CHAPTER III

IMPLICATIONS OF DIFFERENT LAWS IN CAPITAL PUNISHMENT
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"Capital punishment kills immediately, whereas lifetime imprisonment does so slowly. Which executioner is more humane? The one who kills you in a few minutes, or the one who wrests your life from you in the course of many years?"

- Anton Chekhov

3.1 Introduction

The Judicial members are divided on the critical issue of life or death sentence. Some of them support abolition and other support retention of death penalty; who support abolition argues that death penalty is degrading and contrary to the view of human dignity, it is irreversible and an expression of retributive justice which has no place in modern penology; who support retention justify death penalty as a social necessity having a unique deterrent force.

The ever-changing trend towards obligation of death sentence for the offence of murder is clearly apparent from the amendments made in criminal law from time to time. Prior to 1955, judicial discretion in awarding a lesser penalty instead of death sentence was bounded by requiring the judge to record his reasons for awarding a lesser punishment. This in other words, meant that the discretion of the judge was open to further judicial review. However, it was subsequently realized that this restriction on the power of court was unnecessary because at times it nullified the achievement of the judge if his reason for awarding life imprisonment instead of death sentence, did not argue well even though he might be ultimately correct in his final judgment. Thus in Avtar Singh v. Emperor161, the judge concerned considered it proper to award a sentence of life imprisonment instead of death for the reason that the accused was initially condemned to death which remained suspended for a period of over six months. Giving reasons for his decision, the learned Judge observed that it

161 17 CWN 1213
was unjust to keep the sentence of death hanging over the head of the accused for a long period of over six months because it must have caused him great mental torture. He, therefore, thought it proper to reduce the sentence of death to one of life imprisonment. But in another case *Queen v. Osram Sungra*¹⁶², where the accused committed a deliberate cold blooded murder for ulterior motives, the court awarded a lesser punishment of life imprisonment instead of death, without recording reasons of such leniency.

Restrictions on the discretion of the judge to record reasons for awarding a lesser punishment of life punishment to murderer instead of sentence of death were withdrawn by the amending act¹⁶³, of 1955. After this amendment the judge had the discretion to commute the sentence of death to that of life imprisonment but in case he considered the imposition of death sentence necessary, he had to state the reason as to why a lesser penalty would not serve the end of justice. Thus the amendment clearly reflected the shift in trend towards death penalty.

India retained the death penalty as one of the punishments in the Indian Penal Code, 1860 (IPC) after independence. Death penalty is also prescribed in special or local laws for various offences. Presently, death penalty is provided under the IPC for various offences such as Section 121,¹⁶⁴ Section 132,¹⁶⁵ Section 194,¹⁶⁶ Section 195A,¹⁶⁷ Section 302,¹⁶⁸ Section 305,¹⁶⁹Section 307(2),¹⁷⁰ Section 364A,¹⁷¹ Section 396,¹⁷² Section 376E,¹⁷³ and Section 376A.¹⁷⁴

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¹⁶² (1886) 6 WR (Cr) 82
¹⁶³ Section 66 of Amending Act, (XXVI) of 1955
¹⁶⁴ Treason, for waging war against the Government of India
¹⁶⁵ Abetment of mutiny actually committed
¹⁶⁶ Perjury resulting in the conviction and death of an innocent person
¹⁶⁷ Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
¹⁶⁸ Murder
¹⁶⁹ Abetment of suicide by a minor, insane person or intoxicated person
¹⁷⁰ Attempted murder by a serving life-convict
¹⁷¹ Kidnapping for ransom
¹⁷² Dacoity with murder
¹⁷³ Repeat offenders of rape
The special or local laws which provide for death penalty are the Army Act, 1950;175 the Air Force Act, 1950;176 the Navy Act, 1950;177 the Indo Tibetan Border Police Act, 1992;178 the Assam Rifles Act, 2006;179 the Border Security Force Act, 1968;180 the Sashastra Seema Bal Act, 2007;181 the Defence and Internal Security Act, 1971;182 the Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985 as amended in 1988183 the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989;184 the Explosive Substances Act, 1908 as amended in 2001;185 the Unlawful Activities Prevention Act, 1967, as amended in 2004;186 the Maharashtra Control of Organised Crime Act, 1999;187 the Karnataka Control of Organised Crime Act, 2000;188 the Andhra Pradesh Control of Organised Crime Act, 2001;189 and the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002.190 A number of local laws such as the Arunachal Pradesh Control of Organised Crime Act, 2002 providing death penalty have been repealed.191 Although various laws provides for the death penalty, it is mainly given under Section 302 IPC.

174 Person committing an offence of sexual assault and inflicting injury which causes death or causes the person to be in a persistent vegetative state
175 Section 34, Section 37, Section 38, Section 69, The Army Act, 1950
176 Section 34, Section 35, Section 38, Section 71, The Air Force Act, 1950
177 Section 34, Section 35, Section 36, Section 37, Section 38, Section 39, Section 43, Section 44, Section 49, Section 56, Section 59, Section 77, The Navy Act, 1950
178 Section 16, Section 19, Section 20, Section 49, Indo Tibetan Border Police Act, 1992
179 Section 21, Section 24, Section 55, Assam Rifles Act, 2006
180 Section 14, Section 15, Section 17, Section 18, Section 46, Border Security Force Act, 1968
181 Section 16, Section 19, Section 20, Section 49, Sashastra Seema Bal Act, 2007
182 Section 5, Defence and Internal Security Act, 1971
183 Section 31 A, Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985
184 Section 3(2)(1), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
185 Section 3(b), Explosive Substances Act, 1908
186 Section 16(1), Unlawful Activities Prevention Act, 1967
187 Section 3(1)(i), Maharashtra Control of Organised Crime Act, 1999
188 Section 3(1)(i), Karnataka Control of Organised Crime Act, 2000
189 Section 3(1)(i), Andhra Pradesh Control of Organised Crime Act, 2001
190 Section 3(1)(G)(i), Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002
191 Section 3(1)(i), Arunachal Pradesh Control of Organised Crime Act, 2002
3.2 Indian Penal Code and Death Penalty

In India the only method of death penalty is death by hanging. In August 1983, the Attorney-General of India described hanging as the best method of execution based on the theory that the vascular, nervous and respiratory systems are extinguished in a single moment. However, experience shows that hanging can be a brutal and long suffering. For example, Nathuram Godse, the man convicted of murdering Mahatma Gandhi, was suspended for fifteen minutes from the scaffold before finally dying.

Notably, Mahatma Gandhi would have likely opposed his killer’s fate: “I cannot in all conscience agree to anyone being sent to the gallows. God alone can take life because he alone gives it”.

Punishment is the suffering in person or property, inflicted on the offender under the sanction of law. Punishment of the wrongdoer for the offence one has committed is that which makes criminal law grand and deterrent.

Indian Penal Code seems to measure the gravity of the violation by the seriousness of the crime and its general effect upon public tranquility. There is correlation between measure of guilt and measure of punishment. Section 53 of the Indian Penal Code deals with the kinds of punishments which can be inflicted on the offender; they are as follows:

a) Death penalty,
b) Imprisonment for life,
c) Imprisonment,
d) Forfeiture of property and
e) Fine.

As far as imprisonment is considered, for majority of the offences the Code prescribes the maximum penalty and leaves the infliction of the appropriate term
within that set limit to judicial discretion. For some offences minimum sentence is fixed by the Code and infliction of sentence beyond that is left to the discretion of the Judges. For some other offences the Code prescribes alternatives and the Court is free to choose either of them. Thus, generally speaking, the IPC gives much sentencing discretion to the judicial officer. As this approach helps the Court to take an informed decision it is in accordance with the constitutional principles also. Since Section 303 IPC did not fall in line with this policy it was struck down by the Supreme Court in *Mithu v. State of Punjab*¹⁹². There are, however, some more provisions like Sections 311, 363A (2) which fall foul of the constitutional scheme. In the light of *Mithu* their validity remains doubtful.

Similarly there is a clause in Section 307 IPC which conforms neither to law nor to logic. The section defines attempt to murder and prescribes penalty. A person attempting to murder might, if hurt was caused, be imprisoned for life or imprisonment for ten years. But where the offender was already imprisoned for life then, he may be punished with death penalty. So the Code maintains different punishments for those who are undergoing life sentence and any sentence other than life sentence or those who have served out life sentence or others. This classification of offenders is not in conformity with constitutional principles. There is no nexus between the classification made and the objective of deterrence to be achieved. And it is not a reasonable classification as well. Moreover the relevant part of the section leads one to some awkward situations. Now after *Mithu case*, if a life convict is found guilty of murder he will be convicted under Section 302 and may get life imprisonment or death penalty. But a life convict, if failed to commit murder but caused only hurt to the victim he would be given death penalty under Section 307.

### 3.2.1 Offences Punishable under Indian Penal Code, 1860

"Following are the provisions in which the penalty of death may be provided:

1. Being party to a criminal conspiracy to commit an offence punishable with death (Section 120B (1)).
2. Waging war against the Government of India (section 121).
3. For abetment of mutiny (Section 132).
4. For intentionally fabricating evidence resulting in execution of an innocent person (section 194).
5. Punishment for Murder (Section 302).
6. For abetment of Suicide of child or insane person (Section 305).
7. For attempt to murder by life convicts (section 307).
8. For rape resulting in death or permanent vegetative state (Section 376 A).
9. Punishment for repeat offenders of rape (Section 376E).
10. For committing murder in the course of committing dacoity (Section 396).
11. Kidnapping for ransom and threatening to hurt (Section 364A).
12. (Repealed) Punishment for murder by a convict sentenced to life imprisonment (Section 303).”

Crime punishable under IPC

1. Being party to a criminal conspiracy to commit an offence punishable with death (Section 120B (1)).

2. Waging war against the government of India (Section 121) “it provides that whoever wages war against the Government of India or attempts to wage...”

193 Section 120 B, Indian Penal Code, 1860
such war, or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine. The offence under Section 121 is a capital offence because it threatens the very existence of an organized Government, which is essential for the protection of human life.”

3. **For abetment of mutiny Section 132** “whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy, or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment of life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Section 132 is also a capital offence, because it aims at the destruction of the very forces, which are intended to protect the machinery of the State. Sections 121, 124-A and 132 prescribe death penalty for the offences intended to affect the stability, political independence and territorial integrity of the Nation.”

4. **For intentionally fabricating evidence resulting in execution of an innocent person Section 194** aims at the persons who give or fabricate false evidence with intent to procure conviction of capital offence to innocent persons. It runs thus: “Whoever gives or fabricates false evidence, intending thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. And if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished with either death or the punishment herein before described.” Section 194 “part II is punishable with death on the logic that the person concerned gave false evidence with the intention of or knowledge of likelihood of deprivation of innocent human life”.

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194 Section 121, Indian Penal Code, 1860
195 Section 132, Indian Penal Code, 1860
196 Section 194, Indian Penal Code, 1860
5. Punishment for Murder  Section 302 of Indian Penal Code is the most important section in the jurisprudence of Capital Punishment. It prescribes death sentence for the offence of murder. But the section gives discretion to the sentencing judge by prescribing life imprisonment as an alternative punishment though the authors of the Code prescribed death as a punishment, they are convinced that it ought to be sparingly inflicted. They also observed: “Though the sentence consequent upon a conviction of murder must be death, if there exists any grounds for mercy, that circumstance will have to be considered by the Government or its executive minister, and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law.”

6. For abetment of suicide of child or insane person section 305 “if any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commit suicide, whoever abets the commission of such suicide, shall be punished with death, or imprisonment of life or imprisonment for a term not exceeding ten years and shall also be liable to fine”.

7. For attempt to murder by life convict Section 307, "whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is herein before mentioned. When such an attempt is made by a life convict, he may, if hurt is caused, be punished with death."

The offence under Section 307 is one where the attempt is not successful; the disregard of the sanctity of human life is, however, transparent here also. But, the sentence of death can be awarded only where hurt is caused and the person offending is already under sentence of imprisonment for life. The last

197 Section 302, Indian Penal Code, 1860
198 Section 305, Indian Penal Code, 1860
requirement is merely an illustration of the proposition that the law has not ruled out the consideration of the individual.\textsuperscript{199}

8. For rape resulting in death or permanent vegetative state Section 376 A

"Whoever, commits on offence punishable under sub section (1) or sub section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of woman or causes the woman to be in vegetative state, shall be punished with a term which included rigorous imprisonment for a term which not be less than twenty years but which may extends to imprisonment for life which shall mean imprisonment for the remainder of that person’s natural life, or with death."\textsuperscript{200}

9. Punishment for repeat offenders of rape Section 376 E "whoever has been previously convicted of an offence punishable under section 376 or section 376 D and is subsequently convicted of an offence punishable under any of said sections shall be punished with imprisonment for life which shall be mean imprisonment for the remainder of that person’s natural life, or with death."\textsuperscript{201}

10. For committing murder in the course of committing dacoity

Section 396. It runs thus: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. The offence under Section 396, is a specific case of vicarious liability in respect of the sentence of death, but even here it would be difficult to discuss the principle of protection of human life: the section requires that there must be five or more persons who are conjointly committing dacoity and that one of such persons must commit murder in so committing dacoity. Joint liability under this section does not arise unless all the persons conjointly commit dacoity and the murder was committed in so committing dacoity.\textsuperscript{202}

\textsuperscript{199} Law Commission of India, Thirty-Fifth Report (September 1967)
\textsuperscript{200} Section 376A, Indian Penal Code, 1860
\textsuperscript{201} Section 376E, Indian Penal Code, 1860
\textsuperscript{202} Section 396, Indian Penal Code, 1860
11. Kidnapping for ransom and threatening to hurt Section 364 A

"whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person death or hurt or causes hurt or death to such person in order to compel the government or any foreign state or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death or imprisonment for life and shall also be liable to fine."\(^{203}\)

12. Punishment for murder by a convict sentenced to life imprisonment Section 303 (Repealed) "whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death".

