimes of military nature". If such reservations are to be made, the State concern shall notify the Secretary General of the Organisation of American States (OAS) of the specific application of such reservations under the Protocol, such as the time period and circumstances of the beginning and the end of any state of war in their territory. The Protocol is open for signature and ratification for the State parties to the American Convention on Human rights and such States have to place the documents of ratification and accession to the General Secretariat of the Organization of American States. The Protocol would come in to force in different State after the process of ratification and accession has made successfully.[168]

As of 2011, only eleven states have ratified the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 1990 namely Mexico, Costa Rica, Brazil,

[166] "The Death Penalty in the Inter-American Human Rights System: From Restriction to Abolition", 2012 Available at http://https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf, (6-07-2018)
[167] Preamble of the Protocol to the American Convention on Human Rights to Abolish Death Penalty, 1990, Available at https://www.oas.org/en/iachr/mandate/Basics/american-convention-abolish-death-penalty.pdf,(2-07-2018)
[168] The Protocol to the American Convention on Human Rights to Abolish Death Penalty, 1990, Available at https://www.oas.org/en/iachr/mandate/Basics/american-convention-abolish-death-penalty.pdf, (6-07-2018)

Paraguay, Ecuador, Panama, Uruguay, Nicaragua, Venezuela, Chile, Argentina and Honduras.[169]

The Inter-American Commission on Human Rights, had come across many challenges on issues for abolition of death penalty, as even though half of the American States had abolished death penalty, a considerable number of States have still retained capital punishment.[170]

The Commission have constantly worked over the past 20 years in persuading States to abolish death penalty. The Commission have reminded the States of their obligatory safeguard regarding imposition of such punishment to any individuals. The development and progress between the judicial approach and human rights bodies and obligations have opened up an unprecedented transformation on the laws and policies relating to death penalty. Currently, only three States still retain Death penalty i.e. United States, Cuba and Guatemala but under strict application of due process of law and other States are in the process of reforming their law in line with the human rights standards and abolition of death penalty.[171]

While the progress for abolition of death penalty is still a challenge in the American States but at the same time it has brought a lot of development in this region, in which there have been a lot of restriction and reformation on the circumstances and crimes relating to capital punishment and application of *de facto* moratoriums on States have been very effective. The American Civil Liberties Union reported that almost 139 people of those sentenced to death are found innocent and released. Thus there are many programmes and projects such as the "Innocent Project" in the United States of America to help those who were previously convicted for capital punishment. The Inter-American Commission on Human Rights had worked on many reports and programmes for the development of the standards regarding the application and restriction of death penalty which will be more accessible to the American States.[172]

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[169] "The Death Penalty in the Inter-American Human Rights System: From Restriction to Abolition", 2012 Available at http://https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf, (6-07-2018)
[170] *Ibid.*
[171] *Ibid.*
[172] "The Death Penalty in the Inter-American Human Rights System: From Restriction to Abolition", 2012 Available at http://https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf, (6-07-2018)

In the study of International and regional perspective on capital punishment, it is seen that the international community had passed through many changes and development in law and in the society. Their approach to capital punishment has revolutionized the whole concept of punishment whereby they have undertaken many steps to abolish it after they have seen its effects on individual, society and the State. The United Nations and many of its treaties and conventions have contributed a lot to the abolition of capital punishment through many resolutions, safeguards and the Second Optional Protocol to ICCPR itself is a milestone achievement in this aspect. Though not all States are party to the Protocol, however, the Protocol has been able to put forward a strong appeal towards the world community and has made an attempt to strongly influence all retentionist States to have a different mindset and a different approach towards punishment and upheld the right to life and dignity of all human being.

Chapter IV

National Perspective on Capital Punishment

In the Indian ancient history the ruled and also the ruler was ruled by Dharma, "Cosmic Law and order".[173] The Maurya period developed the Law of treason and any person who was found committing crimes under this act was punishable by death.[174]Brahmins were let off from death penalty, while Brahmin offenders were branded. The basis of the liability was the caste of the offender, where the Sudra's would receive capital punishment for homicide while the Brahmin would only be blinded.[175]

Before the British rule, Muslim Law prevailed in India. Crimes under the Muslim Jurisprudence were classified into three categories. Viz.,[176]

1. Offences against God,
2. Offences against the State, and
3. Offences against an individual.

A person who committed a crime such as murder with robbery was punished with death and the body was exhibited to the public as a sign of warning[177].

Under the British rule, in 1829, the practice of Sati was banned, anyone found committing such offences and even an abettor was guilty of culpable homicide and was awarded death penalty as a punishment.[178]

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[173] The mythological stories in *Ratnayana* provide some instances; *Thadaka,* the sex-maniac evil woman was killed by the King Sree Rama for common good. The King seemed to be more retributive when he abandoned his wife Sita in the midst of forest only on suspicion of her chastity raised by the public. The killing of *Shambuka* (who violated the custom by the performance of penance which was denied to backward classes of people) and the giving up of his life by Laxmana himself according to the words of the King are other notable examples of executions according to *dharma.,* K.S Ajay Kumar,*"*Capital Punishment in India: New Trends*",* 1980 p.158

[174] Majumdar, R.C. (ed.), "History and Culture of Indian People*",* (1965), Vol. 1, p. 438.

[175] Kangle, RAP., "Kautilya Arthasasthra Part II*"* (Trans. 1972), pp.283-85.

[176] Sarkar, Jadunath, "Mughal Administration*",* (1952), pp. 101-9.

[177] Law Commission of India, 35th *Report* Vol. II (1967),p. 215.

[178] Misra, B.B., "The Central Administration of the East India Company*",* (1959), p. 374.

The Indian Law Commission in 1837 prepared a Draft Penal Code that prescribed for offences like waging war against the State, providing false evidence to convict and innocent person, murder, perjury. In May 30th, 1851, before receiving the assent of the Governor-General the revised edition of the Code was circulated among judges for comments.[179]

In relation to capital punishment, a notable amendment in 1955 was brought to the Criminal law (Code of Criminal Procedure), "It is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty."[180] Before the amendment, it was mandatory for a judge to give his reasons in the judgment for not sentencing death penalty to an accused.[181]

The relevant provisions of the Indian Penal Code (Amendment) Bill 1972 was evolved legislatively to be in line with new judicial approach to death penalty.[182] Life imprisonment according to this Bill was kept as a punishment for murder, whereas death penalty was made as a provision for the most serious forms of murder.[183] Section 303 of the Indian Penal Code was proposed to be deleted and the provisions of 305 (death penalty) was to be substituted by life-imprisonment.[184]

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[179] H.J Rust, "Hurt and Homicide*"* (1958), p. 28.

[180] *Jan Mohamed* v. *State*, A.I.R. 1963 All. 501 at 504.

[181] Sub-section (5) of Section 367 of the Code of Criminal Procedurewas repealed by Act XXVI of 1955. The old sub-section (5) ofS. 367 was as follows: "If the accused is convicted of an offence punishable with death and the court sentences him to any punishment other than death, the court shall in its judgment state reason why sentence of death was not passed. Provided that in trials by jury, the court need not write a judgment, but the Court of Sessions shall record the heads of the charge to jury.

[182] The Gazette of India extraordinary, p. 2,3, Part II, section 2, http://www.prsindia.org/uploads/media/Ordinances/Ordinance%20Summary-20Criminal%20Law%202018.pdf

[183] Section 302 is proposed to be amended as follows:

"302 (1): Whoever commits murder shall, save as otherwise provided in sub-section (2), be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever commands murder shall,

(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 a member of any armed forces of the Union or of any police force or of any public servant

whose duty is to preserve peace and order in any area or place, while such member or public servant is on duty; or

(d) if the murder has been committed by him, while under sentence of imprisonment for life and such sentence has become final, be punished with death, or imprisonment for life, and shall also be liable to fine." (See clause 124).

[184] Section 305 is proposed to be amended as follows:

"S. 305. If any person under eighteen years of age, any person in a state of intoxication commits suicide whoever abets the commission of such suicide shall be punished with imprisonment for life, or rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine." (see clause 128).

In this chapter the researcher has made an attempt to analyze some of the Law Commission Report on Death penalty. There are a number of legislations in India which impose death penalty for certain offences. However, the scope of the present chapter is limited to the study of certain specific offences under Indian Penal Code, 1860, Anti- Hijacking Act,2016, Criminal Law (Amendment) Act, 2013 and the Criminal Law (Amendment) Ordinance 2018, which has prescribed death penalty as punishment for such offences.

4.1 The 35th Report and the 187th Report of the Indian Law Commission

The 35th Report of the Indian Law Commission was presented in December, 1967. This report was based on the analysis of the socio-economic, cultural structures and the absence of Indian practical research. The report made a clear statement that death penalty should be retained. It places these main objects of capital punishment which are the atonement by the offender, avoidance of lynching and private vengeance[185], deterrence[186], disabling[187], and disapprobation by the public[188]. In the report it was emphasized that as both the legal and administrative system in India is time-consuming and inefficient, imposing life imprisonment will add more burden to the administrative sector.

The conclusion of the 35th report that "*at the present juncture, India cannot risk the experiment of abolition of capital punishment*,"[189] and the recommendation that "*capital punishment should be retained in the present state of the country*,"[190] were clearly based upon by the prevailing conditions in India at that present time. Six factors which needs due consideration for discussion are as follows-

(1) Development in India:

The conclusion made by the commission for rejecting the abolition of death penalty was in close connection to "*conditions in India, to the variety of the social upbringing*

[185] There have been cases when murderers after they come out of the prison, pursue the man who helped the prosecution.
[186] The unique deterrence of capital punishment acts on professional criminals even.
[187] When certain forms of crimes endanger the peace of the society the remedy is death penalty.
[188] Capital punishment tends to foster the general abhorrence of the crime. The common man thinks that the capital punishment is very effective.
[189] Law Commission of India, 35th Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf(19-06-2018)
[190] *Ibid.*

of its inhabitants, to the disparity in the level of morality and education in the country."[191]

Education, the economic, the general well-being and social conditions prevailing at that time were different in comparison to today. The 35th Report further justified that it was reluctant to risk experiments of abolition with the high crime rate that was prevailing. It opened up its concerns in this said manner: "*The figures of homicide in India during the several years have not shown any marked decline. The rate of homicide per million of the population is considerably higher in India than in many of the countries where capital punishment has been abolished."*[192]

(2) The New Criminal Procedure Code, 1973

Many of the recommendations were made known to the Government even before stating them in the 35th Report. Thus, constant deliberation resulted in the amendment of Section 354 (3) which states that when death penalty was to be imposed on people committing offences punishable with life imprisonment or death 'special reasons' should be stated. The Supreme Court in *Bachan Singh vs State of Punjab*[193] construed it to mean that imprisonment for life should only be the normal sentence and that only in the rarest of the rare case should death penalty be imposed.

Section 354(3) of CrPC conflicted with the recommendations which stated, "*The Commission does not recommend any provision (a) that the normal sentence for murder should be imprisonment for life but in aggravating circumstances the court may award the sentence of death*."[194]

The 35th Report relevantly recommended that Section 303 of the IPC, should remain unchanged[195] and that there requires no minimum interval that with deals death

[191] Law Commission of India, 35th Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf (19-05-2018)
[192] *Ibid.*
[193] *Bacchan Singh vs State of Punjab* (1980) 2 SCC 684.
[194] Law Commission of India, 35th Report, 1967, at para 7 (Summary of Main Conclusions and Recommendations), available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf (19-05-2018)
[195] *Supra Note 191*

penalty and its actual execution[196] such a change requires the attention to review the report.

(3) The emergence of Constitutional due process standards

India, after 1967 witnessed the expansion of Article 21 bringing to light the right to dignity putting into consideration the substantive and the due processes. In *Maneka Gandhi v. Union of India*[197] it was stated that law should provide procedures that is "fair, just and reasonable, not fanciful, oppressive or arbitrary"[198] The concept of death penalty in the 'rarest of the rare' is very unique as it is against life itself.

With its concern to human life and the dignity of human beings and recognising the irrevocability of the punishment, Courts have devised standards in the law of crimes. In light the of the 'rarest of the rare' dictum when the *"alternative option [is] unquestionably foreclosed"*[199]marks the beginning of constitutionally regulating death penalty in India.

(4) Judicial developments on the arbitrary and subjective application of death penalty:

Even with the optimistic view of the Court in Bacchan Singh that the guidelines provided minimum risk of capricious imposition of death penalty, concerns had still been raised about its "arbitrary or freakish response"[200]. In the case of Bariyar, it was held that "*there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle*."[201]

It is useful and informative to examine the Supreme Court observations in *Aloke Nath Dutta v. State of West Bengal*,[202]*Swamy Shraddhananda v. State of*

[196] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.
[197] *Maneka Gandhi vs Union of India* (1978) 1 SCC 248.
[198] *Maneka Gandhi v. UOI*, (1978) 1 SCC 248, at para 48.
[199] *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.
[200] *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15.
[201] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498,at para 104.
[202] *AlokeNath Dutta v. State of West Bengal* (2007) 12 SCC 230.

Karnataka('Swamy Shraddhananda'),[203]*Farooq Abdul Gafur v.State of Maharashtra ('Gafur')*,[204]*Sangeet v. State of Haryana ('Sangeet')*,[205] and *Khade.*[206] Courts have praised the subjective and absolute application of death penalty which led *"principled sentencing"* to become *"judge-centric sentencing"*,[207] based on the *"personal predilection of the judges constituting the Bench."*[208] It has to be noted that the Supreme Court has admitted its errors while applying death penalty in many of these cases. [209]

The Law Commission of India had released in 2003 its 187th Report on the "Mode of Execution of Death and Incidental Matters"[210]. The report was restricted to three issues, viz., (a) the process in which execution of death penalty is taken up, (b) the method of setting aside the differences of opinions between judges of the highest court in passing sentences, (c) the need to equip with the right to appeal to the Supreme Court in matters of death penalty[211].

After seeking public opinion and studying the practices of India and different countries, it was recommended that Section 354 (5) of the Criminal Procedure Code should be amended to allow lethal injection as one of the method of executing the offender apart from hanging. The Commission had also recommended that there should be a right to appeal when the subordinate court confirms a death penalty or its enhancement. It further stated that all death sentence cases should be heard by at least 5 judges bench of the Apex Court.[212]

The 35th Report, has not made any recommendation to change the execution process from hanging. The Commission observed that "*(p)rogress in the science of anaesthetics and further study of the various methods, as well as the experience gathered in other countries*

[203] *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767.
[204] *Farooq Abdul Gafur v.State of Maharashtra* (2010) 14 SCC 641
[205] *Sangeet v. State of Haryana* (2013) 2 SCC 452.
[206] *Shankar Kisanrao Khade v. State of Maharashtra*, 40 (2013) 5 SCC 546.
[207] *Sangeet v. State of Haryana*, (2013) 2 SCC 452.
[208] *Swamy Shraddhananda v. State of Karnataka*, (2008) 13 SCC 767.
[209] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC498, *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546 and *Sangeet v. State of Haryana*, (2013) 2 SCC 452.
[210] Law Commission of India, 187thReport, 2003, available athttp://lawcommissionofindia.nic.in/reports/187th%20report.pdf (19-06-2018)
[211] *Ibid.*
[212] *Ibid.*

and development and refinement of the existing methods, would perhaps, in future, furnish a firm basis for conclusion on this controversial subject."[213]

Keeping in mind the advances in technology in the field of anaesthetics, medicine and science, it is of vital importance to keep in mind the fundamental questions that relates to death penalty and draw the abundance and the new academic, judicial and scientific opinions on these subjects.[214]

4.2 The Constitutional validity of Death Penalty in India

Nations with written Constitution recognises the importance of fundamental rights. These Constitutions also guarantees for every individual "'the right to life', equal protection of the Law, and the due process of the law". Death Penalty as a Constitutional validity; has troubled many constitutional courts of the world. This is a question that tests the spirit of the courts that perform its duties. There arises a conflict between the liberals and the conservative on the legality of death penalty regarding the judiciary having a strong impact on the fundamental right of the weakest members of the society.[215]

Human behaviour and law have very close interactions in everyday life. Law being an instrument of directing social change is necessary to regulate social behaviour. Thus, based on the theory of social contract it is pertinent to impose punishments.[216] Whether capital punishment is justified based on social contract is still a debated issue. According to Beccaria on thread bare examination he argued that, "It seems to be absurd that the laws which are an expression of the public will, which detect and punish homicide, should themselves commit it and that to deter citizens from murder, they order a public one."[217]

Justice Sarkaria in the case of *Bachan Singh vs State of Punjab* had stated:

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[213] This Law Commission report is available on Law Commission website - lawcommissionofindia.nic.in/reports/187th report.pdf. (19-06-2018)
[214] *Ibid.*
[215] "Constitutional Validity on Death Penalty in India", Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/132600/8/08_chapter%203.pdf, (19-06-2018)
[216] Friedmann, " LEGAL THEORY*"* (1967), p. 44.
[217] Henri Paolucci "On Crimes and Punishment*",* (1963), p. 50.

