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CAPITAL PUNISHMENT AND STATUTORY FRAME WORK IN INDIA

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As far as India is concerned, the provisions relating to Capital Punishment are embodied in Indian Penal Code and Criminal Procedure Code. Indian Penal Code is the substantive law, which suggests the offences, which are punishable with death sentence. Criminal Procedure Code is the procedural law, which explains the procedure to be followed in death penalty cases. The substantive law of India viz., Indian Penal Code was enacted in the year 1860. Though very few Amendments are made here and there, in total it remains unchanged, where as Criminal Procedure Code was amended substantially once in 1955 and reenacted in 1972. Though majority of the provisions remain unchanged Section 235(2) and Section 354(3) underwent a major change. The present chapter mainly deals with the substantive and procedural laws pertaining to Capital Punishment. It is also proposed to discuss the power of the executive to grant pardon and commute death into life imprisonment as provided under the Indian Constitution.

**CAPITAL OFFENCES UNDER THE INDIAN PENAL CODE:**

The Indian Penal Code provides for the imposition of Capital Punishment in the following cases:

**Section 121** provides that 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. The offence under Section 121 is a capital offence because it threatens the very existence of an organized Government, which is essential for the protection of human life.

**Section 124-A** provides death penalty for sedition. The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set-up cannot be precisely drawn. Where the legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line between the two is very thin. What was sedition against the Imperial Rulers May today pass of as legitimate political activity in a democratic set-up under our libertarian Constitution? The interpretation has to be moulded within the letter and spirit of our Constitution.¹
According to Section 132 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 of life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Section 132 is also a capital offence, because it aims at the destruction of the very forces, which are intended to protect the machinery of the State. Sections 121, 124-A and 132 prescribe death penalty for the offences intended to affect the stability, political independence and territorial integrity of the Nation.

Section 194 aims at the persons who give or fabricate false evidence with intent to procure conviction of capital offence to innocent persons. It runs thus: "Whoever gives or fabricates false evidence, intending thereby cause, any person to be convicted of an offence which is capital by the law 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. 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 with either death or the punishment herein before described." Section 194 part II is punishable with death on the logic that the person concerned gave false evidence with the intention of or knowledge of likelihood of deprivation of innocent human life.

Section 302 of Indian Penal Code is the most important section in the jurisprudence of Capital Punishment. It prescribes death sentence for the offence of murder. But the section gives discretion to the sentencing judge by prescribing life imprisonment as an alternative punishment though the authors of the Code prescribed death as a punishment, they are convinced that it ought to be sparingly inflicted. They also observed "Though the sentence consequent upon a conviction of murder must be death, if there exists any grounds for mercy, that circumstance will have to be considered by the Government or its executive minister, and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law." According to Section 307, "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 herein before mentioned. When such an attempt is made by a life convict, he may, if hurt is caused, be punished with death."
The offence under Section 307 is one where the attempt is not successful; the disregard of the sanctity of human life is, however, transparent here also. But, the sentence of death can be awarded only where hurt is caused and the person offending is already under sentence of imprisonment for life. The last requirement is merely an illustration of the proposition that the law has not ruled out the consideration of the individual.³

The reasoning, which applied for holding section 303 as unconstitutional, would have applied with same force to the last part of Section 307 also, and the same, if it had left no discretion with the Judge, would have met the same fate. Fortunately, however, the provision for the Capital Punishment, in that section is not mandatory but spells out its desirability. The word "may be" is indicative only of a desirable course.⁴

The last capital offence in the order in Indian Penal Code is Section 396. It runs thus: "If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine." The offence under Section 396, is a specific case of vicarious liability in respect of the sentence of death, but even here it would be difficult to discuss the principle of protection of human life: the section requires that there must be five or more persons who are conjointly committing dacoity and that one of such persons must commit murder in so committing dacoity. Joint liability under this section does not arise unless all the persons conjointly commit dacoity and the murder was committed in so committing dacoity.⁵

The Indian Penal Code provides death penalty in three distinct patterns. Sections 303 and 307 relate to two offences for which the death penalty is the sole form of punishment. Section 302 is the second pattern where death penalty is with only one alternative namely. Life imprisonment. The third pattern is followed in respect of other offences cited above, where death penalty is the maximum to be applied along with wide range of other minimum sentences. In respect of the rules or guidelines for the operation of the choice out of the range of sentences the penal code is fairly bold. The question of when or why the death penalty should be imposed is left to judicial discretion in every case.⁶ Guided by missiles with lethal potential in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process.⁷
Section 303 of Indian Penal Code is a unique section, because it is the only section in the whole Code, which prescribes mandatory death sentence. It runs thus: "Whoever being under sentence of imprisonment for life, commits murder, shall be punished with death." However, the Indian Supreme Court as ultra vires of the Constitution struck down this section.

PROVISIONS UNDER CRIMINAL PROCEDURE CODE:

The new Criminal Procedure Code, 1973 provides a new provision in Section 235(2) at the stage of sentencing. The object of this provision is to give a fresh opportunity to the convicted person to bring to the notice of the court in awarding appropriate sentence having regard to the personal, social and other circumstances of the case.

The accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is breadwinner of the family of which the court may not be made aware of during the trial. The social compulsion, the pressure of poverty, the retributive instinct to seek an extra legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity - all these and similar other considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of Section 235(2) must therefore be obeyed in its letter and spirit.

Under the Code of Criminal Procedure, 1898, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submission in regard to sentence on the assumption that he was ultimately going to be convicted. This provision was most unsatisfactory. The Legislature therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence.

The requirement of hearing the accused is intended to satisfy the rules of natural justice. The Judge must make a genuine effort to elicit from the accused all information, which will eventually bear on the question of sentence. This is indeed one of the reasons in Mithu’s case for the Supreme Court to strike down Section 303 of Indian Penal Code as unconstitutional. "Is a law
which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair?" Section 235(2) becomes a meaningless ritual in cases arising under Section 303 of Indian Penal Code.\(^\text{16}\)

Prior to 1955, Section 367(5) of the Code of Criminal Procedure, 1898 insisted upon the court stating its reasons if the sentence of death was not imposed in a case of murder. The result was that it was thought that in the absence of extenuating circumstances, which were to be stated by the court, the ordinary penalty for murder was death. In 1955, sub-section (5) of Section 367 was deleted and some Courts, to mean that the sentence of life imprisonment was the normal sentence for murder and sentence of death could be imposed only if there were aggravating circumstances, interpreted the deletion, at any rate. In the Code of Criminal Procedure of 1973, there is a further swing towards life imprisonment. The discretion to impose the sentence of death or life imprisonment is not so wide now as it was before 1973 Code. Section 354 (3) of the new Criminal Procedure Code has narrowed down the discretion. Now death sentence is ordinarily ruled out and can only be imposed for special reasons.\(^\text{17}\)

The ultimate shift in legislative emphasis is that, under the New Criminal Procedure Code, 1973, life imprisonment for murder is the rule and Capital Punishment the exception - to be resorted to for reasons to be stated as per Section 354(3) of Criminal Procedure Code.\(^\text{18}\) "... Now only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of death sentence."\(^\text{19}\) But, it is neither necessary, nor possible to make a catalogue of special reasons, which may justify the passing of death sentence in a case.

In keeping with the current penological thought imprisonment for life is a rule and death sentence is an exception... if a death sentence is to be awarded, the court has to justify it by giving special reasons.\(^\text{20}\) Thus Judges are left with the task of discovering "special reasons", observed Krishna Iyer, J.\(^\text{21}\) He further held that "special reasons" necessary for imposing death penalty must relate not to the crime as such but to the criminal. However, in Rajendra Prasad's case,\(^\text{22}\) Kailasam J. did not accept this view of Krishna Iyer J. and observed that such a principle was not warranted by the law as it stands today. "Extreme penalty could be invoked in extreme situations", he opined. In Rajendra Prasad's case the majority further held "Such extraordinary grounds alone constitutionally qualify as special reasons as to leave no option to the Court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic...
requirement, however gruesome the killing or pathetic the situation be, unless the inherent testimony oozing from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a bloodthirsty tiger, he has to quit this terrestrial tenancy. This concept of special reasons is further explained by the Apex Court through Bhagwati, J. in the case of Bachhan Singh. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. It is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

The "special reasons" mentioned in Section 354(3) of Criminal Procedure Code should be taken as equivalent and synonymous to "compelling reasons". Murder is terrific (bhayankaram) is not a reason to impose death penalty. All murders are terrific and if the fact of murder being terrific is an adequate reason for imposing death sentence, then every murder shall have to be visited with that sentence and death sentence will become the rule, not an exception and Section 354(3) Criminal Procedure Code will become a dead letter.

Section 354(5) of Criminal Procedure Code deals with the execution of death penalty. It provides that "when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead." Even if it is not mentioned so also, there is no difficulty. Anyway the High Court has to confirm the death sentence imposed by the Sessions Court. The form of the warrant that is issued when the sentence is confirmed by the High Court direct the convict to be hanged by the neck till he is dead and where the sentence is imposed by the High Court either in appeal under Section 378 Criminal Procedure Code or in exercise of the power of revision, the formal order that flows from the High Court contains a similar direction.

The state must establish that the procedure prescribed by Section 354(5), Criminal Procedure Code for executing the death sentence is just, fair and reasonable and that the said procedure is not harsh, cruel or degrading. The method prescribed by Section 354(5) Criminal Procedure Code for executing the death sentence does not violate the provisions of Article 21 of Indian Constitution. The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind. The direction for execution of death sentence by public hanging is unconstitutional.
and if any Jail Manual were to provide public hanging the Supreme Court would declare it to be violative of Article 21 of the Constitution.28

Section 366 of Code Criminal Procedure insists upon the confirmation of death penalty by the High Court. The first provision of this particular section states, "When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and sentence shall not be executed unless it is confirmed by the High Court." The second provision insists that the Court passing the sentence shall commit the convicted person to jail custody under a warrant. The first provision of the said section corresponds to Section 374 of the Old Code, without any change and Sub-section (2) has been newly added. It is the practice of the High Court to be satisfied on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm the sentence.29

