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STATUTORY PROVISIONS OF DEATH PENALTY

INTRODUCTION

Criminal law provides the ultimate means to the society for the protection of individuals and its institution. Criminal law has to be strong enough, both in its contents as well as in its implementation, without being harsh or arbitrary. The penal law in force in India is to be found in the various statues enacted by the central and state legislature. The general substantive criminal law, operative throughout the country is laid down in the Indian Penal Code enacted in the year 1860. Statutory provision relating to death penalty under Indian Penal Code are following:

I) THE INDIAN PENAL CODE AND DEATH PENALTY

Indian Penal Code is the substantive law, providing penalties for all the criminal wrongs done by any criminal. Section 53 deals with different kinds of punishments, out of which ‘Sentence of Death’ is the most stringent punishment inflicted upon an accused. A detailed study of different provisions touching this penalty has been discussed at length in the chapter.

A) CAPITAL OFFENCE UNDER THE PENAL CODE

The Penal Code provides for the imposition of death sentence in several places.

SECTION 121: Waging or attempt to wage war, against the Government of India:-

Whosoever wage war against the government of India, or attempts to wage such a war, or abets the waging of such a war, shall be punished with death, or imprisonment for life and shall also be liable to fine.
SECTION 132: Abetment of mutiny, if mutiny is committed in consequence there of:-

Whosoever abets, the committing of mutiny by an officer, by soldier, sailor or airman in the Army, Navy or Air Force respectively, of the Government of India, shall, if mutiny be committed in consequence of that abetment either description for a term which may extend to ten years, and shall also be liable to fine.

SECTION 194: Giving or fabricating false evidence with intent to procur conviction of capital offence:-

Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it, to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the 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.

If innocent person be thereby convicted and executed:- If an innocent person be convicted and executed, in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

SECTION 302: Punishment for murder

Whoever, commits murder shall be punished with death imprisonment for life and shall also be liable to fine.

SECTION: 303: Punishment for murder by life convict

Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death.
SECTION 305: Abetment of suicide of child or insane person

If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

SECTION 307:- Attempt to murder by life convict

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 extent 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 here in before mentioned.

In most of these cases capital punishment is available merely as the upper limit of a full range of punitive strategies. But Section 121(war) Section 302 (murder) present the judge, with a limited dichotomous choice between only two possibilities, death and life imprisonment; and section303 makes the death sentence mandatory\(^1\) for a person who commits murder while under sentence of imprisonment fro life. Generally, however, the only content in which capital punishment is of any practical importance is that of Section 302, which provides “Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.”

The authors of Penal Code say:\(^2\)

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1 The provision has been struck down by the Supreme Court in Mithu V. State of Punjab AIR 1983 SC 473.
2 There are as many as 51 sections of the Penal Code which provide for the sentence of life imprisonment. These sections are: S.121, 121-A 122, 124-A 125, 128, 130, 132, 194, 222, 225, 232, 238, 225, 302, 304 Part I, 305, 307, 311, 313, 314, 326, 329, 329, 393-A, 364, 371, 376 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 479, 489-A, 511.
We are convinced that it ought to be very sparingly inflicted and we propose to employ it only in cases where either murder or the highest offence against the state has been committed. To the great majority of mankind nothing is as dear as life. And we are of the opinion that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life. These offences are almost committed under such circumstances that the offender has it, in his power to add murder, to his guilt. As he has, almost always, the power to murder, he will often have strong motive to murder, in as much as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment for murder, he will have no restraining motive. A Law which imprisons for rape and robber and hangs for murder holds out to ravishers and robbery a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which also hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men, from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him, strong motive to follow up his crime with a murder.  

B) DEATH PENALTY AS EXCLUSIVE OR ALTERNATIVE PUNISHMENT

The judicial choice on the matter of sentence is predicated by the normative boundaries set by the measures (a) which prescribe particular punishment or punishments for specific crime situations, and (b) which set procedural guidelines for working the punitive norms. Section 302 of the Indian Penal Code which provides a choice between the death penalty and life imprisonment for the offence of murder and section 235 (2) of the Criminal Procedural Code which obligates the giving of a hearing on the question of a sentence after the issue of conviction is decided which is crucial for death sentence issue, makes it obligatory for the judiciary. To record

“special reasons” in case of choice of death provides the legal frame work relevant for the application of the death sentence.

SECTION 235 (2) OF Criminal Procedure Code

When the conviction is for an offence punishable with death or, in the alternative with imprisonment for term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such a sentence.

The sentencing discretion accorded by Section 302 can be understood in two ways. The first relates to the rage of sentencing alternatives, and the second relates to the absence of proper rules or guidelines to operate the choice. The Indian Penal Code provides the death penalty in three distinct patterns. The first pattern section 303 and 307 relates to, two offences for which the death penalty where death penalty is the sole form of punishment with Section 302 is second pattern where death penalty is only one alternative, i.e. life imprisonment. The third pattern is followed in respect of offences under sections 132, 194, etc. Where death penalty is the maximum to be applied along with wide range of other maximum sentences. In respect of the rules or guidelines for the operation of the choice out of the range of sentence the penal code is fairly bold. The question of when or why is left to judicial discretion in every case. The awesome either/or of the section spells out no specific indicators and law in this fatal area cannot afford to be conjectural. Guided missiles, with lethal potential, in unguided hands, even judicial, are a grave risk where the peril is mortal though tempered by the appellate process. The flame of life cannot flicker uncertain and so Section 302 Indian Penal Code must be invested with pragmatic concreteness that inhibits and hominem responses of individual judges and is in Penal conformance with constitutional norms and world conscience.

4 Pande, B.B. “Face to Face with Death Sentence”, Supreme Court Cases p.47
5 Ibid
6 Rajendra Prasad V. State of U.P AIR 1979 SC 916 at p.920
7 Ibid p.921
The principle behind existing capital offences may not show any common element at first sight, but a close analysis reveals that there is a thread linking all these offences, namely, the principle that the sanctity of human life must be protected. It is the "willful exposure" of life to peril that seems to constitute the basis of provision for the sentence of death.8

C) CAPITAL PUNISHMENT FOR JOINT LIABILITY OFFENCE

Liability to death sentence may arise in certain situations though the actual act of killing was done by another person. These cases may be referred to as cases of "Vicarious" or "Constructive Liability".

The important cases of such liability under the Indian Penal Code seem to be these:

SECTION 34 Indian Penal Code: Act done by several persons in furtherance of common intention.

SECTION 109 to 115 Indian Penal Code: Abetment

SECTION 120B Indian Penal Code: Punishment of criminal conspiracy.

SECTION 149 Indian Penal Code: Every member of unlawful assembly guilty of offence committed in prosecution of common object.

SECTION 396 Indian Penal Code: Dacoity with murder (under section 391 if any one of five dacoits commits murder in committing dacoity, every one of them is punishable with death, etc).

The vicarious liability in all these cases is justified on the ground that the person concerned is a party to the offence, though his physical participation is indirect. The mensrea, in this content is represented by the requirement of "common intention" or of "abetment" or conspiracy simpliciter or of "common object" or "co-joint" commission of a dacoity.

8 35th, Report, Para 77. p.34
Some discussion on two special cases of constructive liability seems to be called for view of their importance; the first is that under Section 34, Indian Penal Code, which reads as follows:

SECTION 34 Indian Penal Code:

“When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner, as if it was done by him alone”

SECTION 149 of the Indian Penal Code is the second specific case which runs as follows:

SECTION 149 Indian Penal Code:

“If an offence is committed by any member of an unlawful assembly in prosecution of common object of that assembly, or such as the member of that assembly know to be likely to be committed in prosecution of that object, every person, who at that time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

In many cases, Section 34 and 149 may overlap; nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of unlawful assembly. Section 34 applies where the facts disclose an element of participation of action on the part of the accused person. The acts may be different, and may vary in the character, but they all are actuated by the same common intention.