"The question whether or not death penalty serves any penological purpose, is a difficult complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty. It is not necessary for us to express any categorical, one way, or the other, as to which of these antithetical views, held by the abolitionist and Retentionist, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue is a ground among other, for rejecting the petitioner's arguments that retention of the death penalty in the impugned provisions is totally devoid of reason and purpose."[218]

The Indian Supreme Court had cautioned the difficulty and predicted the dangerousness, and the erroneous of assuming that convicts of capital crime would be susceptible to future criminal acts. It was for this very reason that courts held it unconstitutional under Article 21 to condemn a man to secluded confinement unless there is a strong evidence of future violent acts. Bring about reformative change in the individual offender is regarded as an important purpose of punishment. But it can never be exercised where death penalty is inflicted. Justice Chinnapa Reddy has found a '….. "grievous injury" which the death penalty inflicts on the administration of justice. [219] Death penalty rejects the concept of reforming and rehabilitating the offenders which is the sole object of Criminal Justice. For this very same reason Krishna Iyer. J argues that 'death penalty is permissible only where reformation within a reasonable range is impossible.'[220]

Whether death penalty is constitutionally valid is based on the basis of Article 14, Article 19 and Article 21 of the Constitution of India. Interpretations of these articles are very much guided by Maneka Gandhi's case. But before discussion of these leading constitutional decisions, it is important to study the challenges faced by courts and the judicial approach in two periods.

1. Pre Maneka Gandhi, and
2. Post Maneka Gandhi.

[218] *Bachan Singh v. State of Punjab* 1980 2 SCC 685,729.
[219] *Bishnu Deo Shaw v. State west Bengal* , 1979 AIR 964,1979 SCR(3) 355
[220] *Rajindra Prasad v. State of UP, 1979 AIR 916, 1979 SCR*(3) 78

4.2.1 The Pre Maneka

The Pre Maneka Gandhi period was governed by *A.K Gopalan v. State of Madras*[221]. The Supreme Court of India laid down that Article 19 and Article 21 were mutually exclusive and also the procedure established by law under Article 21 was to mean procedures provided by the law of the State. This decision laid down that the court had excluded the principles of natural justice and that they had no power to examine the reasonableness if the law is depriving person's life and his personal liberty.[222]

Many questions were raised on the soundness of the view articulated in this case. During this time court were not able to introduce the doctrine of procedural due process in Article 21 because of the rejection by the Constituent Assembly.[223] Thus, before Maneka Gandhi's case it was impossible to challenge the reasonableness of the judicial procedures for the deprivation of the right to life or personal liberty under Article 21 of the Constitution of India.

The constitutional validity of death sentence for murder under Section 302 of the Indian Penal code was challenged for the first time in the case of *Jagmohan Singh v. State of UP*. It was argued that death penalty violates the basic fundamental rights guaranteed under the Constitution, like the right to equality under Article 14. The Supreme Court of India held that there was no merit in the contention and that law had given the Judges a wide discretion in the matter of sentencing after balancing all aggravating and mitigating circumstances of the crime.[224]

In the case of *Bandhan Chowdhary v. State of Bihar*[225]court had pointed out that Article 14 can hardly be invoke when it comes to judicial discretion. It was constituent that the freedom to live was the basis to the enjoyment of all the rights guaranteed in the Constitution even if it is not mentioned in this Article. Therefore, it could not be the desire of any law unless that law has a very reasonable purpose and it is required for the general interest of the public.

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[221] *A.K Gopalan v. State of Madras*, AIR 1950 SC 27

[222] Amar Singh, "Restatement of human rights in sentencing policy of supreme court of India with reference to capital punishment"
Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/127654/16/10_chapter%203.pdf(20-06-2018)

[223] Austin Granvile, "The Indian Constitution cornerstone of a Nation", First Edition, 1966, pp. 101 & 113

[224] *Ibid.*

[225] *Bandhan Chowdhary v. State of Bihar*, AIR 1951 SC 191 (1965)1 SCR 1045

Palekar J pointed in the present case that the clause 'cruel and unusual punishment' has and the liberal interpretation of the 'due process clauses' been taken from the American constitution.[226] However, even in United States of America despite having many favourable factors and evidence and literature supporting the abolition of death penalty, Courts in the United States have not been able to bring a final judgment that death penalty was *per se* unconstitutional.[227]

Through the repeated rejection of the bills and resolutions pertaining to death penalty for crimes convicted for murder that were introduced in the Parliament, Palekar J pointed out that the opinions of the Indians were against the abolition of death penalty. The argument based on Article 19 could not impress the Court.[228] Thus, the Court relied upon the 35th Report of the Law Commission of India to uphold the constitutional validity of death penalty. In view of the prevailing conditions in India the retention of death penalty was favoured by the law commission. In light of this, Courts held that death penalty was neither unreasonable nor against the public interest.[229]

Court was not satisfied with the arguments made on the basis of Article 21 of the Constitution as there was no procedure in law to make a choice between death penalty and life imprisonment. Therefore, Section 302 of the IPC was hit by Article 21.

With regards to this, Palekar J observed:

"The sentence follows the conviction and it is true that no formal procedure for producing evidence with reference to the sentence is specifically provided. The reason is that relevant facts and circumstances of the case are already before the court."[230]

As regard to the procedural safeguards provided in Article 19, Palekar J. commented that the provisions form the part of the 'procedure established by law' as mandated by Article 21.

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[226] The eight Amendment to the Constitution of India, forbid the infliction of cruel & unusual punishment, "Constituionality of Death Penaty", Available At http://shodhganga.inflibnet.ac.in/bitstream/10603/132600/8/08_chapter%203.pdf(20-06-2018)

[227] In furman, out of judges of the Court, only two Judges (Justice Brennan & Justice Marshall) held that death penalty was per se unconstitutional, *Ibid.*

[228] In 1931, an abolition Bill was introduced in the legislative Assembly by Gaya Prasad Sing, in 1956, a bill for abolition was introduced in by the Mukund Lai Agarwal in 1958, a Resolution for abolition was moved in the Rajya Sabha by Prithvi Raj Kapoor in 1961, a similar resolution

[229] The law commission of India: 35th report on Capital Punishment 1967, Vol. I, 354

[230] *Ibid.*

Thus, Section 302 of the Indian Penal Code was not violative of Article 21 of the Constitution. In addition the constitutional validity was also challenged on the basis of Article 245 of the Constitution. The doctrine of 'excessive delegation' made a huge impact on Section 302 of the Indian Penal Code as it imposed wide discretionary powers on judges in imposing death penalty. [231]

Relying upon the case of *McGautha v. State of California*[232] where the US Supreme Court made a statement that standardisation of discrete sentencing was next to impossible in view of the many variety of cases and facets of each. The court also cited from the long standing penal policy in India that gave them utmost discretion to determine punishment. That policy was approved by the British Royal Commission in its Report of Capital Punishment.[233]

The Report had stated that:-

"No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder; Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. We are satisfied that as long as capital punishment is retained this is the only practicable way of correcting the outstanding defects of the existing law"[234].

Palekar J. pointed that judicial procedure had been devised to eliminate errors in sentencing by elaborating provisions for appeal and revisions and further remarked that-

'The impossibility of laying down standards in at the very core of the criminal law administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence is..... Liable to be corrected by superior courts, Laying down of standards to the limited extent possible.....

[231] The law commission of India: 35th report on Capital Punishment 1967, Vol. I, 354
[232] *McGautha v. State of California* (1971) 408 Vs 183: 28 L Ed 2d 711. In this case the constitutional Validity of the law giving discretion to the jury to inflect death sentence was questioned on the ground that the impugned law did not provide any standard for the jury to make a choice between the sentence of death & life imprisonment in such cases.
[233] *Jagmohan Singh Vs State of UP* AIR 1973 SC 947,955
[234] Quoted in *Jagmohan Singh is State of UP* AIR 1973 SC 847,955

could not serve the purpose. The exercise of judicial discretion on well recognized principles is, in the final analysis, the safest possible safeguards for the accused'.[235]

The Court's rejection on forceful reasoning closed the issue of constitutionally and came to a stand still for almost seven years.[236]

Following Jagmohan Singh's case, the Code of Criminal Procedure **1973**, was replaced by the Code of Criminal Procedure 1973. The new Code contained two new provisions under Section 235 (2) and 354 (3) which regulated the infliction of death sentence wherever provided by law.

The decision made by the Supreme Court in Maneka Gandhi completely changed the Gopalan interpretation of fundamental rights where the first challenge to the constitutional validity of death penalty was dealt by the Supreme Court of India.

4.2.2 The Post Maneka Period

The Maneka Gandhi's case unfolded the procedures of law relating to death penalty and the new scope of Article 21 of the Constitution. The desirability of death penalty came up in the case of *Rajindra Prasad v. State of UP.*[237]Justice VR Krishna Iyer discussed a number of issues relating to death penalty[238]. Jagmohan Singh case was differentiated from other cases on the grounds that it had upheld the death penalty as valid on the ground that it is in accordance with the procedure established by law. Iyer also observed:

"We banish possible confusion about the precise issue before us it is not the constitutionality of the provision for death penalty, but only the canalisation of the sentencing discretion in a competing situation. The former problem is now beyond forensic doubt after Jagmohan Singh..... and the latter is in critical need of tangible guidelines at once constitutional and functional."

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[235] H.M Seervai, and N.M Tripathi , "Constitutional law of India" Third Edition, 1988 p. 410
[236] *Ibid.*
[237] *Rajindra Prasad v. State of UP* AIR 1979 SC 916.
[238] The Bench consisted of Justice VR Krishna Iyer, Justice AP Sen and Justice D.A Desai. Justice Krishna Iyer delivered the majority of the court for himself and on behalf of Justice DA Desai, Justice A.P Sen delivered a separate designing opinion.

Although it has been over ruled by the Supreme Court in Bachan Singh, there are points to be noted on the principles laid down and observations that were made by Iyer J.

He pointed out that the provisions laid down in Section 302 of the Indian Penal Code, 1860, gave the discretion to impose either death penalty or life imprisonment for the offence of murder without any guidelines. He further stated that it leads to uncertainty and confusion. He observed that in the case of Ediga Anamma that the use of certain expressions like 'no extenuating circumstances' or 'no ground to interfere' in conforming death penalty gave little guidance in the subsequent cases.[239]Thus, according to **Justice Iyer,**

"All these reasons necessitated the formulation of guide lines to regulate the exercise of sentencing discretion. He also added that the death penalty issue should be examined in the light of growing awareness with respect to the gravity of the punishment, human rights jurisprudence and constitutional protections. He conceded that the task of formulating guidelines fell within legislature's competence. But as the legislatures had not done this job, it was for the judiciary to do this because it had to face this problem daily while sentencing."[240]

"The following factors must be kept in mind in exercising the guidelines of death sentencing:

(a) The shift in the legislative policy towards life and against death.
(b) The growing awareness for the abolition or the restricted use of death penalty.
(c) The concept of social justice and human rights as contained in the provisions of the constitution."[241]

The provisions laid down in Section 302 of the Indian Penal Code with regards to the constitutional validity of death penalty, completely deprive a person of all his fundamental rights. It is agreed that Article 14, 19 and 21 had to be in consonance and in tune with other provisions of Part III of the constitution, Part IV of the Constitution and the concept of human dignity as enshrined in the Preamble of the Constitution[242]. Justice Iyer also remarked

[239] *Egiga Anamna v. State of AP*, AIR 1974 SG 799
[240] Justice Krishna Iyer refined to the case of *Narendra Kumar Vs Union of India* AIR 1960 SC430 in this content.
[241] *Ibid.*
[242] *Ibid.*

that death penalty was not in consonance with the dignity of an individual enshrined in the Constitution.[243]

In a widely accepted view judicial statements made in Rajendra Prasad's case would clear the bench for the future court to review Jagmohan Singh. But an opportunity came in the case of *Bachan Singh vs State of Punjab.*[244]The disagreement of Justice Sen, in Rajendra Prasad echoed in the majority of decisions of Bachan Singh.

It was clearly pointed in Bachan Singh's case that the judgement in Jagmohan Singh's case needed to be reconsidered for the following reasons.

- " Jag Mohan Singh case was decided keeping in view the old Code of Criminal Procedure of 1898 whereas under the new Code of 1973, death penalty had ceased to be the normal penalty for murder.
- The principle laid down in Maneka Gandhi required that every law in its procedure and substantive aspects must satisfy Article 14, 19 and 21. This liberal interpretation of these fundamental rights was not available when Jagmohan Singh was decided.
- India being a signatory to the International Covenant on Civil and Political Rights, according to which the capital sentence had become outmoded, stands admitted to a policy for abolition of death penalty
- The very nature of the issue of death penalty necessitated its reconsideration to be in tune with the evolving standards of decency. Therefore, it could not be decided on the basis of stair decises."[245]

The Court came up with two questions:-

1. "Whether the death penalty as prescribed in Section 302 of the Indian Penal Code was unconstitutional? and
2. If Section.302 of the Indian Penal Code was constitutional, whether the sentencing procedure provided in Section 354 (3) of Criminal Procedure Code 1973 was

[243] Justice Krishna Iyer refined to the case of *Narendra Kumar Vs Union of India* AIR 1960 SC430 in this content

[244] The appellant in this case killed his son because he suspected the deceased was not his own son, but had been foisted on him by his infidel wife. He was sentenced in death by the trial court and this sentence was also confirmed by the HC

[245] Amar Singh, "Restatement of human rights in sentencing policy of supreme court of India with reference to capital punishment"
Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/127654/16/10_chapter%203.pdf(20-06-2018)

> unconstitutional for investing unguided and untrammelled discretion in the court?"[246]

The decision on Death Penalty was upheld by the Supreme Court of India in its constitutional validity. Leading cases have pointed out the judicial opinion in favour of learning new skill of death penalty. Courts have ruled out that death penalty should be used in the rarest of the rare cases whereas some judges who favour abolition of death penalty have expressed strong views that they are bound to have harmful effects by the use of death penalty.

4.2.3 Rarest of the rare cases

In *Bacchan Singh v. State of Punjab*[247] the Supreme Court of India held that death penalty must be used for the most brutal murders and for the most heinous crimes where the rarest of the rare cases should be applied.

In *Santosh Kumar Bariyar v. State of Maharashtra,* has further explained that, "The rarest of rare dictum serves as a guideline in enforcing Section 354(3) and establishes the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the court, in case it selects death penalty as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum."[248]

In 1983 the Supreme Court of India in the cases of *Machhi Singh v. State of Punjab* traced the origin of the phrase "rarest of the rare cases"[249]. The judgment followed the decision of *Bachan Singh v State of Punjab*[250] and the constitutional validity of death penalty was upheld.

Certain criteria for accessing crimes under this category were laid down in Machhi Singh case. Some guidelines were adopted in identification of the rarest of the rare cases which

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[246] Amar Singh, "Restatement of human rights in sentencing policy of supreme court of India with reference to capital punishment"
Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/127654/16/10_chapter%203.pdf(20-06-2018)
[247] *Bacchan Singh v. State of Punjab* (1980) 2 SCC 684
[248] *Santosh Kumar Bariyar v. State of Maharashtra* (2009) 6 SCC 498
[249] *Machhi Singh v. State of Punjab* AIR 1983 SC 1957
[250] *Bacchan Singh v. State of Punjab* AIR 1980 SC 276

were discussed and formalised by the bench. The relevant statements to *Yakub Memon's case* are mentioned here to understand the doctrine. "The reasons why the community as a whole does not approve the humanistic method reflected in death sentence."Firstly, the foundation of deep respect for life principle is said to construct the humanitarian group. If any member of a community violates the life principle by killing another human, society may not feel to be limited or controlled by the doctrine.

Secondly, becoming aware that members of the community can live safely without the life being endangered because the community protects them and the rule of law that is being enforced by it. The existence of the rule of law and the fear of being taken down operates as a deterrent to people who kill to suit their ends. Members are indebted to the community for their protection. When no appreciation of kindness is shown by killing a member who protects the murderer from being killed, or when the whole community feels that for the sake of preserving oneself the killer has to be killed by sanctioning the death penalty. It may do so in the rarest of the rare cases when the collective moral ethics is shocked that it expects the judiciary to inflict death penalty despite personal opinion.

The scope of the Doctrine of the rarest of the rare cases

It was not until 1973 that courts were asked to make statements of reason for not awarding death penalty by preferring the alternative life imprisonment in capital offence, where death penalty is the rule and life imprisonment was only an exception.[251] The Supreme Court in the case of *Jagmohon Singh v. State of UP*[252] upheld the constitutional validity of death penalty, coming to a decision that it is not merely a deterrent, but a token of affirmative disapproval of the crime by the community.

India could not risk with its experiment on the abolition of death penalty; errors could be corrected by appeals to superior courts. "Courts made it clear that death penalty was not the rule of punishment but only a narrow exception. The circumstances of the cases were compelling to protect the security of the state, public order or the interest of the public."

[251] Section 367(5) Code Criminal Procedure, 1973
[252] *Jagmohon Singh v. State of UP* AIR 1973 SC 947

The judgment made in *Bachan Singh v. State of Punjab*[253] took special consideration under **Section 345 (3)**. The court formulated the rarest of the rare doctrine on the legitimacy of death sentencing as a means of punishment. It is reflected in the conclusion made by the court. "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

The Court has given in detail on two questions that must be taken into consideration:

"First, was there something unusual about the crime interpreting a life imprisonment sentence insufficient and;

Second, were the circumstances of the crime such that there was no alternative but to impose the death sentence, even after according maximum weightage to the mitigating circumstances that spoke in favour of the offender?"[254]

A mere certainty was sported, but vague in substance, hence court has set out the latitudes of the doctrine in *Machhi Singh & Ors.* V. *State of Punjab*[255]. This was the case of extraordinary cruelty, where due to a family dispute, Machhi Singh and eleven others attacked homes killing seventeen people of the other family.[256] It includes the motive, the manner of commission; the magnitude; the anti-social or abhorrent nature of the crime; and the personality of the victim. The courts took a light view of Machhi case as a precedent, since the illustrations went beyond its actual matrix.