The High Court has to come to its own individual conclusions as to the guilt or innocence of the accused, independent of the opinion of the Sessions Judge.30 The High Court is duty bound to independently consider the matter carefully and examine all relevant and material evidence.31 The High Court is under an obligation to consider what sentence should be imposed and not to be content with trial court's decision on the point.32

When an accused is convicted and sentenced to death, he is only a convict prisoner and not to be treated as condemned prisoner. The death sentence is not executable without confirmation of the High Court. Such a prisoner will be governed by Chapter XVII of the Jail Manual and will be given facilities under that chapter...at least till he is declared as condemned prisoner in the eye of law.33 Neither he is serving rigorous imprisonment nor simple imprisonment. He is in jail so that he is kept safe and protected with the purpose that he may be available for the execution of death sentence.34

Section 367 of Criminal Procedure Code deals with the power of High Court to direct further enquiry to be made or additional evidence to be taken. Sub-section (i) of this section provides "If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session." Where an application by an accused person to call material evidence bearing on his line of defence was refused by the lower court but was renewed in the
High Court, it was held that the accused should be permitted under this section to produce further evidence. As pointed out by the Supreme Court, when the reference is made for the confirmation of the death sentence, the High Court is to see not only the correctness of order passed by the Sessions Judge but must examine the entire evidence by itself. The High Court may even direct a further inquiry or the taking of additional evidence for determining the guilt or innocence of the accused and then come to its own conclusion on the entire material on record whether the death sentence should be confirmed or not.

Section 368 of Criminal Procedure Code empowers the High Court to confirm sentence or annul conviction. It envisages "In any case submitted under Section 366, the High Court - (a) may confirm the sentence, or pass any other sentence warranted by law, or (b) annul the conviction, and convict the accused of any offence of which the court of session might have convicted him, or order a new trial on the same or on amended charge, or (c) may acquit the accused person; Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of."

Section 369 of the Code prescribes that either confirmation of the sentence or new sentence is to be signed by two judges of High Court. It runs thus: "In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

Where the Court consists of two or more Judges and the order of confirmation of sentence of death is made, passed and signed by one of them, the sentence of death is not validly confirmed but remains submitted to the court which has to dispose of the same under Sections 367-371. The Code mandates that when the High Court concerned consists of two or more Judges, the confirmation of the death sentence or other sentences shall be signed by at least two of them and this applied only where the court, at the time of confirmation of the death sentence, consists of two or more Judges. But, when a single judicial commissioner alone is functioning, Section 369 of the Code is not attracted and he may sign the confirmation of the death sentence alone and there will be no illegality.

Section 370 of the Code deals with the procedure in cases of difference of opinion. "Where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the
case shall be decided in the manner provided by Section 392 of the same Code." When a sentence of death is referred to the High Court for confirmation and the Judges differ, the matter should be referred to a third Judge, under section 370, who should not decide it according to the opinion of the Judge for acquittal or conviction, but shall deliver his opinion. The third Judge’s duty is to examine the whole evidence and come to a final judgment. No fetters can be placed on the third Judge. He is at liberty to express and act upon the opinion, which he himself arrives at. If the third Judge chooses he can pass a sentence of death, even though one Judge favors an acquittal and the other gives a lesser sentence when convicting the accused. But, the golden rule to be followed by the third Judge is to give the benefit of doubt to the accused. The observation of such a rule does not amount to abdication of his functions as a Judge under Sections 370 and 392 of the Code. However, when there is difference of opinion in the High Court not only on the question of guilt but also on that of sentence, the sentence should be reduced to imprisonment for life. In the same case as a precautionary method the Supreme Court further maintained that when appellate Judges who agree on the question of guilt differ on that of sentence, it is usual not to impose death penalty unless there are compelling reasons.

Section 371 of the Code deals with the procedure in cases submitted to High Court for confirmation. It provides “In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the Order, under the seal of High Court and attested with his official signature, to the Court of Session."

Section 385 of Criminal Procedure Code dealing with the procedure for hearing appeal ordinarily not to dismiss such appeals summarily-

(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given -

(i) To the appellant or his pleader:

(ii) To such officer as the State Government may appoint on his behalf:

(iii) If the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant:

(iv) If the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.
(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and near the parties: Provided that if the appeal is only as to the extent or the legality of the sentence, the court may dispose of the appeal without sending for the record.

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

This section corresponds to section 422 of the Old Code with some changes and additions. This section embodies the principles of natural justice by providing that the appellate court shall cause notice of the time and place at which such appeal shall be heard to be given to the appellant or his pleader and this is mandatory.

Section 389 deals with the suspension of sentence pending the appeal and release of appellant on bail. It runs thus: "(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if is in confinement, that he be released on bail, or on his own bond." This section corresponds to the provisions of Section 426 of the Old Code.

Section 413 deals with the execution of order passed under Section 388: It reads "When in a case submitted to the High Court for the confirmation of a sentence of death, if the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary." This section corresponds to section 381 of the Old Code without any change in the substance. No fixed period of delay can be held to make the sentence of death inexecutable.

