CHAPTER – IV
CAPITAL PUNISHMENT IN INDIA: AN OVERVIEW

4.1 INTRODUCTION

Capital Punishment in India has a chequered history. In this Chapter the researcher would peep into the concept of punishment and its different theories, religious sanctions, legislative development and present day crusade to deal with capital punishment.

Social interest in a civilized society lies in a peaceful and secure atmosphere, which is governed by rule of law. A man possesses free choice to follow either good or evil. If he chooses evil, he is responsible for his choice thereby inviting appropriate punishment. To impose just punishment is necessary as society cannot be denied the right of self-preservation in a secured way. To dream for peaceful and orderly society, the inherent evils developed in individuals need to be eliminated for safety and comfort of others. It is indeed a melancholy commentary upon a civilized society for having failed to make a crime free living. A crusade to conquer evil disturbing the moral fibre of society, for preservation of justice, righteousness, human life and to create a decent, humane society, the punishment being a perennial process has travelled in diverse directions leading towards the present day legal vessel where human life is more sacred than the time immemorial. What was punishment for a minor crime in yesteryears is today punishment for a major crime. Capital punishment is the highest punishment for any crime.

Despite there being varied punishments for varied crimes from generation to generation, crime is prevalent in every society. The efficacy of punishment has been justified in every society with only exception that the harsh punishments have been more or less eliminated from the Code and evil is treated in charity in most of the crimes. Even though not in toto, the barbarity breeds barbarity seems to have been understood and the human flight seems to be ruling the day where sentencing is viewed as a process of re-educating a criminal thereby rehabilitating him so as to return him in the society as a responsible citizen. The holistic view of sentencing has yet to eliminate the severity in crimes which are bestial and treacherous tragedies deserving terrible condemnation and are so shocking to the human
conscience that infliction of severe punishment becomes irresistible. The harshness and the human flight could not change the colour of crimes.

4.2 EFFICACY OF PUNISHMENT

Life is always sweet and death is always cruel. A man is accountable for his acts and a penalty is the sanction that supports accountability. The punishment is a dynamic process in a given society so as to know about its objectives. The question arises as to the efficacy of the ‘Punishment’ from past to present generation.

Questions arise - Is ‘punishment’ in its varied forms an artificial danger for the society? - Is it meant for creation of effective deterrence or re-education of the convict so as to make him a responsible person of the society? Is it a mean of repairing the wounds made upon collective sentiments? And/Or, Is it a decree of vengeance in favour of State necessary for maintaining the law and order?

Ideally, a Criminal Law is a command, usually a prohibition, against anti-social conduct; that is to say, against conduct which will interfere with the order and smooth and satisfactory running of the society, and any such explanation of the law demonstrates the necessity that there should be such laws, otherwise chaos would come again. It is of the nature of such a law that practically everybody is ordered to obey it.¹

What, then, is to happen if an individual disobeys the law? And the first answer to this surely must be that something must be done to demonstrate that the law is a law, and not a mere request, or pious opinion of what conduct is appropriate. Law is not a law, at any rate in modern times, without a sanction. This we may call punishment. Punishment is required to vindicate the law.²

Crime is a dynamic concept and its denotative meaning changes with the growth of society both from the point of view of direction and dimension. What is not crime today may be ‘crime’ tomorrow, or what is a crime of insignificant gravity today may be of high gravity tomorrow. Naturally, the prescription of punishment also changes accordingly.³

¹ CODDINGTON, F.J.O. Problems of Punishment, THEORIES OF PUNISHMENT, STANLEY E. GRUPP (ed), 333-336 (LONDON INDIANA UNIVERSITY PRESS 1971)
² Id., p. 337
³ MITRA, N.L., A New Question on Penal Law, CRIMINAL LAW & CRIMINOLOGY, K.D. GAUR 72 (2002 DEEP & DEEP PUBLICATIONS PVT. LTD.)
4.3 **PUNISHMENT - ITS OBJECT & PURPOSE OF PUNISHMENT**

The purpose of punishment is to extinguish the rising flame of criminal tendency in a human being. By inflicting a just punishment, a civilized society usually tries to re-educate the criminal so as to make him a responsible member of the society. While the battle rages loud and long, as a perennial process, the generations have never given up recovering a worst criminal out of criminal vices by varied means of punishment for protection of the mankind. Since punishment is one of the main concerns of this study, it is important to have a brief survey of the concept of ‘punishment’. A precise survey of the developments explaining the concept of punishment is succinctly explained in following passages.

Halsbury’s Laws of England\(^4\) defines the aims of punishment as follows:

“The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided.”

Sir Henry Sumner Maine, the English legal historian, observed that punishment evolved from social necessity. The concept of punishment as a form of expiation or atonement reaches far back into human nature as well as into human history. The notion that the threat of punishment by the State will restrain the potential criminal is one of the most commonly accepted justifications for it. The idea has a philosophical basis in the utilitarians’ concept of the rational man acting upon a deliberate calculation of possible losses and gains. If men choose rationally among possible future courses of action then surely the likelihood of a criminal course of action could be decreased by attaching to it a quick, certain and commensurate penalty.

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Like every other institution, says Sir Henry Sumner Maine, which has accompanied
the human race down the current of its history, the punishment of death is a necessity of
society in certain stages of the civilizing process. There is a time when the attempt to
dispense with it baulks both of the two great instincts which lie at the root of all penal law.
Without it, the community neither feels that it is sufficiently revenged on the criminal, nor
thinks that the example of his punishment is adequate to deter others from imitating him. The
incompetence of the Roman Tribunals to pass sentence of death led distinctly and directly to
those frightful Revolutionary intervals, known as the Proscriptions, during which all law was
formally suspended simply because party violence could not find any other avenue to the
vengeance for which it was thirsting. No cause contributed so powerfully to the decay of
political capacity in the Roman people as this periodical abeyance of the laws; and, when it
had once been resorted to, we need not hesitate to assert that the ruin of Roman liberty
became merely a question of time. If the practice of the Tribunals had afforded an adequate
vent for popular passion, the form of judicial procedure would no doubt have been as
flagrantly perverted as with us in the reigns of the later Stuarts, but national character would
not have suffered as deeply as it did, nor would the stability of Roman institutions have been

Punishment, whatever shape it may assume, is an evil. The supreme importance
visible in punishment is that it prevents offences. The rationale of punishment enunciated by
Jeremy Bentham has been presented by John Bowring\footnote{BENTHAM, \textit{Principles of Penal Law}, \textit{The Works of Jeremy Bentham}, Vol.1, 383-390, JOHN BOWRING (ed.)} as follows:

\begin{quote}
“Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensured from the act, if performed, will also by that means be prevented.

… Punishment has three objects: incapacitation, reformation, and intimidation. If the crime he has committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again. But if the crime, being less dangerous,
only justifies for the delinquent to return to society, it is proper that the
punishment should possess qualities calculated to reform or to intimidate him.”

Bentham in his celebrated treatise *Principles of Penal Law* discussed *Measure of
Punishment* to establish a proportion between crimes and punishments. He observed thus\(^7\):

> “Punishments may be too small or too great; and there are reasons for not
> making them too small, as well as for not making them too great. The terms
> minimum and maximum may serve to mark the two extremes of this question,
> which require equal attention.

With a view of marking out the limits of punishment on the side of the first of
these extremes, we may lay it down as a rule—

1. That the value of the punishment must not be less, in any case, than what is
   sufficient to outweigh that of the profit of the offence.

By the profit of the crime, must be understood not only pecuniary profit, which
has operated as a motive to the commission of the crime.

The profit of the crime is the force which urges a man to delinquency; the pain
of the punishment is the force employed to restrain him from it. If the first of
these forces be the greater, the crime will be committed; if the second, the
crime will not be committed. If, then, a man, having reaped the profit of a
crime, and undergone the punishment, finds the former more than equivalent to
the latter, he will go on offending for ever; there is nothing to restrain him. If
those, also, who behold him, reckon that the balance of gain is in favour of the
delinquent, the punishment will be useless for the purposes of example.

If it be determined to preserve the punishment of death, in consideration of the
effects it produces *in terrorem*, it ought to be confined to offences which in the
highest degree shock the public feeling – for murders, accompanied with
circumstances of aggravation, and particularly when their effect may be the
destruction of numbers; and in these cases, expediencies, by which it may be
made to assume the most tragic appearance, may be safely resorted to, in the
greatest extent possible, without having recourse to complicated torments.”

Bentham also examined the issue of minimum and maximum of punishment. He
observed thus\(^8\):

> “The minimum of punishment is more clearly marked than its maximum. What
> is too little is more clearly observed than what is too much. What is not
> sufficient is easily seen, but it is not possible so exactly to distinguish an
> excess. An approximation only can be attained. The irregularities in the force
> of temptations, compel the legislator to increase his punishments till they are
> not merely sufficient to restrain the ordinary desires of men; but also the
> violence of their desires when unusually excited.

\(^7\) Id, pp. 399, 450
\(^8\) Id, p.401
The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most preparations, as on this side there has been shown the greatest disposition to err.”

Bentham also examined capital punishment. According to him, the most remarkable feature in the punishment of death, and that which it possesses in the greatest perfection, is the taking from the offender the power of doing further injury: whatever is apprehended, either from the force or cunning of the criminal, at once vanishes away; society is in a prompt and complete manner delivered from all alarm. According to him⁹:

“Death is the absence of all pleasures indeed, but at the same time of all pains. If it be determined to preserve the punishment of death, in consideration of the effects it produces in terrorem, it ought to be confined to offences which in the highest degree shock the public feeling – for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without having recourse to complicated torments.”

Punishment, says Ted Honderich¹⁰, is imposed on an offender, someone who is found to have broken a rule, to have done something prohibited. A judge cannot find someone to have broken the law, in this sense, if he is convinced that he has not done so. Nor can he find him to have broken the law if he does not investigate the matter in certain ways.

The magnitude of punishment is of importance. Punishment is an expression of society’s disapproval of the act and the degree of approval is expressed by the magnitude of punishment. A serious crime must be answered with a severe punishment, a minor misdemeanour with a lenient reaction.¹¹

The concept of punishment is explained by Hans Von Henting¹² as follows:

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⁹ Id., p.390
¹² HENTING HANS VON, PUNISHMENT – ITS ORIGIN, PURPOSE AND PSYCHOLOGY, 2 (1ST ed., WILLIAM HODGE AND COMPANY LTD., LONDON 1937)
“Punishment means the establishment of artificial danger. Punishment is organized hurt, an impairment of life organized in the form of laws, which society consciously uses to train humanity to avoid certain possible courses of action potentially injurious or hostile to itself. Punishment is imitation of precedents which in real life are hourly repeated: here lurks the injurious agent, and there, guarded by man’s living senses, wait the motor functions, and over both mechanisms is their great co-ordinator, the Brain. With sound cooperation the stimulus which cannot be overcome or surmounted will be avoided, circumvented, or rendered harmless by flight.

Punishment can only be tuned to the moral pitch of the average man in an average position of life. It must fail whenever these assumed conditions are in any way altered. Far from being a difficult problem, punishment would be a mere arithmetical exercise if sensitiveness were always normal and healthy.”

While discussing the development and future of punishment, Hans Von Henting observed thus:\ enroll

“The magical and religious foundations which we have excavated from under the visible walls of punishment do not only give an explanation of the form and contents of many means of punishment, but they, above all, help us to understand the tremendous tenacity with which capital, corporal and many derogatory punishments defend themselves in our emotional life against any rationalization.

The road of progress in penal law is curiously zigzag. The need for punishment surges up in strange rhythms, sinks and suddenly returns in new disguises of a return to mysticism.”

According to Robert G. Caldwell and William Nardini punishment is the penalty imposed by the State upon a person adjudged guilty of crime. It has these two essential elements: (1) public condemnation of antisocial behaviour, and (2) the imposition of unpleasant consequences by political authority. The infliction of punishment, therefore, always involves the intention to produce some kind of pain, which is justified in terms of its assumed values.

Jackson Toby in his celebrated article Is Punishment Necessary noted that most of the textbook writers have found the trend in modern countries toward humanizing punishment and toward the reduction of brutalities. They point to the decreased use of capital

\13 Id. p. 232
\14 CALDWELL, ROBERTS G. & NARDINI, WILLIAM, Criminal Courts and Procedure, FOUNDATIONS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, 229 (1st ed. BOBBS-MERRILL EDUCATIONAL PUBLISHING, INDIANAPOLIS 1977)
\15 TOBY, JACKSON, Is Punishment Necessary, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ED), 102-106 (LONDON INDIANA UNIVERSITY PRESS 1971)
punishment, the introduction of amenities into the modern prison by enlightened penology, and the increasing emphasis on nonpunitive and individualized methods of dealing with offenders, e.g., probation, parole, psychotherapy. The punishment is a vestigial carry-over of a barbaric past and will disappear as humanitarianism and rationality spread. Let us examine this inference in terms of the motives underlying punishment and the necessities of social control.

Jackson further discussed punishment as a means of sustaining the morale of conformists and referred to Emile Durkheim’s philosophy as follows:

“Durkheim considered punishment indispensable as a means of containing the demoralizing consequences of the crimes that could not be prevented. Punishment was not for Durkheim mere vindictiveness. Without punishment Durkheim anticipated the demoralization of “upright people” in the face of defiance of the collective conscience. He believed that unpunished deviance tends to demoralize the conformist and therefore he talked about punishment as a means of repairing “the wounds made upon collective sentiments.” Durkheim was not entirely clear; he expressed his ideas in metaphorical language. Nonetheless, we can identify the hypothesis that the punishment of offenders promotes the solidarity of conformists.

Durkheim anticipated psychoanalytic thinking as the following reformation of his argument shows: One who resists the temptation to do what the group prohibits, to drive his car at 80 miles per hour, to beat up an enemy, to take what he wants without paying for it, would like to feel that these self-imposed abnegations have some meaning. When he sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices were made in a good cause. If “the good die young and the wicked flourish as the green bay tree,” the moral scruples which enable conformists to restrain their own deviant inclinations lack social validation. The social significance of punishing offenders is that deviance is thereby defined as unsuccessful in the eyes of conformists, thus making the inhibition or repression of their own deviant impulses seems worthwhile. Righteous indignation is collectively sanctioned reaction formation. The law-abiding person who unconsciously resents restraining his desire to steal and murder has an opportunity by identifying with the police and the courts, to affect the precarious balance within his own personality between internal controls and the temptation to deviate.”

On the same point Beccaria in his historic work On Crimes and Punishments\(^\text{16}\) denounced retributive basis of punishment:

“The aim of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise.