4.3 Crimes Punishable by Death in India under Different Penal Acts

Some of the provisions under different penal act which provides death penalty in India are as follows-

[253] *Bacchan Singh v. State of Punjab* AIR 1980 SC 276
[254] *Bacchan Singh v. State of Punjab* AIR 1980 SC 276
[255] *Machhi Singh & Ors.* v. *State of Punjab* (1983) 3 SCC 470
[256] *Ibid.*

4.3.1 Indian Penal Code

Section 120C provides the meaning of attempt, in which it states that a person commits an offence if act of attempt is done with knowledge or intention and such act is connected with the commission of such offence, and such act fails only because of the situation beyond the persons control or there is lack of knowledge of such act.[257]

Any person who is found guilty of an attempt to commit any offence under the Indian Penal Code, shall be punished under section 120D of the Indian Penal Code, 1860, with imprisonment for life or one-half of the imprisonment for life if no term is expressly laid down under the Code.[258]

The India Penal Code also laid down other provisions which prescribe capital punishment to persons who commits other offences which are prescribed under the Act, which are as follows-

The Indian Penal Code, 1860 has prescribed death penalty for the following crimes :
Section 120B (1), provides that a person who commits criminal conspiracy should be punished in the same way as the person abetted to the crime itself, will be given punishment of life imprisonment or death penalty with rigorous punishment of two years.[259]

Those who attempt or abet to wage war or are waging war against the Government of India, will also face death penalty or life imprisonment.[260]

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[257] "120C. Attempt.- A Person attempts to commit an offence punishable by this Code, when –
(a) With the intention or knowledge requisite for committing it does any act towards its commission;
(b) The act so done is closely connected with, and proximate to, the commission of the offence; and
(c) The act fails in its object because of facts not known to him or because of circumstances beyond his control." of the Indian Penal Code, 1860.

[258] "120 D. Punishment for attempt - Whoever is guilty of an attempt to commit an offence punishable by this Code with imprisonment for life, or with imprisonment for specified term, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or as the case may be, one-half which may extend to one half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both." of the Indian Penal Code, 1860.

[259] "Section 120 B (1). Being party to a criminal Conspiracy to commit an offence punishable with Death- Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence." of the Indian Penal Code, 1860.

If any person abets a soldier or an officer of the Army or Air force or Navy to commit mutiny such a person will be given ten years imprisonment or life imprisonment or death penalty.[261]

If anyone tampered with the evidence of an offender convicted for capital offence while on trial, with the intent to get that person executed by giving false evidence or fabricating evidence and if the offender is executed unjustly because of such evidence, the person giving these evidence will be held guilty and punished either with life imprisonment or death penalty.[262]

If person murder or attempts to murder another person, they will also be punished with life imprisonment or sentenced to death.[263] If any person abets in commission of suicide of a person below the age of 18 years, or to an idiot or delirious or to a person under intoxication, such person shall be punished with life imprisonment or capital punishment.[264] If a person or

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[260] "Section 121. Waging , or Attempting to Wage War, or Abetting waging of War against the Government of India- Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine." of the Indian Penal Code, 1860.

[261] "Section 132. Abetment of Munity, if Munity is Committed in Consequences thereof- Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." of the Indian Penal Code, 1860.

[262] "Section 194. Giving or Fabricating False Evidence with intend to Procure Conviction of Capital offence- Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the laws for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; If innocent person be thereby convicted and executed. If innocent person be thereby convicted and executed.-- and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described." of the Indian Penal Code, 1860.

[263] "Section 302. Punishment for Murder- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine." And "Section 307- Attempt to Murder- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. Attempts by life-convicts-When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death." of the Indian Penal Code, 1860.

[264] "Section 305- Abetment of Suicide of Child or Insane Person- If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine." of the Indian Penal Code, 1860.

two to five people jointly commits the offence of dacoity along with the murder of another person, then such persons shall be punished jointly with life imprisonment or with death.[265]

If anyone abducts or kidnaps a person and threatens to hurt or kill the victim and if such victim is found death or it leads to death due to the demeanour of the offenders, then such act shall also be punished with imprisonment for life or death penalty.[266]

Any person who commits the offence of rape under Section 376 of the Indian Penal Code, 1860, and in the course of such action impose grave injury and harm to the victim that will lead the victim to a vegetative state or ultimately lead to death of the victim, then the offender will be given punishment of life imprisonment or death penalty.[267]

Those convicts who commit the same offence twice or repeat the same offence under Section 376 or 376A and 376D shall also be punished with death penalty or life imprisonment.[268]

4.3.2 The 262nd Report of the Law Commission of India

Chaired by Justice A. P. Shah, the commission's 262nd report aimed for the abolition of death penalty for almost all offences except that of terrorism. The report was widely praised for its

[265] "Section 376A. Punishment for causing Death or resulting in Persistent Vegetative State of the Victim- Whoever, commits an offence punishable under sub section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with a term which included rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death." of the Indian Penal Code, 1860.

[266] "Section 364A- Kidnapping for Ransom, etc- Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death or imprisonment for life, and shall also be liable to fine." of the Indian Penal Code, 1860.

[267] "Section 376A. Punishment for causing Death or resulting in Persistent Vegetative State of the Victim- Whoever, commits an offence punishable under sub section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with a term which included rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death." of the Indian Penal Code, 1860.

[268] "Section 376E. Punishment for Repeat Offenders- Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall be mean imprisonment for the remainder of that person's natural life, or with death." of the Indian Penal Code, 1860.

progressive move in the juristic death penalty of India. [269] The 262nd Report has replaced the 'rarest of the rare' doctrine as an exception in cases relating to terrorism. 'Rarest of the rare' is an accepted judicial scrutiny, while terrorism falls within the category of criminal offences.

The issue had been referred by the Supreme Court in the case of *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra.*[270]and *Shankar Kisanrao Khade v State of Maharashtra*[271]. The Commission under took a broad study on death penalty since it was of a very sensitive nature. The commission came up with the conclusion that death penalty has failed to serve the penological goal of preventing the occurrence any more than the imprisonment for life. It further concluded that, while focusing on death penalty as the main ultimate measure of justice, the spirit of restoring and rehabilitating the person accused are forgotten. The unequal application of *Bacchan Singh case* has fallen foul of the constitutional due processes and the principles of equality[272].

Cumbersome problems like the inefficient resources, the lack of updated modes of investigation, the overuse of police force, the flaws in the prosecution and poor legal aid have troubled the system. As death penalty falls within the same context it suffers both structurally and systematically, leaving its administration still fallible and exposed to misapplication. The exercise of the provisions of Article 72 and Article 161 of the Constitution of India completely failed in safeguarding against the mistake of justice in imposing death penalty. There are many situations in which the Supreme Court has pointed out the flaws and illegalities in how mercy power has been discharged. In addition to this, the death row circumstances are coupled with degrading and oppressive conditions imposed on convicts who breached Article 21 on imposing excessive punishment.[273]

The theory of law recommended by the Commission had moved forward on the removal of the requirements of special reasons for the imposition of imprisonment for life rather than death penalty in the year 1955; to the need of special reasons to impose death sentence in

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[269] "Ordinance of criminal Law", Available at http://www.prsindia.org/uploads/media/Ordinances/Ordinance%20Summary-20Criminal%20Law%202018.pdf (20-06-2018)

[270] *Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498

[271] *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546

[272] Amar Singh, "Restatement of human rights in sentencing policy of supreme court of India with reference to capital punishment"
Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/127654/16/10_chapter%203.pdf(20-06-2018)

[273] *Ibid.*

1973; to narrowing down death penalty to the rarest of the rare cases by the Supreme Court which has shown the direction in which India is headed. Although no valid penological justification arise for treating terrorism uniquely, concerns have been raised by jurist on the abolition of death sentence in terrorist activities, which may affect the national security.[274]

Lastly, the Report of the Commission made essential recommendations that States must come up with schemes to compensate victims and the rehabilitation of the victims of crime. The commission also highlighted that often victims and witnesses are silenced by threats from the accused persons hence it finds it necessary to established protection schemes.

4.3.3 The Criminal (Amendment) Act, 2013

The Criminal (Amendment) Act, 2013 which is also known as the "Anti-Rape Law" is the strongest step that has taken for the protection of women from violence and exploitation; it is a milestone in the development of law in India. After the Delhi gang rape case, 2013, the country finally took a stand in amending the law for rape in India. As a result, a judicial committee known as the Verma Committee was established to suggest for the laws that would best protect women from all kinds of sexual abuse and exploitation. Subsequently, more that 80,000 suggestions were submitted in the report[275], which the State took as basis to amend the penal provision pertaining to women. Thus, accordingly, the State amended Sections 166, 22A, 354, 375 , 376 and 506 of the Indian Penal Code, 1860; Section 54A, 154, 160, 173, 197, 309, 357 of the Code of Criminal Procedure, 1973; Section 53A, 114A,119, 146 of the Indian Evidence Act, 1872, and lastly Section 42 of the POSCO, Act.

The Criminal (Amendment) Act, 2013 has broadened the scope of rape by redefining the concept of rape itself in a very detailed manner under Section 375 of the Indian Penal Code, in which rape is committed if a person forces a woman to have sex, and includes oral sex and insertion of external objects inside the women urethra, vagina or anus, without her consent or if such consent is obtained by threatening her, or she has mistakenly slept with another man whom she thought to be her husband, or she is of unsound mind or intoxicated or is in a circumstances where she is unable to give her consent, or where the girl is under 18 years of

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[274] Amar Singh, "Restatement of human rights in sentencing policy of supreme court of India with reference to capital punishment"
Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/127654/16/10_chapter%203.pdf(20-06-2018)

[275] P.S. Thakur, Jayanti Yadav, and Arneet Arora, "Criminal Amendment Act, 2013, and Issue of Age", Vol.37: No.4, 2015, Available at http://medind.nic.in/jal/t15/i4/jalt15i4p422.pdf (20-06-2018)

age.[276] It also includes more crimes such as sexual harassment of women in work place, voyeurism, stalking, and acid attacks.[277] Punishment for such crimes are also made stricter in which almost all crimes are punishable with imprisonment of not less than seven years and goes up to life imprisonment.

Punishment has been prescribed under Section 376 of the Indian Penal Code, for crime of rape. For other offences the Act has prescribed under the Act i.e. rigorous imprisonment which is not less than 7 years and may extend to imprisonment for life.[278]The amended Act under section 376A provides a more stricter punishment for the act of rape mentioned in sections 375 and 376, and if such act of the offender causes the victim to be in a "vegetative state", such person shall be punished with death or imprisonment for life.[279] Section 376 E, states that a person who is a repeat offender and is convicted on same section, i.e., section 376A, or 376D, shall be punished with imprisonment for life or death penalty.[280]

There is a wide variation between the Verma Committee recommendations and the Amended Act, 2013, especially with the imposition of death penalty. The Committee was very careful in recommending law and gave due consideration for the applications of these laws while recommending them. It provided a more reform structure of laws which kept in mind the importance of human value in which the minimum jail term was 7-10 years and advocated that the maximum punishment should be life imprisonment which means that jail term for "the entire natural life of the convict" and not ending the life of the individual.[281] It was strongly opposed to imposition of death penalty on crimes against women. The panel when discussed about death penalty, found that even the women in the panel were against its use,

[276] See Section 375 of the Criminal Amendment Act, 2013
[277] See Section 354 A, 354 B, 354 C and 354 D, *Ibid.*
[278] "Section 376. 1. Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine." of the Criminal Amendment Act, 2013
[279] " Section 376A. Whoever, commits an offence punishable under sub-section (l) or sub¬section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death" of the Criminal Amendment Act, 2013
[280] " Section 376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 3760 and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death." of the Criminal Amendment Act, 2013, Available at https://www.advocatekhoj.com/library/bareacts/criminallawamendment/9.php(20-06-2018)
[281] Sandeep Joshi, "Verma Panel Says 'No' to Death Penalty", Available at https://www.thehindu.com/news/national/verma-panel-says-no-to-death-penalty/article4336046.ece(20-06-2018)

fearing the counter effect of such punishment might have on crimes against women and more over they were of the view that, "there is a strong submission that seeking death penalty would be a regressive step in the field of sentencing and reformation."[282]

The Committee had rightly examined the scenario in India and the along with the study made by the Working Group of Human Rights in India, stated that, death sentence is mostly pronounced in the "rarest of the rare" and such should be applied carefully which will not infringe its principle. It had stated that,

"*We believe that such offences need to be graded. There are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death*." [283]

4.3.4 The Anti- hijacking Act, 2016

The persistent menace of militant organisation in hijacking aircraft had compelled the Government of India to review the existing laws and made some amendments and development of the outdated Act to meet the required exigencies. On May 9, 2016, the Lok Sabha passed the new Anti-Hajacking Act, 2016, which also included the standards provided by the Beijing Protocol of 2010 and The Hague Convention of 1971.[284]

The Act widen the scope of the word "hijacking" by expanding its definition which further includes "threats to commit" such offences, or to direct or abet others to commit such offences. The jurisdiction is also broadened up into a universal jurisdiction which includes both national and international hijackers.[285]

Any person who commits such offence of hijacking will be punished with death penalty or life imprisonment, if the result of such act causes the death of other people who are held hostage during the act of hijacking. Section 4 of the Act provides that-

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[282] Payaswini Upadhyay, " 2013 Committee Cautioned against Death Penalty for Rape", Available at https://www.bloombergquint.com/law-and-policy/2018/04/22/2013-committee-had-cautioned-against-death-penalty-for-rape (20-06-2018)
[283] Report of the Committee on Criminal Amendment law, *Ibid.*
[284] Satvik Varma and Vikrant Panchada, "The New Hijaking Act, 2016", Available at, https://thewire.in/law/the-anti-hijacking-act-2016-an-explainer, (2-06-2018)
[285] *Ibid.*

"*4. Whoever commits the offence of hijacking shall be punished—*

(a) with death where such offence results in the death of a hostage or of a security personnel or of any person not involved in the offence, as a direct consequence of the office of hijacking; or

(b) with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine and the movable and immovable property of such person shall also be liable to be confiscated."[286]

Project 39A has list down 23 Acts which falls under crimes punishable by death. The Acts include the Indian Penal Code, 1860; Explosive Substance Act, 1908; the Air Force Act, 1950; the Army Act, 1950; the Navy Act, 1957; the Geneva Conventions Act, 1960; Petroleum and Minerals Pipelines (Acquisition of right of user in land) Act, 1962; the Unlawful Activities (Prevention) Act, 1967; the Border Security Force Act, 1968; the Defence of India Act, 1971; the Coast Guard Act, 1978; the Narcotic Drugs and Psychotropic Substances, 1985; Commission of Sati (Prevention) Act 1987; the Schedule Caste and Schedule Tribes (Prevention of Atrocities)Act, 1989; the Indo-Tibetan Border Police Force Act, 1992; the Maharashtra Control of Organised Crime Act, 1999; the Karnataka Control of Organised Crime Act, 2000; the Andhra Pradesh Control of Organised Crime Act, 2001; the Assam Rifles Act, 2006; Sashastra Seema Bal Act, 2007; the Bombay Prohibition (Gujarat Amendment) Act, 2009; the Bihar Excise Amendment Act, 2016.[287]

4.3.5 The Criminal Law (Amendment) Ordinance, 2018

Promulgated on 21st April 2018, the Criminal Law (Amendment) Ordinance, 2018, has amended laws which relates to rape of minors. The Ordinance include the following amendments.

The Criminal Law (Amendment) Ordinance, 2018 came up with the following salient features.

1. The minimum punishment for rape under Section 376 of the Indian Penal Code has been extended to ten years of imprisonment and may extend to life imprisonment.

[286] The Anti-Hijacking Act, 2016, The Gazette of India Extraordinary, Available at , http://www.civilaviation.gov.in/sites/default/files/Anti-hijacking%20Act%2C%202016.pdf, (2-06-2018)

[287] NLU Delhi, "Project 39A, Equal Justice Equal Opportunity", Available in https://www.project39a.com/landmark-judgements, (23-06-2018)

2. A new clause, Section 376 C provides for a minimum punishment of twenty years to a person who has committed rape on a woman below the age of 16 years.
3. Section 376 AB provides that twenty years of rigorous imprisonment and maximum death penalty or life imprisonment will be given to persons who have committed rape on a girl below 12 years of age.
4. Section 376 DB provides that, a fine which is just and reasonable will be imposed so as to meet both medical and rehabilitation expenses of the victim of rape.
5. The amendment also provides that a police officer who has committed rape shall be punished with rigorous imprisonment of a minimum of ten years in prison.
6. The amendment also adds that all investigations for rape should be completed within a period of two months.
7. Anticipatory bail has been blocked for persons accused of rape on girls of the age less than sixteen years.
8. All appeals that have been made shall be disposed of by courts within a time frame of six months.[288]

Amendment made to the Indian Penal Code

- Section 376 IPC: A minimum punishment of ten years has been added for rape and the maximum is life imprisonment.
- Clause (3) has been inserted to Section 376, providing the Minimum punishment of twenty years to any persons who rape a woman below Sixteen years of age.
- Section 376AB has been added which provides for the minimum punishment of twenty years rigorous imprisonment to person who rapes a woman less than twelve years of age. The rapist can also be awarded capital punishment.
- Section 376DA and 376DB prescribes the minimum punishment of life imprisonment to accused who is involved in gang rape of woman below the age of 16 years and 12 years respectively. Death penalty may also be awarded to such persons.
- The amendment also provides the imposing of fines that is just and reasonable in meeting the medical expenses and rehabilitation of the victim.