A warrant does not mean only one warrant, even when interpreted in isolation and out of context. A warrant once issued can go unexecuted and is liable to be rendered ineffective in a number of situations. But, by no logic can it be said that since warrant has become infructuous and that death sentence should automatically stand vacated. No provision of the Code bars return of the first warrant without the execution having been carried out. Nor does it do so in case of issuance of a second warrant.
Section 414 of Criminal Procedure Code deals with the execution of sentence of death passed by High Court. When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant.

Section 415 Code of Criminal Procedure deals with the postponement of execution of sentence of death in case of appeal to Supreme Court."(1) Where a person is sentenced to death by the High Court and an appeal from its judgment lies to Supreme Court under sub-clauses (a) or sub-clause (b) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of."

The sub-clause (2) of the same section provides "Where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of certificate under Article 132 or under sub-clause (c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court."

The sub-clause (3) of the section provides "Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition."

Section 416 of Code of Criminal Procedure is an important provision because it deals with the postponement of Capital Punishment on pregnant woman. It envisages: "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may if it thinks fit commute the sentence to imprisonment for life."

This provision does not specify the time for which the execution has to be postponed. There is no clue, whatsoever; in the provision whether such postponement is for good or till the woman delivers. Moreover, the High Court is the only forum in which the law vests the power of postponing the execution of a sentence of death passed and confirmed on a woman proved to be
pregnant. The Sessions Judge, may, of course, direct the postponement of the execution of the sentence, until appropriate orders to that effect are passed by the High Court. The High Court, under such circumstances, is empowered even to commute the sentence to one of life imprisonment, if it thinks fit and this is one instance making a departure from the mandate of Section 362 of the Code of Criminal Procedure, 1973 that no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.41

The provision of Section 416 of the Code of Criminal Procedure is an instance of "Reprieve" or "Respite". It is stated that when a woman is convicted and sentenced to death, clerk of the Crown, after sentence, is to ask whether the woman has anything to say in the stay of the execution of the sentence. If she then claims or the Court, then or later on, has reason to suppose that she is pregnant, a jury of twelve matrons are empanelled and sworn to try whether or not she is quick with child. If the Jury requires the assistance of a medical man, a medical man is requested by the Court to retire and examine the prisoner and is then examined as a witness. If the Jury finds that the prisoner is quick with child, the Court stays the execution of the Capital sentence until the prisoner delivers a child or it is no longer possible that she should deliver a child. It is however, for the prisoner to plead pregnancy, because the right to a Jury of matrons accrues to her only when she pleads but not otherwise. In India, too, it is implied, under the provisions of Section 416 of Criminal Procedure Code, that the convict herself, or her counsel should reveal the state of her pregnancy, though, for the postponement of execution, it is not at all necessary that she should be quick with child. What is necessary is that she must be pregnant, and the time factor as to the duration of the pregnancy at the time of conviction is immaterial.42

In France, United Kingdom (position prior to abolition) USSR, Czechoslovakia, Yugoslavia, Australia, Netherlands, New Guinea, Laos, China, Cambodia, and The Central African Republic of Morocco, pregnant women are exempted from being executed. The law provides only for the postponement of the execution for a period which varies depending upon the fact whether the women sentenced to death breast-feed the child or not.43 The aspect of breast-feeding is not considered in India. It is quite interesting to note whether by depriving a child from being fed by mother is violative of his fundamental right or not. However, in actual practice, the postponement of the execution in such circumstances generally leads to subsequent commutation of the death sentence.
Section 432 of the Code deals with suspension, remission and commutation of sentences. It runs in the following terms:

**Power to suspend or remit sentences:**

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

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

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

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

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

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

(b) Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.
(6) The provision of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means, -
(a) In cases where the sentence is for an offence against or the order referred to in sub-section (6) is passed under any law relating to a matter to which the executive power of the Union extends, the Central Government:
(b) In other cases, the Government of the State within which the offender is sentenced or the said order is passed."

Section 432 incorporates the provisions of section 401 and 402(3) of the Old code. There is no change in substance of the old law. This section does not give any power to the Government to reverse the judgment of the Court, but provides the power of remitting the sentence. The minimum sentence awardable under section 302 of Indian Penal Code, being life imprisonment no reduction is possible. This power is executive in nature.

While Article 161 of the Constitution speaks of grant of reprieves, pardons and remissions etc., it does not speak of imposition of conditions for the grant, whereas section 432 of Criminal Procedure Code speaks of remission or suspension with any condition. Section 432(3) specifically provides for consequences of the conditions, which are contemplated by Section 432(1) of Criminal Procedure Code not being fulfilled. Section 432(3) contemplates remanding the person so subjected to remission to jail once again. Section 432 of Criminal Procedure Code is not manifestation of Articles 72 and 161 of the Constitution but a separate, though similar provision.44

In cases of murder, the Judge may report any extenuating circumstances calling for a mitigation of punishment to the Government and the Government may thereupon take such action under this section as it thinks fit. The word remit as used in Section 432 is not a term of art. Some of the meanings of the word "remit" are to pardon, to refrain from inflicting, and to give up. There is therefore, no obstacle in the way of the Governor in remitting a sentence of death.45 When the concerned Court feels sympathetic towards the accused, owing to some reasons such as the wife of the accused is a cancer patient with six children46 or the accused is a boy of tender years47 or accused is a young lady who committed murder under the influence of others48 but legally constrained to show mercy, then it recommends such cases to the Government, because the power of granting mercy is vest with the executive but not with the judiciary.
An order passed under Section 432 Cr.P.C. is justiciable on any of the following grounds:

1. That the authority exercising the power had no jurisdiction.
2. That the impugned order goes beyond the extent of power conferred by law.
3. That the order has been obtained on the ground of fraud or that it has been passed taking into account the extraneous considerations not germane to the exercise of the power or in other words, is a result of malafide exercise of power. 