This section was struck down as unconstitutional by the Supreme Court in *Mithu v. State of Punjab*\(^{204}\) in 1983. The reasoning, which applied for holding section 303 as unconstitutional, would have applied with same force to the last part of Section 307 also, and the same, if it had left no discretion with the Judge, would have met the same fate. Fortunately, however, the provision for the Capital Punishment, in that section is not mandatory but spells out its desirability. The word "may be" is indicative only of a desirable course.\(^{205}\)

The Indian Penal Code provides death penalty in three distinct patterns. "Sections 303 and 307 relate to two offences for which the death penalty is the sole form of punishment. Section 302 is the second pattern where death penalty is with only one alternative namely the Life imprisonment. The third pattern is followed in respect of other offences cited above, where death penalty is the maximum to be applied along with wide range of other minimum sentences."

In respect of the rules or guidelines for the operation of the choice out of the range of sentences the penal code is fairly bold. The question of when or why the

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\(^{203}\) Section 364 A, Indian Penal Code, 1860

\(^{204}\) *Mithu v. State of Punjab* (AIR 1983 SC 473)

death penalty should be imposed is left to judicial discretion in every case. Guided by missiles with lethal potential in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process. Section 303 of Indian Penal Code is a unique section, because it is the only section in the whole Code, which prescribes mandatory death sentence. It runs thus: “Whoever being under sentence of imprisonment for life, commits murder, and shall be punished with death. However, the Indian Supreme Court as ultra vires of the Constitution struck down this section.”

3.3 Death penalty under Other Laws

In India, the penalty of death given under various acts other than the Indian penal Code. Some of them are as follows:

3.3.1 Armed forces and paramilitary legislation:

The Penalty of Death provided under various armed forces and Paramilitary Act. Like Airforce Act, 1950, Navy Act, Border security Force Act etc. Various provision of these acts under which death penalty is provided are explained as under:

3.3.1.1 Air Forces Act, 1950

The Air Force Act, 1950 also provides for the awarding of the penalty of death and its executions relating to some offences provided there under this Act.

The sentence of death as provided under The Air Force Act, 1950 will be pertinent for the purpose of studying the execution of the penalty of death awarded

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206 Pande, B.B: "Face to Face with Death", Supreme Court Cases 124 (1986)
207 Rajendra Prasad v. State of Uttar Pradesh AIR 1979 S.C. 916
208 Chapter VI of The Air Force Act, 1950 in Section 34 provides for the offences in relation to the enemy and punishable with death, Section 37 is on mutiny and provides for the infliction of death sentence in case the accused is convicted. Chapter VII provides for the various punishments and the competent court-martials to pass it, section 73 provides for the punishments awardable by Court martial. Chapter XII provides for the Confirmation and Revision provisions. Chapter XIII provides for the Execution of Sentences, section 163 deals with the form of the sentence of Death.
Section 34: offences in relation to the enemy and punishable with death

"Any person subject to this Act who commits any of the following offences, that is to say,-

(a) shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit the said act; or

(b) Intentionally uses any means to compel or induce any person subject to military, naval or air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy; or

(c) In the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

(e) Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

(f) Treacherously or through cowardice sends a flag of truce to the enemy; or

(g) In time of war or during any air force operation, intentionally occasions a false alarm in action, camp, garrison or quarters, or spreads reports calculated to create alarm or despondency; or

(h) In time of action leaves his commanding officer or his post, guard, piquet, patrol or party without being regularly relieved or without leave; or

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209 Section 34, The Air Force Act, 1950
Having been made a prisoner of war, voluntarily serves with or aids the enemy; or
Knowingly harbors or protects an enemy not being a prisoner, or
Being a sentry in time of war or alarm, sleeps upon his post or is intoxicated; or
Knowingly does any act calculated to imperil the success of the military, naval or air forces of India or any forces co-operating therewith or any part of such forces;
Treacherously or shamefully causes the capture or destruction by the enemy of any aircraft belonging to the forces; or
Treacherously uses any false air signal or alters or interferes with any air signal; or
When ordered by his superior officer or otherwise under orders to carry out any air forces operations, treacherously or shamefully fails to use his utmost exertions to carry such orders into effect;

shall on conviction by the court-martial, be liable to suffer death or such less punishment as is in this Act mentioned”.

This section authorises the court martial to award the sentence of death for the offences mentioned in section 34 (a) to (o) of The Air Force Act, 1950. These punishments however are subject to provisions as pronounced in Chapter XII which covers procedure for the Confirmation and Revision provisions. The provision in Chapter XIII provide for the Execution of sentences.

Section 163 provides for the form of the sentence of death as:-

“In awarding a sentence of death, a court-martial shall, in its discretion, direct that the offender shall suffer death by being hanged by the neck until he be dead or shall suffer death by being shot to death”.
“This provides for the discretion of the Court Martial to either provide for the execution of the death sentence by hanging, or by being shot to death. This section provides for the procedure and method in which death sentence is to be carried out in accordance with the provisions under the Act. It is important to note that The Air Force Act, 1950 provides for the execution of the death by being shot to death. This method though not being prescribed under the Code of Criminal Procedure is provided in The Air Force Act, 1950 for the execution of the Death sentence. This means that the execution procedure in India also permits the execution of the Death sentence up to certain extent by another method namely by being shot to death. This is with the objective to provide for the easy simple method of the execution in case of the convicted offender of the offences mentioned in the Act."^{210}

It is worth mentioning that unless the punishment is confirmed by the concerned authorities under the Act^{211} convict will not be executed. It provides for the results and the order to be confirmed by the Central Government or any officer empowered by the same in this behalf.^{212} “This provides for the mandatory review of the all the decisions of the Court Martial by the central government. This enables the Central Government to scrutinize the irregularity pertaining to the procedure or the finding of the Court Martial. The Army Act, 1950, The Navy Act 1957 also provide for the similar provisions as in The Air Force Act, 1950. The provisions that are similar in nature to that of in The Air Force Act, 1950 also provide for the option of the execution of the death penalty by being shot at death."^{213}

After referring to these relevant provisions in these Acts inference can be drawn that “the shooting as one of the method provided for execution of the death

^{210} Section 34 (a) to (o), The Air Force Act, 1950
^{211} Chapter XII, The Air Force Act, 1950
^{212} Section 153, The Air Force Act, 1950
^{213} The provisions relating to awarding the Death penalty in The Army Act, 1950 are enunciated in Chapter VI Section 34 (a) to (l) relates to offences in relation to the enemy and punishable with death, Section 37 deals with Mutiny and provides for the infliction of death sentence in case the accused is convicted. Chapter VII pertains to Punishments awardable by Court Martial, Chapter XII is on Confirmation and Revision, Chapter XIII is on Execution of Sentences, Section 166 deals with form of Sentence of Death. Section 147 of The Navy Act 1957 provides for the Form of Death Sentence.
penalty under the Act aims to make it simple and easily executed with the availabilities of the weapons and equipment in these forces. The form of the shooting a condemned man necessarily involves less agony as that in the case of the hanging where there is procedure as to weighting, measuring of the height, etc. in order to determine the length of the drop specific restrictions are also put as to wearing certain kinds of apparel, etc."

It may be pointed out here that during the Nuremberg trials after the Second World War executions, the members of the German High Command “who were condemned to death opted for the execution of the death sentence by being shot to death against hanging. They wanted soldiers' death instead of degrading death by hanging. This is sufficient to objectively assert that the execution by being shot to death is simpler and less painful to the hanging by neck till death. The practice of this method both in various developing and developed countries is apparently because this method being simple, easy to execute, less painful too.”

3.3.1.2 The Army Act, 1950

The Army Act, 1950 also provides for the awarding of the punishment to death and its executions relating to some offences provided there under Chapter VI of The Army Act, 1950 in “Section 34 provides for the offences in relation to the enemy and punishable with death”, “Section 37 is on mutiny and provides for the infliction of death sentence in case the accused is convicted.” Chapter VII provides for the various punishments and the competent court-martials to pass it, “section 71 provides for the punishments awardable by Court martial. Chapter XII provides for the Confirmation and Revision provisions.” Chapter XIII provides for the Execution of Sentences, section 166 deals with “the form of the sentence of Death.”

Section 34: offences in relation to the enemy and punishable with death

“Any person subject to this Act who commits any of the following offences, that is to say,-
(a) shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit the said act; or

(b) Intentionally uses any means to compel or induce any person subject to military, naval or air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy; or

(c) In the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

(e) Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

(f) Treacherously or through cowardice sends a flag of truce to the enemy; or

(g) In time of war or during any air force operation, intentionally occasions a false alarm in action, camp, garrison or quarters, or spreads reports calculated to create alarm or despondency; or

(h) In time of action leaves his commanding officer or his post, guard, piquet, patrol or party without being regularly relieved or without leave; or

(i) Having been made a prisoner of war, voluntarily serves with or aids the enemy; or

(j) Knowingly harbors or protects an enemy not being a prisoner, or

(k) Being a sentry in time of war or alarm, sleeps upon his post or is intoxicated; or

(l) Knowingly does any act calculated to imperil the success of the military, naval or air forces of India or any forces co-operating therewith or any part of such forces;

(m) Treacherously or shamefully causes the capture or destruction by the enemy of any aircraft belonging to the forces; or
(n) Treacherously uses any false air signal or alters or interferes with any air signal; or
(o) When ordered by his superior officer or otherwise under orders to carry out any air forces operations, treacherously or shamefully fails to use his utmost exertions to carry such orders into effect;

shall on conviction by the court-martial, be liable to suffer death or such less punishment as is in this Act mentioned.”

37. Mutiny. —“Any person subject to this Act who commits any of the following offences, that is to say, -

(a) Begins, incites, causes, or conspires with any other person to cause any mutiny in the military, naval or air forces of India or any forces co-operating therewith; or

(b) Joins in any such mutiny; or

(c) Being present at any such mutiny, does not use his utmost endeavours to suppress the same; or

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

(e) Endeavours to seduce any person in the military, naval or air forces of India from his duty or allegiance to the Union; shall, on conviction by court-martial, be liable to suffer death or such less punishment as is in this Act mentioned”.

38. Desertion and aiding desertion. 214. (1) “Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial, if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and if he

214 Section 38, The Army Act, 1950
commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who knowingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act, who being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned”.

3.3.1.3 Navy Act, 1957.

Misconduct by officers or persons in command: misconduct include: “if intended to assist the enemy, failing to do utmost to bring into Action a vessel; surrounding a ship (without necessity); failing to pursue enemy or assist friend; withdrawing from action or failing to encourage others; surrendering a naval establishment (without necessity).”

Section 34: Misconduct by officers or persons in command. “Every flag officer, captain or other person subject to naval law who, being in command of any ship, vessel or aircraft of the Indian Navy, or any naval establishment-

(a) fails to use his utmost exertions to bring into action any such ship, vessel or aircraft which it is his duty to bring into action; or

(b) surrenders any such ship, vessel or aircraft to the enemy when it is capable of being successfully defended or destroyed; or
(c) fails to pursue the enemy whom it is his duty to pursue or to assist to the utmost of his ability any friend whom it is his duty to assist; or

(d) in the course of any action by or against the enemy improperly withdraws from the action or from his station or fails in his own person and according to his rank to encourage the persons under his command to fight courageously; or

(e) surrenders any such naval establishment or any part of such an establishment to the enemy when it is capable of being successfully defended or when it is his duty to cause it to be destroyed, shall,-

(a) if such act is committed with intent to assist the enemy or from cowardice, be punished with death or such other punishment as is hereinafter mentioned; and

(b) in any other case, be punished with imprisonment for a term which may extend to seven years or such other punishment as is hereinafter mentioned.

Section 35: Misconduct by persons other than those in command: “Every person subject to naval law who, not being in command of any naval establishment or any ship, vessel or aircraft of the Indian Navy, fails when ordered to prepare for action by or against the enemy, or during any such action, to use his utmost exertions to carry the lawful Orders of his superior officers into execution shall,-

(a) if such act is committed with intent to assist the enemy, be punished with death or such other punishment as is hereinafter mentioned; and

(b) in any other case, be punished with imprisonment for a term which may extend to seven years or such other punishment as is hereinafter mentioned. Delaying or discouraging action or service commanded”.