\(^{16}\text{BECCARIA, CESARE, On Crimes and Punishments, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 119 (LONDON INDIANA UNIVERSITY PRESS 1971)}\)
Punishments, therefore, and the method of inflicting them, should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.

For a punishment to be efficacious, it is enough that the disadvantage of the punishment should exceed the advantage anticipated from the crime; in which excess should be calculate the certainty of punishment and the loss of the expected benefit. Everything beyond this, accordingly, is superfluous, and therefore tyrannical.”

The author further formed questionnaire as to what are to be the proper punishments for crimes:

“Is the death-penalty really useful and necessary for security and good order of society? Are torture and torments just, and do they attain the end for which laws are instituted? What is the best way to prevent crimes? Are the same punishments equally effective for all times? What influence have they on customary behaviour? These problems deserve to be analyzed with that geometric precision which the mist of sophisms, seductive eloquence, and timorous doubt cannot withstand.”

Beccaria noted that the scale of punishments should be relative to the state of the nation itself. Very strong and sensible impressions are demanded the callous spirits of a people that has just emerged from the savage state. A lightning bolt is necessary to stop a ferocious lion that turns upon the shot of a rifle. But to the extent that spirits are softened in the social state, sensibility increases and, as it increases, the force of punishment must diminish if the relation between object and sensory impression is to be kept constant. The weight of punishment and the consequence of a crime should be that which is most efficacious for others, and which inflicts the least possible hardship upon the person who suffers it; one cannot call legitimate any society which does not maintain, as an infallible principle, that men have wished to subject themselves only to the least possible evils.

Beccaria discussed the issue of the certainty of punishment and noted thus:

“The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men’s minds, and hope, that heavenly gift which is often our sole recompense for everything, tends to keep the thought of greater evils remote from us, especially when its strength is increased by the idea of impunity which avarice and weakness only too often afford.”

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17 Id., p.119
18 Id., p.127, 128
Speaking on the treatment of crime and criminal, in the House of Commons on July 25, 1919 as Home Secretary, Winston Churchill said:\(^{19}\):

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State – a constant heart searching by all charged with the duty of punishment – a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts toward the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.

Churchill pleaded for balance in society’s responses to crime – first, balance between the urge to punish and the recognition that the reclamation of offenders is in the societal interest and, second, balance between resort to the law’s authority to protect society and the respect for civil rights that is the cornerstone of a democracy. Can a nation’s people and their agents of criminal justice strike this balance in spite of the passions fuelled by crime? Whether or not the people have this regard toward criminals tells us much about their humanitarian regard for one another – the hallmark of social virtue.”

Justice V. R. Krishna Iyer in his celebrated article *Capital Punishment & Human Rights*\(^{20}\) wrote, “Let us, with humility and confidence and in all conscience, strive to lead kindly light amidst the encircling gloom. Taking a human life even with subtle rites and sanction of the law is retributive barbarity and violent futility, travesty of dignity and violation of divinity”. He discussed as to what is the existential approach to punishment? To this theory, he referred to the condensed statements of Jean Paul Sartre and Albert Camus, which are as under:

“... punishment is an artificial means of maintaining man’s bondage to an inauthentic restriction of absolute freedom and self-projection. ... If there is no nature, nothing is unnatural. If every man is unique, there is no consensus, if there is no consensus, there is no law, and hence nothing illegal. Since nothing is unnatural or illegal, man’s only punishment lies in the fact that his existence is shared by others.

The criminal always remains a human offender, and as human he is always free to learn new values and new adaptations. The imposition of punishment is justified only by its ability to re-educate an offender and thereby to return him to society as an integral human being.

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\(^{19}\) **JOHNSON, ELMER H., CRIME, CORRECTION AND SOCIETY, 561 (4\(^{th}\) ed., THE DORSEY PRESS, ILLINOIS)

\(^{20}\) **IYER, V. R. KRISHNA, CAPITAL PUNISHMENT & HUMAN RIGHTS, MINORITIES, CIVIL LIBERTIES AND CRIMINAL JUSTICE, 110 (PEOPLE’S PUBLISHING HOUSE 1980)**
Law intends to allow for the maximum exercise of freedom. Punishment intends to restore to the offended his mitigated freedom and to the offender a correct appreciation of his existential situation as a being-in-the-world with other freedoms. Punishment, then, is justified not by deterrence or prevention but by re-education. Punishment thus seeks to safeguard and maintain rather than to minimize the criminal’s freedom. (Crime and Justice, Vol.II Edited by Radzisowicz and Wolfang, pp 116, 117)

A judicial journey to the penological beginning reveals that social defence is the objective. The triple purposes of sentencing are retribution, draped sometimes as a public denunciation, deterrence, another scary variant, with a Pavlovian touch, and, in our era of human rights, rehabilitation, founded on man’s essential divinity and ultimate retrievability by raising the level of consciousness of the criminal and society. We may avoid, for the nonce, theories like “society prepares the crime, the criminal commits it”; or that “crime is the product of social excess” or that “poverty is the mother of crime”.

Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that society. And it is a virus from which society must seek protection. .. The prime function of punishment must clearly be the protection of that society. The Courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime.

Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive.

Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it becomes duty of the Court to impose on him such sentence as is prescribed by law. Penal laws, by and large, adhere to the doctrine of proportionality in

21 Maru Ram v. Union of India, (1981) 1 SCC 107, para 42
24 Gopal Singh v. State of Uttarakhand, (2013) 7 SCC 545 at 552
prescribing sentences according to culpability of criminal conduct. Judges in principle agree that sentence ought always to commensurate with the crime. In practice, however, sentences are determined on other relevant and germane considerations. Social impact of the crime, particularly where it relates to offences against women, cannot be lost sight of and per se requires exemplary treatment. Any liberal attitude of imposition of meagre sentence or too sympathetic view may be counterproductive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system.25

4.4 THEORIES OF PUNISHMENT

Punishment is a dynamic process which requires due consideration to achieve penal objectives. It is necessary to be clear and sure of our fundamentals vis-à-vis the theory of punishment. The traditional trinity of theories is retribution, deterrence and reformation/rehabilitation and sometimes a blended brew of all the three. These theories point out the objectives of punishment and rationale for sustaining the sentencing system.

The general policy which the courts have followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.26

What is done to the criminal is a very accurate index to the quality of any civilization.27 A given punishment theory stands as a model which is used as a point of reference for generating and evaluating punishment procedures.28

Jurisprudence, says Justice V. Krishna Iyer29, often reflects the values of the age and people and so changes from time to time. Criminal justice, likewise, responds to the ethos of a community although certain universal norms are being woven by the civilised march of mankind. Indeed, the modern trend of criminal justice is a blend with human rights, so much so no country, in its jurisprudence, is an island and the new world legal order directs the broad course of criminal law even in its penal dimension. The unconscious impact of the

27 Winston Churchill
28 GRUPP, STANLEY E. (ed), Introduction, THEORIES OF PUNISHMENT STANLEY, 5 (LONDON, INDIANA UNIVERSITY PRESS, 1971)
29 IYER, V.R. KRISHNA, Liberty – A Non-Negotiable Value, THE DIALECTICS & DYNAMICS OF HUMAN RIGHTS IN INDIA (YESTERDAY, TODAY AND TOMORROW), TAGORE LAW LECTURES, 332 (EASTERN LAW HOUSE 1999)
changes in the normative nuances in criminal sentences as reverence for human life and considerations of compassion and rehabilitation received larger liberalism is best witnessed in judicial attitudes.

Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. Ultimately, it becomes the duty of the courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed, etc. The courts should impose a punishment befitting the crime so that the courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise. 30

According to Sir John Salmond31, the ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all-important one, the others being merely accessory.

Various authors have opined different theories of punishments differently, which read thus:

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31 *Salmond, Sir John, Jurisprudence, 9th ed 141* (Sweet & Maxwell 1966)
4.4.1 DETERRENT THEORY

Deterrence is a valid punitive component of sentencing. Deterrence is the primary purpose of the State’s sanction. The objective of this theory is to deal with the offender in such a manner as to serve notice on potential offenders so as to deter them from committing crimes. People are believed to refrain from committing crime because of their fear for punishment. Application of swift, certain and severe punishment deters an offender from breaking the law again and such a punishment becomes an example to others in desisting from indulging in crimes.

Deterrence is the use of punishment to prevent others from committing crimes. The offender is punished so that he will be held up as an example of what happens to those who violate the law. The fact that crime continues to exist does not mean that punishment is not efficacious as a deterrent, since there is no way to determine how much crime there would be if criminals were not punished. Some persons abstain from murder because they fear the penalty, but many others do so because they regard murder with horror.

While discussing the mental classification of punishment, Sir John Salmond dealt with deterrent theory as follows:

“Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him.”

While discussing the mental classification of punishment, Hans Von Henting dealt with deterrent theory as follows:

“The effects of selection which penal law obtains by intimidation are not essentially more efficacious. As a psychological attempt to exercise compulsion, intimidation works in two directions. An association between the action threatened with punishment and the painful consequences of the action can only be established in the mind and emotional life of the punished person as a result of simple infliction of pain.

It would be important to find out whether it is just the severity of the threatened punishment which affects human prudence and whether the fact that

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32 Id
34 SALMOND, SIR JOHN, JURISPRUDENCE, 9th ed. 141 (Sweet & Maxwell 1966)
35 HENTING, HANS VON, Mental Classification of Punishment, PUNISHMENT – ITS ORIGIN, PURPOSE AND PSYCHOLOGY 135-138 (1ST ed., WILLIAM HODGE AND COMPANY LTD., LONDON 1937)
a deep gulf lies between threat and execution, does not make the severity of the threat illusory for many people who are sure of themselves, their strength and cleverness, or also who are unconscious of their stupidity.”

Deterrence was undoubtedly the major goal of punishment in recent times, and still is in many cases, and in many Courts, particularly with respect to adults. Deterrence is intended to operate by fear. The idea is that the sentence imposed shall be so unpleasant – so terrible, if the word be understood without exaggeration – that the offender will hereafter be afraid to repeat similar offences, and that others will be afraid to imitate his crime. If this were all, the more savage the sentence the better – as our ancestors apparently thought.36

Lord Justice Denning appearing before the British Royal Commission on Capital Punishment stated his views on deterrent aspect of punishment as follows:

“Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrong-doing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else … The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.”

Fear plays an important role in deterring most persons from the commission of legally prohibited acts, although other motives are of course, also operative. Since the threat of arrest and punishment is an appeal to fear, which for most persons is probably the strongest motive, it doubtlessly has a deterrent value. It is fallacious to argue, as many do, that because the volume of crime in proportion to the population has not diminished, or is rising (if such be the case), such a condition proves that the treatment of punishment is no deterrent.37 But though the threat of punishment has some deterrent value, it must be pointed out that a scientific system of penal law taking the point of view of modern psychiatry would not, in any real sense, deprive society of whatever deterrent effect such threat might have.38 The vital element of the possibility of lifelong incarceration if the individual is shown by scientific investigation

37 GUECK, SHELDON, Principles of a Rational Code, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 271, 276 (LONDON INDIANA UNIVERSITY PRESS 1971)
38 Id. p.276
to require it, may reasonably be expected to reinforce the natural deterrent effect of the threat of punishment.\textsuperscript{39}

4.4.2 PREVENTIVE THEORY

Preventive Theory aims to disable or prevent a person from committing crime repeatedly by imprisonment, surveillance or execution of the criminal. According to Sir John Salmond\textsuperscript{40}, “Punishment is, in the second place, preventive or disabling. For not only do we endeavour to deter offenders by fear, but also to disable them from repeating the offence by such penalties as imprisonment, death, exile or forfeiture of offence, as a secondary object of criminal law”.

4.4.3 RETRIBUTIVE THEORY

Retribution theory is outcome of vengeance which acknowledges the principle of ‘tooth for tooth and an eye for eye’. It is the pain which the offender is made to suffer because he has broken the law and which is proportioned according to the gravity of the offence. It helps to placate whatever passion for revenge the victim and his relatives and friends may have and so tends to regulate and control feelings that otherwise might be disruptive in organized society. It helps to unify society against crime and criminals.\textsuperscript{41}

According to Sir John Salmond\textsuperscript{42}:

“Retributive punishment in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion or retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation, which exists, not merely in the individual wronged, but also by way of sympathetic extension in the society at large.

It is scarcely needful to observe that, from the utilitarian point of view hitherto taken up by us, such a conception of retributive punishment is totally inadmissible. Punishment is in itself an evil, and can be justified only as the means of attaining a greater good. Retribution is in itself not a remedy for the mischief of the offence, but an aggravation of it.”

\textsuperscript{39} Id., p.277
\textsuperscript{40} SALMOND, SIR JOHN, JURISPRUDENCE, 9\textsuperscript{th} ed. 141 (Sweet & Maxwell 1966)
\textsuperscript{41} CALDWELL, ROBERTS G. & NARDINI, WILLIAM, Criminal Courts and Procedure, FOUNDATIONS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE 230 (1\textsuperscript{st} ed., BOBBS-MERRILL EDUCATIONAL PUBLISHING, INDIANAPOLIS 1977)
\textsuperscript{42} SALMOND, SIR JOHN, JURISPRUDENCE, 9\textsuperscript{th} ed. 141 (Sweet & Maxwell 1966)
Retribution, says Hegel, is revenge for an injury. He says\textsuperscript{43}:

“Punishment is only the manifestation of crime, the second half of which is necessarily presupposed in the first, retribution is the turning back of crime against itself. The criminal’s own deed judges itself.

You hurt me, and I will hurt you. Indeed that is its literal meaning. And if I cannot hurt you myself. I demand that you should be hurt by others. The desire to make the offender suffer, not because it is needed so that the guilt is purged, not also because suffering might deter him from further crime, but simply because it is felt that he deserves to suffer, is the essence of retribution.”

The retributivist defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves, and that it is highly desirable to provide for an orderly, collective expression of society’s natural feeling of revulsion toward and disapproval of criminal acts. This expression vindicates the criminal law and in so doing helps to unify society against crime and criminals.\textsuperscript{44}

An enlightened society will recognize the futility of severely punishing unavoidable retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings.\textsuperscript{45}

According to Immanuel Kant’s theory, the right of administering punishment is the right of the Sovereign as the Supreme Power to inflict pain upon a subject on account of the Crime committed by him. There exists a categorical imperative to punish criminals by an application of the \textit{lex talionis}. Punishment does not serve any end or purpose; it is an end in itself.