The brother of the murdered person is considered to one of the most aggrieved parties and has the locus standi to challenge the order of remission of punishment. While the State Government is not legally obliged to give reasons for remitting sentence, it is duty bound to reply to allegations made in petition challenging the remission. The State Government is not bound to produce the records under writ of certiorari. The initial onus is on the petitioner to give prima facie evidence to show that the power has been exercised malafide. Reference under sub-section (2) of section 432 Criminal Procedure Code is not mandatory and therefore non-compliance of the said provision does not make the impugned order without jurisdiction. Even though the sentence Revising Board is not required to give detailed reasons; nevertheless the administrative orders are subject to judicial review.

Section 433 of Criminal Procedure Code deals with the power of commuting the sentence. The appropriate Government may, without the consent of the person sentenced, commute -

(a) Sentence of death, for any other punishment provided by the Indian Penal Code:
(b).............

Section 433 corresponds to the provisions of Section 402(1) of the Old Code. A combined reading of the provisions of the Articles 72,73,161,162 and 246 of the Constitution of India and those of Section 433(a) Criminal Procedure Code indicates that the State Government continues to enjoy the power of commuting a sentence of death; since the expression “State Government” means the Governor under the General Clauses Act and under Section 433 Cr.P.C, the Governor can commute sentence of death under Section 433 Cr.P.C.

Albeit the Court initially felt that reasons need not be given in the case of reduction of sentence of death under prerogative of mercy of State. Later observations of the Supreme Court insist that if there are any mitigating circumstances, not brought on record for reducing the sentence of
death to imprisonment for life, the proper course is to bring them to the notice of the appropriate Government.

It is true that in proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it. But, this is no rule of law and is a matter primarily for consideration of the State Government. Accordingly no rule can be laid down that delay exceeding two years in the execution of death sentence can be used to demand its conversion into life imprisonment.

Section 434 of Criminal Procedure Code envisages that the power conferred by Sections 432 and 433 upon the State Government may, in the case of sentence of death, also be exercised by the Central Government. This section corresponds to Section 402 (2) of Old Code. However, this section is applicable only to a sentence of death and to no other sentence.

The Supreme Court retains and must retain an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done.

**PARDONING POWER UNDER CONSTITUTION AND JUDICIAL REVIEW REGARDING CAPITAL PUNISHMENT:**

The degree of importance and self-sufficiency enjoyed by each organ of the State and the independence of power vested in each of them is not absolute but relative to the provisions of the Constitution in general and to the provisions defining the power of other organs in particular. Whatever the degree of vastness of the powers enjoyed by the Legislature and by the Executive it is all subject to the provisions of the Constitution since each organ derives its power from and under a written Constitution. Not only the provisions of a law passed by the Legislature, but also the action taken, decision arrived at, orders passed and discretion used by the Executive or other statutory body or tribunal empowered as such by or under the Constitution or other law, ordinance, rule or regulation, is required to be in strict conformity with the provisions of the Constitution. Since, it is the exclusive business of the judiciary to apply and interpret the Constitution, in the final analysis it is the judicial organ, which assumes supremacy. Under the Constitution, the power to decide whether a piece of Legislation, or the provision of a rule or regulation or the action or order by a competent authority is void or not on the ground of its
unconstitutionality or its inconsistency with the provisions of the Constitution, is given to the Courts and to nobody else. This power to decide cases or controversies involving the constitutionality of law or of any action taken or any decision given by or under the powers of a law whether by the executive or by any other body or authority, is technically known as the "judicial review". 58

The administration of justice through courts of law is part of the constitutional scheme to secure law and order and the protection of life, liberty, or property. Under that scheme it is for the judge to pronounce judgment and sentence, and it is for the executive to enforce the sentence59. Normally this is the procedure. But, sometimes the sentence pronounced by the judge is not carried out as it is. It may be altered into the following forms.

(a) **PARDON**: A pardon releases both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of law, the offender is as innocent as if he had never committed the offence.60 If granted before conviction, it removes the penalties and disabilities and restores him to all his social rights. However, pardon is an act of grace and therefore it cannot be demanded as a matter of right.

(b) **COMMUTATION**: Commutation means exchange of one thing for another. Here it means substitution of one form of punishment for another, of lighter character.

(c) **REMISSION**: Remission means reduction of the amount of punishment without changing its character.

(d) **RESPITE**: Respite means awarding a lesser punishment on some special grounds. Eg. The pregnancy of a woman offender-

(e) **REPRIEVE**: Reprieve means temporary suspension of death sentence. Eg. Pending proceeding for pardon or commutation.