“Common Intention” in Section 34, presupposes a preconcerted plan i.e. a prior meeting of minds, though it is not necessary that there should be long interval between the plan and the act. The common intention may even be developed on the spot. The net result under Section 34 is that the common intention and participation in the crime make the person concerned guilty of the offence. Whether, however, he
should be punished with the highest punishment provided for the particular offence, i
not a matter on which is section 34 has the final say. The question of sentence i
entirely the discretion of the court.

II) DEATH PENALTY UNDER CRIMINAL PROCEDURE CODE: PROCEEDURAL SAFEGUARDS

In view of the grave consequence of the death sentence, it also become
necessary to see the procedural safeguards provided for the imposition of this extrem
penalty. The death penalty is administered according to the legal provisions containe
in the Code of Criminal Procedure 1973. This Code contains a number of provision
to safeguards the interest of the accused. The object of these safeguards is to eliminat
any chance of eliminating a person.

A) HEARING THE ACCUSED ON QUESTION OF SENTENCE

According to Section 235(2) of the Code of Criminal Procedure 1973, th
accused shall be heard on the question of sentence. This section provides as follows:-

If the accused is convicted, the judge shall unless he
proceeds in accordance with the provisions of Section 360,
hear the accused on the question of sentence, and then pass
sentence him according to law.

This provision is in conformity with the modern penology which regards th
offence and the offender as equally material in deciding the appropriate sentence.

This appropriate sentence in any given case is governed by various factor
such as the nature of the offence, the extenuating and aggravating circumstances c
the offence, the background of the offender with reference to the educatio
employment, home, life, sobriety, social adjustment, emotional and mental conditio
of the offender, prospects for rehabilitations, and so on. Further, there may be man
circumstances is given case which may be altogether irrelevant at the stage of fixin
the guilt, but these circumstance become relevant in determining the appropriat
sentence.
The present provision which casts a statutory duty on the court to hear the accused on the question of sentence is of special importance in capital cases where the court has to choose from the alternatives of life and death. The duty of the sentencing judges is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. They must make a genuine effort to elicit from the accused all that will eventually bear on the question of sentence and thus bring out the true scope of his provision.

B) SPECIAL REASONS FOR AWARDING DEATH PENALTY

There has been a significant change in thinking and approach to the subject of death penalty since India became free. Prior to the amendment of section (5) of the Code of Criminal Procedure 1898 by Act 26 of 1955, the normal rule was to impose sentence of death on person convicted for capital offence and, if a lesser sentence was to be imposed, the court was required to record reason in writing. In 1955, this provision was deleted and the result was that the court became free to award either death sentence or the lesser sentence. Under the new Criminal Procedure Code 1973, a provision has been made in this respect in Section 354 (3). This section requires the court to record ‘special reason’ for imposing the sentence of death. It provides as follows:

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence.

By the enactment of this section, the entire policy with regard to death penalty has been completely changed. Death Sentence is now an exceptional sentence which is to be imposed after recording the ‘Special reasons’ for its imposition.

The duty cast by this provision on the court to give ‘special reason’ for awarding sentence of death in a capital case enables the High Court to judge whether...
the lower court has exercise its discretion judicially and also provides material to the authorities concerned at the times of considering the mercy petition of the condemned person.

In view of the change, there is no doubt that death penalty has ceased to be general punishment. The policy is very clear in Section 354(3) Criminal Procedure Code 1973, that it should be imposed only in extreme cases. And, therefore, special reasons need to be recorded. But the expression ‘special reason’ has not been defined in the code and it has been left for the judicial interpretation. Perhaps, this is the right steps as it is not possible to exhaustively, enumerate all the factors which may be taken as ‘special reason’. No doubt this provision has vested some discretion in the judges, but it is inevitable.

C) PROCEDURE, AFTER THE IMPOSITION OF DEATH PENALTY

The court of session sentencing the accused to death is required to inform him of the time period within which he may prefer the appeal that lies from such judgment as of right. This is provided under Section 363(4) of Criminal Procedure Code which says:

When the accused is sentenced to death by any court and an appeal lies from such judgment as of right, the court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Again, when the sentence of death is awarded by the trial court, it can not be executed unless it is confirmed by the High Court. A reference is to be made by the trial court to the High Court is this respect\(^\text{11}\). The legal provision regarding reference to the High Court for the confirmation of death sentence is mandatory and is applicable irrespective of at the appeal if any, filed by the accused. In the meantime, the person convicted has to be committed to the jail custody under warrant.\(^\text{12}\)

\(^{11}\) 366(1) of Cr.P.C
\(^{12}\) 366(2) of Cr.P.C.
In the proceedings submitted in the court for the confirmation of death sentence, Section 367 (1) Criminal Procedure Code 1973 empowers the High Court to make further inquiry or take additional evidence, bearing on the guilt or innocence of the convicted person, if it thinks necessary. The High Court may be so either itself or direct the Court of Session. Section 367 (1) of Criminal Procedure Code provides:

If when such proceeding are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the court of Sessions.

When the inquiry is not made or the evidence is not taken by the High Court itself, the result of such inquiry or evidence shall be certified to such court.13

The presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken, unless the High Court directs otherwise14. The confirmation proceedings are taken up by a Division Bench of the High Court and the confirmation of the sentence, or any new sentence or order passed by the High Court is required to be signed by atleast two judges.15

Further, Section 370 of the code provides:

That where any such case is heard before a Bench of judges and such judges are equally divided in opinion, the case shall be decided in the manner provided by Section 392. In any case submitted by the trial court for confirmation of sentence of death, the High Court:

(a) may confirm the sentence or pass any other Sentence warrant.

13 367(3) Cr.P.C.
14 367 (2) Cr.P.C.
15 S. 369 of Cr.P.C.
(b) may annul the conviction, and convict the accused of any offence of which the court of Session might have convicted him, or order a new trial on the same charge, or

(c) may acquit the accused person

However, no order of confirmation shall be made until the period allowed for performing an appeal has expired, or if an appeal is presented within such period until such appeal is disposed of a person sentenced to death by the Sessions judge can file an appeal under Section 374(2) to the High Court. Normally, the appeal against the sentence of death is filed in the High Court by the convicted person and the survey of the practice followed in various High Courts reveals that the confirmatory proceedings and the appeal are taken up together, for hearing. The High Court has come to its own conclusion as to the guilt or innocence of the accused by appraising the entire evidence and merits of the case, independently of the finding of the trial court.

Where the High Court has passed a sentence of death after setting aside the order of acquittal of the accused, the accused has a constitutional entitlement to prefer an appeal as of right to the Supreme Court.

The right to appeal to the Supreme Court in such a case is granted under Article 143 (1) (a) of the constitution. Such a safeguard is also provided by Section 379 of the Criminal Procedure Code 1973. The person under the sentence of death can also file an appeal to the Supreme Court if the sentence has been confirmed or upheld in appeal. The High Court after upholding the sentence may give a certificate for appeal to the Supreme Court if it deems the case fit for the same. If no certificate for appeal to the Supreme Court is given, this does not mean that an appeal shall lie. The Supreme Court can grant special leave to appeal under Article 136 (1) of the constitution. The confirmation of death sentence or upholding of
without observing the guidelines of the Supreme Court on death penalty will be a fit case for the intervention of the Supreme Court to prevent miscarriage of justice\textsuperscript{21}.