Section 36: Delaying or discouraging action or service commanded: “Every person subject to naval law who wilfully delays or discourages upon any pretext whatsoever, any action or service which has been commanded on the part of the
Navy, regular Army, or Air Force or of any forces co-operative therewith shall,—(a) if such act is committed with intent to assist the enemy, be punished with death or such other punishment as is hereinafter mentioned; and (b) in any other case, be punished with imprisonment which may extend to seven years or such other punishment as is hereinafter mentioned”.

Section 37: Penalty for disobedience in action. “Every person subject to naval law who, being in the presence or vicinity of the enemy or having been ordered to be prepared for action by or against the enemy—

(a) deserts his post; or

(b) sleeps upon his watch, shall be punished with death or such other punishment as is hereinafter mentioned”.

Section 38: Penalty for spying. “Every person not otherwise subject to naval law who is or acts as a spy for the enemy shall be punished under this Act with death or such other punishment as is hereinafter mentioned as if he were a person subject to naval law”.

Section 39: Correspondence, etc., with the enemy. “Every person subject to naval law, who,—(a) traitorously holds correspondence with the enemy or gives intelligence to the enemy; or (b) fails to make known to the proper authorities any information he may have received from the enemy; or (c) assists the enemy with any supplies; or (d) having been made a prisoner of war, voluntarily serves with or aids the enemy; shall be punished with death or such other punishment as is hereinafter mentioned”.

Section 43: Punishment for mutiny. “Every person subject to naval law, who,—(a) joins in a mutiny; or

(a) begins, incites, causes or conspires with any other persons to cause, a mutiny;
(b) endeavours to incite any person to join in a mutiny or to commit an act of mutiny; or
(c) endeavours to seduce any person in the regular Army, Navy or Air Force from his allegiance to the Constitution or loyalty to the State or duty to his superior officers or uses any means to compel or induce any such person to abstain from acting against the enemy or discourage such person from acting against the enemy; or
(d) does not use his utmost exertions to suppress a mutiny; or
(e) wilfully conceals any traitorous or mutinous practice or design or any traitorous words spoken against the State; or
(f) knowing or having reason to believe in the existence of any mutiny or of any intention to mutiny does not without delay give information thereof to the commanding officer of his ship or other superior officer; or
(g) utters words of sedition or mutiny; shall be punished with death or such other punishment as is hereinafter mentioned”.

Section 44: Persons on board ships or aircraft seducing naval personnel from allegiance.

“Every person not otherwise subject to naval law who being on board any ship or aircraft of the Indian Navy or on board any ship in the service of the Government endeavours to seduce from his allegiance to the Constitution or loyalty to the State or duty to superior officers any person subject to naval law shall be punished under this Act with death or such other punishment as is hereinafter mentioned as if he were a person subject ‘to naval law’.

Section 49: Desertion.

“(2) Every person who deserts shall,—

(a) if he deserts to the enemy, be punished with death or such other punishment as is hereinafter mentioned; or
(b) if he deserts under any other circumstances, be punished with imprisonment for a term which may extend to fourteen years or such other punishment as is hereinafter mentioned; and in every such case he shall forfeit all pay, head money, bounty, salvage, prize money and allowances that have been earned by him and all annuities, pensions, gratuities, medals and decorations that may have been granted to him and also all clothes and effects which he deserted, unless the tribunal by which he is tried or the which he deserted, unless the tribunal by which he is tried or the Central Government or the Chief of the Naval Staff, otherwise directs”.

Section 56: Offences by officers in charge of convoy.

“(1) All officers appointed for the convoy and protection of any ships or vessels shall diligently perform their duty without delay according to their instructions in that behalf.

(2) Every such officer subject to naval law, who,-

(a) does not defend the ships and goods under his convoy without deviation to any other objects; or

(b) refuses to fight in their defence if they are assailed; or

(c) cowardly abandons and exposes the ships in his convoy to hazard; or

(d) demands or exacts any money or other reward from any merchant or master for convoying any ships or vessels entrusted to his care; or

(e) misuses the masters or mariners thereof; shall be punished with death or such other punishment as is herein-after mentioned, and shall also make such reparation in damages to the merchants, owners and others as a civil court of competent jurisdiction may adjudge”.
Section 59: Arson.

"Every person subject to naval law who unlawfully sets fire to any dockyard, victual ling yard or steam factory yard, arsenal, magazine, building, stores or to any ship, vessel, hoy, barge, boat, aircraft, or other craft or furniture thereunto belonging, not being the property of an enemy, shall be punished with death or such other punishment as is hereinafter mentioned”.

3.3.1.4 Border security force, 1968

Section 14: offences in relation to the enemy and punishable with death

“Any person subject to this Act who commits any of the following offences, that is to say:-

(a) shamefully abandons or delivers up any post, place or guard, committed to his charge or which it is his duty to defend; or

(b) intentionally uses any means to compel or induce any person subject to this Act or to military, naval or air force law to abstain from acting against the enemy or to discourage such person from acting against the enemy; or

(c) in the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) treacherously holds correspondence with or communicates intelligence to, the enemy or any person in arms against the Union; or

(e) directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies or in any other manner whatsoever; or
(f) in time of active operation against the enemy, intentionally occasions a false alarm in action, camp, quarters, or spreads or causes to be spread reports calculated to create alarm or despondency; or

(g) in time of action leaves his Commandant or other superior officer or his post, guard, picket, patrol or party without being regularly relieved or without leave; or

(h) having been captured by the enemy or made a prisoner of war, voluntarily serves with or aids the enemy; or

(i) knowingly harbours or protects an enemy not being a prisoner; or

(j) being a sentry in time of active operation against the enemy or alarm, sleeps upon his post or is intoxicated; or

(k) knowingly does any act calculated to imperil the success of the Force or the military, naval or air forces of India or any forces cooperating therewith or any part of such forces, shall, on conviction by a Security Force Court, be liable to suffer death or such less punishment as is in this Act mentioned”.

Section 17: Mutiny

“Any person subject to this Act who commits any of the following offences, that is to say:-

(a) begins, incites, causes or conspires with any other person to cause any mutiny in the Force or in the military, naval or air forces of India or any forces co-operating therewith; or

(b) joins in any such mutiny; or

(c) being present at any such mutiny, does not use his utmost endeavour to suppress the same; or
(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny or of any such conspiracy, does not, without delay, give information thereof to his Commandant or other superior officer; or

(e) endeavours to seduce any person in the Force or in the military, naval or air forces of India or any forces co-operating therewith from his duty or allegiance to the Union; shall, on conviction by a Security Force Court, be liable to suffer death or such less punishment as is in this Act mentioned”

Section 18: Desertion and aiding desertion

“(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by a Security Force Court,-

(a) if he commits the offence when on active duty or when under orders for active duty, be liable to suffer death or such less punishment as is in this Act mentioned.”

Section 46: Civil offences

“Subject to the provisions of section 47, any person subject to this Act who at any place in, or beyond India, commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Security Force Court and, on conviction, be punishable as follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned.”
3.3.1.5 Coast Guard Act, 1978

Section 17: “Any person subject to this Act who commits any of the following offences that is to say,-

(a) begins, incites, causes or conspire with any other person to cause any mutiny in the Coast Guard or in the military, naval or Air Force co-operating therewith; or

(b) joins in any such mutiny; or

(c) being present at any such mutiny, does not use his utmost endeavours to suppress same; or

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny or of any such conspiracy, does not, without delay, give information thereof to his commanding officer or other superior officer; or

(e) endeavours to seduce any person in the Coast Guard or in

the military, naval or air forces of India or any forces co-operating therewith from his duty or allegiance to the union, shall, on the conviction by a coast Guard Court, be liable to suffer death or such less punishment as is in this Act mentioned.

Provided that a sentence of death awarded under this section shall not be carried out unless it is confirmed by the Central Government.”

Section 49: Civil offences

“Subject to the provisions of section 50, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Coast Guard Court, and, on conviction, be punishable as follows, that is to say,-
(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law or such less punishment as is in thus act mentioned.

3.3.1.6 ITBP Force Act, 1992

Section 16: “Offences in relation to the enemy or terrorist and punishable with death.-Any person subject to this Act who commits any of the following offences, that is to say,

(a) Shamefully abandons or delivers up any post, place or guard, committed to his charge or which it is his duty to defend; or

(b) intentionally uses any means to compel or induce any person subject to this Act or to any other law relating to military, naval, air force or any other armed force of the Union to abstain from acting against the enemy or to discourage such person from acting against the enemy; or

(c) in the presence of the enemy or terrorist, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) Treacherously holds correspondence with, or communicates intelligence to, the enemy terrorist or any person in arms against the Union; or

(e) Directly or indirectly assists the enemy or terrorist with money, arms, ammunition, stores or supplies or in any other manner whatsoever; or

(f) in time of-active operation against the enemy or terrorist, intentionally occasions a false alarm in action, camp, quarters or spreads or causes to be spread reports calculated to create alarm or despondency; or
(g) in time of action leaves his commanding officer or other superior officer or his post, guard, picket, patrol or party without being regularly relieved or without leave; or

(h) Having been captured by the enemy or made a prisoner of war, voluntarily serves with or aids the enemy; or

(i) Knowingly harbours or protects an enemy, not being a prisoner; or

(j) Being a sentry in time of active operation against the enemy or alarm, sleeps upon his post or is intoxicated; or

(k) knowingly does any act calculated to imperil the success of the Force or the military naval or air force of India or any forces, co-operating therewith or any part of such forces, shall, on conviction by a Force Court, be liable to suffer death of such less punishment as is in this Act mentioned."

Section 19. Mutiny. —"Any person subject to this Act who commits any of the following offences, that is to say,

(a) begins, incites, causes or conspires with any other person to cause any mutiny in the Force or in the military, naval or air force of India or any forces co-operating therewith; or

(b) joins in any such mutiny; or

(c) Being present at any such mutiny, does not use his utmost endeavors to suppress the same; or

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny or of any such conspiracy, does not, without delay, give information thereof to his commanding officer or other superior officer; or
(e) endeavours to seduce any person in the Force or in the military, naval or air force of India Of any forces co-operating therewith from his duty or allegiance to the Union, shall, on conviction by a Force Court, be liable to suffer death or such less punishment as is in this Act mentioned.”

Section 20: “Desertion and aiding desertion.-

(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by a Force Court,

(a) if he commits the offence when on active duty or when under orders for active duty, be liable to suffer death or such less punishment as is in this Act mentioned.”

Section 49: Civil offences.-“Subject to the provisions of section 50, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Force Court and, on conviction, be punishable as follows, that is to say,--- (a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned.”

3.3.1.7 Assam Rifles Act, 2006

Section 21: Offences in relation to the enemy and punishable with death.-“Any person subject to this Act who commits any of the following offences, that is to say,-

(a) shamefully abandons or delivers up any post, place or guard, committed to his charge or which it is his duty to defend; or

(b) intentionally uses any means to compel or induce any person subject to this Act or to army, naval, air force law or any member of other armed forces to abstain from
acting against the enemy or to discourage such person from acting against the enemy; or

(c) in the presence of enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

(e) directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies or in any other manner whatsoever; or

(f) in time of active operation against the enemy intentionally occasions a false alarm in action, camp, quarters or spreads or causes to be spread reports calculated to create alarm or despondency; or

(g) in time of action leaves his Commandant or other superior officer or his post, guard, picket, patrol or party without being regularly relieved or without leave; or

(h) having been captured by the enemy or made a prisoner of war, voluntarily serves with or aids the enemy; or

(i) knowingly harbours or protects an enemy not being a prisoner; or

(j) being a sentry in time of active operation against the enemy or alarm, sleeps upon his post or is intoxicated; or

(k) knowingly does any act calculated to imperil the success of the Force or the army, naval, air forces of India or any other armed forces of the Central Government cooperating therewith or any part of such forces, shall, on conviction by an Assam Rifles Court, be liable to suffer death or such less punishment as is in this Act mentioned.”
Section 24: Mutiny. —“Any person subject to this Act who commits any of the following offences, that is to say,

(a) begins, incites, causes or conspires with any other person to cause any mutiny in the Force or in the military, naval or air force of India or any forces co-operating therewith; or (b) joins in any such mutiny; or

(c) Being present at any such mutiny, does not use his utmost endeavors to suppress the same; or

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny or of any such conspiracy, does not, without delay, give information thereof to his commanding officer or other superior officer; or

(e) endeavours to seduce any person in the Force or in the military, naval or air force of India of any forces co-operating therewith from his duty or allegiance to the Union,

shall, on conviction by an Assam Rifles court, be liable to suffer death or such less punishment as is in this Act mentioned.”

25. Desertion and aiding desertion. —“(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by an Assam Rifles Court, (a) if he commits the offence when on active duty or when under orders for active duty, be liable to suffer death or such less punishment as is in this Act mentioned.”

55. Civil offences. —“Subject to the provisions of section 56, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by an Assam Rifles Court and, on conviction, be punishable as follows, that is to say, (a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment
assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned."