Ted Honderich in his celebrated book\textsuperscript{46} discussed traditional retributivism. He found that Immanuel Kant’s statement on retribution theory was one of the influential statements in the eighteenth century. Kant’s \textit{Philosophy of Law}\textsuperscript{47} provides thus:

\textsuperscript{43} \textit{CHHABRA, K.S., Theories of Punishment, Criminal Law & Criminology, K.D. Gaur, 686 (2002 DEEP & DEEP PUBLICATIONS PVT. LTD.)}
\textsuperscript{44} \textit{GRUPP, STANLEY E (ed.), Theories of Punishment, 6 (LONDON, INDIANA UNIVERSITY PRESS 1971)}
\textsuperscript{45} \textit{COHEN, MORRIS RAPHAEL, Reasons and Law, 60-61 (COLLIER BOOKS, NEW YORK, 1961)}
\textsuperscript{46} \textit{HONDERICH TED, Punishment – Its Supposed Justifications 11 (1st ed., HUTCHINSON & CO. (PUBLISHER) LTD., LONDON, 1969)}
\textsuperscript{47} Id at 195
“Juridical punishment can never be administered merely as a means for promoting another Good, either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime. For the man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right [i.e. goods or property]. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens. The penal Law is a categorical Imperative, and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the clear measure of it, according to the Pharisaic maxim: 'It is better that one man should die than that the whole people should perish.' For if Justice and Righteousness perish, human life would no longer have any value in the world."

Even if a Civil Society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a People inhabiting an island resolving a separate and scatter themselves through the whole world – the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realise the desert of his deeds, and the bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.”

Talking about retributive theory of punishment, Royal Commission on Capital Punishment in UK (1949-53) observed in para 52 of their report as under:

“In the first sense the idea is that of satisfaction by the state of the wronged individual’s desire to be avenged; in second, it is that of the state marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offence. The modern penological though discounts retribution in the sense of vengeance; retribution in the sense of reprobation must always be an essential element in any form of punishment.”

It is further stated in the report:

“Punishment presupposes an offences and the measure of punishment must not be greater than the offences deserves. Moreover, we think that it should be recognized that there is a strong and wide-spread demand of retribution in the sense of reprobation.”

In its punitive sense, retributive theory emphasizes that punishment should not be inflicted not merely to attain certain ends, but solely because the accused has committed a crime. It is undoubtedly true that the wrongdoer is punished not only for deterrent, reformative or preventive purposes but mainly because he deserves it. If it were not true, all
punishments would be rendered unjust because that else could be more immoral than to punish a criminal for the sake of deterring others. Thus, in the punitive sense of the retributive theory, what else punishment would be more deserving than the sentence of death for murderous crimes.

4.4.4 MERGING OF ELEMENTS OF DETERRENCE & RETRIBUTION

Theories of Deterrence and Retribution as classified above seem to be two different theories but having more or less same goal both get merged into the one and same element. This merging of elements of both the theories stands explained by the Law Commission of India as follows:

“The retributive object of capital punishment has been the subject-matter of sharp attack at the hands of the abolitionists. We appreciate that many persons would regard the instinct of revenge as barbarous. How far it should form part of the penal philosophy in modern times will remain a matter of controversy. No useful purpose will be served by a discussion as to whether the instinct of retribution is or is not, commendable. The fact remains however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct the feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence.”

4.4.5 REFORMATORY THEORY

This theory in the widest sense brings a change in mental habitus of a criminal whereby he is supposed not to offend again. By this theory of punishment, a society feels that the evil-doer will no longer be a danger to the peace and comfort of other citizens.

India, like every other country, has its own crime complex and dilemma of punishment. Solutions to tangled social issues do not come like the crack of dawn but are the product of research and study, oriented on the founding faiths of society and driving towards that transformation. Man is subject to more stresses and strains in this age than ever before and a new class of crimes arising from restlessness of the spirit and frustration of ambitions has erupted. 

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49 GAUR, K.D., CRIMINAL LAW & CRIMINOLOGY, 440 (2002 DEEP & DEEP PUBLICATIONS PVT. LTD.)
50 LAW COMMISSION OF INDIA, REPORT NO.35, 265 (1967)
Punishment is to reform, that is, to use pain and fear to direct the criminal away from crime and toward socially accepted forms of behaviour. But every program of reformation must have positive as well as negative elements, and so as this point punishment comes into direct contact with treatment in the correction of offenders.  

It is a common belief that fear of death keeps people deterred from committing serious crimes. It is a dull delusion that crimes will be exiled by severe punishments. Despite there being death penalty in the Penal Code, the graph of crime stands on the same footing or the higher one. Fear of death does not deter the hardened criminals. In such a scenario, society needs to protect itself by rehabilitating the accused or isolating them. The reformatory theory emphasizes the need to reform and rehabilitate a criminal so as to make him a responsible member of the society.  

While, deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime, to espouse a monolithic theory of its deterrent efficacy is unscientific and so we think it right to shift the emphasis, to accept composite factors of penal strategy and not to put all the punitive eggs in the ‘hanging’ basket but hopefully to try the humane mix.  

The human today, says Justice Krishna Iyer, views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defense.  

There is a treasure in every human being and never give up hope of rehabilitating him into finer personhood through appropriate therapeutics. Even the worst criminal, once his soul is recovered from the garbage of gross greed, carnal tension and other criminal vices becomes a good member of society.  

Law is evolutionary, not atavistic, dynamic in terms of the values it activates, not repressively red in tooth and claw. The time is ripe for social scientists to rehabilitate Law

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55 IYER, V.R. KRISHNA, Liberty – A Non-Negotiable Value, THE DIALECTICS & DYNAMICS OF HUMAN RIGHTS IN INDIA (YESTERDAY, TODAY AND TOMORROW), TAGORE LAW LECTURES 330 (EASTERN LAW HOUSE 1999)
and Man. Generation after generation man is born anew. Each generation gives rise to new quests for fulfilment, new aspirations in life and new standards of thought and action, beyond obdurate obscurantism. .. Law is for life, let us declare from this whispering gallery, and look beyond death penalty lying buried on the debris of civilisation to a Human tomorrow fashioned by the new-frontiersmen carving Cosmos out of Chaos.\(^{56}\)

Crime, like sin, proceeds from the mind, though committed by the body, and it is obvious that if the mind can be altered so that the individual no longer wishes to do that which transgresses the law, the result will be more satisfactory, so far as the individual is concerned, and so far as society as a whole is concerned, than any other possible treatment.\(^{57}\)

According to Sir John Salmond\(^{58}\):

> “Punishment is in the third place reformative. Offences are committed through the influence of motives upon character, and may be prevented either by a change of motives or by a change of character. Punishment as deterrent acts in the former method; punishment as reformative in the latter.

The reformatory theory alone is insufficient. A compromise is necessary in which deterrent theory must have the last word, for this is the primary and essential end of criminal law.

It is needful in view of modern theories and tendencies to insist on the primary importance of the deterrent element in criminal justice. The reformatory element must not be overlooked, but neither must it be allowed to assume undue prominence.”

According to Enrico Ferri, in social life penalties have the same relation to crime that medicine has to disease. After a disease has developed in an organism, we have recourse to a physician.\(^{59}\) To cure the disease in criminals, we need to adopt therapeutic attitude like medical professionals. Karl Menninger in his write up on *Love against Hate*\(^{60}\) has dealt with this issue as under:

> “Doctors charge fees; they impose certain penalties or prices but they have long since put aside primitive attitudes of retaliation toward offensive patients. A patient may cough in the doctor’s face or may vomit on the office rug; a patient may curse or scream or even struggle in the extremity of his pain. But

\(^{56}\) Id. 54, pp.135, 136  
\(^{58}\) SALMOND, SIR JOHN, *JURISPRUDENCE*, 9th Ed p.141 (Sweet & Maxwell 1966)  
\(^{59}\) FERRI, ENRICO, *The Positive School of Criminology. THEORIES OF PUNISHMENT*, GRUPP, STANLEY E (ed), 119 (LONDON INDIANA UNIVERSITY PRESS 1971)  
\(^{60}\) MENNINGER, KARL, *Love Against Hate, THEORIES OF PUNISHMENT*, GRUPP, STANLEY E (ED), 248 (LONDON INDIANA UNIVERSITY PRESS 1971)
these acts are not punished. Doctors and nurses have no time or thought for
inflicting unnecessary pain even upon patients who may be difficult,
disagreeable, provocative, and even dangerous. It is their duty to care for
them, to try to make them well, and to prevent them from doing themselves or
others harm. This requires Love, not Hate.

There is another element in the therapeutic attitude i.e. the quality of
hopefulness. If no one believes that the patient can get well, if no one — not
even the doctor — has any hope, there probably won’t be any recovery. Hope
is just as important as love in the therapeutic attitude.97

According to Henry Weihofen,61 the rehabilitative ideal not only is projected as the
most efficient way to protect society against the likelihood of the offender re-lapses into
crime, but also is motivated by humanitarianism, a belief in the worth and dignity of every
human being and a willingness to expand effort to reclaim him for his own sake and not
merely to keep him from again harming us. The main objective is to change the person’s
attitude and to help him cope with his circumstances, gain insight into his own motivations
reorient his feelings, and achieve a measure of self control. If we believed strongly enough in
the rehabilitation objectives, we might wish to treat the convicted offender until we were sure
they would not offend in the future. This would protect society from a lot of people and in the
meantime presumably rehabilitate them.

A society which is truly cultured - a society which is reared on a spiritual foundation
like the Indian society - can never harbour a feeling of revenge against a wrong doer. On the
contrary, it would try to reclaim the wrong-doer and find the treasure that is in his heart. The
wrong-doer is as much a part of the society as anyone else. Let it not be forgotten that no
human being is beyond redemption. 62

From the foregoing, it becomes clear that as crime being a dynamic concept changes
with the growth of society, the prescription of punishment also changes. Punishment, on some
occasions, may seem an artificial danger so as to deter potential offenders, sometimes it
creates effective deterrence; sometimes it re-educate a convicted offender to make him a
responsible person of the society; sometimes by convicting an offender it seem to be giving
solace to the public; and it seems to be armoury of the State for maintaining law and order.
Different societies have adopted different theories of punishment which have interrelationship

61 WEIHOFEN, HENRY, Punishment and Treatment : Rehabilitation, THEORIES OF PUNISHMENT, GRUPP,
STANLEY E (ed), 248 (LONDON INDANA UNIVERSITY PRESS 1971)
and should not be considered separately and independently of one another. As on date, punishment being art involves balancing of each and every theory of punishment emphasizing the changing need of the society.

People are believed to refrain from crime because they fear punishment. Beccaria claimed capital punishment was justified in only two instances; first, if an execution would prevent a revolution against a popularly established government, and secondly, if an execution was the only way to deter others from committing a crime. No other punishment, says Sir James Fitzjames Stephen, deters men so effectually from committing crimes as the punishment of death. Since people fear death more than anything else the death penalty is the most effective deterrent. It has been available from generation to generation. Even today though used in rarest to rare cases, death penalty is the most deterrent punishment.

4.5 INFLUENCE OF THE RELIGIONS ON CAPITAL PUNISHMENT

Capital punishment is an ancient sanction. We find references of capital punishment in our ancient scriptures and law books. A bare perusal of the ancient legal system would show that it had established a duty based society. However, the crime existed in all societies and continued to emerge as a challenge for all the rulers and the society. Supremacy of the law was the basis on which the edifice of ancient administration was built up. 63 35th Report of the Law Commission of India has presented a detailed study 64 on ancient legal system so as to find out the relevancy of capital punishment in different periods under different religions. It is crystal clear that capital punishment was one of the punishments in ancient India.

4.6 LEGISLATIVE DEVELOPMENT

In the year 1834, First Law Commission of India was constituted under the Chairmanship of Lord Thomas Babington Macaulay to suggest a comprehensive Penal Code for India. On 14th October 1837, a draft Code was prepared by the Commission. Thereafter, in 1845 Second Law Commission was constituted, comprising of Members Mr. C.H. Cameron and Mr. D. Eliott, which submitted its report in two parts – one on 23rd July 1846 and other on 24th June 1847. The first report dated 23rd July 1846 followed Notes dated 8th July 1948 by Mr. J.M. Macleod. The second report dated 24th June 1847 was studied by Sir

63 JOIS, RAMA, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE, III (LUCKNOW, EASTERN BOOK COMPANY 1990)
64 This survey finds mentioned in Appendix XXIII of the 35th Report (Vol.II) of the Law Commission of India, 1967 p.191
Lawrence Peel, Chief Justice of the Supreme Court at Fort Williams (previously Advocate-General) and gave their observations to the Government in 1848. The Draft Code was thereafter revised by a committee of Drinkwater Bethune and Sir Barnes Peacock etc. and was submitted to the Legislative Council in 1856. The Draft Code after thorough discussion was finally passed by the Legislative Council and it received the assent of the Governor-General in Council on 6th October 1860. The Indian Penal Code (XLV of 1860) came into force from 1st January 1862.

A precise survey of the legislative development leading towards enactment of Indian Penal Code (XLV of 1860) would be sufficient for the purpose of this study.

The Draft Penal code (First Report) proposed enactment of a uniform Penal Code to take the place of the rules of Muslim laws and the various Regulations modifying it or in Bombay codifying the Penal Law and explaining the scheme of the proposed Code, the Indian Law Commissioners proceeded to set out the recommendations in the form of a Bill. Under clause 40, one of the punishments to which offenders were liable was death. The next was transportation. Clause 41 gave power to the Government of the Presidency to commute death sentence without the offender’s consent.

As regards death sentence, the framers of the Draft code observed thus65:

“First among the punishments provided for offences by this Code stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed.”

The framers of the Draft Code did not find the offences of robbery and rape to be placed in the same class with murder. They observed, “To the great majority of mankind, nothing is so dear as life. And we are of opinion that to put robbers and ravishers, and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.” Regarding the power of commutation, it was observed that it was evidently fit that the Government should be empowered to commute the sentence of death (without consent of the offender) for any other punishment.

Mr. J.M. Macleod presented his Notes on the first report dated 23rd July 1846 of the Law Commissioners on 8th July 1948. In his Notes, he discussed the punishment of death and observed that the punishment of death is only employed in cases of murder and of the highest

offence against the State. If, still retaining that punishment, it should be deemed advisable to confine the use of it within yet narrower limits.

Finally, the Draft Code came to be enacted as uniform Penal Code. The framers of the Code expressed their willingness to remove the defects of the Code, if any. It is worthwhile to reproduce the Preamble of the Indian Penal Code (XLV of 1860) as under:

“In attempting to place the whole law of a country in a written form before those who are to administer, and those who are to obey it such a mutual relation will be found to exist between the several parts of the law that no single and separate part can be put into writing in a perfect form, while the other parts remain imperfect. That portion, be it what it may, which is selected to be first formed into a Code, with whatever clearness and precision it may be expressed and arranged, must necessarily partake, to a considerable extent, of the uncertainty and obscurity in which other portions are still left.