**D) EXECUTION OF DEATH SENTENCE**

The Code of Criminal Procedure, 1973, also contain the procedure for the execution of death sentence. The procedure has been briefly described here. According to **Section 413** of the code,

> when the court of session receives the order of confirmation or other order of the High Court in a case submitted by it to the latter for the confirmation of death sentence, it causes such order for be carried out into effect by issuing a warrant or taking other necessary steps.\textsuperscript{22}

In case the death sentence is confirmed, the Court of Session would issue a warrant in the prescribed form\textsuperscript{23} to the officer in charge of the prison for the proper execution of the sentence. When the sentence of death has been executed, the officer executing it shall return the warrant to the court issuing it with an endorsement in his hand certifying the manner in which the sentence has been executed\textsuperscript{24}. According to **section 414** of Criminal Procedure Code,

> If the High Court passes a sentence of death in appeal in revision, the Court of Session in receiving the order of the High Court causes the sentence to be carried out issuing a warrant. The Court of Session issues the warrant in the same manner as discussed above.

Execution of the death sentence may be postponed in case of appeal to the Supreme Court. **Section 415** of the Criminal Procedure Code empowers

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\textsuperscript{21} Singh, Gurpal, 'A critique of the law of Capital Punishment in India: Need for its prevesion and reform (1979) 1 SC J (Journal) 51,57

\textsuperscript{22} S. 413 or Cr.P.C.

\textsuperscript{23} Warrant of execution of a sentence of death is to be issued in form no. 42 of second schedule of Cr.P.C. 1973

\textsuperscript{24} S. 430 of Cr.,P.C.
The High Court to postpone the execution of death sentence in case an appeal lies to Supreme Court from its judgment, or if the convicted person makes an applicant to the High Court for the grant of a certificate to appeal to the Supreme Court, or if it is satisfied that the accused intends to present a petition for special leave to appeal in the Supreme Court.

The execution may lie postponed till such period allowed for appeal expires, or till the application made to the High Court is disposed of, or till the period it considers sufficient to enable the convicted person to present a petition in the Supreme Court for special leave to appeal. In case the convicted person prefer an appeal, the execution of death sentence is postponed till such appeal is disposed of.  

The provision safeguards the interest of the condemned Prisoner who may ultimately be acquitted or his sentence reduce by the Supreme Court. The High Court may also postpone the execution of the death sentence imposed on a pregnant woman.

In this connection, Section 416 of Criminal Procedure Code provides:

If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.

Thus, under the law, only High Court have been empowered to put off the execution of death penalty confirmed by it.

III) PROVISION FOR PARDON, REMISSION OR COMMUTATION OF DEATH PENALTY

Apart from providing various safeguards in the procedure for the imposition of death sentence, law also vests the power to grant pardons, reprieves etc, in the executive. Because of the irreversible nature of death penalty, there should not be the remotest possibility of executive an innocent person. This power helps to take into

25 Section 415 of Cr.P.C.
account al realistic factors and circumstances of the case once again before executive a person. Therefore, the vesting of such powers in the executive seems to be based on pragmatic approach. In India, the provisions for pardon, commutation, reprieves and remission of the sentence of death are continued in the Indian Penal Code, Criminal Procedure Code and constitution.

A) **PROVISION UNDER THE INDIAN PENAL CODE**

Under the penal Code, the appropriate Government has been empowered to commute the sentence imposed on a person to any sentence, though it may be the lowest sentence of fine. **Section 54 and 55** of the Penal Code deal with the commutation of sentences. However, only sec 54 deal with commutation of death sentence. It provides as follows:

In every case in which sentence of death has been passed, the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this code

Thus the legislature has conferred the unqualified power on the executive to commute the sentence of death. No indication is given as to the reason for, or circumstances under which this power shall be exercised.

B) **PROVISION UNDER CRIMINAL PROCEDURE CODE**

The Code of Criminal Procedure 1973, provides for suspension, remission or commutation of sentences. **Section 432** vests the executive with the power to suspend or remit sentences. **Section 433** vests the executive with the power to commute the sentence. Under Section 432, the appropriate Government is empowered to suspend or remit whole or any part of the punishment imposed on any person convicted of an offence, with or without any condition attached to such suspension or remission. The condition or which a sentence is suspended or remitted may be one to be fulfilled by the person in whose favour the sentence has been suspended or remitted or one independent of his will. The appropriate government,
under this section is also empowered to make rules or issue direction as to the suspension of sentence and the conditions on which petitions should be presented and dealt with. Section 433 of the code empowers the appropriate Government to commute the sentence of the person convicted of an offence. This section specifies as to what types of sentence should be commuted to what extent. Under this Section death sentence imposed on a person may be commuted to any other punishment provide by the Penal Code.

The exercise of power by appropriate Government under Section 432 and 43; is not subject to control by the court. These sections empower the appropriate Government to suspend or remit or commute a punishment with or without any conditions. The power given to the executive by these section is purely discretionary, and the law does not enjoin upon the Government to give reason for its order. However, the appropriate Government must exercise this power fairly, and not arbitrarily. The order which is the product of extraneous or malafide factors will vitiate the exercise of the power.

C) PROVISION UNDER THE CONSTITUTION

Under the constitution, the power to grant pardon, reprieve, etc and to suspend, remit or commute sentences has been confined on the President of India and the Governors of the States by Article 72 & 161 respectively. The President of India or the Governors of the States can pardon, reprieve or respite the sentence of death even though he has exhausted all legal remedies available to him. The courts have interpreted those constitutional provisions in a number of cases.26 The Supreme Court has held that this constitutional power vested in the heads of executed has to be exercised justiceably and not arbitrarily on the advice of his Council of Ministers.27

Time and again the issue of formulation of specific guidelines to regulate the exercise of the power under Article 72 has been raised before the Supreme Court. It has been urged that this would avoid the vice of discrimination in the exercise of the power.

26 Article 72 of Constitution
27 State Vs KM Nanawati AIR 1950 Maru Ram Vs Vo1 AIR 1980,Kuljet Singh Vs H. Governor of Delhi
pardoning power. This issue was finally settled by the Supreme Court in *Kehar Singh Vs UOI.* The court held that there was sufficient indication in the terms of Article 72 and in the history of power enshrined in that provision as well as the case law on the point. Therefore, specific guidelines need not be spelled out. The futility and insufficiency of any attempt to formulate such guidelines was also pointed out by the court. Speaking for the court Chief Justice Pathak observed:

> Indeed it may not be possible to lay down any precise, clearly defined and sufficiently Channelized guidelines, but we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in constitutional scheme.

In this *Kehar Singh Vs Union of India,* a five judge Bench of the Supreme Court has examined in detail the scope of the President’s pardoning power under Article 72. The petitioner Kehar Singh, was convicted of an offence of murder for assassinating the P.M Smt Indira Gandhi and Sentenced to death which was confirmed by High Court and his appeal to the Supreme Court also dismissed. Thereafter, he presented a petition to the president for the grant of pardon. He prayed that his representative may be allowed to see the resident Personally on order to explain his case. The president rejected his petition on the advice of the Union Government without going into the merits of the decision of the Supreme Court confirming the death sentence. The Court held that while exercising his pardoning power it was open to the president to scrutinize the evidence on the record and come to a different conclusion both on the guilt of Kehar Singh and the sentence imposed upon him. In going so, the president does not amend or modify or supersede the judicial record. The judicial record remains intact. Kehar Singh has no right to be

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28 AIR SC 964  
29 AIR 1989 SC 653
heard by the president. The court need not spell out specific guidelines for the exercise of power under Article 72 this is so because the power under Article 72 is the “widest amplitude” and can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case. The President can not be asked to give reasons for this order. The power of pardon is part of the constitutional scheme. The order of the President can not be subjected to judicial review on its merits. Accordingly it was held that the President must consider the matter a fresh in accordance with the law laid down in the present case.