3.3.1.8 Sashastra Seema Bal, 2007

Section 16: offences in relation to enemy and punishable with death:

"Any person subject to this Act who commits any of the following offences, namely:

(a) shamefully abandons or delivers up any post, place or guard, committed to his charge or which it is his duty to defend; or

(b) intentionally uses any means to compel or induce any person subject to this Act or to any other law relating to military, naval, air force or any other armed force of the Union to abstain from acting against the enemy or to discourage such person from acting against the enemy; or

(c) in the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

(d) treacherously holds correspondence with, or communicates intelligence to, the enemy, terrorist or any person in arms against the Union; or

(e) directly or indirectly assists the enemy or terrorist with money, arms, ammunition, stores or supplies or in any other manner whatsoever; or

(f) in time of active operation against the enemy or terrorist, intentionally occasions a false alarm in action, camp, quarters, or spreads or causes to be spread reports calculated to create alarm or despondency; or

(g) in time of action leaves his commanding officer or other superior officer or his post, guard, picket, patrol or party without being regularly relieved or without leave; or
(h) having been captured by the enemy or made a prisoner of war, voluntarily serves with or aids the enemy; or

(i) knowingly harbours or protects an enemy, not being a prisoner; or

(j) being a sentry in time of active operation against the enemy or alarm, sleeps upon his post or is intoxicated; or

(k) knowingly does any act calculated to imperil the success of the Force or the military, naval or air force of India or any forces co-operating therewith or any part of such forces, shall, on conviction by a Force Court, be liable to suffer death or such less punishment as is in this Act mentioned."

Section 19: Mutiny

"Any person subject to this Act who commits any of the following offences, namely:

(a) begins, incites, causes or conspires with any other person to cause any mutiny in the Force or in the military, naval or air force of India or any forces cooperating therewith; or

(b) joins in any such mutiny; or

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

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny or of any such conspiracy, does not, without delay, give information thereof to his commanding officer or other superior officer; or

(e) endeavours to seduce any person in the Force or in the military, naval or air force of India or any forces co-operating therewith from his duty or allegiance to the Union,
shall, on conviction by a Force Court, be liable to suffer death or such less punishment as is in this Act mentioned."

Section 20: Desertion and aiding Desertion

“(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by a Force Court,

(a) if he commits the offence when on active duty or when under orders for active duty, be liable to suffer death or such less punishment as is in this Act mentioned."

Section 49: Civil Offences

“Subject to the provisions of section 50, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Force Court and, on conviction, be punishable as follows, namely:

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned.”

3.3.2 Anti-Terror Legislation:

There are various Anti-terror Legislation made by the parliament according to the need of time under which the penalty of death is also mentioned. Some of them are as follows:
3.3.2.1 Explosive Substance Act, 1908.

For causing an explosion likely to endanger life or to cause serious injury to property Section 3(b): “Punishment for causing explosion likely to endanger life or property: Any person who unlawfully and maliciously causes by (b) any special category explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with death or rigorous imprisonment for life and shall also be liable to fine.”

3.3.2.1 Arms Act, 1959

The Arms Act, 1959 “administers matters related to acquisition, possession, manufacture, sale, transportation, import and export of arms and ammunition.” It defines a specific class of ‘prohibited’ arms and ammunitions, restricts their use and prescribes penalties for contravention of its provisions.

Section 7 of the Act “forbids the manufacture, sale, and use of prohibited arms and ammunition unless it has been specially authorised by the central government. Section 27(3) prescribes that any contravention of Section 7 that results in the death of any person shall be punishable with death.”

Section 7: “Prohibition of acquisition or possession or of manufacture or sale, of prohibited arms or prohibited ammunition

No person shall —

(a) Acquire, have in his possession or carry; or

(b) Use, manufacture, sell, transfer, convert, repair, test or prove; or

(c) Expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof;
any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf.”

2) **Section 27(3) of the Arms Act, 1959**

“Section 27(3) whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person shall be punishable with death.”

Section 27(3) of the Act was challenged in the Apex Court in 2006 in *State of Punjab v. Dalbir Singh*\(^\text{215}\). The final verdict in the case was pronounced last week. The judgment not only affects the Act in question but may have important implications for criminal law in the country.

When the law was first enacted, Section 27 provided that “possession of any arms or ammunition with intent to use the same for any unlawful purpose shall be punishable with imprisonment up to seven years and/or a fine.”

This section was amended in 1988 to provide for enhanced punishments in the context of rising terrorist and anti-national activities. In particular, section 27(3) was inserted to provide for mandatory punishment of death.

The Supreme Court judgment says that Section 27(3) is very widely worded. Any act (including use, acquisition, possession, manufacture or sale) done in contravention of Section 7 that results in death of a person will attract mandatory punishment of death. Thus, even if an accidental or unintentional use results in death, a mandatory sentence of death must be imposed.

The bench quotes relevant sections of an earlier judgment delivered in 1983, in *Mithu v. State of Punjab*\(^\text{216}\). In this case, “the court had looked into the constitutional validity of mandatory death sentence. The final verdict had ruled that a provision of

\(^{215}\) *(2012) 3 SCC 346*

\(^{216}\) *AIR 1983 SC 1957*
law which deprives the Court of its discretion, and disregards the circumstances, in which the offence was committed, can only be regarded as harsh, unjust and unfair."

The judgment goes on to say that the concept of a just, fair and reasonable law has been read into the guarantees under Article 14 (Equality before law) and Article 21 (Protection of life and personal liberty) of the Constitution. A law that imposes an irreversible penalty such as death is ‘repugnant to the concept of right and reason’. Therefore, Section 27 (3) of the Arms Act, 1959 is unconstitutional.

Section 27(3) is also unconstitutional in that “it deprives the judiciary from discharging its duty of judicial review by barring it from using the power of discretion in the sentencing procedure.”

Under Article 13 of the Constitution, laws inconsistent with the Constitution shall be null and void. Therefore, Section 27(3) of the Arms Act, 1959 shall now stand amended. Courts shall have the discretion to impose a lesser sentence.

It is notable that the Home Minister had also introduced a Bill in the Lok Sabha on the 12th of December, 2011 to amend the Arms Act, 1959. The Bill seeks to remove the words “shall be punishable with death” and replace these with “shall be punishable with death or imprisonment for life and shall also be liable to fine”. This Bill is currently being examined by the Standing Committee.

3.3.2.3 Unlawful Activities(Prevention) Act, 1967

The Unlawful Activities Prevention Act was intended to deal with associations and activities that questioned the territorial integrity of India. The ambit of the Act was strictly limited to meeting the challenge to the territorial integrity of India. The Act was a self-contained code of provisions for declaring secessionist associations as unlawful, adjudication by a tribunal, control of funds and places of work of unlawful associations, penalties for their members etc. The Act has all along been worked
holistically as such and is completely within the purview of the central list in the 7th Schedule of the constitution. 217

1. For causing death as a member/ promoter of an unlawful association in possession of illegal arms and ammunition. {Section 10(b)(i)}

Section 10: “Penalty for being member of an unlawful association etc.

(a) Where an association is declared unlawful by a notification issued under section 3 which has become effective under sub- section 3 of that section.

(b) a person, who is or continues to be member of such association, or voluntarily does an act aiding or promoting in any manner the object of such association and in either case is in possession of any unlicensed firearms, ammunitions, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property.

(i) and if such act has resulted in the death of any person, shall be punishable with death or imprisonment for life, and shall also be liable to fine.”

2. Punishment for committing a terrorist act resulting in the death of any person

Section 16(1) (a)

Section 16: Punishment for terrorist Act: “whoever commits a terrorist act shall

(a) If such act has resulted in the death of any person be punishable with death or imprisonment for life and shall also be liable to fine.”

217 Legal service India, Criminal law, Available at www.legalservicesindia.com/article/article/anti-terrorism-laws-in-india-382-l.html (visited on 4/2/16) at 03:05 PM
3.3.2.4 Defence of India Act, 1971

For contravention of rules under the Defence of India Act or Contravention of the provisions or rule of the aircraft Act, 1934, the Arms Act, 1959, the Indian Explosive Act, 1884, the Explosive substance, 1908, or, the Inflammable substance act, 1952. Following provisions are provided:

Section 5: Enhanced penalties

“(1) If any person contravenes, with intent to wage war against India or to assist any country committing external aggression against India, any provision of the rules made under section 3 or any order issued under any such rule, he shall be punishable with death or imprisonment for life, or imprisonment for a term which may extend to ten years and shall also be liable to fine.

(2) If any person, (a) contravenes any such provision of, or any such rule or order made under, the Aircraft Act, 1934 (22 of 1934), as may be notified in this behalf by the Central Government, or

(b) in any area notified in this behalf by a State Government, contravenes any such provision of, or any such rule made under, the Arms Act, 1959 (54 of 1959), the Indian Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), or the Inflammable Substances Act, 1952 (20 of 1952), as may be notified in this behalf by the State Government, he shall, notwithstanding anything contained in any of the aforesaid Acts or rules made thereunder, be punishable with imprisonment for a term which may extend to five years, or, if his intention is to assist any country committing external aggression against India, or, to wage war against India, with death or imprisonment for life or imprisonment for a term which may extend to ten years and shall, in either case, also be liable to fine.
(3) For the purposes of this section, any person who attempts to contravene, or abets or attempts to abet, or does any preparatory to, a contravention of any provisions of any law, rule or order shall be deemed to have contravened that provision."

3.3.2.5 Maharashtra control of organised crime act, 1999.

Other major Anti-terrorist law in India is “The Maharashtra Control of Organised Crime Act, 1999” which was enforced on 24th April 1999. This law was specifically made to deal with rising organized crime in Maharashtra and especially in Mumbai due to the underworld. For instance, the definition of a terrorist act is far more stretchable in MCOCA than under POTA. MCOCA mention organized crime and what is more, includes “promotion of insurgency” as a terrorist act. Under the Maharashtra law a person is presumed guilty unless he is able to prove his innocence. MCOCA does not stipulate prosecution of police officers found guilty of its misuse.

Section 3: Punishment for organized crime-

(1) Whoever commits an offence of organized crime shall,

(i) If such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lakh.

3.3.2.6 Karnataka control of organised crime act, 2000

Section 3: “Punishment for organized crime - (1) whoever commits an organized crime shall, - (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, which shall not be less than one lakh rupees.”
Andhra Pradesh control of organised crime act, 2001

Section 3: “Punishment for organized crime:- (1) Whoever commits an offence of organized crime shall, (i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lakh;”

The Prevention of Terrorism Act, 2002

Section 3(2) "Whoever commits a terrorist act, shall,

(a) If such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(b) In any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

With the growth of cross-border terrorism and the continued offensive agenda of Pakistan ISI targeted at weakening India and it became necessary to put in place a special law to deal with terrorist acts. Accordingly, the Prevention of Terrorism Act, 2002 (POTA, 2002) was enacted and notified on 28.03.2002.

The POTA, 2002 clearly defines the terrorist act and the terrorist in Section 3 and grants special powers to the investigating authorities under the Act. In the case of People's Union for Civil Liberties v. Union of India (UOI) the constitutional validity of the Prevention of Terrorism Act, 2002 was discussed. The court said that the Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Need for the Act is a matter of policy and the court cannot go into the same.

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218 (2004) 9 SCC 580
However, in order to ensure that these powers are not misused and the violation of human rights does not take place, specific safeguards have been built into the Act. "Some of these are:

a) No court can take cognizance of any offence under the Act without the previous sanction of the Central Government or, as the case may be, of the State Government.

b) No officer lower in rank than the Deputy Superintendent of Police can investigate offences under the Act.

c) Confession made by a person before a police officer not below the rank of Superintendent of Police is admissible as evidence under the Act provided such person is produced with 48 hours before a magistrate along with his confessional statement.

d) The Act provides for punishment for any officer who exercises powers maliciously or with malafide intentions. It also provides for award of compensation to a person who has been corruptly or maliciously proceeded against under the Act."

The Prevention of terrorism Act, 2002 is a special law for the prevention of and for dealing with terrorist activities and clearly defines the terrorist act and the terrorist in Section 3, Sub-Section (1) of the Act. The Act provides the legal framework to support the hands of the administration in our fight against the danger of terrorism and can and should be applied against such persons and acts as are covered by the provisions of this law and it is not meant as a substitute for action under ordinary criminal laws.

3.3.2.9 Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)

The second major act came into force on 3 September 1987 was The Terrorist & Disruptive Activities (Prevention) Act 1987 this act had much more stringent provisions then the UAPA and it was specifically designed to deal with terrorist
activities in India. When TADA was enacted it came to be challenged before the Apex Court of the country as being unconstitutional. "The Supreme Court of India upheld its constitutional validity on the assumption that those entrusted with such draconic statutory powers would act in good faith and for the public good in the case of Kartar Singh v. State of Punjab\(^{219}\). However, there were many instances of misuse of power for collateral purposes. The rigorous provisions contained in the statute came to be abused in the hands of law enforcement officials. TADA lapsed in 1995."