**ARTICLE 72 OF THE INDIAN CONSTITUTION:**

"Power of President to grant pardon etc., and suspend, remit or commute sentence in certain cases:

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence -

(a) In all cases where the punishment or sentence is by a Court Martial:
(b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends:
(c) In all cases where the sentence is a sentence of death:

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

ARTICLE 161 OF THE INDIAN CONSTITUTION:

Power of Governor to grant pardon etc., and to suspend, remit, or commute sentences in certain cases: "The Governor of a State shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive power of the State extends."

From the above two articles it is clear that the power of pardon and other powers of clemency are conferred upon the President of India and the Governor of the States. Why is this power conferred upon them?

"The object of conferring this judicial power on the President is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections". There is one more reason worth mentioning. "... Circumstances may arise where carrying out a sentence, or setting machinery of justice in motion, might imperil the safety of the realm. Thus, if the enforcement of the sentence is likely to lead to bloodshed and revolution, the executive might well pause before exposing the State to such peril". Similar Conditions apply to amnesty.

Section 54 of the Indian Penal Code also confers a similar power on the Government. "In every case in which sentence of death shall have been passed, the appropriate Government may, without the consent of the offender commute the punishment for any other punishment provided by this Code." But, the framers of the Code gave a totally different reason for conferring such power on the Government. "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judges, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect."
The State of those remote Provinces of the Empire, in which convict settlements are established, and the way in which the interest of those provinces may be effected by any addition to the convict population, are matters which lie altogether out of the cognizance of the Tribunals by which those sentences are passed, and which Government only is competent to decide. Anyhow, now the total scenario is changed. The provisions of Sections 54 and 55 of Indian Penal Code became unnecessary by the ampler provisions of the Code of Criminal Procedure which Empower the appropriate Government to commute, suspend or remit all judicial sentences.

A subsequent petition for clemency after the former having been rejected is not barred, that is to say, the rejection of one clemency petition does not exhaust power of President or Governor. The circumstances about the political nature of the offence, the undoubted decline in Capital Punishment in most countries of the world, the prospective change in the laws bearing on the penalty in new wake of the age, the later declaration of law in tune with the changing tone of penology with its correctional and rehabilitative bias, the circumstances that the Damocles’ sword of death sentence had been hanging over the head of the convict for over a number of years and like factors may probably be urged before the President and Governor for entertaining a subsequent petition.

Both the President and the Governor have the power of pardon etc., Are they distinct from each other? Undoubtedly the President’s power is wider than that of the Governors’ of the States:
1. The President has executive power to grant pardon in cases, where the sentence is a sentence of death while the Governor cannot grant pardon in case of a death sentence.
2. The President can pardon punishment or sentences inflicted by Court Martial. Governors cannot.
3. In respect of suspension, remission and commutation of sentence of death both have concurrent powers.

Articles 72(1)(c) expressly provides that the President’s power extends to pardoning sentences in all cases where the sentence is one of death. The President’s power extends to pardoning offences against laws enacted by Parliament in respect of matters in List I, Schedule 7, and the Governor’s power extends to pardoning offences against laws enacted by State Legislature in respect of matters in List II, Schedule 7. The power of the President and the Governors extends also to pardoning offences in respect of matters in List III, but subject to the limitation on executive power contained in Article 73 (1) (a), proviso and Article 162 proviso respectively. The
Governor exercise a constitutional and not a statutory power, his authority being derived from Article 161, which enables him to pardon all offences against all laws relating to a matter to which the legislative authority of the state extends. As the Penal Code and the matters contained therein is a subject of concurrent legislation since the penal code is the general law of crimes in India, which provides for sentence of death, it is clear that the Governor's power of pardon under Article 161 extends to pardoning a sentence of death.

This constitutional power of the Governor came into conflict with the power of judiciary in Nanavati's case. In the case of Nanavati, the petitioner was convicted of murder and was sentenced to imprisonment for life by Bombay High Court. At the time of the decision of the High Court the petitioner was in Naval custody. Soon after the judgment was passed by the High court the petitioner made an application for leave to appeal to Supreme Court. On the same day, the Governor of Maharashtra issued an order under Article 161 suspending the sentence subject to the condition that the accused shall remain in Naval Jail till the disposal of his appeal by the Supreme Court. The warrant issued for the arrest of the accused was returned unserved. The question involved was: Should the accused surrender to his sentence as required by rules of the Supreme Court under Order 21 Rule 5 or should he remain in Naval custody in pursuant to the order made by the Governor under Article 161.

The Supreme Court held that the power to suspend a sentence by the Governor under Article 161 was subject to the rules made by the Supreme Court with respect to cases, which were pending before it in appeal. The power of Governor to suspend the sentence of a convict was bad so much as it came in conflict with the rule of the Supreme Court, which required the petitioner to surrender himself to his sentence. It is open to the Governor to grant a full pardon at any time even during the pendency of the case in the Supreme Court in exercise of what is ordinarily called mercy jurisdiction. But, the Governor cannot exercise the power of suspension of the sentence for the period when the Supreme Court is seized of the case. The order of the Governor could only operate until the matter became subjudice in the Supreme Court and it did become so on the filing of the petition for a special leave to appeal. After filing of such a petition and till the judicial process is over the power of the Governor cannot be exercised.