[288] The Criminal Law (Amendment) Ordinance, 2018 Available at http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf (1-06-2018)

- Section 376 (2) (a), omitted the phrase *"within the limits of the police station to which such police officer is appointed"*. It clearly implies that a police officer who commits rape at any place will be punished with ten years imprisonment.[289]

Amendment to Criminal Procedure Code

- All investigations relating to rape has be completed within three months at the time of giving the information and recorded by the Officer in Charge.
- The provision has also been amended to prescribe six months' time for disposal of appeal rape cases.
- Anticipatory bail has been blocked for persons accused of rape on girls of the age less than sixteen years.
- Section 349 has been added with a sub section which makes it mandatory for an informant or and authorised person to be present during the time of hearing the application for bail on persons accused of rape of girls below the age of sixteen years.[290]

Amendment to Protection of Children from Sexual Offences Act (POCSO) and Evidence Act.[291] The Ordinance amended Section 42 of the POCSO Act to add new provisions of the IPC, i.e., section 376AB, section 376DA, and section 376DB.[292] The Ordinance also amended Section 53A of the Evidence Act dealing with latter sexual experience no more relevant in certain cases and also Section 146 of the Act which deals with evidences or latter sexual experience which is not relevant anymore in few cases and added more clear procedures to provisions of the IPC which includes section 376AB, section 376DA, and section 376DB.[293]

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[289] The Criminal Law (Amendment) Ordinance, 2018 Available at http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf (1-06-2018)

[290] The Criminal Law (Amendment) Ordinance, 2018 Available at http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf (1-06-2018)

[291] The Criminal Law (Amendment) Ordinance, 2018 Available at http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf (1-06-2018)

[292] Section 24, "In section 42 of the Protection of Children from Sexual Offences Act, 2012, for the figures and letters "376A, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted",

[293] Section 7 provides that amendment to, "In section 53A of the Indian Evidence Act, 1872 (hereafter in this Chapter referred to as the Evidence Act), for the words, figures and letters -section 376A, section 376B, section 37, section 376D", the words, figures and letters "section 376A, section 376AB, section 3760, section 376C, section 37613, section 376DA, section 376DB" shaft be substituted" also, Section 8 provides amendment to

From the above discussion, it is seen that capital punishment was not new to India; it was prevalent from ancient times through the rules in the religious text such as Dharma or through different Penal laws. Under the ancient text offences against God, the State or another individual were punishable with death penalty which was considered as the highest punishment. These elements are also present in the Indian Penal Code, 1860 which prescribe many provisions relating to death penalty according to crimes committed. However, over the years, with the new judicial approach and studies by the Law Commission of India on issues relating to capital punishment, many new developments had evolved. The Criminal Procedure Code,1973 was amended, with the emergence of the due process standards in which test of the "Rarest of the Rare dictum" evolved, and many other amendments have taken place through the Criminal Law Amendment Act, 2013 and the Criminal Law (Amendment) Ordinance, 2018.

"section 146 of the Evidence Act, in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 37613", the words, letters and figures "section 376A, section 376AB, section 376B, section 376C, section 37613, section 376DA, section 376DB" shall be substituted", The Criminal Law (Amendment) Ordinance, 2018 Available at http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf (1-06-2018)

Chapter V

Capital Punishment in India: A Judicial Approach

One of the biggest human concerns is the debate on capital punishment. The movement against capital punishment started from the middle ages through Bentham Utilitarian concept. India's legal trend on death penalty has shown a considerable decline since Independence. However, the last few decades saw a shift in high number of execution and convictions in India; this was seen in the Law Commission Report of 1967 where in the 1953-1967 there were about 1410 executions done in India.[294] Thus, there has been considerable discussion by the judicial and legislative authority on the various Judgements and Reports concerning death penalty, issues on how and in what circumstances they should be awarded. In the Indian Penal Code,(IPC) 1860 there are many offences listed which attract capital punishment such as Murder under section 302 and 303, Dacoity with murder under section 396, Abetment of suicide of a Minor under section 302 Part II, Prejury of the innocent under section 194 and treason under section 121.[295]

Though there are numbers of varied national legislation which impose death penalty for offences specified there in, there is no exclusive legislation on death penalty and thus the laws and concept of death penalty is mostly based on judicial precedent. Judicial adjudication is the most potent backbone in developing the law and the concept of capital punishment. But death penalty conviction is dependable on the circumstances of each and every case, the nature of crime and the loss and effect of the victim and the society as a whole. These factors are taken into consideration by the Judiciary in imposing death penalty in India.

In the present chapter attempt has been made to explain about the procedure followed in death penalty cases and also to elaborately discuss the role of judiciary in developing the law relating to capital punishment.

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[294] Advaid Mohair, "Law Commission Recommendation to End Death Penalty: A welcome Decision", Available at the https://qrius.com/law-commissions-recommendation-to-end-death-penalty-a-welcome-decision/, (20-06-2018)

[295] Harsh Bajpai, "Rarest of Rare Case: A Condition Precedent For Death Penalty", Available at https://www.linkedin.com/pulse/rarest-rare-case-condition-precedent-death-penalty-harsh-bajpai, (20-06-2018)

5.1 Procedure to be followed in death penalty

The procedure followed by the court before the judgement of death penalty is pronounced is discussed as follows-[296]

5.1.1 Court of Session

- Firstly all cases pertaining to death penalty are conducted in the Court of Sessions.
- The Court of Session decides whether the case is a capital case or not, if so, it is then referred to the High Court for validation under Section 366 (1), of the Code of Criminal Procedure.[297]

5.1.2 High Court Confirmation

- After the Court of Session convicts a person for capital punishment for any offence under the law, the case will be sent to the High Court for verification and if there is any doubt it will again send for further investigation. The high court can annul or confirm the Court of Session decision.
- The High Court bench must consist of two judges and the court after further deliberation can enhance the judgement of the Court of Session under section 386 (c) of the Code of Criminal Procedure(CrPC),1973. If such enhancements are made, the court must be sure that there is no reasonable doubt and that opportunity should be given to show cause against the High Court judgement and the accused should be given the chance to plead for reducing it or for acquittal of the judgement under section 377(3) of the Code of Criminal Procedure, (CrPC), 1973.
- Here the government that is, the Central or State government may appeal on the ground of inadequacy to the High Court through a Public Prosecutor against the judgement granted by the Court of Session.
- The High court may at its own accord of take steps to appeal against the inadequacy of the sentence and enhance the Court of Session judgement by using it *sou-motto revision* powers under Section 397 read with 401 of the Code of Criminal Procedure, (CrPC), 1973.

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[296] NLU Delhi, "Project 39A, Equal Justice Equal Opportunity", Available in https://www.project39a.com/landmark-judgements, (23-06-2018)
[297] *Ibid.*

- If a case is pending before a subordinate court, the High Court can withdraw that case and may try it itself if it finds it reasonable to give the sentence of capital punishment, under section 407 Code of Criminal Procedure, (CrPC), 1973.[298]

5.1.3 Supreme Court Appeals

- When the High court does not considers the appeals from the Court of Session for awards on capital punishment, appeals are sent to the Supreme Court for further consideration under Article 134 of the Constitution of India, 1950
- Under Article 134A of the Constitution of India, 1950 the Supreme may grant a Certificate of Appeal for any order, sentence, judgement or degree made by the High Court for any aggrieved party.
- Under Article 136 of the Constitution, an Appeal on Special Leave may be granted by the Supreme Court on its discretion for any case and judgement by the High court.
- The accused may also file a review petition to the Supreme Court under Article 137 of the Constitution of India, 1950 seeking for review of Judgement within 30 days from which the High Court had pronounced the judgement.
- If the review petition is dismissed then the Supreme Court may file a curative petition to re-evaluate the order or the judgement if it is perceived that there has been a violation of the principles of natural justice or hesitation on part of the judges or if there has been any biasness. It should be given to the same bench of judges and that it may be disposed of without oral argument or orders by the Supreme Court.[299]

5.1.4 Pardon request

- If both the High Court and Supreme Court has confirmed on the Judgement of Death Penalty then the accused can go forward for the plea of pardon

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[298] NLU Delhi, "Project 39A, Equal Justice Equal Opportunity", Available in https://www.project39a.com/landmark-judgements, (23-06-2018)
[299] *Ibid.*

from the Governor of the State or President of the India under Article 72 or 161 of the Constitution of India, 1950.

- The pardon request must first go through the State Government, asking for pardon from the Governor of the State. If the Governor of the State rejected such plea request, it shall then be forwarded immediately to the Minister of Home Affairs, Secretary of the Government of India.
- The plea of pardon will then pass through the consideration of the Minister of Home Affairs on which he would advice the President of such pardon given to him and the President will decide on the matter based on such suggestions.
- The plea of pardon will be sent to the Chief Commissioner or the Lieutenant and through him it will be forwarded to the Secretary of State after which it will come to the consideration of the President of India for the case of Union Territories.
- This executive power to award pardons to the person for such conviction does not require giving any requirement for the acceptance or rejection for such pardon; however, it will have to consider every aspects of social and economic circumstances of the sex, age, or any deficiency of the convict on the basis of his mental and physical aspects. This power does not however undermine the judicial power in awarding such judgement. This request can be submitted by the person or any other for the benefit of the person, but such request must be on substantial ground.

5.1.5 Writ Petition

- The judiciary cannot question the Executive decision on the matter of granting such pardon to the accused. If such plea is rejected by both the Governor and the President, the person can file a writ to the Supreme Court for examining such non-consideration by the executive authority on the basis of violation of Article 21 of the Constitution of India. This, give the Court another opportunity to review such decision as to whether the Court has considered all the appropriate grounds and if there is any possibility of substituting death penalty with life imprisonment.

5.2 Judicial Precedent on Capital Punishment

In India, capital punishment is imposed or awarded only in certain cases depending on the circumstances of each case. India did not have any aggravating or mitigating factors which were recognised to act as a guideline while awarding capital punishment before the ***Ediga Annamma*** **case**[300]. The Court before awarding capital punishment takes into account the following factors-

1. **Offender Age**-

The "young age" of the offender is one of the mitigating factors which may be taken into consideration by the court on which the sentence of capital punishment can be reduced. However, this might not be a factor where the offender might get clemency for such offence, especially when the crime committed is huge and done in a heinous and cruel manner. However, the age of the offender is taken into consideration along with circumstances of each case. This is also supported by the Law Commission 35th and 42nd report which regarded age as a factor and it was recommended that a person who is under the age of 18 years should not be given capital punishment and this was later provided under Section 55 B of the Indian Penal Code.[301] Thus, if a person is convicted when he or she is below 18 years then the Court cannot execute the person later after trial when he is above 18 years.

2. The Offender's Gender-

A factor based on the gender of the accused is neither taken as mitigating nor an aggravating factor for consideration before pronouncing capital punishment. Crimes committed by women are very less as compared to crimes committed by men. The reason is not that women can't commit the same crime but that in most cases crimes committed by women are either not reported or they are not produced before the Court for questioning. Moreover, if the crime is jointly committed with a man then the man will get most of the blame as he is looked at, as an influencing factor for committing the crime and more consideration are given to a woman. Such was seen

[300] *Ediga Annamma v. State of Andra Pradesh*, 1974 AIR 799, 1974 SCR (3) 329

[301] Krishna A. Kumari, "A Study of capital Punishment India", Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/124159/12/12_chapter%205.pdf, (22-06-2018)

in the case of ***Ediga Annamma***[302] where the court took the gender of a person as a mitigating factor for reducing the sentence of capital punishment. However, now that trend is changed and women are equally guilty for the same crime as men and that there are circumstances where it has been observed by the Court especially on dowry cases where women are the culprit for gruesome murder either by the mother-in- law or the sister-in-law. Thus, in such cases the court would award death punishment as a deterrent effect but till now no such punishment has been pronounced on women based on gender consideration.[303]

3. Manner and Motive of the crime-

In Criminality, the motive of the crime is the most essential part in determining the imposition of death penalty. In cases where the motive of the person is of a malafide intention and it is done in such a gruesome and cruel manner which proves fatal and results in severe injuries to the individual then the court will not hesitant to enforce capital punishment against the offender. [304]

5.2.1 Constitutionality of Death Penalty in India

Article 21 of the Constitution of India provides for right to life[305] to every individual in India. Death penalty is the legal process of ending life and it is barbaric in nature and substance. However, it is legal in the judicial system. Thus, it is the duty of the judges to avoid any grey lines in pronouncing such death penalty to the accused, and be extremely careful in weighting the mitigating factor, so that it would not violate the fundamental rights to life of a person. Capital punishment must be considered in the light of the provision of the Constitution of India.[306]

The practice of capital punishment is questioned of being violative of the right to life of a person; however it has always been turned down by the judiciary from time to time. This has

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[302] *Ediga Annamma v. State of Andra Pradesh*, 1974 AIR 799, 1974 SCR (3) 329
[303] *Ibid.*
[304] *Ibid.*
[305] Article 21, states that "No person shall deprived the right to life or personal liberty, except according to procedure established by law", Constitution of India, 1950
[306] Justice A.k Ganguly, "Constitutional Validity of Capital Punishemnt", Available at https://newindialaw.blogspot.com/2012/11/constitutional-validity-of-capital.html,(22-06-2016)

been a matter of debate for a long time since 1967 when the Law Commission undertook its study on death penalty in its 35th Report.[307]

In the case of ***Jagmohan v. State of U.P***,[308] Bhagwan Singh and Prayag Singh were brothers. Roop Singh S/O Bhangwan Singh was married to Smt. Putti, who was the sister of the accused Ramesh and Sobran Singh. Eventually after an unfortunate incident Roop Singh and his father died. Soon after the widow Putti developed intimate relationship with Jagmohan Singh, which was not appreciated by Prayag Singh and he raised his objection. Because of this, a lot of hatred and resentment cumulated and thus led to the murder of Prayaq Singh. Four Accused namely Jagmohan Singh, Sobran and Ramesh Singh and Brij Singh were sentence to death under section 302/307 read with Section 34 of the Indian Penal Code, 1860.[309]

On an appeal to the Supreme Court, for the first time the Supreme Court undertook to answer the question of constitutional validity of death penalty. Four crucial points were being questioned on this matter, i.e. it violated all the fundamental rights under article 19 (1) (a)-(g), secondly, it violated article 14 of the Constitution as the judgement did not stand on equal grounds when it came to the discretion of the court, for to one it had given capital punishment and the other life imprisonment, thirdly, it was regarding 'procedure established by law' as there was no prescribed procedure by the Code of Criminal Procedure,(CrPC) 1973, for proper and justified evaluation to grant such judgement, and lastly, Judiciary's wide power to give such judgement without any legislative law is an excessive delegation of power to the judiciary.[310]

However, this was not contented by the court on which it defended that the judiciary's power can be reviewed by the Supreme Court and that in the same year the new Code of Criminal,(CrPC) 1973, Procedure was adopted which provided a requirement for the judges

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[307] Sujato Bhandra, "Indian Judiciary and the Issue of Capital Punishment", Available at https://cafedissensus.com/2014/01/01/indian-judiciary-and-the-issue-of-capital-punishment/, (22-06-2018)

[308] *Jagmohan v. State of U.P*, 1973 AIR 947, 1973 SCR (2) 541

[309] *Jagmohan Singh v. State of U.P*, 1973 AIR 947, 1973 SCR (2) 541, Available at http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=304002649100, (26-06-2018)

[310] Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

to give 'special reason' before pronouncing the judgement of death penalty to the accused with a pre-sentencing of the hearing from the trail court itself.[311]

Ediga Anamma v. State of Andhra Pradesh[312] is another important judgement in which it was decided that criminal and crime are equally important as a decisive factor for determining death penalty. Justice Iyer in this case extensively examined all the other factors and circumstances of the accused and with utmost deliberation reduced the punishment of the accused after further consideration of her mental and social circumstances.[313] In this, case, the accused was a rural woman who was thrown out of her husband's house by her father in law and was living in her maternal home with her child. She was convicted of a murder, which she initiated out of jealousy and envy of another woman who had a relationship with her lovers. The murder which was intentionally planned for another young woman resulted in the death of some other woman. The Session Court then imposed death penalty on the accused which was confirmed by the High Court.[314]

In the case of ***Rajendra Prasad v. State of Uttar Pradesh***[315], Rajendra Singh and Ram Kumar were accused of a murder of one Kamala Srivastava, by strangling her while committing robbery and both were sentenced to death, however, with an appeal all got acquitted except for Ram Kumar who was sentence for life imprisonment. The Court allowed the appeal of Rajendra Prasad and rejected Ram Kumar. This was challenged by Ram Kumar on the acquittal of Rajendra Prasad and others.[316] This case provided an important ground on which death penalty could be pronounced, i.e. firstly, before imposing such judgement the judge must accord special reason for such judgement and secondly, it must be imposed only in extra-ordinary case.[317]

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[311] Section 354(3) Code of Criminal Procedure, CrPC,1973, also see "A Study of Supreme Court Judgement in Death Penalty Cases, 1950-2006", Available at https://darkindia.wordpress.com/a-study-of-supreme-court-judgments-in-death-penalty-cases-1950-2006/, (26-06-2018)