Thus, the court held that the power to pardon belongs exclusively to the president and the Governors. The courts could not ask for the reasons for the President’s orders. They could go into the scope of Article 72, but could not analyze the exercise of power under Article 72 on merits.

Lastly, the court made it clear that where there was no right in the condemned person to insist on an oral hearing before the president as the proceeding was of an executive character. The manner of consideration of the petition lay within the discretion of the president, and it was for him to decide how best he could acquaint himself with all the information that was necessary for its proper and effective disposal. If necessary, he could even given an oral hearing to the parties. The matter was entirely in the discretion of the president.30

Oral hearing from the President

There is no right in the condemned person to insist on an oral hearing before the President. The proceedings before the President is of an executive character, and when the condemned person files his petition, it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. The manner of consideration of the petition lies within the discretion of the President and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the accused which

he considers pertinent, and he may, if he considers, it will assist in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. For the exercise of power under Article 72 of the constitution, no specific guidelines can be spelled out by the court as Article 72 itself provides sufficient guidelines.31

It may be pointed out that if Article 72 clemency power as a part of the 'Constitutional scheme' is subject to the discipline of Article 21, then the accused convicted to die must have fundamental right to personal hearing; to say, as the court does, that such an accused has no right to insist on presenting an oral argument is to say that article 72 is not simply a part of the constitutional scheme (For the court has insisted on such a right in all kinds of context where a decision (regarding of how it is named, whether 'executive' or 'ministerial', or 'quasi-judicial') affects the constitutional rights of the accused. It has even recognized the right to a post-decisional hearing. In capital punishment situations, such hearing ought to be, under Article 21 a constitutional imperative, if demency power is a part of the constitutional scheme.32

A right to personal hearing would certainly set right or at least make visible the various factors (including the play of power, pull or prejudice and push of influence) and provide the matrix of the ultimate decision. The clemency power, in its final operation shows wide variation statistically.33

Power to Pardon—Justiciability

The order of the President can not be subjected to the judicial review on its merits except within certain limitations. However, the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the full attitude of the scope of the power is a matter for the court. The power to pardon belongs exclusively to the President and the governor

under the Constitution. There is also no question involved of asking for the reasons for the President’s order. The Courts are the constitutional instrumentalities to go into the scope of Article 72 but can not analyse the exercise of the power under Article 72 on its merit. The question as to 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.\(^{34}\)

**Power to Pardon : No interference by the courts.**

The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilized societies regarded seriously and recourse, either under express constitutional provisions 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 to some high authority to scrutinize the validity of the threatened denial of life or the threatened or the 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 it should be so treated in the India Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoy High Status. The power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of article 74(1) must act in accordance with such advice.\(^{35}\)

**Power to pardon-different from judicial power**

It is open to President in the exercise of the power vested in him by Article 72 of the Constitution (in case of Governor of State under Article 161) to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court of record to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in  

wholly different plan from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it and this is so, notwithstanding that the practical effect of the presidential act is to remove the stigma of guilt from the accused to remit the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial suppression of the original sentence. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. The President is entitled to go into the matter of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Supreme Court.36

It is submitted that in Kehar Singh’s case, a strange situation appears to have allowed to proceed. The Court was not averse to the grant of pardon by the President under Article 72 of the Constitution, and was shifting the judicial burden on the President. While passing the order the Supreme Court did not dismiss the writ Petition (Criminal) Nos. 526-27 of 1988 for want of jurisdiction, etc, but on the other hand, granted no relief to Kehar Singh as in Antuley’s case. But the Supreme Court provided indirect indication to the President for clemency while is observed finally:

"..We hold that the petition invoking that power (article 72) shall be deemed to be pending before the President to be dealt with and disposed of afresh. The sentence of death imposed on Kehar Singh shall remain in abeyance meanwhile."37

It is further submitted that Prof. Upendra Baxi has right commented when he observed:

“Quite clearly, Kehar Singh falls to persuade as an act of reasoned discourse. This then raises deeper questions concerning judicial behavior. Why did the court admit a writ petition against the President’s order? Why then did it

decide as it did? An answer suggests itself if we bear in full review the intensity of outraged public opinion at the Supreme Court’s decision awarding capital punishment to Kehar Singh of which even the author had some access, through International media coverage, as far as Australia during his academic sojourn there.\textsuperscript{38}

It is also relevant to quote that Kehar Sing’s case might have different outcome, had it been decided by the Supreme Court after the change of the Government in 1989 or the same was decided by the President under Article 72 in the said circumstances. It reminds us the case of Sanjay Gandhi s/o Late Mrs. Gandhi convicted in ‘Kissa Kursi Ka’ case who was acquitted by the Supreme Court when the regime at the Centre was changed. The Kehar Singh’s case decision is likely to be termed as a political decision rather than judicial decision and reminds the death sentence and execution of Raja Nand Kumar. It has been quoted in M.P. Jain’s Outline of Indian Legal History 122-126 (2nd Edn. 1966) which described the view of James Fitzjames Stephen that the Calcutta Supreme Court’s trial was unfair especially in its reliance on circumstantial evidence and grave mistake of law. Keith described the death sentence and execution of Raja Nand Kumar as an ‘odious crime’ committed by the Supreme Court decision of 1878 trial was also described as “judicial murder”. M.P. Jain also agrees with the overall view that the Nand Kumar’s trial was vitiated. The view taken by Upendra Baxi about Kehar Singh’s case death sentence and execution has a reference to the death sentence and execution of Nand Kumar’s case in the following words:

“Just as we today, nearly two hundred and fifty years later discussed the judicial behavior in Raja Nand Kumar’s case. Indian posterity will now be burdened with a searching moral examination of Kehar Singh. But for the present, Kehar Sigh means just this Article 21 will remain the custodian of the due process rights of people in high places charged with corruption. It would not exist, even in its most

\textsuperscript{38} See Upendra Baxi “Clemency Erudition and Death, J.I.L.I. 1988, 501 at 506.
attenuated forms, for the accused in cases of high political assassination. Convicted wholly on circumstantial evidence, even of most doubtful veracity, Kehar Singh emerges as a monument dedicated to the reason of state in India. The prospects for just governance in India depend on its rift and through going demolition.39

It is submitted that if, as Supreme Court maintains, clemency power is a part of the “constitutional scheme”, then Article 21 rights and standards assuredly extend to its exercise. Regardless of the issue whether it is discretionary power of the President or one on which he must act on the aid and advice of council of Ministers, clemency power being a creature of the Constitution, must remain subject to Article 21 discipline. Even the history of this power, so elegantly traced by Chief Justice Pathak, has to be construed in India in the light of the sovereignty of Article 21 so well asserted in Antuley’s case40 (A.R. Antuley v. R.s. Nayak, (1988) 2 S.C.C. 602)41

Supreme Court is wholly reticent to apply the Antuley standard of Article 21 solicitude in Kehar Singh..... Deftly the court returns the final burden to the executive. And it hopes that its elegant and erudite discourse will provide a functional substitute for not allowing a Writ petition challenging the constitutional validity of the conviction and sentence of Kehar Singh.42

The power to grant pardon, reprieves etc and to suspend, remit or commute sentences, vested in the president and the Governors is very wide. The power is not affected by Sec 433-A Criminal Procedure Code 1973. However since Sec 433-A has been passed by the parliament itself, it seems that while exercising the powers under Art 72 & 161 of the constitution, neither the president nor the State Government is likely to defeat the object of Sec 433-A.