Another landmark judgment in the area of pardoning power is that of Kuljeet Singh's case where the petitioner questioned the fairness and reasonableness of this duty of the President In Kuljeet Singh, the accused Kuljeet Singh alias Ranga had been convicted along with Jasbir Singh alias
Billa by the Additional Sessions Judge, Delhi for various offences including murder and rape, causing the death of two young children, Geetha Chopra and her brother Sanjay and sentenced them to death, which was confirmed by the High Court. The accused presented a special leave petition to the Supreme Court to appeal from the judgment of the High Court. Supreme Court dismissed the petition.

But, the accused presented a mercy petition to the President to commute their death penalty. While petitions were pending Ranga presented a writ petition to the Supreme Court in effect inviting the Supreme Court to reappraise his case, and reconsider the dismissal of his special leave petition. Chandrachud C.J. (for himself, A.P.Sen and Bharul Islam, JJ.) After a careful scrutiny of the evidence held that there was no doubt that Ranga and Billa had murdered the two children, after a savage planning which bears a professional stamp. “The survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security.... they are professional murderers and deserve no sympathy in terms of the evolving standards of decency of a mature society.” However, Chandrachud C.J. expressed the hope that the President would dispose of the mercy petition expeditiously.

The President rejected the petitions of mercy. Thereupon Ranga filed a writ petition contending that the power conferred by Article 72 on the President to grant Pardons and to commute sentences especially the sentence of death was a power coupled with a duty, which must be fairly and reasonably exercised. Chandrachud C.J., observed that the Court did not know whether the Government of India had formulated any uniform standard of guidelines by which the exercise of the power under Article 72 was intended to be, or was in fact, guided. The petition was fixed in the second week of January 1982. Meanwhile the execution was stayed, and in order to obviate the necessity of persons similarly situated filing writ petitions, the Court directed that “the death sentence imposed on any person whatsoever whose petition under Article 72 or Article 161 has been rejected by the President or the Governor should not be executed until the disposal of this writ petition.

The Court observed that question as to the scope of the President’s power may have to await examination on appropriate occasion. The present petition did not provide such an occasion because whatever are the guidelines observed for the exercise of the power conferred by Article 72, the only sentence, which can possibly be imposed on Ranga and Billa, is that of death and no circumstances exist for interference with that sentence. The Chief Justice recalled his earlier
words "... the survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security." "...The necessity or justification of exercising the pardoning power had to be judged from case to case." He quoted Chief Justice Taft of the United States in the case of Grossman. "The administration of justice by the courts is not necessarily always wise or certainly considerate or circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as monarchies, to vest in some other authority than the courts power to avoid particular judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it, but, whoever is to make it useful must have full discretion to exercise it..."

It is not out of place to recall the observations made by the Supreme Court in Nanavati's case in this regard. "The view of the language of Articles 72 and 161, which was similar to that used in Section 295 (2) of the Government of India Act, 1935 and similar to that of American Constitution, the President and the Governors of the States in India had the same powers of pardon both in nature and effect, as is enjoyed by King in Great Britain and the President in the United States. Therefore, in India also the pardoning power can be exercised before, during, or after trial."

In Maru Ram it was held that while exercising the pardoning power the object and spirit of Section 433-A of Criminal Procedure Code must be kept in view. The power to pardon is exercised by the President on the advice of the Council of Ministers. In Sher Singh while disposing of a writ petition for the commutation of death sentence into life imprisonment on the grounds of inordinate delay the Court took an opportunity to impress upon the Central and State Governments that the mercy petitions filed under Article 72 and 161 of the Constitution or under Section 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously. Chandrachud C.J. observed " A self-imposed rule should be followed by the executive authorities vigorously, that every such petition shall be disposed of within a period of three months from the date when it is received. Long delay in the disposal of these petitions are a serious hurdle in the disposition of justice and indeed, such delay tend to shake the confidence of the people in the very system of justice." The Court cited several instances and one such case was mercy petition under Article 161 pending before the Governor of Jammu and Kashmir for the last eight years.

It would, however, be a travesty of justice, as Sen J. observed and the course of justice will be perverted, if for the same offence, the petitioner has to swing and pay the extreme penalty of
death where as the death sentence imposed on his co-accused for the very same offence is commuted and his life is spared.71

The facts of the case are as follows: Three persons were sentenced to death by a common judgment and regretfully, each one has eventually met with a different fate. One of those three persons, Jeeta Singh, who did not file any Review petition before the Supreme Court was executed on October 6, 1981. The other person Kashmira Singh succeeded in having his death sentence commuted into life imprisonment. The petitioner Harbans Singh was to be executed but, fortunately, he filed this writ petition on which the Court passed an order staying the execution of his death sentence. Imposing death on the petitioner involves the Court as well as the authorities concerned in violation of rudimentary norms governing the administration of justice. But, instead of commuting his sentence the Court observed that in the interest of comity between the powers of Supreme Court and the Powers of the President of India, it will be more in the fitness of things if they were to make a recommendation to the President of India to exercise his pardoning power under Article 72 of the Constitution, and commute his sentence into the life imprisonment. This is because the President has already considered his mercy petition once and rejected it. The propriety and decorum require that the matter should be referred back to the President instead of the Court deciding to commute the sentence.