[312] *Ediga Anamma v. State of Andra Pradesh*, 1974 AIR 799, 1974 SCR (3) 329

[313] Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

[314] *Ediga Anamma v. State of Andra Pradesh,* 1974 AIR 799, 1974 SCR (3) 329, Available at https://indiankanoon.org/doc/1496005/

[315] *Rajendra Prasad v. State of Uttar Pradesh*, 1979 AIR 916, 1979 SCR (3) 78, *ibid.*

[316] *Rajendra Prasad v. State of UP 1979 AIR 916, 1979 SCR (3) 78,* Available at http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=009891500000

[317] Justice A.k Ganguly, "Constitutional Validity of Capital Punishemnt", Available at https://newindialaw.blogspot.com/2012/11/constitutional-validity-of-capital.html,(22-06-2016)

Bachan Singh v. State of Punjab[318], is a landmark case relating to death penalty. The brief fact of the case was the victim/deceased insulted one Sulakhan Singh as he first insulted his son Puran Singh. Soon after that, Bachan Singh , Pal Singh and Makhan Singh came to the house of the victim/deceased to confront him and his son which turned into a quarrel. When their argument when out of control Makhan Singh raised a lalkara and prompted the accused to not let anyone out of the house alive and this culminated in to a fight in which Makham Singh and Bachan Singh gave a "spear blow to the deceased on the left side of the chest which had proved fatal" to the deceased. When the son of the deceased tried to fight back to defend his father, he was also beaten up by them and soon after a few minutes the victim passed away and after that the accused fled the scene. Soon, they were caught by the police and were convicted by the court for unlawful assembly and sentenced to death penalty with rigorous imprisonment for one year which was to be run simultaneously.[319] There was an appeal to the Supreme Court and the Supreme Court upheld the constitutionality of death penalty. It rejected the ruling in *Rajendra Prasad* and upheld again the *Jagmohan ruling* and considered that the maintaining of the penalty as an optional punishment in certain circumstances under the State is not enough and that concept pertaining to criminal and crime cannot be limited to separate water-tight compartment.[320] The Judgement provided that both mitigating and aggravating circumstances indicating both criminality and crime are to be considered for delivering the judgement of death penalty and moreover, it should be used only in the "rarest of the rare" cases.[321] When the court upheld the constitutional validity of capital punishment, it limited the scope of the punishment while acknowledging the development of international law and human rights in which many jurists have stipulated that "a real and binding concern for the dignity of human life postulates resistance to taking a life

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[318] *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE *713, (1980) 2 SCC 684, 1983 1 SCR 145*

[319] *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE *713, (1980) 2 SCC 684, 1983 1 SCR 145*
Available at http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=002991862000, (25-06-2018)

[320] In *Bachan Singh v. State of Punjap*, Stated, "*The expression 'special reasons' in the context of this provision obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.",* Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

[321] "A Study of Supreme Court Judgement in Death Penalty Cases, 1950-2006", Available at https://darkindia.wordpress.com/a-study-of-supreme-court-judgments-in-death-penalty-cases-1950-2006/, (26-06-2018)

through law's instrumentality. That ought not to have been done to save in the rarest of rare cases when the alternative option is unquestionably foreclosed."[322]

Later this judgement was further subsequently affirmed in the case of ***Machhi Singh v. State of Punjab***[323]**.** Brief facts of the case are that, a dispute between two families ended in dreadful consequences in which seventeen people died including women and children on the course of the incident between 12th and 13th August 1977. In this case, Macchi Singh the common accused along with eleven others were tried by the session court and were convicted under relevant provisions, in which nine were given life sentence and four of them were awarded death sentence by the court. Their sentences were subsequently affirmed by the High Court and therefore made a special leave appeal to the Supreme Court.[324] The Supreme Court stated that there should be a balance sheet between mitigating and aggravating circumstances before giving the judgement of capital punishment. Under this case, the Supreme Court laid down two tests which may be applied for determining a case of death penalty, i.e. Whether there is any inadequacy in imposing life imprisonment and, secondly, whether after further deliberating with full weight of the circumstances at hand, there is no other alternative than death penalty.[325] However, the judgement in the cases of Bachan Singh, Jagmohan and Macchi Singh set death penalty as an exception and not a rule[326] in legal jurisprudence in India.

On the basis of these principles the consideration of reasonable doubt is given to the offender. The Code of Criminal Procedure, 1973, provides sufficient safeguards against mis-judgement towards death penalty. Section 354(3), provides that a judge has to provide special reason for delivering the sentence of death penalty and section 235(2) provides that after the conviction of the accused a hearing has to held for such sentence. Constitutionality on capital punishment is mainly based on the principles laid down in Bachan Singh case. The standard of such judgement is mainly in the hand of the judge's discretionary power in imposing death

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[322] Sujato Bhandra, "Indian Judiciary and the Issue of Capital Punishment", Available at https://cafedissensus.com/2014/01/01/indian-judiciary-and-the-issue-of-capital-punishment/, (22-06-2018)

[323] *Machhi Singh v. State of Punjab*, 1983 AIR 957, 1983 SCR (3) 413, Available at https://indiankanoon.org/doc/545301/, (22-06-2018)

[324] *Ibid.*

[325] *Machhi Singh v. State of Punjab*, Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

[326] *Machhi Singh v. State of Punjab*, stated, that , "*The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability...In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances*", *Ibid.*

penalty and understanding that aside death penalty, life imprisonment is a wide enough punishment for the highest crime.[327]

5.2.2 Mode of execution

The mode of executing death penalty is another debate which many activists have pointed out as a brutal and inhumane process for any individual. In India death penalty is usually carried out by public hanging or shooting. This was seen in cases such as ***Deena v. Union of India,***[328] where in this case the appellant who was convicted for murder was given a death penalty, and it was contented on behalf of the appellant in anticipation of their execution that the mode of execution by hanging on a rope is barbarous and cruel and such mode of execution which was lay down under section 354 (5) of the Code of Criminal Procedure, 1973 is violative of Article 21 of the Constitution of India.[329] This was another ground on which constitutional validity was questioned. Thus, the decision in Bachan Singh case was over-ruled and it was recommended that the state should provide another dignified procedure for executing capital penalty. The court however did not hold the same view and held that Section 354(5) does not violate the constitutional principles and that the execution procedure laid down are fair and reasonable method. This has further been backed by the medical expert opinion on which they state that hanging by rope is less painful and serves as the best method for executing death penalty[330]. The court then stated that neither shooting or electrocuting nor using of lethal gas or lethal injection has "any distinct advantage" over hanging.[331]

5.2.3 Unconstitutionality of Section 303 of the Indian Penal Code, 1860

In ***Mithu v. State of Punjab***,[332] the appellant was convicted for murder and was sentenced to death penalty under Section 303 of the Indian Penal Code, 1860. The appellant contended that Section 303 of the Indian Penal Code, 1860 violated the right to life and was an unfair procedure as he was already serving his jail term. The respondent on the other hand stated

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[327] Justice A.k Ganguly, "Constitutional Validity of Capital Punishemnt", Available at https://newindialaw.blogspot.com/2012/11/constitutional-validity-of-capital.html,(22-06-2016)

[328] *Deena v. Union of India* 1983 AIR 1155, 1984 SCR (1) 1, Available at https://indiankanoon.org/doc/888451/, ,(22-06-2016)

[329] *Ibid*.

[330] The Report of the U.K Royal Commission, 1949, and the opinion of the Director General of Health Service of India, along with the 35th Law Commission of India Report, Available at http://ijlljs.in/wp-content/uploads/2015/12/13.pdf, (24-06-2018)

[331] Ravi Boolchandani, " Death Penalty Constitutional Position", Vol.2:Iss.7, IJLLJS, pp.165-170, Available at http://ijlljs.in/wp-content/uploads/2015/12/13.pdf, (24-06-2018)

[332] *Mithu v. State of Punjab*, 1983 AIR 473, 1983 SCR (2) 690, Available at https://indiankanoon.org/doc/590378/, (24-06-2018)

that the ratio of murder was death penalty which was already upheld in Bachan Singh, thus, stands on valid ground.[333] However, the Supreme Court struck down the section as unconstitutional in 1983 and stated that there was no compulsory judgement on death penalty for an offence of murder. The section was originally drafted to control the assaults by life-convicts on the staff in prison however, it exceeded its intention. It however, deprived them of the right under Section 235(2) of Code of Criminal Procedure,(CrPC) as it provided mandatory death penalty on murder by life convict. It deprives them of the right to defend themselves and goes against all logic of the provision as for e.g. hypothetically speaking, a convict undergoing life sentence for forgery is mandatorily punished with death when he commits the offence of murder. The section provides no valid justification for giving a "special reason" to establish death penalty on the convict, thus, was ultimately removed by the court and added together under section 302 of the Indian Penal Code, 1860.[334]

5.2.4 Delay of cases

One of the factors which may be considered to commute a death penalty into life imprisonment is when there was unreasonable or unjustified delay in executing such cases. In the case of ***Triveniben v. State of Gujarat and others***,[335] the appellant was given capital punishment for murder of several people through impersonation of a custom officer. The appellant had kidnapped them under the disguise of custom officer and then taken for interrogation with the intention to rob and murder them. For eight years he was kept in solitary detention and such delay of execution by the court violated the right to liberty life under Article 21 as it caused a dehumanising effect on the convict.[336] Thus, the Supreme Court held that, "... undue long delay in execution of death sentence will entitled the condemned to approach the court under Article 32 for a writ petition under the Constitution of India, but the court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process...No fixed period of delay could be held to make the sentence of death as in executable. If the Supreme Court finds the delay

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[333] *Mithu v. State of Punjab*, 1983 AIR 473, 1983 SCR (2) 690, Available at https://indiankanoon.org/doc/590378/, (24-06-2018)

[334] Suraj Nath, "Constitutionality of Provision of Section 303, I.P.C-Explained", Available at http://www.shareyouressays.com/knowledge/the-constitutionality-of-the-provisions-of-s-303-i-p-c-explained/111704, (24-06-2018)

[335] *Triveniben v. State of Gujarat and others* 1989 AIR 1335, 1989 SCR (1) 509

[336] NLU Delhi, "Project 39A, Equal Justice Equal Opportunity", Available in https://www.project39a.com/landmark-judgements, (23-06-2018)

to be undue foregoing senses, the court will squash the sentence of death and substitute it with the sentence of imprisonment for life to the accused."[337]

Undue delay of execution for death penalty undermines Article 21 of the Constitution which proclaims that procedure established by law should follow a fair and reasonable manner justified by law. Such delay resulted in inhumane and torturous treatment of the accused on death row which violates right to life and liberty. Thus in cases where the procedure is delayed for more than 2 years are given the opportunity to commute to life imprisonment.[338]

5.2.5 Doctrine of the "Rarest of the Rare case"

The doctrine "rarest of the rare" was established in 1983 in the landmark case of ***Bachan Singh v. State of Punjab***[339] and further interpreted with guidelines in ***Macchi Singh v. State of Punjab***,[340] which upheld the constitutional validity of capital punishment. However, the court did not make capital punishment a rule but an exception to the rule. Thus, the court brought out the concept of rarest of the rare case and provided certain guidelines through which the Court can determine if the case falls under the ambit of rarest of the rare case to deliver the judgement of death penalty.

In the case of ***Bachan Singh v. State of Punjab***[341], for the first time the following guidelines were laid down for the imposing of death penalty by the Court,

- "Only in the gravest cases of extreme culpability, this extreme penalty of death may be awarded;
- The circumstances of the offender along with the circumstances of the crime have to be taken into consideration;
- When the sentence of life imprisonment seems inadequate having regard to the nature and circumstances of the crime, only then death sentence may be awarded; and
- The aggravating and the mitigating circumstances have to be balanced."[342]

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[337] Justice A.k Ganguly, "Constitutional Validity of Capital Punishemnt", Available at https://newindialaw.blogspot.com/2012/11/constitutional-validity-of-capital.html,(22-06-2016)

[338] NLU Delhi, "Project 39A, Equal Justice Equal Opportunity", Available in https://www.project39a.com/landmark-judgements, (23-06-2018), also see newindialaw.blogspot.com

[339] *Bachan Singh v. State of Punjab*, AIR 1980 SC 898

[340] *Machhi Singh v. State of Punjab*, 1983 AIR 957, 1983 SCR (3) 413,

[341] *Ibid.*

[342] "Analysis of Death Penalty in the Rarest of the Rare Case", Available at http://www.theindianlawyer.in/blog/2017/05/13/analysis-death-penalty-rarest-rare-cases/, (24-06-2018)

The Supreme Court again reiterated this in the case of ***Macchi Singh v. State of Punjab***[343], in which it upheld the doctrine of rarest of the rare cases and further provided that, "when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty, then death penalty may be sanctioned."[344]

A more prominent view of the rarest of the rare cases can be viewed from the case of ***Yukub Memon case***[345], in which the Court deliberated that, the main cause that the society does not support the humanistic approach on this doctrine is that, the pillar of such approach is to be constructed on the ground of "reverence for life" principle. If one person violates this principle by murdering another person, then the principle is violated and the community itself does not feel safe upholding such a doctrine. It should be realized that the all individuals should be able to live their life safely and that it is the duty of the rule of law to maintain such decorum and the State to enforce it. The fear of being account to the rule of law brings a deterrent effect to those who have no sense of right and wrong in committing any crime which will affect the society. Every individual owes a responsibility for this protection in the community. If this chain is broken and some member goes against such principle by killing other members of the community, then, it is justified that for the safety of the whole community that the killer has to be get rid of, even if it comes to taking his life. Thus, it is justified in imposing death penalty for the good of the whole society. This is taken in certain occasion when collectively the conscience of the society is shocked by such act of the offender in rarest of the rare cases in which the State is forced to take such action that enforce death punishment on these cases even if the judiciary hold its opinion otherwise.[346] Such sentiment by the community may be entertained if certain factors are proved such as motive and manner of committing the crime, nature of the crime.

- Manner of committing the crime- when murder is done in such a way that the act is gruesome, brutal, revolting or devious manner, so as to shock and intensify the resentment of such act by the community. For instance, when the victim's body is

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[343] "Analysis of Death Penalty in the Rarest of the Rare Case", Available at http://www.theindianlawyer.in/blog/2017/05/13/analysis-death-penalty-rarest-rare-cases/, (24-06-2018)

[344] *Ibid.*

[345] *Yukub Abdul Razak Memon v, State of Maharashtra* Th:Cbi, 21th March 2013, Criminal Appeal No. 1728 of 2007

[346] Ravi Soni, " What does 'Rarest of the rare case' means in the context of Death Penalty in the Yukub Memon Case", Available at https://www.quora.com/What-does-a-rarest-of-rare-case-mean-in-the-context-of-death-penalty-In-the-Yakub-Memon-case-wasnt-the-death-penalty-bit-harsh, (25-06-2018)

butchered into pieces, or when the victim is set on fire alive, or when a victim is killed by an inhuman and cruel act.

- Motive behind the crime- If a crime is committed with a malafide intention or motive with meanness and depravity in such crime, such as someone hired an assassin to commit murder, or in a way of betray their motherland committed murder, or for the property where a cold- blooded murder is committed.
- Socially abhorrent or anti social crime- These crimes are done with an intention to target a specific group in society, or to terrorize a community so as to cause them to flee from a place, or to stimulate social wrath or to overturn past injustice to maintain back the balance in society. Such crimes are mostly committed to schedule caste or minority.
- Magnitude of such crime- When the weight of crime is huge and such as a multiple murder is committed to a large number of people or family belonging to certain caste or creed with ulterior motives.
- The victim's personality- This takes in many forms and in many circumstances such as a child, an old person, or helpless women, or where the victim is in a inferior position than the offender, etc.