Such is the relation between law generally and that department of it which defines offences and punishes them, that uncertainties in other portions of the law must especially be felt, if the criminals branch is the one first selected to be formed into a Code. For, in every system of law, the department which contains the penal provisions of the law is added as a guard to the rest of the system, the existence of which, in some form or other, is assumed. A Penal Code assumes that there exist laws creating and defining rights, imposing duties, and providing means for the protection and enforcement of these rights and duties; and that what is commanded or authorized by these laws may well be ascertained. The provision of a Penal Code are only some of the means of compassing' the ends of substantive laws, which are the laws that define civil rights and duties. The rights, duties, and powers which these laws create are secured by the penal law, which may be regarded as a part of the subsidiary law for causing the principal laws to be observed and executed. Some acts in breach of these principal laws are thought fit, on account of the mischievous consequences they have a natural tendency to produce, to be constituted crimes or offences; and to put a stop to such consequences, there is annexed to every such act a certain artificial consequence consisting of punishment to be inflicted on the doer.

A Penal Code, that is a Code of offences and punishments, is then an auxiliary to the other departments of the law. If many important questions concerning rights and duties are undetermined by the Civil law, it must often be doubtful whether the provisions of the Penal law do or do not apply to a particular case: we cannot know correctly if any given act is to be accounted an offence under the latter, while it is uncertain what recognition the Civil law gives to the right which has been infringed. A Penal Code therefore necessarily partakes of the vagueness and uncertainty of the rest of the law. It cannot be clear and explicit while the substantive Civil law and the law of procedure are dark and confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot always be certain whether those rights have been attacked or those powers exceeded.
But if a Code of offences and punishments is necessarily imperfect while other parts of a system of law are so, its defects may, in some degree, be removed by the mode in which the definitions of offences are framed. Seeing that this portion of adjective law should have regard rather to the motives and intentions of men's acts than to their strict conformity to law or to any loss or damage wrongfully caused by them, it may be possible to define an offence in such a way as to avoid nice distinctions of substantive Civil law, and to provide punishments for grave infractions of rights without encountering difficult questions concerning the precise nature of those rights, or the things to which they extend, or the persons in whom they are vested.

The Indian Penal Code, although it comes into operation without the aid of a Code defining Civil rights, has this advantage that the law of procedure both in Civil and Criminal cases has been, in great measure, fixed and codified. Many questions will doubtless still arise occasioned by the uncertainty of other parts of the law, to perplex the criminal tribunals: but it will be found that the definitions and other provisions of this Code are framed to obviate, as much as may be, such difficulties.”

The Indian Penal Code, 1860 paved the way for legal reforms in criminal law in India. Before dealing with the prevalent laws relating to capital punishment and judicial trends, it would be worth to mention the historical parliamentary debates.

4.7 PARLIAMENTARY DEBATES

It is needless to point out that the debate on “to hang” or “not to hang” between the abolitionists and the retentionists of capital punishment has continued in full swing for many decades. This debate has not only continued between the jurists on open platforms but it has also been an issue inside the Legislative Assembly/Parliament in pre-independence and post-independence era. Several attempts have been made to remove death penalty from the statute book but every effort vent in vain. Every time, there has been a mix reaction of the parliamentarians on the issue.

Before analyzing the parliamentary debates, it would be pertinent to precisely refer to the developments. During the British Rule, attempts were made to procure the abolition of capital punishment. On 17th February 1931, an Abolition Bill was introduced in the legislative assembly but a motion for circulation of the Bill was negatived after reply of the then Home Minister. On 24th March 1933, Shri Gaya Prasad Singh made an unsuccessful attempt to abolish the punishment of death for offences under the Indian Penal Code. On 22nd March 1946, on query of Seth Govind Das as to whether Government would consider the proposal for the abolition of capital punishment at least for the political prisoners?, the Home
Minister replied that the Government of India do not think it wise to abolish capital punishment. On 29th November 1948, Shri Z.H. Lari while discussing draft Article 11A also discussed abolition of capital punishment in the Constituent Assembly and suggested insertion of Article 11B in the Draft Constitution seeking abolition of capital punishment except for sedition involving use of violence. However, on 30th November 1948, after detailed discussion, the amendment was put to the voting by Dr. B.R. Ambedkar and the same was negatived. Again on 29th March 1949, Lala Raj Kanwar drawn attention of the Government to abolish capital punishment and Shri Sardar Vallabhbhai Patel replied that the present is considered inopportune for the abolition of capital punishment. On 24th August 1956, Shri Mukund Lal Agarwal presented a bill in first Lok Sabha for abolition of capital punishment and leave was granted. After detailed discussion, on 23rd November 1956, the bill was negatived.

4.7.1. PARLIAMENTARY DEBATES : RAREST OF RARE FORMULA

It is said that “Rarest of Rare” formula in death sentencing regime came to be evolved by the Supreme Court of India. However, a bare perusal of the Parliamentary Debates shows that “Rarest of Rare” formula came to be suggested in the Parliament of India in a debate on Capital Punishment on 23rd November 195666. One of the Members of the Parliament, Shri Raghubir Sahai observed thus:

“The arguments of Mr. Agrawal do not make out a very good case for the abolition of capital punishment here and now because in considering this matter we have to consider also the conditions in which a particular country at a particular time. It is quite true that capital punishment has been abolished in many countries and there the crime of murder may not have increased. But to apply that argument in India in the year 1959 when still we find that there are vast tracts of country where gangs of Man are roaming about will not be proper. The leaders of those gangs may be dead. But their followers are still there. They do all sorts of havoc. They play with life. It will not be discreet on the part of this august House to entertain this Bill for the abolition of Capital punishment here and now. The conditions in our country are entirely different. I can say that if any punishment in India has got a deterrent effect, it is the capital punishment. We find that the High Courts and the Supreme Court are very very cautious and they are very reluctant to maintain the capital punishment. Only in extreme cases, they would award that punishment.

66 Lok Sabha Debates, Criminal Law Amendment Bill (Reg.: Abolition of Capital Punishment), 23rd November 1956 Volume 9 p. 915
The present state of society does not permit us to say that the abolition of the capital punishment will be to the good of the country and to the society in which we live. To say that capital punishment should be abolished, I think, will be something very indiscreet.

My motion wants that this important matter should be placed before the country, and public opinion should be elicited.”

Shri Pandit Thakur Das went on to continue the discussion. He advocated retaining the sentence of death in rarest cases. According to him, it would not be legally valid to abolish capital punishment. Following are the excerpts from his discussion:

"मैं श्री मुकुन्द लाल अग्रवाल को मुबारकबाद देता हूँ कि उन्होंने एक ऐसे मजमन को इस बिल के अन्दर लाकर हाउस के सामने रखा है जो निहायत जस्ती था और जो डिबेटबुल (बादविवाद के योग्य) भी है।

मैं इस दोष को मानता हूँ कि रेडर कंसेज (किसी मामलों) में फांसी की सजा होनी चाहिए क्योंकि इसे जमेंट ने हमेशा ही सर्टिफीड (निरस्त) नहीं हो सकती। इसलिए इस सज़ा को उन कंसेज के लिये ही होना चाहिए जिसे सर्टिफीड हो।

अभी इस हाउस के रूबरू बड़े जोर से महात्माओं की बात कहीं गई है। मैं अपने को इस काबिल नहीं समझता हूँ कि मैं महात्माओं के मुताबिक कुछ कह सकूँ कि उन की विच (लक्ष्य) क्या थी। लेकिन मुझे मालूम है कि महात्मा गांधी की ब्लिंग (आर्थिक) उन लोगों के लिये थी जो रेडर्स (आक्रमणकारी) का मुकाबला करने के लिये कास्टर गये थे। मुझे मालूम है कि गीता में कहा गया हैः

“परित्राणाय साधूनाम, विनाशायच दुष्कृतां, धर्म संस्थापनाथृयं, संवभामी युगे युगे।”

दुष्कृतां के विनाश के लिये मैं जन्म लेता हूँ। जुर्म के लिये साप्त हार्टडनेस (समयद्वार) नहीं है। किसी सूरत में हक नहीं है कि कोई आदमी किसी आदमी की जान ले। हमारे यहां शास्त्रों में लिखा हुआ है कि जो आउटला (आतातायी) लोग हैं उन को मार देना कोई जुर्म नहीं है।

मैं अन्त में इसना ही कहना चाहता हूँ कि रेडरस कंसिस में ही परिशमेंट आफ धेअ (मुख्यदंड) रखा जाय लेकिन इसको रैलोलिक लीगली जायज (विधि की दृष्टि से उद्धित) नहीं होगा, पोलिटिकली (राजनीतिक दृष्टि से) जायज नहीं होगा। और न ही मारल पाइंट आफ व्यू (राजनीतिक दृष्टि से) जायज होगा।"
On 25th April 1958, a resolution for abolition moved in the Rajya Sabha by Shri Prithvi Raj Kapur, Member of Parliament was withdrawn after debate. On 25th August 1961, a further resolution was moved in the Rajya Sabha by Smt. Savitry Devi Nigam, Member of Parliament which was negatived after discussion. On 21st April 1962, finally the resolution moved in the Lok Sabha by Shri Raghunath Singh, Member of Parliament received more serious attention. Many parliamentarians including Dr. L.M. Singhvi, Shri Bade and Shri Bai Krishna etc. moved amendments seeking constitution of a Commission for examining the issue. After discussions at length, the resolution was withdrawn on assurance of the Government that the matter will be forwarded to the Law Commission of India for consideration in the context of its review of the Indian Penal Code and the Code of Criminal Procedure. However, the matter was not referred to the Law Commission. Thereafter, on 19th December 1963, a question was put in the Rajya Sabha on the subject. The Government again gave an assurance that a copy of the debates that had taken place in the Rajya Sabha in 1961 on the resolution of Smt. Savitry Devi Nigam would be forwarded to the Law Commission of India. This progress led to the consideration of the issue by the Law Commission of India in its 35th Report (1967).

4.7.2 **REFERENCE TO THE LAW COMMISSION OF INDIA**

On reference by the Parliament, the Law Commission of India extensively considered, in its 35th report, the issue of retention or abolition of death sentence. After great discussion, the Law Commission concluded that “having regard to the conditions in India, to the variety of the social-upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, we do not think that the country can risk the experiment of abolition of capital punishment”.  

**Development after 35th Report:**

After submission of the 35th report, it was expected that the controversy will be put to rest but in fact the development at transnational and regional level led abolition of death sentence in one country to another and it also continued to ignite the fuel seeking abolition of death sentence in India despite their being increase in crime rate and coming into picture more crimes within the scope of our criminal justice system.

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67 Lok Sabha Debates, Resolution Regarding Abolition of Capital Punishment, 21st April, 1962 Volume 1 p.307
It is pertinent to mention here that after six years of the 35th Report, unsuccessful challenge was made to the constitutional validity of capital punishment before the Supreme Court in *Jagmohan Singh v. State of UP*[^69]. Subsequent to the decision in *Jagmohan Singh’s case*, three developments took place i.e. *firstly*, the 1973 Cr.P.C. amendment came into existence that [under Section 354(3)] required special reasons to be mentioned for inflicting death sentence; *secondly*, in *Maneka Gandhi v. Union of India*[^70] the Supreme Court of India held that every law of punitive detention both in its procedural and substantive aspects must pass the test of reasonableness on a collective reading of articles 14, 19 and 21 of the Constitution of India. In *Rajendra Prasad v. State of U.P.*[^71], the Court held that the special reasons necessary for imposing the death penalty must relate not to the crime but to the criminal. It could be awarded only if the security of the state and society, public order and the interests of the general public compelled that course. *Thirdly*, there was a development at international level. The International Covenant on Civil and Political Rights, 1966 came into force in 1976 and India being signatory to this covenant committed itself to the progressive abolition of death penalty. Therefore, a need had arisen for consideration of the constitutional validity of the death penalty. Finally, all these aspects fell for consideration before a five-Judge Bench of the Supreme Court in *Bachan Singh v. State of Punjab*[^72].

In *Bachan Singh*, the Court considered the suggestions (aggravating circumstances) given by the learned counsel concerning the crime as follows:

“Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(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 of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

[^69]: *Jagmohan Singh v. State of UP*, (1973) 1 SCC 20
[^70]: *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621
The Court further considered mitigating circumstances (concerning the accused) as suggested by the learned counsel as follows:

“Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”

For aggravating circumstances, the Court observed that “there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.” For mitigating circumstances, the Court observed that “we will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.”

The majority view of judges in this case affirmed the decision in Jagmohan Singh and overruled Rajendra Prasad insofar as it sought to restrict the imposition of death penalty only in cases where the security of the state and society, public order and the interests of the general public were threatened. The Court observed that “judges should never be bloodthirsty. 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 held that “the provision of death penalty as an alternative punishment for murder is not unreasonable and is
in public interest. The impugned provision in section 302 Indian Penal Code violates neither the letter nor ethos of Articles 19 or 21 of the Constitution. The normal sentence for murder is life imprisonment and the sentence of death can be passed only in gravest cases of extreme culpability.”

In *Machhi Singh*, the “rarest of rare cases” formula emerged in *Bachan Singh* once again engaged attention of the Court as the identification of the guidelines spelled out in that case in order to determine whether or not death sentence should be imposed was creating problem and required to be addressed. The Court noted the reasons why the community as a whole does not endorse the humanistic approach reflected in ‘death sentence in no case’ doctrine as under:

“1. When a member of the community violates the ‘reverence for life’ principle, on which the very humanistic edifice is constructed, by killing another member, the society may not feel itself bound by the shackles of this doctrine.

2. When ingratitude is shown instead of gratitude by ‘killing’ a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. But the community may sanction death penalty in the rarest of rare cases when its collective conscience is shocked.”

The Court further noted that “in rarest of rare cases 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 irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward, or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in
circumstances which arouse social wrath; or in cases of ‘bride burning’ or ‘dowry deaths’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.”

The Court noted the following guidelines which emerged from *Bachan Singh* will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

“(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the ‘crime’.

(iii) Life imprisonment is the rule and death sentence is an exception. 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 provided, 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.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.”