The recent case in this context is that of Kehar Singh’s72. Pathak, C.J., observed that keeping in view the fallibility of human judgment, which may occur even in the most trained mind, a mind resourced by harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, entrusting should extend the protection the power to some high authority to scrutinize the validity of the threatened denial of life. The power so entrusted is a power belonging to the people and is reposed in the higher dignitary of the State. So, this power was regarded as a part of the Constitutional scheme and the Bench observed that it should be so treated in our Republic also; and the same has been reposed by the people through the Constitution in the Head of the State and it enjoy high status.

Such a power was not regarded as a power amounting to amending or modifying or superseding a judicial verdict and it was stated that the order granting pardon would not be justifiable on its neither merits, nor can reasons be asked. However, whether the act of a constitution or statutory functionary falls within the constitutional or legislative conferment of power or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the scope of the power is a matter,
which could be examined by courts. It was stated that the manner of consideration of such a petition lies within the discretion of the functionary, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The functionary may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues, which he considers prudent, and he may, if he considers it will assist him, give an oral hearing to the parties. The matter, however, lies entirely within his discretion.\footnote{73}

In Kehar Singh, the court made the following observations:

(a) The courts are not competent to question the decision of the President (or the Governor as the case may be) as to the exercise of, or denial to exercise the power in a particular case on its merits.

(b) The President or the Governor is not bound to disclose the reasons for his order and the Courts are not entitled to ask the reasons. On the other hand-

Since the Court is the final interpreter of the Constitution and limitations imposed by it on the different organs of the State,-

(a) The Court is competent to determine the scope and area of the power conferred by Article 72 (or Article 161 as the case may be) and whether the President (or the Governor) has Transgressed the limits of that power.

(b) The Court can interfere if, in a particular case, the President has refused to exercise the power on an erroneous appreciation of the scope of that power, e.g., where the President refuses to consider an application for pardon on the erroneous assumption that he was precluded from going into the merits of the case by the judgment of the final Court as to the Guilt of the person. In truth, the scope of the power under Article 72 is altogether different from powers vested in the Courts. Hence, notwithstanding the judgment of the Supreme Court, the President is entitled to go into the merits of the case and even to examine the evidence of the criminal case. In such a case of wrong refusal to exercise the constitutional power the Supreme Court directed the President to reconsider the application, which was deemed to be pending. It has even suggested that the Court may interfere if the exercise of the otherwise discretionary power is "wholly irrelevant, irrational, discriminatory or malafide."

But, this proposition has little practical utility if the President (or the Governor) has no obligation to disclose reasons for his discretion. Kehar Singh's case is a rare instance where the Court could
interfere because the President's order clearly stated that he could not exercise the power simply because the highest Court of the land had decided the merits of the case against the convict.

At any rate, Indian Judges appear to be more assertive in this narrow field of judicial review, than their counterparts in the United States.

CONCLUSION:
The Indian Penal Code provides Capital Punishment for eight categories of offences namely, waging war against the Government of India (S.121), abetting mutiny by a member of the armed force (S.132), fabricating false evidence with intent to procure conviction of a capital offence, with the death penalty applicable only if an innocent person is in fact executed as a result (S.194), murder (S.302), murder committed by a life convict (303), abetting the commission of suicide of a child or insane person (S.305), attempted murder actually causing hurt, when committed by a person already under sentence of life imprisonment (S.307) and dacoity with murder (S.396). Criminal Procedure Code provides with the procedure to be followed while awarding and executing the death sentence.

The administration of justice through courts of law is part of the constitutional scheme and under that scheme it is for the judge to pronounce judgment and sentence and it is for the executive to enforce them. Articles 72 and 161 of the Indian Constitution empowers the President or the Governor as the case may be to grant pardon and also to suspend, remit or commute sentences in certain cases. The executive heads can exercise this power, before, during and after the trial.

2 Ibid at 1121
5 Supra note 3 at 36
6 Pande, B.B: "Face to Face with Death": Supreme Court Cases: 124 (1986)
8 Section 235 (2): If the accused is convicted, the judge shall Unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass Sentence on him according to law.
16 Ibid.
23Ibid
25State v. Heera: 1985 Cri.L.J. 1153 (Raj)
33Kehar Singh v. State: 1987 Cri.L.J. 291 (Del)
39In re Narasiah: AIR 1959 A.P. 313 at 317-318.
42Ibid at 61.
47Nawab v. Emperor: AIR 1932 Lah. 308
48Kartar Singh v. Emperor: AIR 1932 Lah. 259
51Rakesh Kaushik v. Delhi Administration: 1986 Cri.L.J. 566 (Del)
54Kartar Singh v. State : 1977 Cri.L.J. 214 (S.C)
55AIR 1964 S.C. 276
57Supra note 49 at 32-38
62Supra note 60 at 124.
65Supra note 61 at 1765.
67Supra note 61 at 1769.