The courts have kept in mind the "collective conscience" of the people and draw their judicial reasoning to justify death penalty in many cases. It was used to examine the appeal of the community as a whole to propound such judgement. The court had constantly used the principle of collective conscience in their discretion to back their judgement.[347]

The doctrine of rarest of the rare cases is quite vague even with the guidelines of the case of Bachan Singh and Macchi Singh. The phrase "Rarest of the Rare" case itself does not have any definition and its interpretation is left on the court. In ***Shankar Kisanrao Khade v. State of Maharashtra***,[348] a young girl of about 11 years of age went missing in July 2006. After 48 hours later her body was found in the field. She was raped and strangled to death. The accused had lured her with candy and took her to their son's friend's place where he raped her while everyone was fast asleep. The accused was caught and thrown out of the house immediately. He was then convicted under section 302 IPC which was subsequently

[347] Ravi Soni, " What does 'Rarest of the rare case' means in the context of Death Penalty in the Yukub Memon Case", Available at https://www.quora.com/What-does-a-rarest-of-rare-case-mean-in-the-context-of-death-penalty-In-the-Yakub-Memon-case-wasnt-the-death-penalty-bit-harsh, (25-06-2018)

[348] *Shankar Kisanrao Khade v. State of Maharashtra*, Criminal Appeal nos. 362-363 of 2010, 25th April 2013

confirmed by the High Court. Thus, an appeal was brought in 2006 for which the judgement was given three years after the appeal was made.[349] The highlight of this judgement was that a different approach was taken by the Court to come to conclusion, i.e., by using the "Crime test and Criminal Test" to that of the "Rarest of the rare" test to balance the crime. Here the "Criminal test" referred to mitigating circumstances and "Crime test", referred to the aggravating circumstances. In order to give death penalty, there needs to be agreement and fulfilment of result on 0% from the "Criminal test" and 100% of the "Crime test", along with the test of the "Rarest of the rare" cases. In this case, application of the these two test were rightly applied in which it was seen that, "the degree of barbarity of the crime was confirmed by the brutal nature of the rape and the murder; the 52-year old accused was neither a young man who could possibly have been reformed, neither could he have been shown to lack the intention to commit the crimes; and the very fabric of the Society was befouled by the commission of such a crime."[350]

The court gave a judgement which comprehends the arbitrary and subjective nature of death penalty. It compiled all the judgement which falls under death penalty and those that didn't and brought out situation where excessive importance were given to circumstances under which crime was committed without even considering the mitigating nature. The Court commuted the death penalty of the accused. Thus, "aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The Consideration for both is distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs to be reviewed."[351]

It also led to other problem as have been outlined by Justice Sinha in the case of where it was seen by the Court that in most cases in the Subordinate court and Supreme Court the rule laid down in *Bachan Singh case* is not strictly followed and therefore many arbitrary judgment are made.[352] However, the latter part of the doctrine, i.e. "that ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed", needs serious consideration in interpretation by judges as have been stated in Bachan Singh that death

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[349] Sudipta Purkayastha, "Analysing Death Penalty like Never Before: Shankar Kisanrao Khade v. State of Maharashtra", Available at http://lexquest.in/analysing-death-penalty-like-never-before-shankar-kisanrao-khade-v-state-of-maharashtra/, (25-06-2018)

[350] *Ibid.*

[351] *Sangeet v. State of Haryana* (Criminal Appeal Nos. 490-491 of 2011) , Available at http://www.ijli.in/assets/docs/AdityaGujarathi.pdf

[352] *Satosh Bariyar v. State of Maharashtra*, 2009(57)BLJR2348; JT2009(7)SC248; 2009(7)SCALE341; (2009)6SCC498; 2009(6)LC2797(SC),Available at http://www.ijli.in/assets/docs/AdityaGujarathi.pdf

penalty is the last resort when there no other alternative and it is proved that life imprisonment is not enough to bring justice.[353]

5.3 The New Judicial Trend

Apart from the guidelines provided in the *Bachan Singh case* and *Macchi Singh Case* for death penalty, a lot of other cases have contributed to the development in providing clarity to these guidelines and act as a check to capital punishment. Some of the important cases which laid down new judicial trend relating to capital punishment are as follows-

5.3.1 Juvenile offender

The approach against death penalty on juvenile offender was first brought up by the 35th report of Law Commission and again it was reiterated in the 42nd Report where an amendment was proposed the Indian Penal Code (Amendment) Bill, 1972. The bill never came to life in the form of a law however the judiciary has made it obligatory to prohibit the death penalty of juvenile offender.

In the case of *Jagmohan* the age of the offender was regarded as a mitigating factor. This was also seen in the case of ***Harnam v State of U.P***[354], in which the fact of the case was that the accused was charged with murder by beheading the victim and carrying it in his hand in the most inhuman manner. Thus, he was sentenced to death penalty by the court which was upheld by the High Court. When the appeal was made to the Supreme Court, the Court found that the accused was only 16 years old when he committed the crime. Thus, on the basis the sociological and juristic thinking, the Court found that it will be inappropriate to impose such heavy punishment as the accused was "too young" i.e. below 18 and referred to the Law Commission 42nd Report, and refused to impose death penalty to the accused.[355]

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[353] Satya Vrat Yadav, "Rarest of Rare Doctrine : Death Penalty", Available at https://www.lawctopus.com/academike/rarest-rare-doctrine-death-penalty/

[354] *Harnam v State of UP*, 1976 AIR 2071, 1976 SCR (2) 274

[355] *Harnam v State of UP*, 1976 AIR 2071, 1976 SCR (2) 274, Available at https://indiankanoon.org/doc/1016332/, (26-06-2018)

5.3.2 Proportionality

In **Vikram Singh v. Union of India**[356], the accused was given capital punishment under Section 302 and 364A IPC, which was confirmed by the High Court. The accused then appealed to the Supreme Court. The petition was filed before the Supreme Court on the ground that Section 364A IPC was unconstitutional as it imposed death penalty for everyone found guilty. However, the petition was withdrawn and it was again sent to the High Court for review, but it was dismissed by the High Court affirming its previous judgement. Therefore, again an appeal to the Supreme Court was made.[357]

When the appeal was brought to the two-bench judge, the Supreme Court widely accepted verdict of the lower court and contented that Section 364 A of the IPC widely covered situations where not only terrorist and inter-governmental situation occurred but also cases where a person kidnaps or abducts another person for ransom. However, the appellant contention was that these circumstances did not apply in his case and that the elements of his crime did not justify his conviction. Thus, the court took recourse from invoking the inherent power under Article 129 and 142 of the Constitution of India for modification, recall or reversal of the appellant case, as it is the duty of the Court to correct any error in law and in passing judgement that might affect the rights of the individual. Thus, the court after further deliberation held that, "the punishment must be proportionate to the nature and gravity of the offences for which the same are prescribed".[358] It was also contemplated such punishment was inappropriate to the crime that was not actually murder and that the court has not made any reference to international paradigm on this issue.[359] The fact that the case was also delayed was a question that was considered with regard to the issue of imposition of capital punishment.

5.3.3 Review in delay cases

In the case of ***Devender Singh v. State of N.C.T of Delhi***,[360] the question of the sentence of Capital punishment was reviewed. Facts of the case are that, Devender was an engineer who became a teacher and later he was accused to be a terrorist. He was accused of killing more

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[356] *Vikram Singh and Ors. vs. Union of India (UOI) and Ors.* (21.08.2015 - SC) : MANU/SC/0901/2015
[357] *Vikram Singh and Ors. vs. Union of India (UOI) and Ors.* (21.08.2015 - SC) : MANU/SC/0901/2015Available at http://www.manupatrafast.in/pers/Personalized.aspx, (26-06-2018)
[358] *Ibid.*
[359] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[360] *Devender Singh v. State of N.C.T of Delhi*, 17th December 2007, Review Petition (crl.) 497 of 2002

than 9 people in a boom explosion in 1991 and 1993 and was found guilty under Section 3 (2) (i) of the Terrorist and Disruptive Activities (Prevention) Act,(TADA), 1987. He was imposed capital punishment on 22.03.2002 and all his petition for review of the judgement was also rejected by the court. Therefore his only hope was the petition to the President for mercy under Article 72 of the Constitution of India. However, his petition was put on hold for 8 years and in 2011 Bhullar he came to know that his petition was squashed.

A question arises as to whether undue delay outside the scope of "procedure established by law" can attract the principle laid down in Triveniben Case. However, it was held that the accused was convicted under Terrorist and Disruptive Activities (Prevention) Act, (TADA) and thus the 'Triveniben priniciple' could not be applied, and it was said, "A conviction under Indian Penal Code, 1860 and a conviction under special laws like TADA is not the same thing. TADA is reasonably so different that a distinct treatment is warranted. The rule of Triveniben's case does not, therefore, applies in terrorism cases."[361]

However, the court took another view in ***Navneet Kaur v. State of NCT of Delhi***[362], as Navneet Kaur the wife of Devender Bhullar, filed a Curative Petition following the dismissal of the mercy petition in 2013, in which she asked for reducing the punishment of Devendar Bhullar on the ground that the case superseded it's time period and the case was delayed for more than 8 years in hearing the mercy petition.[363]

Here the Court, took another turn in delivering this judgement, in which it not only considered the principle of *Triveniben case* but also considered the judgement of ***Shatrughan Chauhan***[364], and ultimately commuted the sentence of capital punishment into life imprisonment. The Court held that, the *Triveniben principle* was not a legitimate law and that not all cases should be disqualified because they are convicted under TADA and that due to the unreasonable delay and other circumstances and factors which were considered led the Court to take such decision.[365] Therefore, the Court followed the principle laid down under Shatrughan Chauhan whereby a person that suffers " insanity/mental illness/schizophrenia is

[361] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[362] *Navneet Kaur v. State of NCT of Delhi*,(31.03.2014 - SC) : MANU/SC/0253/2014)
[363] *Ibid.*
[364] *Shatrughan Chauhan v. Union of India*, *21th January 2014, 16 Writ Petition(Criminal No. 193 of 2013),* Available at, https://indiankanoon.org/doc/59968841/, (27-06-2018)
[365] *Shatrughan Chanhan v. Union of India*, Available at http://www.manupatrafast.in/pers/Personalized.aspx, (25-06-2018)

also one of the supervening circumstances for commutation of death sentence to life imprisonment."[366] Thereby, accused was saved from being executed due to an error of law.

5.3.4 Death penalty on Women

In ***Shubnam v. State of U.P***[367], two people, Saleem and Shabnam fell in love and wanted to marry each other. However, their family background led to strong disagreement by the family of Shannam for them to be together. The strong opposition of the family members lead to resentment and rivalry. Soon after, the couple planned to kill the family members of Shubnam to root out their problems for good. Therefore, Saleem brought sleeping tablets and gave it to Shubnam. She mixed it with tea and served that to her whole family. When the whole family became unconscious, Saleem came to their house with an axe and cut their heads one by one and Shubnam held the heads of her family members in her hands.[368]

Both the Session and High Court convicted the two accused for murder of the whole family and imposed capital punishment on them. When the appeal was made to the Supreme Court, the Court struggled, in finding the balance between mitigating and aggravating circumstances and then they took recourse to the case of ***Ramnaresh v. State of Chhattisgarh***,[369]which had laid down Five Principles, seven Mitigating circumstances and thirteen Aggravating circumstances. The Court also recognised the complex nature of the case at hand as, the judgement underline the condition in India, and the Court had to deliver a judgement which would have a linkage of pronouncing either death penalty or life imprisonment with that of the contemporary society and their values views and hope in the legal system. It was an important statement on the varying social and legal thinking about "daughter" in India. The court after further deliberation and application of all principles and doctrine of "the rarest of the rare" along with the factors of condition of the victim, the mode of execution of the crime and the consequences of it, decided on the death penalty on both the accused. However, this judgement was deeply criticised by the abolitionist as the couple bore a child who became an orphan after both the parents were executed. Justice Madan B Lokure also raised certain doubts on "the crime test and criminal test" applied in this case, and also contemplated that

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[366] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[367] *Shubnam v. State of U.P and others*,14, May, 2014, Criminal Revision no. 2090 of 2006
[368] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[369] *Ramnaresh v. State of Chhattisgarh*, 28th Febuary 2012, Criminal Appeal Nos. 166-167 of 2010

one test of the "rarest of the rarest case" is not enough to determine the death sentence, it will only limit its liability both in the doctrine and on execution of the judgement.[370]

Thus, through this case the Court changed its old trend of giving clemency to cases based on gender and gave equal judgement of death penalty to women based on the nature of crime and the mode of executing of such crime.

5.3.5 Death penalty in terrorist cases

Yakub Memon, was the only convict executed for the 1993 Mumbai blast in Nagpur Central jail, on July, 30th, 2015. He was one of the high profile convict for the blast. Memon was once a respected Chartered Accountant in 1990, and a successful businessman with his own independent firm, " AR & Sons". However, he used his business to finance the boom blast in Mumbai by illegal purchasing the ammunition for the blast and for the training of some youth for the operation. He was also accused for conspiracy with his brother Tiger Yemon and known criminal mind Dawood Ibrahim and in helping the escape of other accused involved in the blast.[371]

Yakub Memon was arrested in Kathmandu in 1994, after being caught with multiple passports in the Airport. He was then convicted for Criminal Conspiracy, Abetment in terrorist act, and illegal possession of ammunition with intent to endanger lives.[372] Thus, he was sentenced to Capital punishment by the court on 27th July 2007. Thereafter, Memon filed an appeal for review of the judgement which was rejected on 30, July 2013 by Justice P. Sathasivam who also dismissed Memon's oral hearing as well as review petition. Because of the dismissal of the oral hearing, Justice C. Nagappan and J. Khehar imposed a stay on execution of death penalty for Memon. However, later his hearing was not held in an open court but in a chamber and he was imposed with a death penalty and was to be executed on 30th July 2015. On 22nd May 2015 he filed a curative petition before the Supreme Court but that was also denied in July 2015. His last attempt was a mercy plea to the Governor of

[370] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[371] " Who is Yukub Memon: Here's all you need to know about the 1993 Mumbai Blast Convict", Available at https://www.firstpost.com/india/all-you-need-to-know-about-1993-mumbai-blasts-accused-yakub-memon-2354838.html, (25-06-2018)
[372] *Ibid.*

Maharashtra to put a stay on his execution as all legal opportunities was not over and he was again denied and subsequently executed on 30th July 2015 in Nagpur Central Jail.[373]

Even though all evidence led him to be guilty prima facie, however the way the court proceeded with the execution process was not justified for he was not allowed to be called in an open hearing and this violated the international standard of a fair trial, and other issue was raised that curative petition was not given on full merit as the procedural matter was not followed in accordance with law. Justice Kurian Joseph argued that the curative petition that was partly heard on 27 July 2015 was deferred the next day. He also pointed out that the review petition was heard by a bench of 3 Judges consisting of Justice Anil R. Dave, J. Chalameswar and himself. However, the curative petition was heard by the Senior most, Chief Justice H.L Dutta, Justice T.S Thakur and Anil R. Dave on 21th July 2015 which goes against Rule 4(1) r/w 2(1)(k) of Order XLVIII of the Supreme Court, 2013. Therefore, Justice Jurian Joseph stated that there was a violation of Article 21 of the Constitution of India in which if such defect is not alleviated first then such execution will be unjustified. However, due to conflicting opinion amongst the judges, the execution was allowed by other judges such as Justice A.R. Dave. One more issue with which the Court was challenged was that if the convict was notified of such death execution by the court, then the court had to prove that such notice was issued accordingly. These questions were raised within a few hours of issuing the death warrant. The court rectified each one of them which became to be known as the "late night petition" which was a new development after the curative petition by the court. Thus, the Court justified the execution of Yakub Memon on July 30th 2017.[374]

5.3.6 Degree of evidence

While considering the degree of evidence the Court must make a decision after all the evidence are cleared and there is no reasonable doubt on the judgement. Here the maxim "***falsus in uno falsus in omnibus***" which means "*false in one thing, false in everything*", should be observed in settling the law that even in "proposition of law, there is no

[373] Saksham Dwivedi, "Yukub Yemon Case: Justice or Injustice", Available at https://www.lawctopus.com/academike/yakub-memon-case-justice-injustice/, (25-06-2018)
[374] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)

contradiction, or omission of any kind should be avoided or else the entire evidence should be disregarded".[375]

In the case of ***Vyas Ram v. State of Bihar SC 2013***[376], the appellants Vyas Kahar alias Vyas-jee, Naresh Paswan and Bugal Mochi alias Bugal Ravidas challenged the death penalty awarded by the designated session court, Gaya, State of Bihar. The appellants were charged under Section 3(1) of TADA and life imprisonment under Section 302 read with 149, 346 r/w 149, 307 r/w 149 of Indian Penal Court. The appellants were found guilty of the carnage of 35 persons and injuring 7 persons of Bara village, District Gaya, State of Bihar. All the victims belonged to the Bhumihar community.

On the night of 13.02.1993, in the village of Bara, Gaya District of Bihar, where mass killing was witnessed, appellants Vyas Kahar alias Vyas- jee, Bugal Mochi alias Bugal Ravidas were seen and recognised in the court by witness, Birendra Singh. Supreme Court upheld the charges against Vyas Kahar and Bugal Mochi and convicted them for the offences but commuted the death sentence to life imprisonment, which meant imprisonment for the rest of their natural life. While Naresh Paswan was acquitted of the charges on the ground that his name was not mentioned in the FIR and also for the reason that the injured witness, Birendra Singh was incapable of identifying Naresh Paswan in the Court and other witnesses had also not attributed any role in the event. Vyas Ram, was convicted of the offences by the Court. Though according to the FIR, he was not attributed to have played any role of slitting the throats but his name was mentioned in the same. Injured witness, Birendra Singh stated orally that Vyas Ram was one of the member slitting the throat and also identified him in the court. Bugal Mochi, was mentioned in the FIR and was also identified in the court by injured witness Birendra Singh. According to the witness he was actively playing a role in the event by slitting the throats. Other witnesses also identified him as a participant in the crime.[377] Hence, the court convicted both of them under the offences they were charged, and were commuted to life imprisonment, for the reason that the unreliable evidences and the investigation were not in accordance to the laid procedure, the time taken to frame the

[375] Anurag Deep, "Recent Trend in Capital Punishment: Judicial Mistakes to Judicial Maturity," Available at http://vips.edu/wp-content/uploads/2017/07/PUNISHMENT.pdf, (25-06-2018)
[376] *Vyas Ram v. State of Bihar*, 20th December 2013, Criminal Appeal No. 791 of 2009, Available at https://indiankanoon.org/doc/33656987/, (25-06-2018)
[377] *Vyas Ram v. State of Bihar*, 20th December 2013, Criminal Appeal No. 791 of 2009, Available at https://indiankanoon.org/doc/33656987/, (25-06-2018)
refer para 32-34

charges was more than nine months. The court considered that the incident caused due to casteism and also no harm was done to women and children.[378]

In the application of TADA, the learned council for the appellants, failed to prove the notification of the notified area as necessary under section 2(f) of TADA. The amended Section 20A of TADA provided certain investigation procedures which were not followed during the course therefore the evidences provided were unreliable in the absence of examination of the informant, the investigating officer and other related witnesses to the case. The Council also stressed on 20A (1) which states that no First Information Report (FIR) can be recorded without written approval of the District Superintendent of Police.[379] The learned State Counsel submitted that First Information Report (FIR) was not vital for evidence, and also non examination of the witness[380] which the investigating officer, Ram Japit Kumar, was directed verbally by the SP of police to investigate. Ram Japit Kumar was not available to investigate the case hence the case was transferred to Suresh Chander Sharma, who was examined as a prosecution witness and this made the evidence weak. [381]

5.3.7 Rape and Murder case

Violence against women are common in India and the rate of rape and murder are extremely high in India, however India is quite reluctant to upheld death sentence on the matter and even if death sentence is imposed, it is mostly commuted by the Supreme Court either by lack of evidence or a lack of weight on the doctrine that is laid down for death penalty. Even after the High Court warning that realising the accused is much like letting a "sex maniac on prowl"[382] the Supreme Court reduced the judgement of the accused by saying there is less prove and that there might be element of consent.[383] Likewise, in Raju v. State of Haryana, where the accused after raping the victim hit her with two bricks stone which ultimately led

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[378] *Vyas Ram v. State of Bihar*, 20th December 2013, Criminal Appeal No. 791 of 2009, Available at https://indiankanoon.org/doc/33656987/, (25-06-2018)
., refer to para 32
[379] *Ibid.* (25-06-2018) Refer to para 10-14
[380] *Krishna Mochi v. State State of Bihar, 15 April 2002, Appeal(Crl.) 761 of 2002*, Available at https://indiankanoon.org/doc/1558297/, (25-06-2018)
[381] *Vyas Ram v. State of Bihar, 20th December 2013, Criminal Appeal No. 791 of 2009*, Available at https://indiankanoon.org/doc/33656987/, (25-06-2018)
[382] *Kumudi LaL v. State of Uttar Pradesh (AIR 1999 SC 1699)*, Also see, Amnesty International, "Lethal Lottery: Death Penalty in India, A Study of Supreme Court Judgement In Death Penalty cases 1950-2006", https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf, (25-06-2018)
[383] *Ibid.*

to her death. The Supreme Court gave the same judgement in which the Court noted that the accused did such act as the victim threatened to disclose the incident and there was lack of criminal record on part of the accused and did not see him as a threat to society and thus, commuted the death sentence of the accused.