3.3.3 Social Reforms and protection legislation:

Capital punishment given in the various act of Social Reforms and Protection like Commission of Sati Prevention Act, 1987, Schedule Caste/ Schedule Tribe Prevention of Atrocities Act, 1989 etc. Some of them are explained as follows:

3.3.3.1 The Commission of Sati Prevention act 1987

Section 4: Abetment of sati

"(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860) , if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine."

3.3.3.2 Schedule caste and schedule Tribes prevention of Atrocities act, 1989

Section 3: Punishment for offences of atrocities

(2) "Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,- (i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent

\(^{219}\) (1994) 3 SCC 569
member of a Scheduled Caste or a Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, shall be punished with death;”

3.3.4 Narcotics and Alcohol legislation

Death penalty provided for the Narcotics and Alcohol related offences. Some of the provisions are explained as follows:

3.3.4.1 Narcotics Drugs and psychotropic Substance Act, 1985

31A. “Death Penalty for certain offences after previous conviction

(1) Notwithstanding anything contained in Section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under section 19, section 24, section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance, is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to, –

(a) Engaging in the production, manufacture, possession, transportation, import into India, export from India or transhipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity, which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table:

<table>
<thead>
<tr>
<th>Particulars of Narcotics Drugs/ Psychotropic Substance</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opium</td>
<td>10 kg</td>
</tr>
<tr>
<td>Morphine</td>
<td>1 kg</td>
</tr>
<tr>
<td>Heroine</td>
<td>1 kg</td>
</tr>
<tr>
<td>Codeine</td>
<td>1 kg</td>
</tr>
<tr>
<td>Substance</td>
<td>Quantity</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Thebeine</td>
<td>1 kg</td>
</tr>
<tr>
<td>Cocaine</td>
<td>500 gms</td>
</tr>
<tr>
<td>Hashish</td>
<td>20 kg</td>
</tr>
<tr>
<td>LSD, LDS-25(+)-(N)-Diethyllysergamide (d-lysergic acid diethylamide)</td>
<td>500 grams</td>
</tr>
<tr>
<td>THC (Tetrahydrocannabinols, the following isomers: 6-a (10a), 6-a (7), 7, 8, 9, (11) and their stereochemical variantas)</td>
<td>500 grams</td>
</tr>
<tr>
<td>Msethamphetamine (+)-2- Methylamine-a-Phenylpropane</td>
<td>1500 grams</td>
</tr>
<tr>
<td>Methaqualone (2-Methyl-3-0-toly-4-(3-H)-Quinanzolinone)</td>
<td>1500 grams</td>
</tr>
<tr>
<td>Amphetamine (+)-2-amino-1- Phenylpropan.</td>
<td>1500 grams</td>
</tr>
<tr>
<td>Any mixture with or without any neutral material of any above drugs</td>
<td>1500 grams</td>
</tr>
<tr>
<td>Salts and preparations of the Psychotropic Substances</td>
<td>1500 grams</td>
</tr>
</tbody>
</table>

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

(2) Where any person is convicted by a competent court of criminal jurisdiction outside India under any law corresponding to the provisions of section 19, section 24 or section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance] such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he has been convicted by a Court in India).

3.3.5 Economic legislations:

Some of the Economic Legislation is as follows under which there is also punishment of Death given for some offences:
3.3.5.1 Petroleum and minerals pipelines Acquisition of right of user in land act, 1962

Section 15(4): “Whoever, with the intent to cause or knowing that he is likely to cause damage to or destruction of any pipeline laid under section 7, causes by fire, explosive substance or otherwise damage to the pipeline being used for transportation of petroleum products, crude oil or gas with the intent to commit sabotage or with the knowledge that such act is so imminently dangerous that it may in all probability cause death of any person or such bodily injury likely to cause death of any person, shall be punishable with rigorous imprisonment which shall not be less than ten years but may extend to imprisonment for life or death.”

3.3.6 Miscellaneous Legislations:
3.3.6.1 The Geneva Conventions Act, 1960

Section 3: Punishment of grave breaches of conventions. - (1) “If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the Conventions he shall be punished,- (a) Where the offence involves the willful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and (b) in any other case, with imprisonment for a term which may extend to fourteen years.

(2) Sub-section (1) applies to persons regardless of their nationality or citizenship.

(3) For the purposes of this section,-

(a) a grave breach of the First Convention is a breach of that Convention involving an act referred to in article 50 of that Convention committed against persons or property protected by that Convention;
(b) a grave breach of the Second Convention is a breach of that Convention involving an act referred to in article 51 of that Convention committed against persons or property protected by that Convention;

(c) a grave breach of the Third Convention is a breach of that Convention involving an act referred to in article 130 of that Convention committed against persons or property protected by that Convention; and

(d) a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in article 147 of that Convention committed against persons or property protected by that Convention."

3.3.6.2 Bombay Prohibition Gujarat Amendment Act, 2009

Section 65A (2):

(2) “when there has been death of any person by the consumption of the said laththa mentioned in sub-section (i) above, the person who has manufactured, kept, sold or arranged to make it drink or distributed laththa shall, on conviction, be punished with death or imprisonment for life and shall also be liable to fine.”

The Narcotics Drugs and Psychotropic substance Act, 1985 prescribed a mandatory death sentence under section 31 A for repeat offenders. The Maharashtra High Court, in *Indian harm Reduction Network v. Union of India*\(^{220}\), declared the punishment under the section was unconstitutional and that the court had discretion in sentencing. Finally an amendment to the act was passed and enacted in 2014 which prescribes a minimum sentence and hence death sentence is no longer mandatory.

\(^{220}\) 2012 Bom CR (CRI) 21
3.4 Death Penalty under Criminal Procedure Code: Procedural safeguards

The code of Criminal Procedure, 1973 contains a provision regarding the penalty of death. Section 354(3) of the code provides that while awarding the sentence of death, the court must record "special reasons justifying the sentence and state as to why an alternative sentence would not meet the ends of justice in that particular cases. Commenting on the provision of the code, Mr. Justice V.R. Krishna Iyer observed that the special reasons which section 354(3) provides reasonableness as envisaged in Article 19 as a relative suggestion dependent on a variety of variables, cultural, social, economic and otherwise."

The code of Criminal Procedure, 1973 further requires that the sentence of death imposed by the Session Judge can be executed only after it is confirmed by High Court. That apart, section 235(2) of the Code further casts a statutory duty upon the court to hear the accused on the point of sentence. The court should also call upon the state, i.e., the Public Prosecutor to mention with reasons whether or not that extreme penalty prescribed by law is called for in view of the facts and circumstances of the case.

It is thus evidently clear that a heavy duty by Section 302 of the Indian Penal Code on the judge, of choosing between death and imprisonment for life for the person found guilty of murder, is now expected to be discharged in a highly responsible manner by complying with the provisions contained in Section 354(3) and 235(2) of the Code of Criminal Procedure, 1973 so that the principle of natural justice and fair play holds its authority in the sphere of sentencing. These provisions also help the judge to individualize sentencing justice and make it befitting to the crime and the criminals.

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221 Death penalty in India Available at: www.webcache.googleusercontent.com/search?q=cache:https://www.deathpenaltyindia.com/death-penalty-in-india (visited on 12/12/15) at 04:06 PM
222 Rajendra Prasad v. State of UP, AIR 1979 SC 916 (931)
223 Section 366(1) of the Code of Criminal Procedure, 1973
The rationale of the above procedural safeguards and the awful consequences of the death sentence on the convict, his family and society were considered by the Supreme Court once again in the case of *Allauddin Mian v. State of Bihar*\(^{224}\). In this case the Apex Court held that when the court is called upon to choose between the convict’s cry “I want to live” and the prosecutor’s demand, “he deserve to die”. It must show a high degree of concern and sensitiveness in the choice of sentence.

The Supreme Court further observed that Special reason clause contained in section 354(3) of Criminal Procedure Code implies that the court can impose extreme penalty of death in fit cases. The provision of Section 235(2) of the code calls upon the court that the convicted accused must be given an opportunity of being heard on the question of sentence. This provides the accused an opportunity to place his antecedents, social and economic background and mitigating and extenuating circumstances before the court.

3.5 Stages of Criminal Procedure for Death Penalty

1. **Death sentence awarded by the Court of Session**
   i. All trials relating to capital cases falling under ordinary criminal law are directed in the Court of Session.
   ii. If the Session Court awards the penalty of death the case is automatically referred to the concerned High Court for confirmation of the death sentence.\(^{225}\)

2. **Proceeding before High Courts**
   i. The High Court may confirm “the death sentence awarded by the court of Session pass any other sentence warranted by law annul the conviction, convict the person of any offence for which the Court of Session might

\(^{224}\) AIR 1989 SC 1456

\(^{225}\) Section 366(1), Criminal Procedure code, 1973
have convicted her, order a new trial on the same or amended charge or acquit the accused person”

ii. “The High Court bench must consist of a minimum of two Judges. The High Court may also enhance the sentence awarded by the Court of Session to death sentence”.

iii. The State government or central government may direct the public prosecutor to appeal to the High Court against the sentence granted by Court of Session on grounds of inadequacy.

iv. The High Court shall not enhance the sentence awarded to the accused without giving her a reasonable opportunity of showing cause against such enhancement and while showing such cause, the accused may even plead for acquittal or reduction of sentence awarded by the Court of Session.

v. In the exercise of its suo-moto revisional powers, the High Court may, in absence of an appeal from the State against the inadequacy of the sentence, enhance the sentence awarded by the Court of Session.

vi. The High Court may conduct or direct further inquiry into or additional evidence to be taken on any point bearing upon the guilt or innocence of the convicted person. Unless directed by the High Court, the accused need not be present during this period of this inquiry or when additional evidence is taken.

vii. The High Court also has the power to withdraw a case pending before a subordinate court and conducts the trial and may award the sentence of death.

226 Section 368, Criminal Procedure Code, 1973
227 Section 369, Criminal Procedure Code, 1973
228 Section 386(C), Criminal Procedure Code, 1973
229 Section 377, Criminal Procedure Code, 1973
230 Section 377(3), Criminal Procedure Code, 1973
231 Section 397 read with Section 401, Criminal Procedure Code, 1973
232 Section 367, Criminal Procedure Code, 1973
233 Section 407, Criminal Procedure Code, 1973
3. Proceeding before the Supreme Court of India

i. “Right to Appeal under Article 134 of Constitution of India
In cases where the high court reverses the order of acquittal on appeal and sentences the accused to death or where the High Court withdraws a case for trial before itself from a subordinate court and in such a trial convict the accused and sentences her to death, an appeal shall with the Supreme Court.”²³⁴

ii. Grant of certificate of Appeal under Article 134A of the Constitution
A High court may grant a certificate for appeal to the Supreme Court against its judgment, decree, final order or sentence, either on its own or on an oral application made by the aggrieved party, immediately after the passing or making of such judgment, decree, final order or sentence.²³⁵

iii. Appeal by Special leave under Article 136 of the constitution
“The Supreme Court may in its discretion grant a special leave to appeal under Article 136 of the constitution from any judgment, decree, determination, sentence or order passed in any case, by any court or tribunal in India.”

iv. Review Petition under Article 137 of the Constitution
A petition seeking review of a judgment or order passed by the Supreme Court may be filed before the Supreme Court within thirty days from the date of such judgment or order. As per the Supreme Court in Mohd Arif @ Askfaq v. The Registrar, Supreme Court of India & others, review petitions filed in those matters where death sentence has been given shall be heard in open court before a three judge bench.

²³⁴ Article 134(1), Indian Constitution Act, 1950
²³⁵ Article 134 A, Indian Constitution Act, 1950
v. Curative petition

As per the Supreme Court in *Rupa Ashok Hurra v. Ashok Hurrah & others*236, after the dismissal of the review petition, the Supreme Court may allow a curative petition to reconsider its judgment or order if it is established that there was a violation of principles of natural justice or apprehension of bias on part of a judge. The curative petition would be circulated before the same bench which decided the review petition, if available, or the three senior most judges of the Supreme Court. The curative petition would be disposed of without oral arguments, unless ordered otherwise by the Supreme Court.

4. Request for pardon filed before a Governor of the State or the President of India

i. The judicial process for the confirmation of a death sentence concludes court or High court (when no appeal has been filed by the prisoner or when the Supreme Court does not grant special leave to the prisoner). Thereafter, a person can file a request for pardon either to Governor in case of a State or the President of India in case of Union Territories. [article 72 & 161]

ii. In case of States, a request for pardon submitted by a person sentenced to death shall at the first instance be sent to the State Government, seeking orders of the governor. Upon consideration, if the request for pardon is rejected by the governor, it shall be immediately forwarded to the secretary of the Government of India, Ministry of Home Affairs for consideration of the President of India.

iii. In case of Union Territories, the request for pardon submitted by a person sentenced to death shall be sent to the Lieutenant- Governor/ Chief commissioner/ Administrator who shall forward it to the secretary to the Government of India, Ministry of Home Affairs, for consideration of the President of India.