39 Ibid., at 506.
40 Antuley’s case permits challenge to the constitutional validity of the Supreme Court own judicial orders in the very same proceedings before the larger Bench, through a petition, even after review has been denied and Special Leave petition dismissed. Justice Rangnath Mishra (former C.J.) in Antuley has observed in this context. To own up mistake when judicial satisfaction is reached does not militate against its status or.... Authority. Perhaps, it enhances both. “In Antuley, the S.C. so vividly illustrates the court is willing publicly to annul its erroneous judgement.
42 Ibid., at p. 506.
Although, the Supreme Court in Kehar Singh case has ruled out the formulation of guidelines by the executive for the exercise of the pardoning power, need for the speedy disposal of petition filed under Article 72 and 161 of the constitution or under Section 432 & 433 of Criminal Procedure Code, 1973 can not be denied. The Supreme Court has itself admitted that long and interminable delays in the disposal of these petition are a serious hurdle in the dispensation of justice and such delays tend to shake the confidence of the people in the very system of justice. Therefore, the court suggested that the executive authorities should rigorously follow a self imposed ruled that every such petition shall be disposed of within a period of three months from the date on which it was received.

IV DEATH PENALTY UNDER OTHER LAWS

A) AIR FORCE ACT, 1950

SECTION 34 : Offence 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:-

- Shamefully abandon 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

- 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

- In the presence of the enemy, shamefully cast away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or
• Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

• Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

• Treacherously or though cowardice sends a flag of truce to the enemy; or

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

• In time of action leave his commanding officer or his post, guard, piquet, patrol or party without being regularly relived or without leave; or

• 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 or 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; or

• Treacherously or shamefully causes the capture or destruction by the enemy of any aircraft belonging to the force; 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 court-martial, be liable to suffer death or such less punishment as is in this Act mentioned.

B) DEATH PENALTY UNDER ARMY ACT, 1950

SECTION 34 Offences in relation to the enemy and punishable with death

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

• Shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to this 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 any of the said acts; or

• 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 to discourage such person from acting against the enemy;

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

• Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or
• Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

• Treacherously or though cowardice sends a flag of truce to the enemy; or

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

• In time of action leave his commanding officer or his post, guard, piquet, patrol or party without being regularly relived or without leave; or

• 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 or 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; or

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

C) DEATH PENALTY UNDER COMMISSION OF SATI (PREVENTION) ACT, 1987

SECTION 4. Abetment of Sati -

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.

D) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985 AND DEATH PENALTY

SECTION 31-A. Death penalty for certain offences after previous conviction:-

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 27-A, is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to-

- Engaging in the production, manufacture, possession, transportation, import into India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity indicated against each such drug or substance, or

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

E) THE PREVENTION OF TERRORISM ACT (POTA) AND THE DEATH PENALTY

The Prevention of Terrorism Act' (POTA) is the latest to join the bandwagon of the death penalty debate. The Act makes a terrorist act punishable with death.

SECTION 3(1) of (POTA) defines a terrorist act as:

- whoever with the intent to threaten the unity, integrity, security of sovereignty of India or strike terror in people by using bombs, dynamite or other explosive substances or inflammable substances or firearms or lethal weapon or poisons or noxious gases or any chemical of hazardous nature in such manner which will cause or likely to cause death or injury to any persons or loss or damage of any property or any equipment used for
defence of India or any state government, or any other agencies or detains
an threatens to kill or injure any person in order to compel the govt. or any
other person to do or abstain from doing any act;

• is or continues to be a member of any association declared unlawful under
the unlawful activities (prevention) Act or is voluntarily aiding or
promoting any object of such association and in either of the case is in
possession of any firearms, ammunition, explosive or other instrument
which may cause mass destruction and commits any act resulting in loss of
human life or grievous injury to any person or causes significant damage
to any person has committed a terrorist act.

SECTION 3 (2). Punishment for terrorist acts;

Whoever commits a terrorist act, shall-

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

- in any other case, be punishable with imprisonment for a term which shall
not be less than five years but which may extend to life imprisonment and
shall be liable to fine.

The first conviction which attracted the death penalty under the Act was in
what know as the 'Parliament Attack Case' Sayed Abdul Rehman Geelani,
Mohammad Afzal, and Shaukat Hussain Guru have been condemned to death for their
role in the December 13, 2001, attack on Parliament House, New Delhi, when
Parliament was in session. Mohammad Afzal is been condemned to death by the
Supreme Court and his death was to be executed on 14th Oct, 200643 but his clemency
petition is pending before the President of India.

Nalini, Murugan, China Sathan and Perarivalan were also condemned in the
'Rajiv Gandhi assassination' case.

But what is the actual legal practice, cannot be ignored in the modern system
of criminal administration of justice. The real tussle, whether a person is guilty of
murder begins to develop in the Court room, where the skilled defence lawyer can

save a first degree murdered because of the facts that prosecution failed to prove the guilt of the accused beyond reasonable doubt. Even otherwise the Court after holding the accused guilty of murder may determine to choose lesser punishment than death keeping in view other factors and individual circumstances. It is well known that the number of women murderers sentenced to death is disproportionately low compared with the proportion of male murderers so sentenced. There was an uproar in our Parliament and several members in the Lok Sabha agitated over reports that a Naxalite woman prisoner Miss Molina Dhak was awaiting execution in a Calcutta Jail. A large number of M.P.s appealed to the President to commute the death sentence awarded to Miss Molina Dhak and Miss Renu Mukherjee, in West Bengal Jails. In a statement they said, "We may have our differences with the Naxalite philosophy but we cannot agree with this extreme punishment meted out to these two young ladies." In a letter to Mr. Jatti, the then officiating President, Mr. Chandra Shekhar, President, Janta Dal Party had said: "In India no woman political worker had been hanged yet. To do so now, when freedom has been so recently restored, would be most unfortunate." But after Rajiv Gandhi's assassination by a women criminals with any philosophy whatsoever.

In addition to political attitude regarding political workers and female murders, if a sentence of death is finally imposed there is still the matter of commutation by Governors or President. Whether or not a death sentence will actually be executed depends on the particular attitude towards the death penalty held by them. One Governor opposed to this punishment, may commute every sentence, another who holds the opposite view may commute few of them. Bias or adventurous circumstances may also exert an influence.

Capital punishment is a complicated issue. If requires to be studied otherwise also. We may abolish it for a limited time in our country to make a thoughtful and practical study to reach the conclusion whether it be abolished or not. The suicide killers could not be deterred so far from committing murders including of high dignitaries for the protection of whom the imposition of death sentence is a basic argument.