It was not only in 2013 with the case of ***Mukesh and another v. State of NCT of Delhi (Nirbhaya Case)***[384] where the applied the test of *the rarest of the rare case* in case of brutal rape case of a medical student. The facts of the case was that, Nirbhaya and her friend boarded a bus on 16 December 2012 on returning from a movie theatre. In the bus the victim was brutally and violently raped and assaulted in which her privates part were mutilated and her organs were pulled out by six men which ultimately led to her death. Her friend on trying to help her was beaten up.[385]

The accused Pawan Gupta, Ram Singh, Vinay Sharma, Mukesh Singh and Akshay Thakur were sentenced to death. The accused Ram Singh committed suicide under trail and another juvenile accused was given a reformatory sentence of three years as he was a minor of 17 years when the crime was committed. The High Court and Supreme Court both upheld the Judgement and thus, the convicts were left with a few chance of review under the Supreme court and the mercy plea from the Governor and President of India.[386]

The Court examined all circumstance and mitigating factors such as poverty-stricken background, no criminal precursor, the suffering of the family if they are executed and no plan of committing of the crime, etc, so also the aggravating circumstances where the mode of the crime was barbaric and brutal in nature which included, sexual violence through insertion iron objects inside the victim body and pulling out her organs which ultimately led to her death.[387] The court stated that, "the appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do." [388]

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[384] *Mukesh & Anr v. State For NCT Delhi and others*, 5.May. 2017, Criminal Appeal no. 607-608 of 2017 (arising out of S.P.L (Criminal) Nos. 3119-3120 of2014)
[385] Sunipun, " Nirbhaya Gang Rape: A Case Study", Available at https://blog.ipleaders.in/nirbhaya-gang-rape-case-study/, (25-06-2018)
[386] Samanwaya Rautray, " Supreme Court Confirms Death Sentence For Four Convict in Nirbhaya Gang Rape", https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-confirms-death-sentence-for-four-convicts-in-nirbhaya-gang-rape-case/articleshow/58531130.cms, (25-06-2018)
[387] "Analysis on the Death Penalty of India", Available at http://www.theindianlawyer.in/blog/2017/05/13/analysis-death-penalty-rarest-rare-cases/, (25-06-2018)
[388] *Ibid.*

Shortly, after the judgment was announced many international Human right organisations such as the Amnesty International opposed the sentence as it violated the right to life. So also Justice Verma Committee opposed granting death penalty in cases of violence against women.[389]

However, this case has created a milestone on the protection against violence of women in India, in which the definition of rape was amended. Up until 2012 rape was limited to sexual intercourse however, with the amendment given under The Criminal Law (Amendment) Act, 2013 which gave a wider definition of the term rape. It amended the definition of rape under Section 375 of the IPC which reads as under after the amendment,

"*any involuntary and forceful penetration without the woman's consent into the woman's body parts like the vagina, urethra, mouth or anus*."[390]

Ultimately, Justice Verma Committee was established to make recommendation on the laws on women protection and women issues, such as trafficking, sexual offence, electoral reform and education. Some of the highlights on provisions relating to rape and sexual assault as mentioned in the report are as under,[391]

1. The committee argued that rape is not only, "*a crime of passion, but it is an expression of power*". So the definition on rape was still lacking even with the latest amendment in 2013 under Section 374 of the IPC.
2. It contemplated that "*non-consentual penenetartion*" should also be included under its scope, and strongly recommended that *marital rape* should be taken as an offence.
3. The committee strongly opposed of the "*two-finger test*" as a test to determine if the victim was raped or not, and recommended that such test should be abolished as it violated the dignity of the person.
4. Lastly, the committee strongly recommend on the abolition of death penalty and that life imprisonment should be taken as the highest form of punishment.

[389] Amrita Madhukalya, " Capital punishment to Nirbhaya Rapist Revives Death Penalty Debate", Available at http://www.dnaindia.com/india/report-capital-punishment-to-nirbhaya-rapists-revives-death-penalty-debate-2430616, (25-06-2018)
[390] Amrita Madhukalya, " Capital punishment to Nirbhaya Rapist Revives Death Penalty Debate", Available at http://www.dnaindia.com/india/report-capital-punishment-to-nirbhaya-rapists-revives-death-penalty-debate-2430616, (25-06-2018)
[391] *Ibid.*

5.3.8 Rape of a girl child

Cases on murder and rape on children were rarely reported in the 1990s, however, death sentence were being upheld by the court as crime rate increased in 1990s-1999s. In the case of **Jumman Khan v. State of U.P**[392], the court upheld the death sentence of the accused for the rape of a minor child of 6 years old. The Court dismissed the appeal for review of the case and also rejected the special leave petition given in 1986 and held that it is one of the most "gruesome and beastly" offence and such a judgement was imposed for social necessity and deterrence.[393]

In **Dhananjoy Chatterjee Dhana v. State of West Bengal**[394], a security guard was accused of rape and murder of an 18 year old girl, Hetal Parekh, who lived in the same building apartment. The accused contented that he went to the apartment to steal a wrist watch. The appellant was convicted under section 380 of the IPC for theft, Section 302 IPC and 376 IPC, and sentenced to death penalty and rigorous punishment and that these sentences were to run concurrently. The High Court affirmed the death sentence and thus there was appeal to the Supreme Court.[395] The Supreme Court heard the cry for justice. The petition was deliberated by a two bench Court consisting of Justice N.P Singh and Justice Anand in which the Court examined that the aggravating factor was that the one who was given the responsibility to protect was the one committing such an offence. Thereby, the appeal was rejected by the Court and the convict was executed on 14 August of 2004, 13 years after the pronounced judgement. This was also the case in which the offender was executed after a long moratorium of execution of death penalty.[396]

However, similar kind of cases got different kind of verdict depending on the judges concerned and the element of crime and its factors, for e.g. a similar case was recorded just

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[392] *Jumman Khan v. State of U.P*, 1991 AIR 345, 1990 SCR Supl. (3) 398

[393] Amnesty International, "Lethal Lottery: Death Penalty in India, A Study of Supreme Court Judgement In Death Penalty cases 1950-2006", https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf, (25-06-2018)

[394] *Dhananjoy Chatterjee Dhana v. State of West Bengal*, 1994 (1) ALT Cri 388, 1994 (2) BLJR 1231, (1994) 1 CALLT 28 SC, JT 1994 (1) SC 33, 1994 (1) SCALE 48, (1994) 2 SCC 220, 1994 1 SCR 37, 1994 (2) UJ 106 SC, Available at https://indiankanoon.org/doc/1328822/, (25-06-2018)

[395] *Ibid.*

[396] Amnesty International, "Lethal Lottery: Death Penalty in India, A Study of Supreme Court Judgement In Death Penalty cases 1950-2006", https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf, (25-06-2018)

few days of the execution of the above case, however, the accused was given clemency for the case and not executed but given rigorous life imprisonment.[397]

Kathua Case-

The Kathua rape case is the latest and most brutal rape case of a minor child of 8 years old in the district of Jammu and Kashmir, which has shocked the whole country. The rape was committed in a temple. The incident was covered up by the police who were given the duty to protect the individual. This case not only saw the brutality of the crime but also had shed light of the situation in India in which communal intensity and violence against women along with the criminal justice system has been questioned. The crime has been termed as "hate crime" by some people.

The fact of the case was that, on January, 12, 2018, a girl of about 8 years old was reported missing by her father, after going to graze horses in a village in Kathua District in Jammu and Kashmir. For a week the police officer could not found any leads about the victim's whereabouts. On January, 17, 2018 the victim's dead body was found in the nearby forest by the local villagers .The body was immediately taken for autopsy to the nearby District hospital the same day. It was found that the victim was administered with sedative drugs and raped multiple times by multiple men while being held captive and was subsequently brutally murdered by them.[398]

In the course of investigation seven accused were being held for trial namely, Sanji Ram, along with his son Vishal, Surinder Verma, Deepak Khujaria, Tilak Raj, Parvesh Kumar and Arvind Dutta. The main accused Sanji Ram was a village priest and the murder was done in his devasthan. It was held that it was his mastermind plan that such act was committed with the intention to create a terror for the other rival community (Bakherwal community) and make them leave the village. Two inspectors were responsible of taking bribe for tampering with the evidence and one accused was a minor.[399]

The trial began on 31 May 2018 in the District Session of Jammu and Kashmir and was later transferred to Pathankot in Punjab. The Accused were charged with section 363/343/376-

[397] *Rahul alias Raosaheb v. State of Maharashtra* [(2005) 10 SCC 322].
[398] " Kathua Rape and murder case in full text of charge sheet filed by Jammu and Kashmir Police", Available at https://www.firstpost.com/india/kathua-rape-and-murder-case-full-text-of-chargesheet-filed-by-jammu-and-kashmir-police-4426853.html, (25-06-2018)
[399] "Kathua case: Charges of rape and murder framed against 7 accused", Available at https://economictimes.indiatimes.com/news/politics-and-nation/kathua-case-charges-of-rape-and-murder-framed-against-7-accused/articleshow/64497229.cms, (25-06-2018)

D/302/201 read with Section 120-B of the Ranbir Penal Code, while the case for the minor accused is still under investigation which will be tried in a juvenile court.[400]

While the case was still on trail, this incident which had outraged the whole country prompted the government to pass new ordinance by the State and Central Government for providing death penalty for rape against children under 12 years and shifted the "burden of prove" on the accused and ensure fast-track investigation of these cases. The Ranbir Penal Code (RBC) was amended as well as the Evidence Act and Criminal Procedure in Jammu and Kashmir. Simultaneously, another ordinance provided for checking of the offence against children up to 16 years of age. The Ordinance was duly approved by the President along with other amendment to the related Acts on Protection of Children from Sexual Offences (POSCO) and the Criminal Law (Amendment) Act 2013.[401] Thus, the Criminal Amendment Ordinance, 2018, approved on 21 April 2018, has introduced mandatory minimum sentence and death penalty for rape of a girl child below 12 years. With the high rate of sexual abuse on children which is 82% from 2015-2016[402] the Ordinance was created as a hope to act as a deterrent effect by imposing death penalty and to guarantee immediate justice to the victims.

A study on the cases reflects that the Indian judiciary had evolved important guidelines for dealing with offences punishable with death penalty. These guidelines by the Hon'ble Court have supplemented the legislations which prescribe death penalty for certain specific crimes. Judiciary being the custodian of the Constitution and protector of the people should be pro-active in rendering justice by imposing punishment having regard to the gravity of the crime committed and life changing consequences of the victims.

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[400] " Kathua Rape and murder case in full text of charge sheet filed by Jammu and Kashmir Police", Available at https://www.firstpost.com/india/kathua-rape-and-murder-case-full-text-of-chargesheet-filed-by-jammu-and-kashmir-police-4426853.html, (25-06-2018)

[401] "After Kathua case Jammu and Kashmir Cabinet approves Death Penalty", Available at https://www.firstpost.com/india/after-kathua-case-jammu-and-kashmir-cabinet-approves-death-penalty-for-child-rape-4444643.html, (25-06-2018)

[402] National Crime Record Bureau (NCRB), Also see "Kathua and After: Why death Penalty for Child Rapist will not Deter Offenders", Available at https://thewire.in/law/kathua-and-after-why-the-death-penalty-for-child-rape-will-not-deter-offenders, (25-06-2018)

Chapter VI

Conclusion and Suggestions

6.1 Conclusion

The proposition of all punishment is that every wrong is followed by the same proportion of penalty. Punishment is based on the believe that is just and right to make any individual suffer for the wrongs that had done and another is that it serves as an example to others not to do such wrongs. Capital punishment also stands on the same belief and it is the oldest and most used penalty for any crime in any society. In India, capital punishment is still regarded as essential part in the criminal justice system. The legal jurisprudence in India is based both on the deterrent principles and reformative theory of principles of punishment. While death penalty is given as a deterrent act it also gives the opportunity for the other offenders to reform.[403] However, with the development of human right and its movement, the practice of death penalty as a whole is questioned as the practice itself is an act of destroying life which is inhumane, degrading and opposed to the right to life of a person inherent in every human being.

The Universal Declaration of human Rights (UDHR), states in Article 3 that, "everyone has a right of life, liberty and security of a person". It further states in Article 5 that, "no one should be subjected to torture or cruel, inhuman or degrading treatment or punishment". If any individual hang a person to death it is considered to an act which is torturous, inhumane and cruel so also it cannot be justified for the State to hang a person to death. The mode or execution of capital punishment regardless of any method, whether by hanging or shooting a person to death is considered cruel and against all the human rights principles.[404]

In the world trend many countries have abolished death penalty either as a whole or in practice. 141 countries have abolished capital punishment in their country, 57 countries still have retained it, and India is one of them, as per the Amnesty report of 2016.[405] India in spite of being a State party to the International Covenant on Civil and Political Rights (ICCPR), still could not let go of such punishment even though it had staunchly emphasized in

[403] Sneha Singh and Anubhuti Singh, "Capital Punishment in India: A Critical Analysis", Vol. 1: Iss.2 ISSN:2456-7280, Available at http://www.droitpenaleiljcc.in/PDF/V1I2/4.pdf, (26-06-2018)

[404] Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

[405] Sam webb and Holly Christodoulou, "Which Countries have the Death Penalty and How many People are Executed in the World", Available at https://www.thesun.co.uk/news/2525739/countries-death-penalty-number-executions-around-world/, (26-06-2018)

progressively abolishing capital punishment. However, in reality there have been not much change has been brought about.[406]

Furthermore, the impact of international arena in India seems very limited. India is a State party to both the International Covenant on the Civil and Political Rights (ICCPR) and also Convention on the Rights of Child (CRC), and even though it is a signatory it has not yet ratified the Convention against Torture. Convention against Torture (CAT) obliges upon India to be bound by such treaty even if it has not ratified it and abstain from such acts which are cruel and inhumane. However, in India implementation of international law requires a domestic legislation for it to be enforceable.[407] For instance, in India there has been the incorporation of the Intentional Covenant on Civil and Political Rights (ICCPR) through the legislation namely, The Protection of Human Rights Act, 1993, in which in Section 2(d) Act, states that, "human rights means the rights relating to life, liberty equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India."[408] Section 2(f) of the Protection of Human Rights Acts, 1993, states, "International Covenants means the International Covenant on Civil and Political Rights(ICCPR) and International Covenant on Economic Social and Cultural Rights(ICESCR) adopted by the General assembly of the United Nation, in 16 December 1966."[409] In the Constitution of India in Article 51(c) provides that India shall, "foster respect for international law and treaty obligations in the dealings of organised peoples with one another"[410]. Thus, even though treaty obligation does not make India automatically binding unless translated in to a domestic legislation, international rules and standards must be respected even if there is no legislation affirming it in India.[411]

India has been quite reluctant in the progress to abolish the practice of capital punishment, though it has made a lot of effort in maintaining standard without being a part to these treaties and it has been very careful in applying such penalty upon persons. The last execution was of Yukub Memon which had taken place in 2015 and almost 149 and 109 people sentenced to

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406 Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

407 Law Commission of India, Report on Death Penalty, No. 262, August, 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (26-06-2018)

408 The Protection of Human Rights Act, 1993, Available at http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf, (26-06-2018)

409 *Ibid.*

410 The Constitution of India, 1949

411 Law Commission of India, Report on Death Penalty, No. 262, August, 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (26-06-2018)

death in 2016 and 2017 respectively.[412] India stance on capital punishment is quite adamant especially with the rise of crimes against women, children and the terrorism. India has not been able to let down its guard against serious crimes.