236 (2002) 4 SCC 388
iv. The Ministry of Home Affairs tenders advice to the President on the question of the Requests for pardon submitted to him and the President is bound to act in accordance with such advice.

v. The power to grant pardon is not limited to the consideration of evidence that was placed before the court but may also involve the examination of various factors that may be pertinent to the question of sentencing such as socio-economic circumstances of the prisoners, age, sex, mental deficiency etc.

vi. There is no requirement on the part of the executive to provide reason for the rejection or acceptance of requests for pardon. The nature of power exercised by a Governor or the President is different from judicial decision making and would not result in abrogating the previous judicial record.

vii. There is no limit as to the number of requests for pardon that can be filed by or on behalf of a prisoner, provided a new and substantial ground is presented in each request for pardon. The Law Commission of India in its 35th report was also of the opinion that it was not desirable to lay down an exhaustive list of principles in accordance with which the sentence may be commuted by the executive.

5. Writ petition after the rejection of request for pardon

i. The merits of the Executive’s decision or manner of execution of the power to grant pardon cannot be scrutinized by the judiciary. The judicial review of the Governor or President’s decision is restricted to the area and scope of the pardoning power, as held by the Supreme Court in *Kehar Singh v. Union of India*237.

ii. In *Shatrugan Chauhan v. Union of India*238, it was held that the courts may also review whether relevant materials were examined by the Executive while exercising the power to grant pardon. The Supreme Court also held that non-consideration of supervening

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237 AIR 1998 SC 609
238 (2014) 3 SCC 1
circumstances by a Governor or the President while rejecting the requests for pardon would be in violation of Article 21 of the constitution and would be a sufficient ground for the Court to commute the death sentence to imprisonment for life. These supervening circumstances would include delay in execution, insanity/ mental illness/ schizophrenia, solitary confinement, reliance on judgments declared per incuriam and procedural lapses in the disposal of the request for pardon.

3.6 Indian Constitution and the Death Penalty

Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life.

While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court too has upheld the constitutional validity of capital punishment in “rarest of rare” cases. In Jagmohan Singh v. State of UP\(^{239}\) (1973), then in Rajendra Prasad v. State of UP\(^{240}\) (1979\(^{2}\)), and finally in Bachan Singh v. State of Punjab\(^{241}\) (1980\(^{2}\)), the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict. This will, however, only be in the “rarest of rare cases”, and the courts should render “special reasons” while sending a person to the gallows.

\(^{239}\) AIR 1973 SC 947
\(^{240}\) (1979) 3 SCC 646
\(^{241}\) AIR 1980SC 276
3.6.1 Pardoning Power under Indian Constitution

Before the commencement of the Indian Constitution, the law of pardon in British India was the same as in England since the sovereign of England was the sovereign of India. The Government of India Act, 1935, recognized and saved the right of the Crown or by delegation to Governor-General to grant pardons, reprieves, respites or remissions of punishment. Section 295 of the Act, 1935, had conferred on the Governor-General acting in discretion power to suspend, remit or commute sentences of death. The prerogative of the Crown was also delegated to the Governor-General by the Letters Patent creating his office, empowering him to grant to any person convicted by any criminal offence in British India, a pardon either free or subject to such conditions as he thought fit 242.

In India, the power to pardon is a part of the constitutional scheme. The Constitution of India conferred the power on the President of India and the Governors of States.

3.6.2 Power to Pardon

In common parlance, to pardon means to forgive a person of his offence. The term 'pardon' has been defined as an act of grace, proceeding from the power entrusted with the execution of the law, which exempts the individual on whom it is bestowed upon, 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 243.

In other words, grant of pardon wipes off the guilt of accused and brings him to the original position of innocence as if he had never committed the offence for which he was charged. Under Indian law, the President of India and the Governors of

242 P J Dhan, Justiciability of the President’s Pardon Power (1999)
243 Pardoning Power of President Available at: www.lawteacher.net/free-law-essavs/administrative-law/power-to-pardon-an-analysis-law-essavs.php(visited on 22/12/15) at 11:06 AM
States have been given the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence. The law governing grant of pardon is contained in Articles 72 and 161 of the Constitution. Granting of pardon may be of two kinds.

3.6.2.1 Absolute:-

Absolute pardon may blot out the guilt itself. It does not amount to an acquittal unless the Court otherwise directs. The accused is released permanently without requiring any condition to be fulfilled.

3.6.2.2 Conditional:-

Under this pardon, the offender is let off subject to certain conditions. The breach of these conditions will lead to revival of his sentence and he shall be subjected to the unexhausted portion of his punishment.

3.6.3 Jurisprudence Of Granting Pardon:-

The philosophy underlying the pardon power is that that “every civilized country recognizes and has, therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases, without such a power of clemency to be exercised by some department or functionary of government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgments are always tampered with mercy.”

The pardoning power is founded on consideration of public good and is to be exercised on the ground of public welfare, which is the legitimate object of all punishments, will be as well promoted by a suspension as by an execution of the sentences.

244 Available at: www.sumanspeakcurrentaffairs.blogspot.in/2013/03/granting-of-pardon-to-sanjay-dutt-and.html (visited on 22/12/15) at 11:08 AM
3.6.4 Purpose Of Granting Pardon:

Pardon may substantially help in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction. The hope of being pardoned itself serves as an incentive for the convict to behave himself in the prison institution and thus, helps considerably in solving the issue of prison discipline. It is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person. The object of pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections.

3.6.5 Pardoning Power of President and Governor

Clemency powers in India are enshrined in the Constitution. Article 72 vests these powers in the President, and Article 161 vests similar powers in the Governors of the States.

**Article 72 states:**

'Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.
(3) Nothing in sub-clause of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State, under any law for the time being in force."

Article 161 states:

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

Neither of these powers is personal to the holders of the office, but is to be exercised on the aid and advice of the Council of Ministers under Articles 74\textsuperscript{245} and 163\textsuperscript{246} respectively.

Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside

\textsuperscript{245}Article74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration. (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

\textsuperscript{246}Article 163 (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.
and beyond the judicial ken. They are also empowered to look at fresh evidence, which was not placed before the courts. In *Kehar Singh v. Union of India*,\(^{247}\) a Constitution Bench (five judges) held as follows:

“To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, 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 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... The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance that the function itself enjoys high status in the constitutional scheme.”\(^{248}\)

Thus, it will be seen that clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of

\(^{247}\) (1989) 1 SCC 204

\(^{248}\) *Kehar Singh v. Union of India*, (1989) 1 SCC 204
mind, scrutiny of judicial records, and wide ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution.

3.6.6 Subjectivity in Exercise of Power under Article 72 by the President

It is to be noted that in exercise of power under Articles 72 and 161, the President or the Governor, as the case may be, is to be guided and directed by the aid and advice rendered by the Council of Ministers under Articles 74 and 163. The Supreme Court has said so in categorical terms in *Maru Ram v. Union of India*\(^{249}\) in the following paragraph:

"Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advise and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release."

The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual

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\(^{249}\) *Maru Ram v. Union of India*, (1981) 1 SCC 107
terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in Shamsher Singh case\textsuperscript{250}. Even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President saving in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government. \textsuperscript{251}

While the President of India in considering a mercy petition is constitutionally obligated to not deviate from the advice rendered by the Council of Ministers, there have been occasions where the President has refrained from taking any decision altogether on the said mercy petition, thus, keeping the matter pending. In the table below, the record of mercy petitions disposed by various Presidents till date is discussed:\textsuperscript{252}

### Details of Mercy Petitions Decided by the President

<table>
<thead>
<tr>
<th>Sr. No</th>
<th>Name of President</th>
<th>Tenure</th>
<th>Number of Mercy Petition Accepted</th>
<th>Number of Mercy Petition Rejected</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Rajendra Prasad</td>
<td>26.1.1950-3.5.1962</td>
<td>180</td>
<td>1</td>
<td>181</td>
</tr>
<tr>
<td>2.</td>
<td>Sarvapalli</td>
<td>13.5.1962-13.5.1967</td>
<td>57</td>
<td>0</td>
<td>57</td>
</tr>
</tbody>
</table>

\textsuperscript{251} Maru Ram v. Union of India, (1981) 1 SCC 107, at para 61  
\textsuperscript{252} This table is based on archival research and RTI data collected by Bikram Jeet Batra and others. Official figures of mercy petitions disposed of by the Presidents at serial nos. 1-9 are not available, and the figures in the table are based on empirical verification from the archives which may not be complete.
<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Dates</th>
<th>Rejected</th>
<th>Commutes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.</td>
<td>Zakir Hussain</td>
<td>13.5.1967-3.5.1969</td>
<td>22</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>6.</td>
<td>N. Sanjeeva Reddy</td>
<td>25.7.1977-5.7.1982</td>
<td>NA</td>
<td>NA</td>
<td>0</td>
</tr>
<tr>
<td>8.</td>
<td>R. Venkatraman</td>
<td>25.7.1987-25.7.1982</td>
<td>5</td>
<td>45</td>
<td>50</td>
</tr>
<tr>
<td>10.</td>
<td>K.R. Narayanan</td>
<td>25.7.1997-25.7.2002</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>11.</td>
<td>A.P.J. Kalam</td>
<td>25.7.2002-25.7.2007</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>13.</td>
<td>Pranab Mukherjee</td>
<td>25.7.2012-till date</td>
<td>2</td>
<td>31</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td>306</td>
<td>131</td>
<td>437</td>
</tr>
</tbody>
</table>

During the period 1950-1982, which saw six Presidents, only one mercy petition was rejected as against 262 commutations of death sentence to life imprisonment. As per available records, President Rajendra Prasad commuted the death sentences in 180 out of the 181 mercy petitions he decided, rejecting only one. President Radhakrishnan commuted the death sentences in all the 57 mercy petitions decided by him. President Hussain and President Giri commuted the death sentence in all the petitions decided by them, while President Ahmed and President Reddy did not get to deal with any mercy petitions in their tenure.

In contrast to the first phase (1950-1982), between 1982 and 1997, three Presidents rejected, between then, 93 mercy petitions and commuted seven death sentences. President Zail Singh rejected 30 of the 32 mercy petitions he decided, and President Venkatraman rejected 45 of the 50 mercy petitions decided by him. Subsequently, President Sharma rejected all the 18 mercy petitions put up before him.
In what can be called the third phase i.e. 1997-2007, the two Presidents kept almost all the mercy petitions received by them from the government of the day pending, and only two mercy petitions were decided during this period. While President Narayanan did not take any decision on any mercy petition before him, President Abdul Kalam acted only twice during his tenure resulting in one rejection and another commutation. During their combined tenure of ten years, they put the brakes on the disposal of mercy petitions.

Later, President Pratibha Patil during her Presidency rejected five mercy petitions, and commuted 34 death sentences. The current President of India, Shri Pranab Mukherjee has thus far rejected 31 of the 33 mercy petitions decided by him.

A perusal of the chart of mercy petitions disposed by Presidents suggests that a death-row convict’s fate in matters of life and death may not only depend on the ideology and views of the government of the day but also on the personal views and belief systems of the President.

3.6.7 Pardoning Power under Judicial Review:

There has always been a debate as to whether the power of the executive to pardon should be subjected to judicial review or not. Supreme Court in a catena of cases has laid down the law relating to judicial review of pardoning power.

In *Maru Ram v. Union of India*\(^{253}\), the Constitutional Bench of Supreme Court held that “the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the head of the Republic.”

In *Dhananjoy Chatterjee alias Dhana v. State of West Bengal*\(^{254}\), the Supreme Court reiterated its earlier stand in Maru Ram’s case and said:

\(^{253}\) (1981) 1 SCC 107
\(^{254}\) AIR 1994 SC 220
"The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the state."

The Supreme Court in *Ranga Billa case*\(^{255}\) was once again called upon to decide the nature and ambit of the pardoning power of the President of India under Article 72 of the Constitution. In this case, death sentence of one of the appellants was confirmed by the Supreme Court. His mercy petition was also rejected by the President. Then, the appellant filed a writ petition in the Supreme Court challenging the discretion of the President to grant pardon on the ground that no reasons were given for rejection of his mercy petition. The court dismissed the petition and observed that the term "pardon" it signifies that it is entirely a discretionary remedy and grant or rejection of it needs not to be reasoned.

The Supreme Court once again in *Kehar Singh v. Union of India*\(^{256}\) reiterated its earlier stand and held that the grant of pardon by the President is an act of grace and, therefore, cannot be claimed as a matter of right. The power exercisable by the President being exclusively of administrative nature is not justiciable.

In *Swaran Singh v. State of U.P.*\(^{257}\), the Governor of U.P. had granted remission of life sentence awarded to the Minister of the State Legislature of Assembly convicted for the offence of murder. The Supreme Court interdicted the Governor’s order and said that it is true that it has no power to touch the order passed by the Governor under Article 161, but if such power has been exercised arbitrarily, mala fide or in absolute disregard of the finer cannons of constitutionalism, such order cannot get approval of law and in such cases, the judicial hand must be stretched to it. The Court held the order of Governor arbitrary and, hence, needed to be interdicted.

\(^{255}\) AIR 1981 SC 2339

\(^{256}\) AIR 1998 SC 609

\(^{257}\) AIR 1998 SC 2026
In the early case of *K.M. Nanavati v. State of Bombay*\(^{258}\), Governor granted reprieve under Article 161 which was held unconstitutional as it was in contrast with the Supreme Court rulings under Article 145.