The Court further observed that the following questions may be asked and answered as a test to determine the ‘rarest of rare’ case in which sentences can be inflicted:

“(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?”
The Court finally held that “if upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest or rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”

Finally, the Supreme Court streamlined death sentencing regime in *Bachan Singh* which was further strengthened in *Machhi Singh*. It was supposed that the law relating to capital punishment stood streamlined. However, on analysis of the cases, it is true that the decisions in both these cases have not been followed uniformly in subsequent decisions thereby giving room for disparity in sentencing by different Benches in similar cases. Few more decisions of the Supreme Court came into being narrowing the path settled by *Bachan Singh* and *Machhi Singh*. In certain similar cases, different punishments have been awarded by different Benches of the Supreme Court of India thereby giving way to the opinion that decisions in death sentence cases have become judge-centric.

Despite there being very articulated decisions in *Bachan Singh* and *Machhi Singh*, the constitutional validity of death penalty has been challenged time and again in the Supreme Court of India. One such challenge came for consideration in *Shashi Nayar v. Union of India* and it was urged that the view taken in *Jagmohan Singh* and *Bachan Singh* is incorrect and therefore it requires reconsideration by a larger bench. However, the appeal was dismissed.

It is pertinent to mention here that there have been very cases where the Supreme Court has put the guidelines in the abovementioned celebrated decisions into the dock. In *Aloke Nath Dutta*, the Supreme Court noticed different decisions by different Bench on similar facts and also growing demand in the international fora for abolition of death sentence. The Court also put a question that in absence of a sentencing policy in clear cut terms, what would constitute a rarest of rare case. In *Swamy Shraddananda (2)*, the Supreme Court observed that “the inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results and the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal

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73 *Shashi Nayar v. Union of India*, (1992) 1 SCC 96
75 *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767
administration of justice.” The Court further found it necessary “to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission” and held that “this would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology.” In Santosh Kumar Satishbhushan Bariyar, the Court observed that “the claim of sentencing to being a principled exercise is very important to the independent and unpartisan image of judiciary.” The Court further noticed international development on death penalty and desired to have a credible up-to-date research by Law Commission of India or National Human Rights Commission. In Mohd. Farooq Abdul Gafur, the Supreme Court once again noted the disparity in capital sentencing and observed that there has to be an objective value to the term “rarest of rare”, otherwise it will fall foul of Article 14. In Sangeet, the Supreme Court observed that “though Bachan Singh intended “principled sentencing”, sentencing has now really become Judge-centric and this aspect of the sentencing policy seems to have been lost in transition, therefore, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in Bachan Singh.” The Court further dealt with the provisions of Section 432 and held that “the appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.” In Shankar Kisanrao Khade, the Supreme Court observed that “while the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. This may also need to be considered by the Law Commission of India.” In Ashok Debbarma, the Supreme Court observed that “arbitrariness, discrimination and inconsistency often loom large when we analyse some of the judicial pronouncements awarding sentence. Of course, it is extremely difficult to lay down clear-cut guidelines or standards to determine the appropriate sentence to be awarded.

79 It is pertinent to mention here that the ruling of the Supreme Court in Sangeet disagreeing with Swamy Shradhannanda (2) and holding that the Court cannot prohibit the State from granting remission came to be overruled by the Supreme Court in V. Sriharan.
Even the ardent critics only criticise, but have no concrete solution as such for laying down a clear-cut policy in sentencing.”

262nd Report:

The decisions in Bariyar and Khade led the Law Commission of India to once again study (in its 262nd Report) “the issue of the death penalty in India to allow for an up-to-date and informed discussion and debate on the subject”. The Law Commission also examined the observations of the decisions in Alok Nath Dutta, Swamy Shraddananda (2), Gafur, Sangeet and Debbarma. The Law Commission of India had an occasion to reappraise the death sentencing regime in India by doing some empirical research with new techniques and to bring out some effective suggestions but whole exercise went in vain. The Law Commission in a surprising way recommended “abolition of death penalty for all crimes other than terrorism related offences and waging war”. The Law Commission noted that “nevertheless, education, general well-being, and social and economic conditions are vastly different today” and that the decline in murder rate raises question about deterrent effect of death penalty. In opinion of the Researcher such a statement is nothing but an *ipsi dixit* of the learned members of the Law Commission. The Researcher has examined decisions of the Supreme Court, Law Commission’s 35th Report, pre-Bachan Singh and Machhi Singh decisions and thereafter till 2015. By passage of time, India has developed a lot and avowedly socio-economic conditions have improved, with ups and downs in rural and urban areas. But what’s the impact of this improvement is need to be examined seriously. The Supreme Court in Mofil Khan\(^2\) observed that criminal justice reform and civil rights movement in India has historically only paid considerable attention to the rights of the accused and neglected to address to the same extent the impact of crime on the victims. The Law Commission seems to have failed to examine the circumstances prevailing in India. The Report lacks credible research having no up-to-date discussion and debate on the subject and therefore, the Report merits rejection.

The Law Commission of India in its 262nd report on the issue in question has failed to resolve the concern shown by the Supreme Court in Alok Nath Dutta, Swamy Shraddananda (2), Gafur, Sangeet and Debbarma. Therefore, the debate remains at the same footing. It is also worthwhile to notice that some members of the Law Commission, including Ms. Justice Usha Mehra and Shri P.K. Malhtora, Secretary, Ex-Officio Member,

Law Commission of India, favoured retention of death sentence. Dr. Sanjay Singh, Secretary, Ministry of Law & Justice, desired to get the matter examined further so as to find out what would constitute “rarest of rare case”. It is also pertinent to mention here that the Report was submitted to the Government of India on 31st August 2015. It may also be noticed from the report that Dr. Sanjay Singh gave his opinion on 28th August 2015. It also finds mentioned in the opinion of Shri P.K. Malhotra that the report was circulated to him for his opinion only on 29th August 2015. Having regard to these facts, the report if seen from this viewpoint also appears to be questionable.

The 262nd Report is pending consideration with the Government. The Report needs to be rejected by the Government.

4.8 LAW RELATING TO CAPITAL PUNISHMENT

After enactment of the Code, there have been amendments from time to time relating to the law on capital punishment. In comparison to the prevailing law on capital punishment with the past, one can notice a sea-change. In pre-1955 position83, the normal rule was to sentence to death a person convicted for murder and to impose the lesser sentence for reasons to be recorded in writing. The extreme penalty was to be inflicted unless special reasons could be found to justify the lesser sentence. The 1955 amendment84 in the Code of Criminal Procedure left the Courts “free to award either sentence”. With the 1973 amendment85, a significant change came into practice. The life imprisonment for murder became a rule and capital punishment an exception to be resorted to for the reasons to be stated.

There are different laws which provide for the imposition of capital punishment, which are mentioned hereunder:

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83 Section 367 (5) Cr.P.C. “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 the reasons why sentence of death was not passed”.
84 By the Amendment Act 26 of 1955 a new sub-section, sub-section (5), was substituted for the former sub-section (5) which does not contain the provision making it incumbent for a judge to record his reasons for imposing a lesser penalty. The discretion of the court in deciding whether to impose the sentence of death or of imprisonment for life became wider.
85 By the Code of Criminal Procedure, 1973 (Act 2 of 1974), sub-section (3) to Section 354 came to be introduced: “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”
Section 53 of the Indian Penal Code, 1860 provides for the punishments to be inflicted on the convicts. Death penalty is the highest punishment prescribed in this section. Following are the provisions of the Indian Penal Code which provide for imposition of death sentence:

- Section 121: Waging war etc. against the Government of India
- Section 132: Abetment of mutiny by a member of the armed forces.
- Section 194: False evidence leading to conviction of innocent person and his execution.
- Section 302: Murder
- Section 303: Murder by life convict (Struck Down by Supreme Court)
- Section 305: Abetment of suicide of child or insane person.
- Section 307: Attempt to murder by life convicts.
- Section 364A: Kidnapping for ransom, etc.
- Section 376A: Punishment for causing death or resulting in persistent vegetative state of victim [In the course of commission of an offence under Section 376(1) or (2)].
- Section 376E: Punishment for repeatedly committing crime under sections 376, 376A and 376D.
- Section 396: Dacoity with murder.

Liability to cause death sentence may arise in certain situations though the actual act of killing was done by another person. These cases may be referred to as cases of vicarious or constructive liability falling under following sections of the Indian Penal Code:

- Section 34: Act done by several persons in furtherance of common intention.
- Sections 109 to 115: Abetment.
- Section 120B: Criminal conspiracy.
- Section 149: Every member of unlawful assembly guilty of offence committed in prosecution of common object.
- Section 396: Dacoity with murder
There are certain other legislations\(^\text{87}\) which provide death sentence as one of the punishments.

It is pertinent to state here that most of the cases of capital punishment relate to “murder” as defined under the Indian Penal Code. In its comparison, the cases falling under categories defined in other legislations are negligible. Therefore, the debate on “hang” or “not to hang” has been in issue for decades only for the cases arising out of the Penal Code. It is, however, pertinent to mention over here that of late, after the decision in \textit{Mithu v. State of Punjab}\(^\text{88}\) wherein the mandatory punishment of death under section 303 IPC was struck down as unconstitutional, Section 27(3) of the Arms Act, 1959 having been enacted in clear contravention of Part III rights has been declared repugnant to Articles 14 and 21 and \textit{ultra-vires} the Constitution.\(^\text{89}\) By providing imposition of mandatory death penalty, Section 27(3) ran contrary to those statutory safeguards which give judiciary the discretion in the matter of imposing death penalty. While declaring this provision void, the Supreme Court also observed that it also deprives the judiciary from discharging its constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure. On the same theory, there has been a challenge\(^\text{90}\) in the High Court of Bombay, to Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985 which provided for mandatory death penalty. The High Court held section 31A as violative of Article 21 of the Constitution. The Union Government argued before the High Court to construe the provision as directory by reading down the expression “shall be punishable with death” as “may be punishable with death” in relation to the offences covered under Section 31A of the NDPS Act. This argument was accepted by the High Court and didn’t declare the provision as unconstitutional.


\(^{90}\) Writ Petition (Crl.) No.1784/2010 and Writ Petition (Crl.) No.1790/2010 of the High Court of Bombay
4.9 HEARING OF ACCUSED ON QUESTION OF SENTENCE AND REQUIREMENT OF SPECIAL REASONS:

In a criminal trial, Section 235\(^{91}\) is one of the most fundamental parts of the Code of Criminal Procedure, 1973. Prior to the enactment of 1973 Code, the legislature intended to have a rational and consistent sentencing policy which required removal of all the deficiencies in the Code. It was felt that a separate stage should be provided after conviction when the Court can hear the accused in regard to various factors bearing on sentence and then pass proper sentence on the accused. At the instance of the Ministry of Home Affairs, a reference was sent to the Law Commission of India for submitting a report on some questions under the Code of Criminal Procedure Bill, 1970. Pursuant to the said reference, the Law Commission of India submitted its 48\(^{th}\) Report on 25\(^{th}\) July 1972. The stream of tendency being towards cautious was expressed by the Law Commission in its 48\(^{th}\) report wherein the Commission while dealing with some questions under the Code of Criminal Procedure Bill, 1970 also dealt with the provision of “sentencing”. The Commission dealing with the concept of “sentencing” observed thus:

“It is now being increasingly recognized that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and back-ground of the offender.

The aims of sentence – Themselves obscure – become all the moreso in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.

We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to co-operate in the process.

The Bill does provide for hearing of the accused as to sentence, but does not contain a specific provision as to evidence. But in our opinion-

(i) both the parties should be heard, as to sentence, and

(ii) and if a request is made in that behalf by either the prosecution or the accused, an opportunity for leading evidence on the question should be given.

\(^{91}\) Section 235. Judgment of acquittal or conviction:—
(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case;
(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.
We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay, adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause.”

In the Code of Criminal Procedure Bill, 1970, there was no provision of providing hearing to the accused on the question of sentence. On recommendation of the Law Commission, sub-section (2) to section 235 came to be inserted. In the aims and objects of 1973 Code which have been given clause by clause, a reference to this particular provision has been made thus:

“If the judgment is one of conviction, the accused will be given an opportunity to make his representation, if any, on the punishment proposed to be awarded and such representation shall be taken into consideration before imposing the sentence. This last provision has been made because it may happen that the accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is the breadwinner of the family of which the court may not be made aware during the trial.”

Para 6(d) of the statement of objects and reasons of the 1973 Code runs thus:

“6. Some of the more important changes intended to provide relief to the poorer sections of the community are:
(a) the accused will be given an opportunity to make representation against the punishment before it is imposed.”

The Statement of Objects and Reasons further indicates that the recommendations of the Law Commission were examined carefully keeping in view, among others, the principle that an accused person should get a fair trial in accordance with the accepted principles of natural justice.

Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element. It is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined.  

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A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances - extenuating or aggravating - of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence.

There has been a challenge to Section 235(2) of the Code on various occasions. The Supreme Court has time and again explained the importance of Section 235(2) of the 1973 Code.

In Santa Singh v. State of Punjab93, the Supreme Court observed that the provisions of Section 235(2) are very salutary and contain one of the cardinal features of natural justice, namely, that the accused must be given an opportunity to make a representation against the sentence proposed to be imposed on him. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.

The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings. 94

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93 Santa Singh v. State of Punjab, (1976) 4 SCC 190 para 3
94 Id
In *Dagdu v. State of Maharashtra*\(^{95}\), the Supreme Court observed that the right to be heard on the question of sentence has a beneficial purpose, for a variety of facts and considerations bearing on the sentence can, in the exercise of that right, be placed before the Court which the accused, prior to the enactment of the Code of 1973, had no opportunity to do. The social compulsions, 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.

In *Muniappan v. State of Tamil Nadu*\(^{96}\), the Supreme Court observed that the obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence.

In *Allaudin Mian v. State of Bihar*\(^{97}\), the Supreme Court observed that “the choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. The requirement of hearing the accused is intended to satisfy the rule of natural justice.”

In *Malkiat Singh v. State of Punjab*\(^{98}\), the Supreme Court observed that “on finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be.”

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\(^{95}\) *Dagdu v. State of Maharashtra*, (1977) 3 SCC 68


In *Sevaka Perumal v. State of T.N.* 99, the Supreme Court observed under Section 235(2) when the accused has been given right to be heard on the question of sentence it is a valuable right. To make that right meaningful the procedure adopted should be suitably moulded and (*sic*) the accused given an opportunity to adduce evidence on the nature of the sentence.

The ratio laid down in the above cases has been consistently followed in subsequent decisions of the Supreme Court100.