The debate on how much such deterrent punishment is effective in society is always debatable and mostly both side whether abolitionist and retentionist has presented vague arguments which are necessary to be considered with the application of death penalty in the Indian scenario.

Execution though death penalty is mostly given to 'terrorist' which are considered enemy of the State and a threat to the life and security of the whole society. This is also an exception in many other states and it is also highlighted in the Law Commission Report on death penalty that death penalty should be abolished except in the case of terrorisms.[413] No doubt that the security of the State is the highest priority and that it is the duty of the State to maintain such peace and security. However, how far imposing of death penalty on such crime claiming it as a deterrent effect so that no one should be a threat to society is effective is often questioned. Terrorist have the main aim of making a statement of their views against the State, and have no iniquity towards the people, for the cause they themselves are willing to die. Thus, giving them a death sentence will only serve their purpose. Also, when looking back at the last execution of Yukub Memon, after his execution his body was taken back to Mumbai, in which a huge crowd assisted his body and swarmed his residence, as well as during his burial in Marine Lines and the Mahim Mosque. The death body of Memon was seen as a "Martyr" rather than an example of deterrent character by the youth and other people. To people it does not make death penalty for terrorist deterrent but "counterproductive". Such has also been stated by Jessica E. Stern in the New York Times, that, "...One can argue about the effectiveness of the death penalty generally. But when it comes to terrorism, national security concerns should be paramount. The execution of terrorists, especially minor operatives, has effects that go beyond retribution or justice. The executions play right into the hands of our adversaries. We turn criminals into martyrs, invite retaliatory strikes and enhance the public

[412] "Twelve Indian States Thinks that Death Penalty Shouldn't be Abolish", Available at https://thewire.in/law/twelve-of-14-indian-states-think-the-death-penalty-shouldnt-be-abolished, (26-06-2018)

[413] Law Commission of India, Report on Death Penalty, No. 262, August, 2015, Available at http://lawcommissionofindia.nic.in/reports/report262.pdf, (26-06-2018)

relations and fund-raising strategies of our enemies…"[414] Therefore such act rather than deterring the crime of terrorism is actually giving more fuel.

Murder is one of the main causes of death penalty, however, in India not all murder concludes to death penalty, only the one that proves the test of the "rarest of the rare case" in which mostly the test is being examined through the guidelines of Bachan Singh case. First of all the doctrine itself is vague and not uniform, it does not provide a clear indication of what comprises of the "rarest of the rare cases" and there is no proportionality of the circumstances that will identify the weight of the aggravating and mitigating nature of the crime and leaves it at the discretion of the court. However, the assessment of the test is given to the judges, for which their opinion differ from judge to another judge and from time to time depending upon the case at hand. Thus, it mostly depends on the discretionary power of the Judges. It is however, pointed out that this power is being exercised arbitrarily by the Judges and that the guidelines are not strictly followed by them and in some cases it is found that the many error of law are made which had resulted in unjustified execution. Thus, this is against the right to life of the person. The question is also raised whether such power should entrusted in the judiciary or not as judges are also human and are prone to making mistake or error in delivering such judgement, thus risking the lives of innocent people. This was seen in the case of ***Harban Singh[415],*** where the court's arbitrariness was paid highly by Jeeta Singh, who was executed unjustly because of defects in procedures. In this, case the court then held that, "the fate of Jeeta Singh by his life has a posthumous moral to tell. He cannot profit by the direction which we propose to give because he is now beyond the processes of human tribunals".[416] The most dangerous effect of this act is its irrevocability nature that it holds. Human is not perfect and thus prone to error and mistakes and it not a surprise that judiciary is also made of judges who are themselves human and are not perfect. However, it should not be an exception to get away, if the life of a person cannot be retrieved back. Moreover, if such act is irreversible in nature, the imposition of death penalty must be done in the most careful manner and with all due consideration.

Another concern is that the Indian judicial system is inefficient in retrieving evidences and getting cases disposed as soon as possible, in which some cases has taken more than 20 years

[414] Anil Divan, "Is Death Penalty a terror Deterrent?", Available at http://www.thehindu.com/opinion/lead/is-death-penalty-a-terror-deterrent/article7566456.ece, (26-06-2018)
[415] *Harban Singh v.State of UP, 1982 AIR 849, 1982 SCR (3) 235*
[416] Dhananjay Kashyap, " Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

to be disposed and some accused even after a long duration of jail term were executed, which is against the rule of *Triveniben principles* in which clemency should be given to cases in which there are more than two years delay. The undue delay of such cases is the one of the most torturing experiences for the accused as it takes away their liberty to move around and the mental pressure that they will be executed effects them psychologically, which takes the form of a torture and cruelty to any individual, and is against the right to life and personal liberty of a person.

For murder it has been found out that common man fear the execution but his first thought would be that he would be going to prison for life. Both these penalty has the same severe consequences that are bleak for the future of person and deterrence of such crime is a myth as the rate of murder has not come down over the years. In 2012 the rate of murder according to the United Nations Office on Drugs and crime (UNODC) was 3.5% and in 2015 it hiked up to 14.8 %. [417] The rate has not changed much in 2018 as case on murder counts from 53 to 59 increased in the first 45 days of the year itself.[418] Thus, death penalty has very little effect of deterrence upon crime. The main objective of a criminal is still to commit crime without getting caught, therefore it doesn't matter how strong the penal provision might be, it is the legal system that must be stronger that will ensure that such crimes will not go unpunished.[419]

The highest crime in India falls in the categories of crimes against women in which sexual exploitation, rape and murder had been on the rise every day. This has led the State to make strict laws on protection of women and impose heavy punishment as well. This is seen in the development of the Criminal Amendment Act, 2013 in which the definition of rape has changed and death penalty have been prescribed in case of brutal rape led the victim to a vegetative state or in case if death. However, even with such heavy punishments that awaits the person who commits the crime, rape and other crimes against women at still on the rise. It does lead to the question as to whether such law are effective in deterring or giving justice to the victims as a whole. Such punishment also have a counter effect as it is seen that offender after raping a girl knowing that such act will attract heavy consequences which will ultimate

[417] Samarth Bansal, "Murder Rate Declining in India", Available at http://www.thehindu.com/todays-paper/Murder-rate-declining-in-India/article16791696.ece, (26-06-2018)
[418] FE online, "Crimes in India rise in 2018 as compared to last year; murder, rapes sees a spike, says this report", Available at https://www.financialexpress.com/india-news/crimes-in-india-rise-in-2018-as-compared-to-last-year-murder-rapes-see-a-spike-says-this-report/1080222/, (26-06-2018)
[419] Dhananjay Kashyap, "Death Penalty in India", Available at https://asianjournaloflegalstudies.files.wordpress.com/2013/11/death-penalty-in-india.pdf, (26-06-2018)

led to his death will try to wipe away the only witness to the crime by murdering the girl. Thus, one crime leads to another.

By imposing such laws in society, the State seems to take an easy approach to deal with the problem in the midst of public pressure while fails to address the main issue pointed out by the human rights activist that, "The death penalty diverts attention from the main issue: the safety of women in the street, education and police reform".[420] The entrenched patriarchal attitude which gives a lot of superiority on women will not change over night because of death penalty. The main problem which India has ignored is that it has not been able to protect the people from such crime and resort to the quick fix to the problem without considering the main cause of the problem. It has been rightly said by Sajid Saleman, in the Huffington Post, that "One might expect the Indian public to be angry at their government's unwillingness to prevent crimes from happening, rather than calling for more severe punishments for the perpetrators once a crime has been committed."[421]

Under the Criminal Amendment Ordinance of 2018, death penalty has been imposed upon person who commits the offence of rape on a girl less than 12 years of age. Due consideration should have been taken before implementing the ordinance into law because of its sensitive nature which involves children and how that would affect them in their life. The way the ordinance was created in a wave of public outrage needs to be checked as it is contrary to the how the Criminal Amendment Act 2013 was created in which a committee was set up to make a study for incorporation of certain offences under specific legislations. However, the said ordinance was passed without any parliamentary discussion except the consideration of public opinion on this matter and no study was undertaken to determine how the imposition of such punishment would deter crime and serve the purpose in the society.[422] One must look at the social and psychological factors at hand, as most of the offenders of child abuse are actually close associates of the victim as a family member or a neighbour. A child hardly has a voice in society and to tell people about the crime is a challenge for them. Moreover if they are being threatened by the offender it become closes to impossible for them to openly speak against such crimes. Another aspect is that the social stigma that weights on them the family members themselves try to sweep the issue under a rug rather than protecting the child. Thus,

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[420] "India brings back Death Penalty over Rape and Terrorism", Available at http://www.france24.com/en/20130912-india-rape-terrorism-death-penalty, (26-06-2018)

[421] *Ibid.*

[422] Vrinda Bhandari, "Kathua and After: Why Death Penalty for Child Rape will not Deter offenders", Available at https://thewire.in/law/kathua-and-after-why-the-death-penalty-for-child-rape-will-not-deter-offenders, (26-06-2018)

if the matter does come to the court, then maximum protection should be given to the child on the basis of the principle of best interest of child. There is not much movement in India to provide information relating to protection against rape or the consequences of it. It is rightly said by Maneka Gandhi that even if "short-term remedy" is given in the shift to amend the Protection of Children from Sexual Offences (POSCO) Act, 2012, "it is easier for the government to just say, 'oh look, we amended rape laws, now we hang child rapists'. That can never be a systematic solution. We need to look at education, sensitisation and accountability of government to actually make any difference to rape victims. Moreover the existing rape laws like POSCO suffer from poor implementation."[423]

The proponents who are against death penalty argued that death penalty should be abolished as it is mostly concentrated on the people who are poor and the helpless. J. Bhagwati in this issued has pointed that, "death penalty strikes most against the poor and deprived section of the society. Most of the convicted persons are poor and illiterate, who cannot afford a competent lawyers. The defence lawyers provided by the State are often incompetent or do not take serious interest in the case."[424] Further, J. O Chinappa Reddy has also stated that, "experience shows that the burden of capital punishment is upon the ignorant, the impoverished and the underprivileged."[425] It is seen that three-fourth of the convicts that awaits their execution are from the marginalised section of the community or the religious minorities and the backward classes. They barely understand the procedures and opportunities which are available to them outside the jails as they hardly get to speak to their lawyers and are mostly left in the dark for years.[426]

Capital punishment is actually an act of vengeance of the society. Punishment is given in order that justice may be preserved. However, there exist always a conflicting opinion about death penalty between the retentionist and abolitionist. A Study was conducted where it was found that 52% of people support death penalty and 40 % are against it.[427] It is however

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[423] Rakhi Bose, "Death to Deter Rape, How effective is Capital Punishment", ttps://www.news18.com/news/india/death-to-deter-rape-how-effective-is-capital-punishment-1725615.html, (26-06-2018)

[424] Arnim Agarwal, "Abolition or Retention of Death Penalty in India: A Critical Reappraisal" , Available at http://www.rsdr.ro/art-1-3-4-2008.pdf, (26-06-2018)

[425] *Ibid.*

[426] Himanshi Dhawan and Pradeep Thakur, "Here's is prove that poor get gallows , rich mostly escape", Available at https://timesofindia.indiatimes.com/india/Heres-proof-that-poor-get-gallows-rich-mostly-escape/articleshow/48151696.cms, (26-06-2018)

[427] Suleman Choudhri and Vishwesh Hiremath, " Public Opinion on Death Penalty -An Empiral Study in Belagavi City, Karnataka India", Vol. 3: Iss.2, IJSARD, pp. 48-51, Available at http://ijsard.org/wp-content/uploads/2017/05/PUBLIC-OPINION-ON-DEATH-PENALTY-AN-EMPIRICAL-STUDY-IN-

depends whether the rage of the public pressure is valid opinion towards developing a law on death penalty. There are a many instances where public opinion and pressure have pushed the Government to implement laws on many issues. Public opinion is of course important through which circumstances and conditions of the people are made known to the Government. This gives the Government a better understanding of the needs and circumstances of the people and enables it to find a solution to those matters. However, when the opinion comes out because of anger or resentment of the people on any matter, it cannot be taken as reasonable in all cases. No decision should be taken in anger, as the mind is functioning in a relative sense and it will thus, lead to more resentment and regret. Thus, it is often questioned when the government make haste law just to please or calm the public down. It is not wise to do so without further consideration and comprehensive study of certain sensitive matter and issues and regards must be given to the root cause of such issues and problems.

More than half of the countries in the world have abolished death penalty, while India is consistently retaining it, as it is believed that it has the highest deterring effect to crime. A practice that is mostly based on revenge actually fails in giving a deterring effect to the society where the same crimes don't seem to stop. If such deterrent act had been effective, we would not have found another murderer nor would we have come across another rapist. Crimes never stop on top of that new crimes emerge with a more appalling nature in the presence of such severe punishment. Such punishment also disregards the possibility of reformative principle which wipes out all the hope of a better life; rather such punishment results in the ending of such life.

This revenge mentality is rooted in the judicial and legislative provisions and the act of commuting is given in the hands of the judiciary, which has given shelter to capital punishment as it upholds its validity. The discretionary power of the judiciary in determining death penalty, when looked at little closely makes it clear that it is unfeasible to apply it fairly even to the most severe and hideous cases. Moreover, imposing capital punishment even to the most brutal crime is an old age approach and imposing such punishment without consideration of the circumstances of the offender and ignoring the rehabilitative principle

leave no room for change in the society and ignores the rights to life and human value which is one of the highly upheld modern concept.[428]

The alternative punishment to death penalty punishment is life imprisonment which serves the same purpose and effect to crime as death penalty and to some extent it is also more effective as it provides both retributive and rehabilitative approach to criminality and crime. Even in ancient India such practice was preferred to death penalty. This was seen in "*Mahabharata*", when "Ashwatthama" was put to trial for killing the sleeping army of the Pandavas which also included children by setting fire for revenge of his father's death. When debated on what punishment was appropriate for him, the assembly decided that death was suitable punishment; however, Krishna came up with another approach and ruled that Ashwattama for 3000 years shall walk on earth, invisible and alone, reek with pus and blood. Thus, it was seen that even in the *Mahabharata*, for hideous crimes death was not the just punishment but was considered to be a more lenient punishment.[429] Thus, punishment should serve as a realization to the offender and the society in which he will find remorse for his crime and he will be reminded about his wrong actions everyday of his life till he dies. Death penalty will provide the offender an easy route to finish his pain and he might have no regrets for his crimes.

India needs to progressively shift from a deterrent approach to a more punitive and reformative approach legal system that may be effective in rooting out the evils in society rather than scraping it from the top. However, in the case of rape of children and women and terrorist acts, death penalty may be imposed only after the courts have analysed all the facts and circumstances of the case and it has been proved that the accused is guilty of committing such inhuman acts. Thus, except for crimes of rape and terrorism, India needs to do away with capital punishment and look at a different approach in fighting crimes.

[428] A. Prasad, Jyotana Yagnik and Binod C. Agarwal, "Should India Retain death Penalty", Vol.1: Iss.1, (LSJ, 2016), pp. 11-18
[429] *Ibid.*

6.2 Suggestions

Firstly, international standards regarding capital punishment should be upheld by India. India stands in a minority as one of the retentionist country from the world community, thus, and a change in the mind set and attitude is needed.

Secondly, the need of a legislative guideline is most important before imposing capital punishment so that there will not be any arbitrary judgement on the side of the court so that no innocent life should be taken away. Moreover, a specific legislation will provide uniformity and clarity in law and practice. Such legislation should be based on the study of crime, its problem and solution with regard to social scenario and condition of the people.

Thirdly, with regard to the rights of the accused, a special fast tract court must be provided to them so that there will not be any delay in dealing with the cases. Appeals and other opportunities should be given to the accused at the earliest and they should be informed and explained of such rights available to them and such rights should not be taken away from them at any cost. Thus, until accused persons have exhausted all the rights and appeal, they should not be executed.

Fourthly, while the accused is under trail or detention, protection and safeguard must also be given to them, so that they will not be harmed by other nor will they harm others. Their personal rights to life and liberty even under detention should not be violated as they are the individual's inalienable rights as a human being. They should be treated equally and fairly like the other prisoners and no form of torture or cruel treatment should be inflicted upon them by the authorities or other inmates.

Fifthly, alternative to capital punishment such as life imprisonment should be considered by the court as they provide a broader approach. Moreover, there is no proof that the deterrent act of capital punishment is even effective in combating crime. Providing long term imprisonment or life imprisonment to convicts and especially with the seclusion from the rest of the other inmates and the world has more retributive effect than death penalty as life imprisonment has a more torturing effect both mentally and physically. This is practiced by other States upon those who commit horrendous crimes in society. This way the criminal will not pose a threat to society and pay for their crimes slowly and miserably. It will serve a more brutal punishment for their crimes.

Sixthly, the State should provide more reformative penal provisions than deterring provision in their attempt to root out crimes rather than doing away with the criminals and to work for a betterment of the society as a whole.

Lastly, in the case of grave crimes such as rape and terrorism, death penalty must be imposed by the judiciary only after all the circumstances have been examined and the guilt of the alleged offender is proved beyond reasonable doubt so that no judgement of the judiciary results in the violation of rights to life of innocent person.

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