In a landmark judgment *Epuru Sudhakar & Anr. v. Govt. of A.P. & Ors*\(^{259}\), it was held by the Supreme Court that it is a well-set principle that a limited judicial review of exercise of clemency powers is available to the Supreme Court and High Courts. Granting of clemency by the President or Governor can be challenged on the following grounds:

1. The order has been passed without application of mind.
2. The order is mala fide.
3. The order has been passed on extraneous or wholly irrelevant considerations.
4. Relevant material has been kept out of consideration.
5. The order suffers from arbitrariness.

Now, it is a well settled principle that power under Articles 72 and 161 is subject to judicial review. The Supreme Court has characterized the nature of mercy provisions (Articles 72 and 161) as constitutional duty rather than privilege or a matter of grace. The Supreme Court observed the following in *Shatrughan Chauhan*\(^{260}\):

“In concise, 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. Further, it is well settled that the power under Articles 72/161 of

\(^{258}\) AIR 1962 SC 605
\(^{259}\) (1976) 1 SCC 157
\(^{260}\) (2014) 3 SCC 1
the Constitution of India is to be exercised on the aid and advice of the Council of Ministers.  

The Supreme Court in *Shatrughan Chauhan* has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

(a) Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

(b) Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

(c) Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

(d) Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

(e) Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench?

(f) Consideration of evidence in fixation of responsibility in gang murder case;

(g) Long delays in investigation and trial etc.  

However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analysed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the executive has considered mercy petitions. In fact, the Supreme Court as part of the batch matter *Shatrughan Chauhan* case heard 11

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261 *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 19

262 Ibid
writ petitions challenging the rejection of the mercy petition by the executive. Some of these decisions are analysed in the following pages.

(i) Chronic Mental Illness Ignored: The Case of Sunder Singh

Sunder Singh was sentenced to death for having burnt five of his relatives alive. His mercy petition was dismissed by the Governor on 21.1.2011, and then by the President on 31.3.2013, even though he had stated in his mercy petition that he had committed the offences under the influence of mental illness. This claim was corroborated by the jail records, which showed that due to his abnormal behaviour he had been presented before numerous medical boards consisting of government psychiatrists who had opined that he was suffering from chronic schizophrenia and required long term treatment. This information had been periodically communicated to the State Government and the Ministry of Home Affairs, Government of India, who nevertheless chose to reject his mercy petitions. He was eventually found to be not mentally fit to be awarded the death penalty by a team of psychiatrists appointed by the State Government and his death sentence was commuted by the Supreme Court.

(ii) Cases involving Long delays in Investigation and Trial

a. The Case of Gurmeet Singh

When a convict on death row has already spent a considerable period of time in prison, before the mercy plea is decided by the President, it becomes a strong factor in deciding whether or not such a prisoner still deserves the additional punishment of execution.

\[263\] Sunder Singh's Writ [Writ Petition (Crl.) No. 192/2013] was considered in the batch matter *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1. See paras 79-87 for discussion on law, and paras 178-195 for the outcome in Writ Petition (Crl.) No. 192/2013

\[264\] *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 190

Gurmeet was arrested on 16.10.1986, convicted and sentenced to death by the trial court on 20.7.1992. The High Court confirmed his death sentence (per majority) on 8.3.1996, and the Supreme Court upheld the conviction and death sentence on 28.9.2005. The convict's mercy petition was decided on 1.3.2013, by which time he had spent 27 years in custody, of which about 21 years were under a death sentence. These factors were ignored and his mercy petition was rejected. The Supreme Court in *Shatrughan Chauhan* commuted the death sentence of Gurmeet Singh on account of inordinate time taken by the executive in disposal of his mercy petition.

b. The Cases of *Simon and Others*\(^{266}\)

Simon, Bilavendran, Gnanprakasam and Madiah were arrested on 14.7.1993, and convicted by the trial court under the Terrorist and Disruptive Activities (Prevention) Act on 29.9.2001. They were sentenced to life imprisonment. The state appealed to the Supreme Court for enhancement of sentence, but its special leave petition was dismissed due to delay. When the criminal appeal filed by the convicts was being heard, the Supreme Court, *suo motu*, issued notice for enhancement of sentence, and then sentenced the convicts to death on 29.1.2004. This was the first time the convicts had been sentenced to death, and since it had been done by the Supreme Court there was no appeal possible after this. When the convict's mercy pleas were decided 9 years later, they had already spent 19 years and 7 months in custody in prison. Simon, Bilavendran, Gnanprakasam and Madiah were aged 50, 55, 60 and 64 years when their mercy petitions were rejected by the President on 8.2.2013 after a delay of about 9 years. Their petitions were finally allowed by the Supreme Court.

\(^{266}\) *Simon v. State of Karnataka*, (2004) 2 SCC 694
(iii) Partial and Incomplete Summary Prepared for President:

The Case of Mahendra Nath Das267

When Mahendra Nath Das challenged the rejection of his mercy petition by the President, the Supreme Court summoned the records relating to the mercy petition and discovered that the recommendation for clemency made by a former President in this very case was not put before or communicated to the President Pratibha Patil when she was asked to reject the mercy petition. The Supreme Court held it to be a very serious lapse, and, combined with the 11 years delay taken in the disposal of the mercy petition, was good enough reason to quash the rejection of the mercy petition and commute the death sentence.

(iv) Non-Application of Mind

a. The Case of Dhananjoy Chatterjee268

In the case of Dhananjoy Chatterjee, when the Governor was advised to reject the mercy petition, he was not informed about the mitigating circumstances of the case. The Supreme Court held the same to be a serious error, which had prejudiced the convict, and consequently quashed the rejection of the mercy petition. However, the mercy petition preferred by Dhananjoy Chatterjee was subsequently rejected by the executive and he was executed.

b. The Case of Bandu Baburao Tidke269

Tidke’s mercy petition was received in the Ministry of Home Affairs in 2007. On 2.6.2012, it was decided to commute his death sentence. However, unknown to the President, the Ministry of Home Affairs and the State Government, Tidke had expired in prison about five years earlier on 18.10.2007 while awaiting a verdict on

267 Mahendra Nath Das v. Union of India, (2013) 6 SCC 253
269 Bandu Baburao Tidke v. State of Karnataka (Unreported Order in SLP Crl. 3048 of 2006)
his mercy plea. His mercy petition had been decided without obtaining updated information from the prison authorities or the State Government, raising questions about the diligence exercised and procedures in adjudicating mercy petitions.

(v) Mercy Petition Rejected without Access to Relevant Records of the Case: The Case of Praveen Kumar

Even though Rule V of the Mercy Petition Rules specifically requires that the entire record be sent to the Central Government when it is deciding the mercy petition, and even though the Guidelines used by the Ministry of Home Affairs clearly requires the close scrutiny of the record, in many cases it has been found that the Central Government has rejected a convict’s mercy petition without reading or obtaining the trial court record.

For example, in Praveen Kumar's case, the Supreme Court found that his mercy petition had been rejected by the Central Government and the President without reading or obtaining the record of the trial court. Consequently, no attention at all was paid to the mitigating circumstances in this case or the circumstances relating to the convict which are necessary for adjudication of mercy petitions as per the Ministry of Home Affairs’ guidelines.

(vi) Wrongful Executions and Failure of the Clemency Process

(a) The Case of Jeeta Singh

The case of Jeeta Singh has been discussed in the previous chapter, but is of relevance here as well. Jeeta Singh, Harbans Singh and Kashmira Singh were sentenced to death by the trial court for equal roles in an offence of murder. The High Court confirmed their death sentences. Each of them filed separate appeals to the
Supreme Court which came up for hearing before different Benches. Jeeta's special leave petition (‘SLP’) was dismissed on 15.4.1976. Kashmira’s SLP was admitted on the question of sentence, and on 10.4.1977 his appeal was allowed and the death sentence was commuted by the Supreme Court. Harbans Singh’s SLP was dismissed on 16.10.1978. His review petition was dismissed on 9.5.1980, and his mercy petition was rejected by the President on 22.8.1981. While rejecting Harbans and Jeeta’s mercy petitions, the executive did not note that the Supreme Court had allowed the appeal and had commuted the death sentence of an identically placed co-accused (Kashmira Singh) more than 4 years earlier. Harbans Singh and Jeeta Singh were scheduled for execution on 6.10.1981. Harbans Singh once again appealed to the Supreme Court by way of an Article 32 petition, and was saved. Jeeta did not, and was hanged.\(^{272}\)

(b) The Cases of **Ravji Rao**\(^{273}\) and **Surja Ram**\(^{274}\)

Cases of **Ravji Rao** and **Surja Ram** have been discussed in the previous chapter. Here, the focus is how their mercy petitions were dealt with by the executive.

In **Ravji @ Ram Chandra v. State of Rajasthan**,\(^{275}\) a case which was decided by a Bench of two judges, the Supreme Court explicitly held:

"It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial."\(^{276}\)

Thus, the Court while confirming the death sentence in **Ravji**'s case held that the circumstances relating to the criminal are irrelevant and focused exclusively on the circumstances relating to the crime.


\(^{275}\) (1996) 2 SCC 175

This aspect of the decision in the Ravji's case is in direct conflict with the Bachan Singh ruling where the Court held that which held that in all cases, including the most brutal and heinous crimes, circumstances pertaining to the criminal should be given full weight. 277

As noted in the previous chapter, the Court in Santosh Kumar Bariyar v. State of Maharashtra (‘Bariyar’) noticed the conflict between Ravji’s case and Bachan Singh and noted the Ravji decision as a per incuriam judgment. Though Ravji was sentenced to death on the basis of a per incuriam judgment, his mercy petition was rejected in a mere 8 days on 19.3.1996 and he was executed on 4.5.1996. Similarly, the mercy petition of Surja Ram, who was also wrongly sentenced to death on the same reasoning, was executed on 7.4.1997. His mercy petition was rejected in 14 days on 7.3.1997.

(vii) Cases of Other Prisoners Sentenced to Death under Judgments Subsequently Declared to be Per Incuriam

“The Supreme Court in the recent years has found a number of decisions, which have resulted in death sentences to be per incuriam.

(a) Cases which have placed reliance on the Per Incuriam Decision of Ravji Bariyar, the Supreme Court, after pointing out the error in Ravji’s case, also noted 6 other cases where Ravji’s case was followed and held that these decisions were also wrongly decided: Shivaji v. State of Maharashtra278, Mohan Anna Chavan v. State of Maharashtra279, Bantu v. State of U.P280, Surja Ram v. State of Rajasthan281, Dayanidhi Biso i v. State of Orissa282 are the decisions where Ravji has been followed. It does not appear that this Court has considered any mitigating

278 AIR 2009 SC 56
279 (2008) 7SCC 561
280 (2008) 11 SCC 113
281 (1996) 6 SCC 175
282 (2003) 9 SCC 310
circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that Ravji has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent.²⁸³

The Court, in Bariyar, observed that it is clear that none of the circumstances relating to the 13 convicts in these six cases have been brought on record and considered by the Supreme Court during the sentencing deliberations. The cases mentioned above have been declared to be _per incuriam_ in Bariyar by the Supreme Court for having followed Ravji. Another case, _Ankush Maruti Shinde and Ors v. State of Maharashtra_,²⁸⁴ where six prisoners were sentenced to death by explicitly following Ravji's wrong reasoning like the cases mentioned above, was decided just a few days before Bariyar and was therefore not noticed in that decision.

Subsequent to Bariyar, the Supreme Court again in _Dilip Tiwari v. State of Maharashtra_²⁸⁵ raised the issue of error committed in Ravji's case and other cases in which Ravji was followed. The Supreme Court in _Rajesh Kumar v. State_²⁸⁶ once again emphasized the miscarriage of justice caused in the Ravji Rao case, and other cases, which followed the Ravji's precedent. Thereafter, the Supreme Court in _Mohinder Singh v. State of Punjab_,²⁸⁷ has held that Ravji's case and those following it have been wrongly decided.

(b) The Case of Saibanna²⁸⁸

The Supreme Court in _Aloke Nath_ and _Bariyar_ has doubted the award of death sentence in _Saibanna v. State of Karnataka_ ("Saibanna"). The facts of the case bear out that Saibanna had killed his first wife as he suspected that she was unfaithful.

²⁸⁴ (2009) 6 SCC 667 at para 28
to him. He was convicted and sentenced to life imprisonment on 2.2.1993. He re-married whilst he was out of the prison on parole. Later, on 13.9.1994 when he was again released on parole, he killed his second wife as well suspecting that she too was unfaithful to him. In 1995 he was charged under Section 303 IPC, which prescribed the mandatory death sentence, even though the Section had already been struck down by the Supreme Court in *Mithu v. State of Punjab* ("Mithu")\(^{289}\) The High Court proceeded to confirm the death sentence under Section 303 IPC. The Supreme Court in appeal upheld the judgment.\(^{290}\) The Court held that Saibanna, already undergoing a life sentence, could not be sentenced to life imprisonment again, and therefore the death sentence was the only available punishment.