Section 354 of the Code is another important provision in criminal trial. It relates to the language and contents of judgment. Section 354(3) is very much important for the purpose of this study and it reads thus:

“Section 354. Language and contents of judgment.— (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”

Before dealing with the above provision, it is pertinent to mention over here that prior to 1955101, the normal rule was to sentence to death a person convicted for murder and to impose the lesser sentence for reasons to be recorded in writing. The extreme penalty was to be inflicted unless special reasons could be found to justify the lesser sentence. The 1955 Amendment102 in the Code of Criminal Procedure left the Courts “free to award either sentence”. With the enactment of the 1973 Code103, a significant change came into practice. The life imprisonment for murder became a rule and capital punishment an exception to be resorted to for reasons to be stated.

101 Section 367 (5) Cr.P.C. “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 the reasons why sentence of death was not passed”.
102 By the Amendment Act 26 of 1955 a new sub-section, sub-section (5), was substituted for the former sub-section (5) which does not contain the provision making it incumbent for a judge to record his reasons for imposing a lesser penalty. The discretion of the court in deciding whether to impose the sentence of death or of imprisonment for life became wider.
103 By the Code of Criminal Procedure, 1973 (Act 2 of 1974), sub-section (3) to Section 354 came to be introduced: “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”
Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report stated the object and reason of making this change, as follows:

“A sentence of death is the extreme penalty of law and it is but fair that when a court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.”

Section 354 (3) has now narrowed the discretion. To inflict death sentence, the Judges have to discover “special reasons”.

The object of hearing under Section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of Section 354(3) which calls for recording of special reasons for awarding death sentence must be read conjointly with Section 235(2) of the Code. The special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) CrPC is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court. These changes in the sentencing structure reflect the “evolving standards of decency” that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual - one of the core values in our Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from “the rule of law” to the “due process of law.

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Under Section 354 sub-section (3) of the Code of Criminal Procedure, 1973, the Court is required to state the reasons for a sentence awarded, and in the case of imposition of a sentence of death the judge has to record “special reasons” for imposing death sentence. It is neither feasible nor legally permissible for this Court to give a definite connotation to the expression “special reasons” occurring in Section 354 sub-section (3) of the Code of Criminal Procedure, 1973. It is difficult to put “special reasons” in a strait-jacket. Each case must depend on its own particular facts. The question of sentence must be left to the discretion of the Sessions Judge trying the accused.\(^{106}\).

In *Dalbir Singh v. State of Punjab*\(^{107}\), the Supreme Court observed that it is neither feasible to define nor legally permissible for this Court to limit or circumscribe the connotation of the expression “special reasons” occurring in Section 354(3) of the Code so as to bring about a virtual abolition of the death sentence. Any attempt to limit or circumscribe the connotation of ‘special reasons’ mentioned in Section 354(3) of the Code of Criminal Procedure by indulging in classification of murders such as white-collar offences and non-white-collar offences or laying down so-called guidelines for imposition of the extreme penalty, would amount to unwarranted abridgement of the discretion legally vested in the trial court and constitutionally upheld by this Court.

In *Bachan Singh v. State of Punjab*\(^{108}\), the Supreme Court held that the “expression “special reasons” in the context of Section 354(3) obviously means “exceptional reasons” founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases.”

Parliament has in Section 354 (3) given a broad and clear guide-line which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an

\(^{106}\) Rajendra Prasad v. State of U.P., (1979) 3 SCC 646
\(^{107}\) Dalbir Singh v. State of Punjab, (1979) 3 SCC 745, at p. 754, 756
extremely small percentage of persons convicted of murder - a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3). The Court further held thus:

“Aggravating circumstances suggested by one of the counsel for the petitioners are acceptable indicators, though it is not preferable to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other. But this much can be said that in order to qualify for inclusion in the category of “aggravating circumstances” which may form the basis of ‘special reasons’ in Section 354(3), circumstances found on the facts of a particular case, must evidence aggravation of an abnormal or special degree. (para 202, 203 and 205)

Mitigating circumstances indicated by the same counsel are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Factor like extreme youth of the accused can be of compelling importance. Post-murder remorse, penitence or repentence by the murderer are not relevant. There are several other mitigating circumstances. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). (para 206, 209)”

In Bachan Singh, the Supreme Court finally observed that “Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. It is imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through

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109 Id., p.165
law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

In Machhi Singh v. State of Punjab\textsuperscript{110}, it was observed that “it was only in rarest of rare cases, 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 irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. If upon an overall global view of all the circumstances and taking into account the answers to the questions posed, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.”

The discretion of the court in awarding punishment when conviction is for an offence punishable with death or with imprisonment for life is controlled by Section 354(3) CrPC; so if the court proposes to impose capital punishment it must record “special reasons” for so doing. What constitutes special reasons cannot be stated with any precision and that has to be determined having regard to the facts and circumstances of each case. If a case falls in the category of “rarest of the rare case” it would justify the requirement of special reasons. But again in deciding whether a case falls within “rarest of the rare case”, the court has to consider both aggravating as well as the mitigating circumstances\textsuperscript{111}.

Special reasons, in the context of Section 354(3) CrPC, obviously mean “exceptional reasons” founded on the exceptionally grave circumstances relating to the crime as well as the criminal. It being extremely difficult to catalogue such special reasons, they have to be construed in the facts of the case and relative weight has to be given to mitigating and aggravating factors. These two aspects are so intertwined that isolation of one from the other would defeat the mandate of law under Section 354(3) CrPC. The aggravating and mitigating factors cannot be taken as inflexible, absolute or immutable and that they must be perceived only as indicators which the courts must bear in mind while deciding upon the sentence and assigning special reasons, if required\textsuperscript{112}.

\textsuperscript{110} Machhi Singh v. State of Punjab, (1983) 3 SCC 470
\textsuperscript{111} State v. Nalini, (1999) 5 SCC 253, at p. 583
\textsuperscript{112} Deepak Rai v. State of Bihar, (2013) 10 SCC 421
It is pertinent to mention here that in *Bachan Singh*, Hon’ble Mr. Justice P.N. Bhagwati (as His Lordship then was) gave his dissenting judgment\(^{113}\). Hon’ble Bhagwati, J. held that “Section 302 IPC read with Section 354(3) CrPC to choose between life and death by providing a totally vague, indefinite and *ad hoc* criterion of “special reasons” renders the death penalty for murder arbitrary and unreasonable and hence violative of Articles 14 and 21 of the Constitution. Where uncontrolled and unregulated discretion is conferred on the court without any standards or guidelines provided by the legislature, so as to permit arbitrary and uneven imposition of death penalty, it would be violative of both Articles 14 and 21.”

In a case where the court imposes death sentence both the aforesaid provisions, namely, Section 235(2) and Section 354(3) of the Code assume signal significance. The constitutional validity of Section 354(3) was upheld in *Bachan Singh* as the learned Judges have said that the legislative policy in sentencing is discernable from those two sections. In my judgment both those two sections supplement each other and in a case where death penalty is imposed, both the sections must be harmoniously and conjointly appreciated and read. Section 235(2) as interpreted by this Court in *Bachan Singh* and quoted above, provides for a “bifurcated trial”. It gives the accused (*i*) a right of pre-sentence hearing, on which he can (*ii*) bring on record material or evidence which may not be (*iii*) strictly relevant to or connected with the particular crime but (*iv*) may have a bearing on the choice of sentence. Therefore, it has to be a regular hearing like a trial and not a mere empty formality or an exercise in an idle ritual. Regardless of whether the accused asks for such a hearing, the same must be offered to the accused and an adequate opportunity for bringing materials on record must be given to him especially in case where Section 354(3) comes into play. It is only after undertaking that exercise that “special reasons” for imposing death penalty can be recorded by the court. Therefore fairness, justice and reasonableness which constitute the essence of guarantee of life and liberty epitomised in Article 21 of the Constitution also pervades the sentencing policy in Sections 235(2) and 354(3) of the Code. Those two provisions virtually assimilate the concept of “procedure established by law” within the meaning of Article 21 of the Constitution. Thus, a strict compliance with those provisions in the way it was interpreted in *Bachan Singh* having regard to the development of constitutional law is a must before death sentence can be imposed. \(^{114}\)

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It can well be seen that the principle of “rarest of rare cases” is outcome of the “special reasons” defined in Section 354(3) of the Code. This principle of “rarest of rare cases” has achieved the main lead in cases of capital punishment. A survey of judicial trends, we find variety of factors in justification of confirmation of capital punishment or commutation of capital punishment. In number of cases, the principle of rarest of rare has been scrupulously followed, in some cases this principle has been completely ignored, in some of the cases it seems to have been redefined by virtue of “judge-centric” theories leading towards uncertainty of the sentencing policy. Despite there being well defined principle of rarest of rare, why there are different theories having been adopted by the Courts in the matter of imposition of capital punishment? What is the way forward? Does this area of imposition of capital punishment require broad standards or guidelines to channelize the discretion of the Courts? These are important aspects which will be discussed in subsequent chapters of this study.

4.10  PARDONING POWER

“Mercy is not a thing opposed to justice. It is an essential part of it.”

- Edmund Burke -

There can be no attributes more important than the life and liberty of a citizen in a civilized society. Article 21 of the Constitution of India provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. The imposition of death penalty on a convict is the procedure established by law which is subject to appeal and review. After exhausting all legal remedies, a convict has an option to seek remedy under constitutional scheme of “Pardon” by moving a petition of mercy before the President of India or the Governor of a State, as the case may be.

4.10.1 WHAT IS PARDON?

“Pardon” is an act of mercy or clemency by which a criminal is excused from a penalty that has been imposed by a Court. It wipes away guilt and makes the person who committed the crime as innocent as though a crime has not been committed. A pardon may be conditional or absolute.\footnote{SUTHERLAND, EDWIN H. and CRESSEY, DONALD R., PRINCIPLES OF CRIMINOLOGY, (1988) p. 544}
Executive clemency, says William Howard Taft, exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy it has always been thought essential in popular governments ... to vest in some authority other than the courts power to ameliorate or avoid particular criminal judgments.  

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the court otherwise directs. Pardon is to be distinguished from “amnesty” which is defined as “general pardon of political prisoners; an act of oblivion”. As understood in common parlance, the word “amnesty” is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

4.10.2 CONSTITUTIONAL SCHEME OF PARDON

The power to pardon is a constitutional responsibility of great significance. The Constitution of India vests this power in the Head of the State. Article 72 of the Constitution of India invests the President of India and Article 161 of the Constitution of India.
India invests the Governors to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person.

Article 72 confers upon the President 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 enumerated in clauses (a) to (c) to Article 72(1). Article 72(2) states that the power conferred by law on any officer of the Armed Forces for the purpose of suspending, remitting or commuting a sentence passed by a Court Martial would not be affected by the power of the President contained in Article 72(1)(a). Article 72(3) further provides that the power of the President to suspend, remit or commute a sentence of death under Article 72(1)(c) would not affect the power of the Governor of a State to suspend, remit or commute a sentence of death under any law for the time being in force. Likewise, Article 161 of the Constitution confers upon the Governor of a State in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision. The necessary sequel to this logic is that notwithstanding any statutory provision, the President and the Governor continue to exercise their power, as the case may be, on the advice of the Council of Ministers.

A plain reading of the above provisions makes it crystal clear that the power conferred upon the President of India under Article 72 is of widest amplitude in comparison to the power conferred upon the Governor of a State.

Article 74(1) of the Constitution states that the Council of Ministers headed by the Prime Minister would aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice. Likewise, Article 163(1) of the Constitution states that the Council of Ministers headed by the Chief Minister would aid and advise the Governor in the exercise of his functions.

In *Shatrughan Chauhan v. Union of India*120, the Supreme Court reiterated the well settled position that “exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to

120 *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1
be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.”

4.10.3 FACTUAL MATRIX OF THE PARDONING POWER

The power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a manifestation of prerogative of the State. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. Pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant’s guilt or innocence. Pardon is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people. While exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty-bound to objectively place the case of the convict.

The rationale behind granting of pardon by the executives exercising the sovereign power mentioned above has been tested on the anvil of truth time and again. The satisfaction of the President or the Governor required by the Constitution is not their personal satisfaction but the satisfaction of the Council of Ministers on whose aid and advice they exercise their powers and functions.

4.10.4 JUDICIAL REVIEW OF THE SCHEME OF PARDON

On numerous occasions, the executive power of pardon has been subjected to judicial review.

In K.M. Nanavati v. State of Bombay121, the Supreme Court considered the question as to what is the content of the power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor of Bombay impinges on the

judicial powers of this court, with particular reference to its powers under Article 142 of the Constitution. The Court after analyzing the factual and legal position of the case held thus:

“26. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It would be for this court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court.”

The principle of checks and balances in a democratic society like ours has great significance as it not only controls the chariot but also the myriad kinds of theories sprouting in the mind of the charioteer thereby cautioning him to only follow the assigned path and finally setting the alleyway in an orderly fashion, failure of which may invest the charioteer to run amok.

In Maru Ram v. Union of India122, the Supreme Court observed that “wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. .. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.” Finally, the Court formulated its findings and held that “Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.”

The ambit and scope of Articles 72 and 161 of the Constitution was extensively considered in Kehar Singh v. Union of India & Another123. The Court held that “the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to

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122 Maru Ram v. Union of India, (1981) 1 SCC 107
123 Kehar Singh v. Union of India & Another, (1989) 1 SCC 204
some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State.” While answering to a question if the President is empowered to scrutinise the evidence on the record of the criminal matter and can take a different view, the Court held that “the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court. The power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.” The Court further held that “the question as to the scope of the President’s power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review within the strict limitations defined in Maru Ram. The limited scope of judicial review is not affected by the accepted position that the power to pardon belongs exclusively to the President and the Governor under the Constitution.”

In Swaran Singh v. State of U.P., the Supreme Court rejected the contention that “this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution and held that if such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.”

In Satpal v. State of Haryana, the Supreme Court observed that “there cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds.”

In *Bikas Chatterjee v. Union of India*\(^\text{126}\), the Supreme Court reiterated the settled legal position that “although the decision of the President of India on a petition under Article 72 of the Constitution is open to judicial review but the grounds therefor are very very limited.”

In *Epuru Sudhakar & Another v. Govt. of A.P. & Others*\(^\text{127}\), the Supreme Court observed that “exercise of executive clemency is a matter of discretion and yet subject to certain standards. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case”.

In *Narayan Dutt v. State of Punjab*\(^\text{128}\), the Supreme Court reiterated the well settled legal position that considerations for exercise of power under Articles 72/161 “may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

4.10.5 NO INTERFERENCE IN PARDONING POWER

In certain cases, the Supreme Court has refused to intervene in the constitutional power relating to grant of pardon.