V) STATUS OF DEATH PENALTY
STATUS OF CAPITAL PUNISHMENT – A WORLD PROSPECTIVE

INTRODUCTION

According to Hume, 72,000 great and petty thieves were executed during the reign of Henry VII of England. In 1533, it is reported, Henry VIII had 27 Protestants burned because they would not acknowledge him as head of the Church\textsuperscript{44}, the Nuremberg Malefactor’s Books reveal the following samples of the use of capital punishment: a cloth maker who strangled his own mother was burned in oil (1392); 18 Jews were burned alive on Jew Hill for murdering four Christian boys (1497); after 1571, an assault frequently sent the offender to the gallows; women thieves were hanged, although death by the sword (considered less shameful) was sometimes allowed; deliverance from the shameful rope (hanging) and substitution of execution by the sword were a matter of great gratitude; the penalty for stealing goods valued over a guldem was death in around 1552); persons who sent letters of defiance or threat were beheaded; wanton lewdness, adultery, and incest were punished by execution; swindlers, seducers and petty thieves were executed by the sword; a witch was tied to the pole, strangled and burned for conspiring with the devil (1659); perpetrators of treasure stoves were executed; insurrectionists and rioters were beheaded, especially peasants and reformers; the disturbers of the peace were executed.\textsuperscript{45}

CAPITAL PUNISHMENT IN ANCIENT ROME AND GREECE

In ancient times the law administrators unflinchingly executed murderers because they believed that “the life of each man should be sacred to each other man”.\textsuperscript{46} They realized that it is not enough to proclaim the sacredness and inviolability of human life, it must be secured as well, by threatening with the loss of life of those who violate what has been proclaimed inviolable – the right of innocent to live. Murder, being the worst of crimes must deserve the highest penalty which is death – sentence. This shall also be in accordance of the principle that punishment must be proportionate to the gravity of the crime.”

\textsuperscript{44} Griffiths, The Chronicles of New Gate, p. 45.
\textsuperscript{45} Theodor Hampe Crime and Punishment in Germany as illustrated by the Nuremberg Malefactor’s Book, pp. 39, 47, 48, 59, 77-78, 82-83, 88-93, 113-114, 116.
\textsuperscript{46} “Homo homini res sacra.
Ancient Romans accepted the deterrent value of death penalty. Under Roman criminal law the offender was put to public ridicule and his execution took the form of a festival. Death was caused to the condemned person in a most tortuous manner. For example, one who killed his father was sewn in a sack along with a living dog, cat and a cobra and thrown into river. The object was to make him die most painfully. The sentence of death could be awarded even to a debtor who was unable to pay off the debt of his creditor. Thus a creditor who found that his debtor was unable to pay off the debt could vent his wrath upon the debtor by marching him up the Tarpeian rock and hurling him from there to death.

The Greek penal system also provided death sentence for many offences. The offenders were stripped, tarred and feathered to death publicly. Execution of death penalty in public places was favoured because of its deterrent effect.

CAPITAL PUNISHMENT IN ENGLAND

The history of crime and punishment in England during the medieval period reveals that infliction of death penalty was commonly practiced for the elimination of criminals. Henry VIII who reigned in England for over fifty years, was particularly famous for his brutality towards the condemned prisoners. He used to boil the offenders alive. His daughter Queen Elizabeth who succeeded him was far more stiff in punishing the offenders. The offenders were not put to death at once but were subjected to slow process of amputation by bits so that they suffered maximum pain and torture. The condemned offenders were often executed publicly. These brutal methods of condemning the offenders were, however, abandoned by the end of eighteenth century when the system of transporting criminals to American Colonies at their option was firmly established.

Prof. Fitzgerald observed that the history of capital punishment in England for the last two hundred years recorded a continuous decline in its incidence. During the later half of the eighteenth century as many as two hundred offences were punishable with death penalty. The obvious reason for the frequency of execution was the concern of the ruler to eliminate criminals in absence of adequate police force to

47 Henry VIII ruled over England from 1491 to 1541 AD.
detect and prevent crimes. The methods of putting offenders to death were extremely cruel, brutal and torturous.

As the time passed the severity of capital punishment was mitigated mainly in two ways: Firstly, this sentence could be avoided by claiming the ‘benefit of clergy’ which meant exemption from death sentence to those male offenders who could read and were eligible for holy order. Secondly, the prisoners who were awarded death sentence could be pardoned if they agreed to be transported to the American Colonies. Thus by 1767 condemned felons could be transported for seven years in lieu of capital sentence. In course of time death punishment for felony was abolished and in 1853 the system of transporting criminals also came to an end and a new punishment of penal servitude was introduced.

Commenting the frequency of executions during the eighteenth century Donald Taft observed that during no period in the history of western civilization were more frantic legislative efforts made to stem crime by infliction of capital punishment as in that century. In his opinion the growing importance of this punishment was owing to the agrarian and industrial changes in the English society resulting into multiplicity of crimes which had to be suppressed by all means. Supporting this view Prof. Radzinowicz observed that more than 190 crimes were punishable with death during the reign of George III in 1810.

In nineteenth century, however, the public opinion disfavoured the use of capital punishment for offences other than the heinous crimes. Bentham and Bright, the two eminent English law reformers opposed frequent use of capital punishment. Sir Samuel Romilly also advocated a view that the use of capital punishment should be confined only to the cases of willful murder.

The irrevocable and irreversible nature of death penalty gave rise to a number of complication which invited public attention towards the need for abolition of this sentence. Consequently the British Royal Commission on Capital Punishment was appointed in 1949 to examine the problem. As a result of the findings of this

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49 In subsequent years this benefit was extended to women also. It was finally abolished in 1927.
50 Death as a punishment for felony was abolished in 1827.
commission death sentence was suspended in England and Wales for five years from 1965 and was finally abolished by the end of 1969.

However, the constant rise in the incidence of crime in recent years has necessitated Britain to reassess its penal policy regarding death penalty. The two latest decisions\(^{51}\) of the Privy Council emphatically stressed that the award of death sentence is not violative of human rights or fundamental rights.

It was only at the commencement of the twentieth century that the actual exemption from capital punishment began. In 1908, with the passing of the Children's Act, persons under sixteen were exempted from capital punishment.\(^{52}\) Still another reduction was effected in 1922. This time it was infanticide committed by women which came to be exempted from capital punishment under the Infanticide Act, 1922.\(^{53}\) In 1930 the Select Committee of Parliament debated a proposal for the abolition of capital punishment for an experimental period of five years, but to no purpose, because six out of the fifteen members of the Select Committee did not agree.\(^{54}\) In 1938, however, as a result of the pressure of public opinion, a private motion to abolish the death penalty for an experimental period of five years was passed in the House of Commons. But the Government of the day did not implement it. A similar private motion was passed in 1948 and the then Government felt compelled to appoint the now famous Royal Commission on Capital Punishment in 1949.\(^{54A}\) After profound deliberations and interviews with experts in several fields, the Royal commission came to the conclusion that "prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment".\(^{55}\) It, however, opined that "The outstanding defect of the law of murder is that it provides a single punishment for a crime widely varying in culpability". It further conclude that this rigidity was the main defect in the law of murder.\(^{56}\) In 1957, the Homicide Act was passed which excluded some of the

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\(^{54A}\) Ibid., p. 108


\(^{56}\) Ibid., p. 6.
murders from the category of crimes punishable with capital punishment. Thus, it is seen that it took almost a century for the law regarding capital punishment in England and Wales to be really modified in a manner similar to that first proposed in 1864.


STATEMENT 1

ENGLAND AND WALES

Volume of award of capital punishment in England and Wales during the period 1921 to 1935 and 1956 to 1965

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of death sentence awarded</th>
<th>Rate per ten Million of population</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>(i) 1921-25</td>
<td>112</td>
<td>31.8</td>
</tr>
<tr>
<td>(ii) 1926-30</td>
<td>101</td>
<td>28.7</td>
</tr>
<tr>
<td>(iii) 1931-35</td>
<td>96</td>
<td>25.7</td>
</tr>
<tr>
<td>(iv) 1956-60</td>
<td>62</td>
<td>14.0</td>
</tr>
<tr>
<td>(v) 1961-65</td>
<td>33</td>
<td>7.0</td>
</tr>
</tbody>
</table>

Percentage decrease in the award of death sentences from 1921-25 to 1961-65 89.83

NOTES:


(ii) Figures of death sentences for the period 1961 to 1963 and 1965, are taken from Whitaker's Almanacks as per pages stated below:


Statement 1 shows how the disinclination by the Administration of Justice to award capital punishment in England and Wales resulted in reduction in the award of capital punishment during the period from 1921 to 1965, the year in which capital punishment was abolished temporarily. It shows that there has been a progressive decrease in the number of awards of capital punishments. The volume of decrease in 40 years is seen to be of the order of about 70 per cent. The decrease is most marked within the latest decade, the volume in the last quinquennium i.e., 1961 to 1965, being only about 53 per cent of that of the previous quinquennium.