Subsequently, the Supreme Court in *Aloke Nath Dutta v. State of West Bengal*\(^{291}\) held that the view taken in the petitioner's case by the Supreme Court was "doubtful". Thereafter, in *Bariyar*, the Court held that its judgment in *Saibanna* was "inconsistent with *Mithu* and *Bachan Singh*,"\(^{292}\) both of which are judgments by Constitution Benches. This admission of error in *Saibanna*’s case by the Supreme Court was also brought to the notice of the President by 14 retired judges (including one former Supreme Court judge, five former Chief Justices of different High Courts, and eight former High Court judges). The President rejected Saibanna’s mercy petition on 4.1.2013.

(c) Decisions held to be *Per Incuriam* by *Sangeet and Khade*

Similarly, the Supreme Court in *Shankar Khade* doubted the correctness of the imposition of the death penalty in *Dhananjoy Chatterjee v. State of West Bengal*,\(^{293}\) where the Court had held that "the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the


\(^{290}\) *Saibanna v. State of Karnataka*, (2005) 4 SCC 165


\(^{293}\) (1994) 2 SCC 220
defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals."\textsuperscript{294} In \textit{Khade}, the Court opined that \textit{prima facie} the judgment had not accounted for mitigating circumstances relating to the offender. Dhananjay Chatterjee was executed in 2004.

Similarly, in \textit{Sangeet}, the Court noted an additional three cases where Bachan Singh's direction to consider both aggravating and mitigating circumstances had not been followed. \textsuperscript{295}

\textbf{3.6.8 Difference between Pardoning Powers of President and Governor:}

The scope of the pardoning power of the President under Article 72 is wider than the pardoning power of the Governor under Article 161. The power differs in the following two ways:

The power of the President to grant pardon extends in cases where the punishment or sentence is by a Court Martial but Article 161 does not provide any such power to the Governor. The President can grant pardon in all cases where the sentence given is sentence of death but pardoning power of Governor does not extend to death sentence cases.

\textbf{3.6.9 Supreme Court on Pardoning Power}

One of the earliest case of significance where a clemency petition was brought under judicial review was \textit{G. Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh and Ors}\textsuperscript{296}, the Court rejected the claim, observing that with respect to actions of the President, the Court \textit{"makes an almost extreme presumption in favour of bona fide exercise"} and that the petitioners had shown no reason for the

\textsuperscript{294} Dhananjay Chatterjee v. State of West Bengal (1994) 2 SCC 220
\textsuperscript{296} (1976) 1 SCC 157
court to consider the rejection of their application "as motivated by malignity or degraded by abuse of power." Even while rejecting the writ petition, the Court however sounded a note of caution and stated that the Court would intervene where there was absolute, arbitrary, law unto themselves malafide execution of public power.

These parameters for judicial review were reiterated again in *Maru Ram v. Union of India and others* where the Constitutional Bench further asserted that the Courts would intervene in cases where political vendetta or party favouritism was evident or where capricious and irrelevant criteria like religion, caste and race had affected the decision-making process. Such malafide and extraneous factors vitiate the exercise of pardon power and should be checked through judiciary.

Then, was the landmark case of *Kehar Singh* in which the challenge was to the president’s order declining clemency to one of the accused in the Indira Gandhi assassination case. The Supreme Court dismissed an appeal by special leave filed by Kehar Singh after the president declined to go into the merits of the case decided by the Supreme Court which was supposedly erroneous and also did not permit an oral presentation of cases before it. The court held that the area 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. (The doubt existed as Article 361 of the constitution states that the president is not answerable to any court in the exercise of his powers.) The Court can never question or ask for reasons why a mercy petition was rejected. However, if the reasons are provided by the president in his order and these are held to be irrelevant, the court could interfere. The court has also admitted judicial review on some specific grounds:

1. To determine the scope of Articles 72 and 161.
2. The court can interfere where the president’s exercise of power is vitiated by self-denial on erroneous appreciation of the full amplitude of power.

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297 (1981) 1 SCC 107
conferred by Art 72, e.g., where the president rejected a mercy petition on the erroneous ground that he could not go behind the final decision of the highest court of the land or where the decision is irrelevant, discriminatory or malafide.

3. In case of inordinate delay in processing the mercy petitions in case of death sentences, it could be substituted to life imprisonment.

The Supreme Court admitted a writ petition in *Kuljeet Singh v. Lt. Governor, Delhi and anr*\(^{298}\). Challenging the arbitrariness of the clemency powers of the President and expressed need for the president to be presented with relevant facts and made aware of the existing circumstances.

In *Swarn Singh v. State of UP*\(^{299}\), the Governor of Uttar Pradesh remitted the whole of the life sentence of an MLA of the State Assembly who had been convicted of the offence of murder within a period of less than two years of his conviction. The Supreme Court found that Governor was not posted with material facts such as the involvement of the accused in 5 other criminal cases, his unsatisfactory conduct in prison and the Governor’s previous rejection of his clemency petition in regard to the same case. Hence, the Supreme Court interdicted the order, acknowledging that though it had no power to touch the order passed by the Governor, if such power was applied arbitrarily, malafide and in absolute disregard of the finer cannons of constitutionalism, such an order cannot get the approval of law.

Similarly, in the case of *Satpal v. State of Haryana*\(^{300}\) it was held that the constitutional power given to the Governor under article 161 if found to be exercised without advise by Government or if the jurisdiction is transgressed or if it is established that the order was passed without application of mind or if the order is malafide or has been passed on some extraneous considerations like political loyalty, religion, caste etc, then the court has full right to interfere. \(^{300}\) The Supreme Court

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298 AIR 1981 SC 324
299 AIR 1998 SC 2026
300 AIR 2000 SC 1702
quashed an order of the Governor pardoning a person convicted of murder on the ground that the Governor had not been advised properly with all the relevant materials. The Court spelt out specifically the considerations that need to be taken account of while exercising the power of pardon, namely, the period of sentence in fact undergone by the said convict as well as his conduct and behavior while he underwent the sentence. The Court held that not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational.

Finally, in the recent case of *Epuru Sudhakar and anr v. Government of Andhra Pradesh*\(^{301}\) the court laid clear grounds on which the pardoning power may be challenged. It was held that with clear separation of powers emphasised in the Constitution of India regarding pardons, the scope for judicial review of executive action is limited. Where constitutional powers of clemency are involved, the extent of judicial review is limited further to extreme cases. The Supreme Court referred to the large number of petitions challenging the grant of pardon or remission to prisoners. There are no cases in which the Supreme Court has quashed the decision of the President/Governor granting clemency.

The Court set aside a remission granted by the Governor of Andhra Pradesh on the ground that irrelevant and extraneous materials had entered into the decision making. The Report of the District Probation Officer which was one of the materials on which the decision was based, highlighted the fact that the prisoner was a ‘Good Congress Worker’ and that he had been defeated due to political conspiracy. Similarly the Report of the Superintendent of Police reached a conclusion diametrically opposite to the one it had reached before elections were conducted. Thus in these judgments concerning the Governor’s exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary. It was also held that the non-consideration of relevant factors such as length of the sentence already undergone, the

\(^{301}\) (1976) 1 SCC 157
prisoner's behaviour and involvement in other crimes and consideration of extraneous or irrelevant grounds such as political affiliation, religion, caste may call for judicial review.

3.6.10 Process of Granting Pardon in India:

The process starts with filing a mercy petition with the President under Article 72 of the Constitution. Such petition is then sent to the Ministry of Home Affairs in the Central Government for consultation. The Home Ministry in consultation with the concerned State Government. After the consultation, recommendations are made by the Home Minister and then, the petition is sent back to the President.

3.6.11 Procedure Regarding Petitions for Mercy in Death Sentence cases

The Ministry of Home Affairs, Government of India, has drafted the Procedure Regarding Petitions for Mercy in Death Sentence Cases to guide State Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners. These rules were summarized by the Supreme Court in Shatrughan Chauhan v. Union of India:

"The Ministry of Home Affairs, Government of India has detailed procedure regarding handling of petitions for mercy in death sentence cases:

1. **Rule I** enable a convict under sentence of death to submit a petition for mercy within seven days after an exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court.

302 (2014) 3 SCC 1
303 Law Commission of India, 262nd Report on Death penalty in India, August 2015
2. **Rule II** prescribes procedure for submission of petitions. As per this Rule, such petitions shall be addressed to, in the case of the States, to the Governor of the State at the first instance and thereafter to the President of India and in the case of the Union Territories directly to the President of India. As soon as the mercy petition is received, the execution of sentence shall in all cases be postponed pending receipt of orders on the same.

3. **Rule III** states that the petition shall in the first instance, in the case of the States, be sent to the State concerned for consideration and orders of the Governor. If after consideration it is rejected, it shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and intimation to that effect shall be sent to the petitioner.

4. **Rule IV** states that in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lt. Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, shall forward such petition, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition.

5. **Rule V** mandates that upon receipt of the orders of the President, an acknowledgment shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner prescribed. In the case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all
other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be.

6. Rule VIII (a) enables the convict that if there is a change of circumstance or if any new material is available in respect of rejection of his earlier mercy petition, he is free to make fresh application to the President for reconsideration of the earlier order.

Specific instructions relating to the duties of Superintendents of Jail in connection with the petitions for mercy for or on behalf of the convicts under sentence of death have been issued:

1. Rule I mandates that immediately on receipt of warrant of execution, consequent on the confirmation by the High Court of the sentence of death, the Jail Superintendent shall inform the convict concerned that if he wishes to appeal to the Supreme Court or to make an application for special leave to appeal to the Supreme Court under any of the relevant provisions of the Constitution of India, he/she should do so within the period prescribed in the Supreme Court Rules.

2. Rule II makes it clear that, on receipt of the intimation of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal filed by or on behalf of the convict, in case the convict concerned has made no previous petition for mercy, the Jail Superintendent shall forthwith inform him that if he desires to submit a petition for mercy, it should be submitted in writing within seven days of the date of such intimation.

3. Rule III says that if the convict submits a petition within the period of seven days prescribed by Rule II, it should be addressed, in the case of the States, to the Governor of the State at the first instance and, thereafter, to the President of India and in the case of the Union Territories, to the President of India. The Superintendent of Jail shall forthwith dispatch it to the Secretary to the State Government in the Department concerned or the Lt. Governor/Chief Commissioner/Administrator, as the case may be, together with a covering
letter reporting the date fixed for execution and shall certify that the execution has been stayed pending receipt of the orders of the Government on the petition.

4. **Rule IV** mandates that if the convict submits petition after the period prescribed by Rule II, the Superintendent of Jail shall, at once, forward it to the State Government and at the same time telegraph the substance of it requesting orders whether execution should be postponed stating that pending reply sentence will not be carried out. The above Rules make it clear that at every stage the matter has to be expedited and there cannot be any delay at the instance of the officers, particularly, the Superintendent of Jail, in view of the language used therein as at once."

Apart from the above Rules regarding presentation of mercy petitions and disposal thereof, necessary instructions have been issued for preparation of note to be approved by the Home Minister and for passing appropriate orders by the President of India.

The extracts from the Prison Manuals of various States applicable for the disposal of mercy petitions have been placed before us. Every State has a separate Prison Manual which speaks about detailed procedure, receipt placing required materials for approval of the Home Minister and the President for taking decision expeditiously. The Rules also provide steps to be taken by the Superintendent of Jail after the receipt of mercy petition and subsequent action after disposal of the same by the President of India. Almost all the Rules prescribe how the death convicts are to be treated till final decision is taken by the President of India. The elaborate procedure clearly shows that even death convicts have to be treated fairly in the light of Article 21 of the Constitution of India.

Nevertheless, it is the claim of all the petitioners herein that all these rules were not adhered to strictly and that is the primary reason for the inordinate delay in disposal of mercy petitions. For illustration, on receipt of mercy petition, the
Department concerned has to call for all the records/materials connected with the conviction. Calling for piecemeal records instead of all the materials connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent on the part of the Home Ministry to place all the materials such as judgment of the trial court, High Court and the final court viz. Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piecemeal.  


The Supreme Court has enjoined a critical role in examining the discharge of mercy jurisdiction by the executive authorities in death sentence matters. The Court has termed this body of jurisprudence as "mercy jurisprudence" and has linked it to the evolving standard of decency, which is the hallmark of the society. In fact, the Court in Shatrughan Chauhan observed that judicial interference is the command of the Constitution when the exercise of mercy power by the executive is lacking in due care and diligence and has become whimsical. The Court has held the following in Shatrughan Chauhan in this behalf:

In the aforesaid batch of cases, we are called upon to decide on an evolving jurisprudence, which India has to its credit for being at the forefront of the global legal arena. Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society. Certainly, 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

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304 Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1
305 Ibid
306 Ibid
307 Ibid
constitutional mandate and not in violation of the constitutional principles. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time.

However, when the delay caused in disposing of the mercy petitions is seen to 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 Articles 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.

Remember, retribution has no constitutional value in our largest democratic country. In India, even an accused has a de facto protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Articles 72/161 but only to uphold the de facto protection provided by the Constitution to every convict including death convicts. 308

308 ibid