In *Nachhittar Singh v. State of Punjab*\(^\text{129}\), the Court held that the circumstances pointed out in the case do not constitute a ground sufficiently compelling for interference with the discretion of the courts below in the matter of sentence. If there are any commiserative factors which can be taken into consideration by the Executive Government in the exercise of its prerogative of clemency it is for that Government to do so.

In *Bishan Dass v. State of Punjab*\(^\text{130}\), the Supreme Court while dealing with the question of sentence held that the appellant’s crime is cruel and inhuman and the consequential deaths dastardly and pathetic. The general trend in courts and among jurists as

\(^{126}\) *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634, at 637

\(^{127}\) *Epuru Sudhakar & Another v. Govt. of A.P. & Others*, (2006) 8 SCC 161


\(^{129}\) *Nachhittar Singh v. State of Punjab*, (1975) 3 SCC 266

\(^{130}\) *Bishan Dass v. State of Punjab*, (1975) 3 SCC 700
well as penal codes in this country and in other countries is towards abolition of capital punishment. The Court reiterated the decision in Ediga Anamma v. State of A.P., (1974) 4 SCC 443 by observing that it is entirely a matter for the clemency of the Governor or the President, if appropriately moved to commute or not to commute.

In Shanker v. State of UP, the Supreme Court held that it is true that lapse of a long period between the award of death penalty and hearing of the appeal by this Court (Total: 13 months) is a factor which, in the context of a particular case, may, in conjunction with other circumstances, justify the commutation of the capital sentence by the Court. But this is not an absolute rule justifying interference with the discretion of the trial court in the matter of sentence in every case. Similarly, that the execution of the death sentence will render extinct the immediate progeny of the accused and will throw the family of the condemned prisoner orphaned and resourceless on the scrap heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be and we are sure, will be, considered by the Executive Government while exercising its powers of clemency.

In G. Krishta Goud v. State of Andhra Pradesh, the Supreme Court presuming clemency power of the President or the Governor a bona fide exercise held it falling outside the judicial review. The Court observed thus:

“... The Court cannot intervene everywhere as an omniscient, omnipotent or omnipresent being. And when the Constitution, as here, has empowered the nation’s highest Executive, excluding, by implication, judicial review, it is officious encroachment, at once procedurally ultra vires and upsetting comity of high instrumentalities, for this Court to be a superpower unlimited. The second limitation conditions all public power, whether a court oversees or not. That trust consists in the purity of public authorities. All power, however majestic the dignitary wielding it shall be exercised in good faith, with intelligent and informed care and honestly for the public weal.

Our reflections on hanging, our philosophy for mercy and our observations about death sentence being abolished in country after country and the irrevocable harm of a wrong execution — these great facts cannot deflect us from our constitutional duty not to interfere where we have no jurisdiction.”

However, the Court sounding a note of caution observed that “absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent.”

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In *Mohinder Singh v. State of Punjab*\(^{133}\), the Supreme Court reiterated its stand that legal justice belongs to the Court but compassionate commutation belongs to the top executive.

In *Amrit Bhushan Gupta v. Union of India*\(^{134}\), the Supreme Court held that the question whether, on the facts and circumstances of a particular case, a convict, alleged to have become insane, appears to be so dangerous that he must not be let loose upon society, lest he commits similar crimes against other innocent persons when released, or, because of his antecedents and character, or, for some other reason, he deserves a different treatment, are matters for other authorities to consider after a court has duly passed its sentence.

In *Shiv Mohan Singh v. State (Delhi Admn.)*\(^{135}\), the Supreme Court once again acknowledged the power of the executive by observing that “Mercy, like divinity, is amenable to unending exercise but in this mundane matter it is for the Head of State to act and not for the Apex Court”.

In *Joseph Peter v. State of Goa, Daman & Diu*\(^{136}\), the Supreme Court held that “Possibly, Presidential Power is wider but judicial power is embanked. A death sentence, with all its dreadful scenario of swinging desperately out of the last breath of mortal life, is an excruciating hour for the Judges called upon to lend signature to this macabre stroke of the executioner’s rope. Even so, Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws, are not always just, and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice. We are bound by the Penal Code and the Criminal Procedure Code, by the very oath of our office.”

### 4.10.6 DELAY AS A GROUND FOR JUDICIAL REVIEW

There are numerous decisions where the hangman’s noose has been taken off the accused’s neck by the Supreme Court by altering death sentence to life imprisonment on the ground of delay. Delay in disposal of appeals or in execution of death sentences has been viewed seriously by the Supreme Court. By passage of time, a sea-change came to be seen in the decisions of the Supreme Court of India. On numerous occasions, the executive power of

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\(^{133}\) *Mohinder Singh v. State of Punjab*, (1977) 3 SCC 346

\(^{134}\) *Amrit Bhushan Gupta v. Union of India*, (1977) 1 SCC 180

\(^{135}\) *Shiv Mohan Singh v. State (Delhi Admn.)*, (1977) 2 SCC 238

\(^{136}\) *Joseph Peter v. State of Goa, Daman & Diu*, (1977) 3 SCC 280
pardon has been subjected to judicial review for the alleged delay in disposal of mercy petitions.

In *Sher Singh v. State of Punjab*\(^\text{137}\), the Supreme Court observed that “we must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously”. The Court further observed that “A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.”

In *K.P. Mohammed v. State of Kerala*\(^\text{138}\), the Court observed that “delays in dispensation of justice are becoming more and more chronic, whether the dispenser of justice is the executive or the judiciary. But there are at least some sensitive areas like those concerning life and death where the need for speedy justice is self-evident. It is perhaps time for accepting a self-imposed rule of discipline that Mercy Petitions shall be disposed of within, say, three months. These delays are gradually creating serious social problems by driving the courts to reduce death sentences even in those rarest of rare cases in which, on the most careful, dispassionate and humane considerations death sentence was found to be the only sentence called for.” The Court finally commuted death to life during the pendency of mercy petition.

In *Triveniben v. State of Gujarat*\(^\text{139}\), the Court held that “as between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.”

\(^{137}\) *Sher Singh v. State of Punjab*, (1983) 2 SCC 344  
\(^{139}\) *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, para 73
In Devender Pal Singh v. State (NCT of Delhi)\textsuperscript{140}, the Supreme Court examined the scope of the Court’s power of judicial review of pardoning power under Articles 72 and 161 of the Constitution of India \textit{in extenso}. The Court also examined “as to whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict; and whether the parameters laid down by the Constitution Bench in \textit{Triveniben case} for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes?” The Court held that “long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes.”

In Mahendra Nath Das v. Union of India\textsuperscript{141}, the Supreme Court considered the question “whether improper and long unexplained delay in disposal of mercy/clemency petition was sufficient for commutation of the sentence of death into life imprisonment.” The Court examined the matter minutely and found 12 years’ delay in the disposal of the appellant’s mercy petition sufficient for commutation of the sentence of death. The rejection of the appellant’s mercy petition was declared illegal and the sentence of death was commuted into life imprisonment.

In Shatrughan Chauhan v. Union of India\textsuperscript{142}, the Supreme Court observed that “the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a Constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it.” The Court further declared “the ratio laid down in Devender Pal Singh \textit{per incuriam} by observing that there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.” On the basis of the said decision, in

\textsuperscript{140} Devender Pal Singh v. State (NCT of Delhi), (2013) 6 SCC 195
\textsuperscript{141} Mahendra Nath Das v. Union of India, (2013) 6 SCC 253
\textsuperscript{142} Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1
Navneet Kaur v. State of NCT of Delhi\textsuperscript{143}, the Court deemed it fit to commute the death sentence imposed on Devender Pal Singh Bhullar into life imprisonment both on the ground of unexplained/inordinate delay of 8 years in disposal of mercy petition and on the ground of insanity.

In Shatrughan Chauhan \textit{(supra)}\textsuperscript{144}, the Supreme Court dealt with number of cases seeking commutation of death to life imprisonment on the ground of delay in disposal of mercy petitions. The Court observed that “a series of the Constitution Benches of this Court have upheld the constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence. The mercy petitions under Articles 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the Ministry concerned to follow its own rules rigorously which can reduce, to a large extent, the delay caused.”

\textbf{4.10.7 NO GUIDELINES FOR EXERCISE OF PARDONING POWER}

In Shatrughan Chauhan, the Supreme Court reiterated the legal position declining “to frame guidelines for the exercise of power under Articles 72 and 161 for two reasons, \textit{firstly}, there is always a presumption that the constitutional authority acts with application of mind; and, \textit{secondly}, considering the nature of power enshrined in Articles 72 and 161, it is unnecessary to spell out specific guidelines. Nevertheless, this Court has been of the consistent view that the executive orders should be subject to limited judicial review based on

\textsuperscript{143} Navneet Kaur v. State of NCT of Delhi, (2014) 7 SCC 264
the rationale that the power under Articles 72 and 161 is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. Accordingly, there is no dispute as to the settled legal proposition that the power exercised under Articles 72 and 161 could be the subject matter of limited judicial review.”

4.10.8 TODAY’S SCENARIO AND THE WAY FORWARD

From the above discussions, it transpires that initially the Court was reluctant to intervene as an omniscient, omnipotent or omnipresent being, in the decision of the President or a Governor of the State presuming it a bona fide exercise by the custodian of the power. The Court opined to interfere only in gruesomely established cases of absolute, arbitrary, law unto oneself mala fide execution of the power. Thereafter came a phase of review of the said power within the strict limitations or in other words with limited judicial review. Even though it has been a constant stand of the Supreme Court that the exercise of power under Articles 72/161 of the Constitution would be tested on the anvil of truth within the strict limitations yet in the recent phase it transpires that the Court in order to examine that the public power, including constitutional power, is not exercised arbitrarily or mala fide went on to check whole procedure of moving a mercy petition, its processing, notes prepared by the Ministry of Home, the papers placed before the President of India and final noting thereon. All this exercise was carried on after it was brought to the notice of the Court that the order passed by the President is an outcome of “non-application of mind” and the rejection of mercy petition is arbitrary and suffers from the vice of inequality and unfairness. The Court found it justified after examining all the material on record. The decisions were found to have been based on non-application of mind and arbitrariness suffering from the vice of inequality and unfairness, particularly on the unexplained reasons including the suppression of facts on the part of the aid and advice machinery of the Government on whose advice the President or Governor of a State has to base its opinion. The Court which was in the past reluctant to interfere in the process of pardoning power not only interfered but also laid down certain guidelines for smooth functioning of the constitutional scheme to uphold the de facto protection provided by the Constitution to every convict including those on death row. In nutshell, it transpires that, all is not well.

It is avowedly clear that judiciary has its limitations to comment on political scenario and its decision making power. The judges speak through their decisions. Even though the President and the Governor of a State are ultimate custodians of the power but they exercise
the power from ciphers with rubber stamp. The political imbroglios make their decisions to suffer by vice of arbitrariness, inequality and unfairness. The changing political scenario having a custodian with no legal background sometimes is bound to be misled by the inefficient or motivated aid and advice subjecting a decision for judicial review in future giving way to an accused to seek judicial pardon under the constitutional scheme flowing from Article 21 of the Constitution. Judicial pronouncements made in rarest of rare cases after long trials are thereby made non-est. When an accused gets benefit on account of the State’s inefficiency or arbitrariness or unfairness, the victims are left with nothing but gaping with awe on the sky with gloominess shining on their forehead. There is need to harmonise the interest of an accused and the fundamental interests of the society.

The framers of our Constitution had woven the democratic set up of our country in a fabric of golden thread providing an important scheme running under Articles 72 and 161 as one of the main arteries of our criminal justice system. The experience during last six decades shows that this artery has slowly slowly got blockages and to rejuvenate the blocked arteries, number of times the same have been operated and everytime the loosening space has been woven with golden thread. Once again it is being felt that the arteries have once again loosened and there is need of a needle with golden thread to screw the loosening gap once and for all.

The question arises as to how we can deal with such shoddy exercise and provide a foolproof system where neither the accused nor the victims feel themselves robbed at the hands of inefficient government machinery. To meet such an eventuality, the Law Commission of India, in its 35th report, came across a suggestion that in exercise of the prerogative of mercy by the President and the Governor, the court should be consulted but the said suggestion came to be rejected on the ground that such a provision would not be in harmony with the essential nature of the prerogative. Justice V. Krishna Iyer, a former distinguished Judge of the Supreme Court of India advocated for “a high-level advisory board to advise the executive.”

Per contra, former President of India Shri Venkataraman went a

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step ahead arguing that the conditions prevailing in the country require that this power of review should vest with the judiciary and not with the President i.e. the executive. 146

In view of foregoing judicial pronouncements and opinion of the jurists, it has become necessity of the day that apart from the existing procedure to deal with the constitutional scheme under Articles 72/161, an independent Advisory Board may be constituted at National and State level so as to examine the intricacies of the mercy petitions from all angles, of course the political biasness or the administrative inefficiency, and human rights jurisprudence at global level, which may become the base of independent opinion of the President or the Governor of a State. Such a foolproof system would not only avoid any instance of getting wrath of judiciary but it would also save the precious time of judiciary from peeping time and again into the political vagaries causing calculated assault on human dignity and pushing civilization a step backward. The quest for justice demands an immediate action in this regard. The ship of humane justice should not sink; humanity should not be forced to fly its flag half-mast; and before such an eventuality, in tune with the maturing society at global level, let’s hoist the flag of humanity.

4.11 LIFE IMPRISONMENT

According to Section 45 of the Indian Penal Code, 1860, the word “Life” denotes the life of a human being, unless the contrary appears from the context. “Imprisonment for Life” is one of the punishments provided under section 53 of the Indian Penal Code. “Imprisonment for life” - What does it mean? Is it meant for whole of the man’s life or is it only for a definite period? – These questions have been debated on various occasions. A possible confusion creeps into this discussion by equating life imprisonment with 14 or 20 years. Under Section 55 IPC or under Section 433(b) Cr.P.C. the appropriate Government is competent to commute the sentence of imprisonment for life to imprisonment of either description for a term not exceeding 14 years. Section 57 IPC provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. The judicial pronouncements make it clear that life imprisonment, unless commuted or remitted by the appropriate Government, means an imprisonment for the entire life. It is now conclusively settled by a catena of decisions that

146 VENKATARAMAN, R., MY PRESIDENTIAL YEARS, referred to in BIKRAM JEET BATRA, ‘COURT OF LAST RESORT : A STUDY OF CONSTITUTIONAL CLEMENCY FOR CAPITAL CRIMES IN INDIA’, CSLG WORKING PAPER SERIES 249 (CSLG/WP/09/04)
the punishment of imprisonment for life handed down by the Courts means a sentence of imprisonment for the rest of life. Despite settled legal position, the questions are posed time and again.

Whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period? No such provision is found in the Indian Penal Code, the Code of Criminal Procedure or the Prisons Act. A statutory instrument cannot be interpreted in such a way that confers power which cannot be derived from the statute. The Constitution as well as the Code of Criminal Procedure confers the power to remit a sentence on the executive Government and it is in its exclusive province. 147 Imprisonment for life must prima facie be treated as imprisonment for the whole of the remaining period of the convicted person’s natural life. Life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predict the time of his death. 148 The sentence of imprisonment for life or transportation for life cannot be equated with any fixed term. 149 A sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence. 150

In Mohd. Munna v. Union of India151, the Supreme Court held that “if a portion of the period of transportation for life is to be treated as sentence of rigorous imprisonment for the same term, naturally, the entire transportation period is to be treated as “rigorous imprisonment for life. Imprisonment for life is a class of punishment different from ordinary imprisonment which could be of two descriptions, namely, “rigorous” or “simple”. It was unnecessary for the legislature to specifically mention that the imprisonment for life would be rigorous imprisonment for life as it is imposed as punishment for grave offences. There is no provision either in the Indian Penal Code or in the Code of Criminal Procedure whereby life

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147 Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600
148 Id
imprisonment could be treated as fourteen years or twenty years without there being a formal remission by the appropriate Government. The Prisons Rules are made under the Prisons Act and the Prisons Act by itself does not confer any authority or power to commute or remit sentence. It only provides for the regulation of the prisons and for the terms of the prisoners confined therein.”

The expression ‘imprisonment for life’ must be read in the context of Section 45 IPC. Under that provision the word ‘life’ denotes the life of a human being unless the contrary appears from the context. The punishments are set out in Section 53, imprisonment for life being one of them. Read in the light of Section 45, it would ordinarily mean imprisonment for the full or complete span of life. The provision in Section 57 that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years is for the purpose of working out the fraction of the terms of punishment. If such a provision had not been made it would have been impossible to work out the fraction of an indefinite term. 152

Life imprisonment which strictly means imprisonment for the whole of the man’s life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder. 153

In case of life imprisonment the term being indeterminate, remissions lead nowhere and do not entitle a prisoner to release. Imprisonment for life lasts until the last breath and whatever be the length of remission earned, the prisoner can claim release only if the remaining sentence is remitted by government. 154

In Subash Chander v. Krishan Lal155, the Supreme Court, in the peculiar circumstances of the case, observed that the imprisonment for life shall be the imprisonment in prison for the rest of life. The accused shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail

152 Ashok Kumar v. Union of India, (1991) 3 SCC 498
153 Dalbir Singh v. State of Punjab, (1979) 3 SCC 745
Manual or any other statute and the rules made for the purposes of grant of commutation and remissions.

Death to a cold-blooded murderer or life, albeit subject to severe restrictions of personal liberty, was the vexed question that arose before the Supreme Court in *Swamy Shraddananda (2) v. State of Karnataka.* The Court observed that ‘a verdict of death would cut the matter cleanly, apart from cutting short the life of the condemned person. But a verdict of imprisonment for life is likely to give rise to certain questions (Life after all is full of questions). How would the sentence of imprisonment for life work out in actuality? The Court may feel that the punishment more just and proper, in the facts of the case, would be imprisonment for life given its normal meaning and as defined in Section 45 of the Penal Code, 1860. The Court may be of the view that the punishment of death awarded by the trial court and confirmed by the High Court needs to be substituted by life imprisonment, literally for life or in any case for a period far in excess of fourteen years. The Court in its judgment may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty, twenty-five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law. What is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run-of-the-mill life term that works out to no more than fourteen years. How can the sentence of imprisonment for life (till its full natural span) given to a convict as a *substitute for the death sentence* be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice?” These were the questions that arose for consideration in this case.

After analyzing some earlier decisions, the Supreme Court found it necessary “to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.” The Court noted thus:

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156 *Swamy Shraddananda (2) v. State of Karnataka,* (2008) 13 SCC 767
“92. ... If the Court’s option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years’ imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years’ imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.”

In Mohinder Singh v. State of Punjab\textsuperscript{157}, the Supreme Court once again held that “Life Imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would be subject to any order passed in exercise of clemency powers of the President of India or the Governor of the State, as the case may be.”

In Bangal v. B.K. Srivastava\textsuperscript{158}, the Supreme Court reiterated the legal position that “once a person is sentenced to undergo life imprisonment unless imprisonment for life is commuted by the competent authority, he has to undergo imprisonment for the whole of his life. It is equally well settled that Section 57 IPC does not, in any way, limit the punishment of imprisonment for life to a term of 20 years.”

In State of Rajasthan v. Jamil Khan\textsuperscript{159}, the Supreme Court observed that “this Court has adopted different methods to ensure that the minimum term of life imprisonment ranges from at least twenty years to the end of natural life. The Court observed that it will do well in

\textsuperscript{157} Mohinder Singh v. State of Punjab, (2013) 3 SCC 294
\textsuperscript{158} Bangal v. B.K. Srivastava, (2013) 3 SCC 425
\textsuperscript{159} State of Rajasthan v. Jamil Khan, (2013) 10 SCC 721
case a proper amendment under Section 53 IPC is provided introducing one more category of punishment - life imprisonment without commutation or remission. There could be a provision for imprisonment till death without remission or commutation.”

From the foregoing, on one hand it transpires that a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence. On the other hand, if a case falls short of the rarest of the rare category and the Court may feel somewhat reluctant in endorsing death sentence and may further feel that a sentence of life imprisonment subject to remission works out to a term of 14 years would be gross disproportionate and inadequate, then what would be the appropriate sentence? How can the sentence of imprisonment for life (till its full natural span) given to a convict as a substitute for death sentence be viewed differently and segregated from the ordinary life imprisonment? In such an eventuality, the Court would take recourse to the expanded option because the sentence of 14 years’ imprisonment being inadequate would amount to no punishment at all. The Court would substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be. This aspect leads to formalisation of a special category of sentence to be used in rarest of rare case falling short for imposition of death penalty. The ratio laid down in Swamy Shraddananda (2) has been upheld in V. Sriharan160. Such a classification of sentencing has resulted into colouring our criminal justice system with humanitarian paint.

4.12 REMISSION/SUSPENSION OF SENTENCE

According to Section 45 of the Indian Penal Code, 1860, the word “Life” denotes the life of a human being, unless the contrary appears from the context. Section 54 of the Indian Penal Code is one of the important provisions. It provides for commutation of sentence of death without the consent of offender. Section 55 of the Indian Penal Code is another important provision which empowers the appropriate Government to commute the sentence of imprisonment for life to imprisonment of either description for a term not exceeding 14 years. Section 57 IPC provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

160 Union of India v. V. Sriharan, (2014) 11 SCC 1
Besides Articles 72 and 161 of the Constitution of India, there are provisions in the Code of Criminal Procedure which provide for grant of pardon. Sections 337 and 338 of the CrPC provide for release of a lunatic under certain conditions. Similarly, section 306 deals with tendering of pardon to accomplice. It empowers a Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into or the trial of the offence, with a view to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, to tender pardon.

Sections 432, 433, 433A, 434 and 435 of the Code of Criminal Procedure are important provisions concerning suspension, remission, commutation of sentences and the power of the State Government and the Central Government.

In many cases whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, the Supreme Court has given imprisonment of 20 years or 25 years or 30 years or 35 years mentioning that if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period. This kind of fixed term of non-remittable term of incarceration upon commutation of death sentence is an alternative devised by the Supreme Court as a via media to impose proportional punishment between “life imprisonment”, which usually passes off after completion of 14 years of imprisonment by grant of remissions by the Executive, and “death sentence”. Such a pathway has to be laid down by the Supreme Court as it found in several cases that death penalty falls little short and the life imprisonment with remission seems inadequate sentence. Some of the cases where sentences have been awarded with new theory are mentioned herein below.

In certain cases, the Supreme Court has awarded the sentences of 20/30 years with a rider that it would be over and above the period of imprisonment already undergone, meaning thereby the benefit of Section 428 stands denied. The result is that the remission power of the State Government has been narrowed down by involving the new theory of sentencing.


162 Dharm Deo Yadav, Anil and Birju (supra)
To deal with serious cases of extreme brutality, another theory has been introduced by the recent decisions. In a recent decision in Shankar Kisanrao Khade, the Supreme Court directed the sentences to run consecutively. Such a theory has also been adopted in some earlier cases\(^\text{163}\). It is pertinent to mention here that in Sunil Damodar Gaikwad v. State of Maharashtra\(^\text{164}\), the Supreme Court has held that imprisonment for life of a convict is till the end of his biological life as held by the Constitution Bench in Gopal Vinayak Godse v. State of Maharashtra\(^\text{165}\). Hence, there is no point in saying that the sentences would run consecutively.

In Swamy Shraddananda (2), the Supreme Court dealt with the issue of remission in extenso. The Court observed that “the provisions in regard to computation, remission, suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence.” The Court reasserted the earlier decision in Bachan Singh and expounded a new theory in the Indian criminal justice system by extending the length of the rarest of rare principle propounded in cases of death penalty to whole life contrition in cage with a rider “no remission” in a new category of cases which even though rarest of rare but falling little short of attracting death penalty.

In Sangeet v. State of Haryana\(^\text{166}\), the Supreme Court considered the remission power vested in the appropriate Government under Section 432 CrPC and held that “the appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.”

In Gurvail Singh v. State of Punjab\(^\text{167}\), it was interesting to see the Court deviating from its recent and latest decision in Sangeet’s case. The Hon’ble Presiding Judge in both the decisions was the same. Unlike the dicta in Sangeet, the Court in the instant case held that

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\(^{164}\) Sunil Damodar Gaikwad v. State of Maharashtra, (2014) 1 SCC 129

\(^{165}\) Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600

\(^{166}\) Sangeet v. State of Haryana, (2013) 2 SCC 452

\(^{167}\) Gurvail Singh v. State of Punjab, (2013) 2 SCC 713
“the courts award death sentence, because the situation demands, due to constitutional compulsion, reflected by the will of the people, and is not judge-centric.” The Court further held that “considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the appellants was not warranted but while awarding life imprisonment to the appellants, we hold that they must serve a minimum of thirty years in jail without remission.”

The jurisdictional issue concerning power of remission came to be discussed in detail before a Constitution Bench in Union of India v. V. Sriharan @ Murugan & Others. The Court overruled the decision in Sangeet to the extent that the Court cannot prohibit the State from granting remission and held that “the ratio laid down in Swamy Shraddananda (2) that a special category of sentence instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded.” Section 53 IPC needs to be amended accordingly.

### 4.13 CASES OF DEATH PENALTY TO BE HEARD BY THREE-JUDGE BENCH

The Supreme Court Rules, 1950 while dealing with the constitution of Division Court under Order XI Rule 1 provided that, subject to the other provisions of these Rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than three Judges nominated by the Chief Justice. Rule 2 provided that where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it.

The Supreme Court Rules, 1966 changed the provision relating to constitution of Division Courts. Order VII Rule 1 of the 1966 Rules provided that every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice. Rule 2 provided that where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter shall be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it.

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168 Union of India v. V. Sriharan @ Murugan & Others, (2016) 7 SCC 1
The Supreme Court Rules, 2013\textsuperscript{169} have brought radical changes in respect of hearing of the matters related to death sentence. Order VI Rules 1 & 2 of the Rules, 2013 is similar to Order VII Rules 1 & 2 of the 1966 Rules. Newly inserted Rules 3 and 4 in Order VI seem to have entertained a long standing demand from various corners of the society. Rule 3 provides that every cause, appeal or other proceedings arising out of a case in which death sentence has been confirmed or awarded by the High Court shall be heard by a Bench consisting of not less than three Judges. Rule 4 provides that if a Bench of less than three Judges, hearing a cause, appeal or matter, is of the opinion that the accused should be sentenced to death it shall refer the matter to the Chief Justice who shall thereupon constitute a Bench of not less than three Judges for hearing it.

The new provisions will have great impact on the judicial trends relating to capital punishment as the decisions rendered by two-Judges Bench will no more be binding on a three-Judges Bench. The formation of three-Judges Bench will re-write the history of capital punishments in India.

A Constitution Bench of five-Judges of the Supreme Court in \textit{Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others}\textsuperscript{170} also considered a question that death sentence cases should be heard by a three-Judge Bench. Referring to the newly enacted the Supreme Court Rules, 2013, the Court directed that “Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon’ble Judges will hear the same”.

4.14 \textbf{OPEN COURT HEARING OF REVIEW PETITIONS IN DEATH SENTENCE CASES}

There has been a demand from various corners at the Supreme Court of India for hearing of the review petitions in cases of death sentence in open Court instead of hearing in Chambers. A Constitution Bench of five-Judges of the Supreme Court in \textit{Mohd. Arif @ Ashfaq} has accepted the plea of Open Court hearing of review petitions in death sentence cases by providing an outer limit of 30 minutes hearing.

\textsuperscript{169} Effective from 19\textsuperscript{th} August 2014.

\textsuperscript{170} \textit{Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others}, (2014) 9 SCC 737
From the said decision, it is also interesting and important to note the dissenting voice of one of the Hon’ble Judges (per Hon’ble Mr. Justice J. Chelameswar) who held that, firstly, review petitions are normally heard by the same Bench which heard the appeal, therefore, the possibility of different judicial minds reaching different conclusions on the same set of facts does not arise. Secondly, the possibility of the “remote chance of deviation” from the conclusion already reached, in my view, is – though emotionally very appealing in the context of the extinguishment of life – equally applicable to all cases of review.

In my considered opinion, even though the dissenting voice may not be of any taste for a convict but it seems that the Constitution Bench of the Supreme Court has tried to give a soothing touch on an emotional plea whose result will surely lead to zero success in all review petitions as the matters will be heard as usual by the same bench which heard the parties earlier and after a thoughtful consideration of all the facts and settled principles of law delivered the decision in main appeal.

It is interesting to note that in the above case, there was no argument for hearing of Curative Petitions in the open Court. A Curative Petition, as provided under Order XLVIII Rule 4(1) of the Supreme Court Rules, 2013, is circulated for consideration to a Bench of the three senior-most judges and the judges who passed the judgment complained of, if available. I am of the opinion that in near future a plea for open Court hearing in Curative Petition will surely be a subject matter of consideration on the same ground and principles of law as discussed in Mohd. Arif. Be that as it may, the law of the day is that the appeals in death sentence cases will be heard by a three-Judge Bench and the Review Petitions in death sentence cases will be heard (for 30 minutes) in open Court.

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