In terms of actual numbers it may be pointed out that about one person in seventy one lakhs and fortytwo thousand, get the award of capital punishment for murder every year. This fact indicates that while in England and Wales 43 persons were killed in every ten million of populations, one person out of more than seventyone lakhs and fortytwo thousand was awarded capital punishment for murder every year.

CAPITAL PUNISHMENT IN U.S.A.

Available literature on capital punishment in the United States testifies that in modern times the sentence of death is being sparsely used in that country. This, however, does not mean that capital punishment is altogether abolished in United

States. The retention of death penalty is still considered to be morally and legally just though it may be rarely carried into practice. The American penologists justify the retention of capital punishment for two obvious reasons. Firstly, from the point of view of protection of the community, death penalty is needed as a threat or warning to deter the potential murderers. Secondly, it also accomplishes the retributive object of punishment inasmuch as a person who murders another has perhaps forfeited his claim for life. It is, however, generally argued that the risk of being executed in fact serves no deterrent purpose because the murderers often plan out their crime in such a way that the chances of their detection are rare and they are almost sure of their escaping unpunished. The retention of death penalty for capital murderers is justified on the ground that if not executed, they will remain menace and potential danger to society.

Recent trend in America is to restrict capital punishment only to the offence of murder and rape. Another noticeable trend during the recent years is to make the process of execution private, painless and quick as against the old methods of public execution which were brutal, painful and time consuming. At present, the common modes of inflicting death penalty in United States are electrocution, hanging, asphyxiation with lethal gas and shooting. Several States have abolished death punishment with beneficial results. More recently Mr. Justice Brennan and Mr. justice Marshall of the U.S. Supreme Court in a well-known decision Furman V. The State of Georgia, observed that death penalty should be outlawed on the ground that it was an anachronism degrading to human dignity and unnecessary in modern life. But most of the judges did not agree with the view that the eighth Amendment of the American Constitution which prohibits capital punishment for all crimes and under all circumstances, is a good law. Some of the recent American decisions suggest that the courts are convinced that death penalty per se is not violative of the Constitution. However, in some parts of the United States the death penalty has been retained only for murder of a prison officer by a life convict.

61 Australian law also provides death penalty for the offence of murder and rape.
An international survey carried out in 1962 by the United Nations, however, confirmed that neither suspension nor abolition of the death penalty had any immediate effect in increasing the incidence of crimes punishable with sentence of death. The countries which had abolished capital punishment, notably, Germany, Austria, Scandinavia, Netherlands, Denmark and some Latin American States reported no ill-effects of abolition.

It is significant to note that with the abandonment of the tourturous and barbarous methods of inflicting death penalty the meaning of the term 'capital punishment' now extends only to death sentence for murder or homicides. Particularly, in western countries rape is no longer serious crime for two main reasons. Firstly, with general laxity in morality the gravity of this offence is fast declining. In the second place the scientists have established rape as a mere passive surrender by the victim because in their opinion it is practically impossible to commit rape unless the victim is made unconscious Likewise, treason being exclusively a war time offence, it is futile to enlist it as a peace time offence and to provide death penalty for it.

In the modern reformative era the retributive principle of 'tit for tat' does not serve any useful purpose. Retribution can only do more harm than good to the criminals and can never be an effective measure of suppressing crime. Retaliation and retribution, apart from being outdated are also against the accepted norms of modern criminal justice Beccaria was perhaps the first criminologist who raised a crusade against capital punishment in 1764. He strongly protested against the use of cruel and barbarous modes of punishing the offenders and emphasized the need of individualized treatment. He expressed a view that death as a sentence symbolizes man's cruelty and insignificance of human life. In course of time mens rea became the guiding principle for determining the guilt and punishment of the offender. It is, however, true that in certain cases it is difficult to determine mens rea of the offender.64

Yet another reason for discarding retribution as a principle of criminal justice to be found in the fact that putting a person to death virtually amounts to killing him

64 Dr. Vimla Devi V. Delhi Administration, AIR 1963 SC 1572.
deliberately. That apart, experience has shown that more than eighty per cent of the persons committing murders are not really murderers but are persons who have fallen a prey to this heinous crime due to circumstances such as passion, provocation, jealousy, sexual impulsiveness, poverty or intoxication. Obviously, death sentence is hardly an appropriate punishment for such offenders. Prof. Scot has expressed doubts about the adequacy of capital punishment as it involves the risk of innocent person being sent to guillotine. Mistakes of judgement as to guilt are known to have occurred. If an innocent person is hanged due to miscarriage of justice, his life is lost for ever and the loss is irredeemable. Perhaps it is for this reason that slightest doubt about the guilt of the accused entitles him for an acquittal on the plea of "benefit of doubt"\footnote{Daiya Moshya Bhil V. State of Maharasthra, AIR 1984 SC 1730.} under the criminal law of most countries.

It is quite often argued that death penalty “brutalizes” human nature and cheapens human life.\footnote{D. Dressier : Reading in Criminology and Penology (2nd Reprint), p. 486.} Thus it vitiates the humanitarian sentiments concerning the sacredness of human life.\footnote{(1977)Cr.LJ. p. 159.} It is for this reason that David Pannick strongly argues that death penalty should be declared per se unconstitutional as cruel and violation of due process of law.

The American viewpoint for and against death sentence may be summarized as follow:-

<table>
<thead>
<tr>
<th>Pro-Arguments</th>
<th>Con-Arguments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Elimination of murderers by execution is fair retribution and saves potential future victims</td>
<td>1. An execution arising out of miscarriage of justice is irreversible.</td>
</tr>
<tr>
<td>2. Punishments must match the gravity of offence and worst crimes should be severely punished.</td>
<td>2. Capital punishment is lethal vengeance which brutalizes the society that tolerates it.</td>
</tr>
<tr>
<td>3. Societies must establish deterrents against crime. Death sentence</td>
<td>3. Capital punishment does not have deterrent effect. Hired murders</td>
</tr>
</tbody>
</table>
serves as a good deterrent. 

4. Death is a just punishment and death penalty has been held constitutionally valid to ensure justice for condemned offenders. 

The prevalence of the recent and contemporary reluctance to award capital punishment by the Administration of Justice in the United States of America, is presented in the following Statement 2.

**STATEMENT 2**

**UNITED STATES OF AMERICA**

Volume of award of capital punishment in U.S.A. during the period 1961 to 1966 (in two year groups)

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of death sentence awarded</th>
<th>Rate per ten Million of population</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) 1961 and 1962</td>
<td>235</td>
<td>13.1</td>
</tr>
<tr>
<td>(ii) 1963 and 1964</td>
<td>189</td>
<td>10.5</td>
</tr>
<tr>
<td>(iii) 1965 and 1966</td>
<td>180</td>
<td>10.0</td>
</tr>
</tbody>
</table>

Percentage decrease in the award of death sentences as between (i) and (iii) 23.6

**NOTES:**

1. Figures of death sentences awarded given in the Statement are taken from an article “the issue of Capital Punishment,” written by Prof. Huge Admn Bedau in the magazine “current History”, August 1967, Pages 83 and 84.

In Statement 2, the reduction to the extent of 25 per cent in the award of capital punishment in U.S.A. in 1965 and 1966 is observed.

It is clear from Statement 2 that on an average one person in twenty lakhs was awarded death sentence for murder by the Administration of Justice in U.S.A. in the year 1965 and 1966 is observed.

It is clear from Statement 2 that on an average one person in twenty lakhs was awarded death sentence for murder by the Administration of Justice in U.S.A. in the year 1966. The comparison of the award of death sentence with the rate of murder needs to be examined. The average rate of murder in U.S.A. during 1965 and 1966 was 5.35 per lakh of population. This means that one person in eighteen thousand seven hundred of people was murdered. This also indicates that on an average when 106 persons were murdered, only one person was awarded capital punishment for murder by the Administration of Justice in U.S.A. in the years 1965 and 1966.

This indicates that while in U.S.A. 53 persons were killed in every ten million of population, one person in twenty lakh was awarded capital punishment.

CAPITAL PUNISHMENT IN CANADA

Canada is today perhaps the only country which, after a good deal of deliberation and prolonged investigation and examination of the aspects of capital punishment through the Joint Committee of the Senate and House of Commons specifically appointed for the purpose, decided to retain capital punishment in 1956. In spite of this, however, we find disinclination prevalent in the Administration of Justice to award capital punishment as seen in Statement 3 overleaf. The Statement indicates that on an average about one person in sixteen lakhs sixty six hundred of people got the award of death sentence for murder in 1965 in Canada.

For further enlightenment, we shall now see the state of affairs in two other countries, one of Europe, France, the country which after the revolution gave to the world the famous tenets of liberty, equality and fraternity and another of Asia, our neighbour, Japan, to acquire a proper perspective of the subject.
Till the early eighteenth century, French law authorized infliction of the death penalty for more than one hundred distinct offences. The French Code of 1810 listed 36 crimes punishable by death. During the period from 1832 to 1842, gradual removal of several crimes from the list of those punishable by death, brought down the number of such offences. By 1962, the number of capital crimes came down to 14. They included espionage, murder, treason, crimes against the country’s integrity (independence).

In the year 1848 another every important step was taken.

STATEMENT 3

CANADA

Volume of award of capital punishment in Canada during the period 1921 to 1935 and 1956 to 1965.

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of death sentence awarded</th>
<th>Rate per ten Million of population</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) 1921-25</td>
<td>100</td>
<td>113.3</td>
</tr>
<tr>
<td>(ii) 1926-30</td>
<td>90</td>
<td>102.4</td>
</tr>
<tr>
<td>(iii) 1931-35</td>
<td>119</td>
<td>114.7</td>
</tr>
<tr>
<td>(iv) 1956-60</td>
<td>59</td>
<td>421.0</td>
</tr>
<tr>
<td>(v) 1961-65</td>
<td>55</td>
<td>302.0</td>
</tr>
</tbody>
</table>

Percentage decrease in the award of death sentences between (i) and (v): 45

NOTES:

1. Figures for the period 1921 to 1935 are taken from “The Report of the Joint Committee of the Senate and House of Commons on Capital Punishment in Canada”, 1956, p. 28.


That was the abolition of the mandatory character of capital punishment and the substitution of the "discretion given to the jury to take extenuating circumstances into account without being required to state their reasons for doing so."\(^71\) Capital punishment came to be abolished for political crimes in 1848. However, after more than eleven decades in 1960 it was reintroduced. Some other offences have continued to be treated as capital ones. For example, castration resulting in death. But in 1958, death penalty was newly prescribed for the offence of causing death of a child under certain circumstances even though without intent to cause death\(^72\) Persons who have completed 18 years at the time of committing the offence alone can be executed.

**CAPITAL PUNISHMENT IN FRANCE**

Statement 4 depicts the disinclination to award capital punishment in France by the administration of Justice during the period from 1921 to 1965.

**STATEMENT 4**

**FRANCE**

Volume of award of capital punishment in France during the period 1921 to 1935 and 1956 to 1965.

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of death sentence awarded</th>
<th>Rate per ten Million of population</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) 1921-25</td>
<td>202</td>
<td>51.5</td>
</tr>
<tr>
<td>(ii) 1926-30</td>
<td>124</td>
<td>31.6</td>
</tr>
<tr>
<td>(iii) 1931-35</td>
<td>98</td>
<td>23.4</td>
</tr>
<tr>
<td>(iv) 1956-60</td>
<td>33</td>
<td>7.7</td>
</tr>
<tr>
<td>(v) 1961-65</td>
<td>34</td>
<td>7.3</td>
</tr>
</tbody>
</table>

Percentage decrease in the award of death sentences between (i) and (v): 83.2

NOTES:


This shows that on an average about one person in sixtyeight lakhs and fourtnine thousand of people was awarded capital punishment for murder in France in the year 1965.

CAPITAL PUNISHMENT IN JAPAN

In Japan capital punishment is mandatory for the offence of “inducement of foreign aggression” by a “person who in conspiracy with a foreign state uses the armed forces against Japan” It is discretionary for the offences of “assistance to enemy, setting fire to dwellings, destruction by explosives, death or wounding through robbery, death resulting from rape in the course of robbery and homicide.” Killing of “his or her own or his or her spouse’s lineal ascendant shall be punished with death or imprisonment at forced labour for life” In all, there are twelve capital offences in Japan. They include, arson, espionage, murder, treason, homicide accompanied by or resulting from another serious crime, illegal use of explosives, etc.

Statement 5 illustrates the disinclination to award capital punishment by the Administration of Justice in Japan during the year to year period from 1961 to 1966.

Statement 5 indicates that on an average about one person out of every hundred lakhs of people got the award of death sentence for murder by the Administration of Justice in Japan in the year 1965.

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75 Personal Communication, Information supplied by the Consul General for Japan, Bombay, through a letter dated 26th Dec. 1962.
VI CONCLUSION

On the detailed analysis of different constitutional and other legal provisions we can just say that we have plethora of legal provisions in different criminal and other legislations but the main drawbacks lies with the practical application of these laws. And the factors leading to their ineffectiveness or unequal impact on the society are personal traits of judges, financial status of the accused, social setup and at times even the empathy of the law enforcement agencies. We have discussed in detail the role of judiciary, legislature and the executive and we can just come to the conclusion that none of it is responsible in isolation for such a fainted position of death penalty, but are somewhere, collectively unable to reach at the common consensus. But no problem in the world has ever existed or will ever exist without a solution and we will find the solution to this also, provided we all are willing to reach at the common consensus to get rid of this chaotic situation in best possible manner.

The figures, conclusion and decisions about the practice in advanced countries indicate how the view on capital punishment got changed, modified and softened. Yet, a certain category of murders has gone on to get the award of capital punishment. This exhibits that although there is great reluctance to award the death sentence, it is found necessary to retain the capital punishment.

This led to increase in the heinous offences like rape, sexual offences and violence against the person. Even in reluctance to convict for murder by the Administration of Justice, evidence was insisted upon so that offences that can be reasonably considered to be murder are declared as homicide not amounting to murder.

This discussion has established the fact that capital punishment

1. has been progressively abolished for a number of offences which earlier were liable to be punished with it.
2. Number of other considerations of legal and also socio-psychological nature have further contributed to its reduction.
3. During the last 25 years the figures in four advanced countries: (i) England Wales, (ii) France, (iii) Japan, and (iv) U.S.A. show that the actual award of capital punishment comes out to be very low so that in the quinquennium 1961 to 1965 the number of convicts who were awarded capital punishment varied from 2 to 10 per ten million or one crore of population.