CHAPTER - IV

CAPITAL PUNISHMENT IN INDIAN LAW

In India, capital punishment may be awarded by the criminal courts under the provisions of the general law of crimes and the special law of crimes. The Indian Penal Code, 1860 is the general law of crimes, and a few other Statutes dealing with certain particular persons, subjects and places together constitute the special law of crimes. These two kinds of laws are the primary sources of law with regard to capital punishment in India.

The Indian Penal Code, 1860 describes the various kinds of offences and the punishments that may be awarded by the criminal courts. It describes the defences that may be pleaded when there is any allegation of the offences mentioned in the Penal Code. It also describes the situations in which Capital Punishment may be awarded. The Penal Code in its nature is a substantive law of crimes. The procedural law however is in the form of the Code of Criminal Procedure, 1973. It also contains the safeguards to the persons accused of crimes.

To everything covered on the subject crimes and punishment in any law of crimes, the fundamental principles of the Constitution are relevant. The significance
of the Constitution therefore is that it contains the safeguards which may be pleaded by a person against the process of conviction by a court of criminal jurisdiction.

Apart from the principles embodied in the Code of Criminal Procedure and the Constitution there are the principles of Human Rights Law which represent the emerging norms of International Law on the subject of safeguards to the individuals against any punishment by the law enforcement agencies.

The object of this chapter is to discuss the penal provisions embodied in the substantive law as well as the procedure law of our country on the subject of capital punishment. The discussion in this chapter also covers the provisions of the Constitution and those of the Human Rights Law with regard to the safeguards available to persons convicted of capital punishment.

The methodology followed in presenting the discussion in this chapter is to describe first the historical background of the system of punishments in India and then discuss the nature and scope of Capital Punishment under the provisions of the general and the special law of crimes. The discussion also covers the provisions of the Code of Criminal Procedure and the Constitution of India which are concerned with the safeguards to the individuals such as the right to seek pardon, remission, or commutation etc. of the punishment awarded by the criminal courts.
I. HISTORICAL BACKGROUND OF THE SYSTEM OF PUNISHMENTS IN INDIA

(i) Crime and Punishment in Ancient India In the Rig-Veda, Sabha, Samiti and Vidatha were defined as the meeting places of the people or the assemblies of the warriors. In such assemblies, the King or the tribal Chief used to be the supreme authority. Such assemblies exercised judicial powers in both civil and criminal matters and they decided the disputes both private and public. However, with the progress of Aryan Civilization, the Sabha usually with the King as its head, came to exercise all judicial functions. Besides the Sabha and Samiti, Yajnavalkya also refers to judicial functionaries, which acted almost like courts. These were the King's functionaries, the village community, the guilds and the families. The objective of having such functionaries was to make justice available to the people in their own places. The parties and their witnesses were not to travel to far off places to seek justice. Thus justice was not only cheap but also expeditious.

(ii) Crime and Punishment During Mughal Period In Mughal India, there were three agencies in general charge of judicial administration. The Emperor and his agents like the provincial Governors, the Faujdars in the Sarkar and Kotwals usually administered the political matters. The Qazi administered Sharia or the sacred law. His jurisdiction was confined only to questions connected with religion. He decided disputes concerning family law and marriage, inheritance of Auqaf and also criminal cases. For the Hindus and the village people there were the courts of the Brahmin
Pandits and the caste elders. They administered the common (unwritten) law or the codes of tribal traditions.

In respect of criminal justice, the Sharia had left a wide field to the discretion of the sovereign. The Emperor was the highest authority in the Kingdom and was the fountain of justice.

(iii) Crime and Punishment during British Period The British regime in India started with the establishment of the Government of India succeeding the East India Company. The Britishers had also introduced, on the pattern of their own system of administration, quasi-judicial institutions like the Tribunals vesting them with a part of the normal powers to decide disputes. These experiments had been initiated by way of alternative dispute resolution mechanism. They also encouraged the system of arbitration, mediation and conciliation so that the delay in disposal of cases was minimized. Several committees and commissions were appointed to examine the problems arising from the application of laws and the functioning of the legal institutions. Prominent among them was the Law Commission of India, which from 1850's onwards took upon itself the task of suggesting a reform of the judicial system and a revision of the substantive and procedural laws. Based on the recommendations of the Law Commission changes were made in the rules of law and the organization of judicial institutions.

Jeremy Bentham, an ardent supporter of the reform of criminal law and codification in England, took interest in the codification of law in India. In England,
Bentham was an untiring campaigner for the reform of the antiquated law. The test to which Bentham subjected every institution was the test of Utility. His doctrine of Utilitarianism had a profound influence on the course of legislation in England.

The influence of Bentham could be seen in the process of law reform and codification in India. Governor General Bentick had sympathies with Bentham's teachings\(^1\). Bentham died in 1832 and the first steps towards codification of law in India were initiated in 1833 through Charter Act of 1833. In order to achieve the objective of a uniform and codified system of law in India the Charter Act, 1833\(^2\) made provision in three directions (1) it established an omni-competent all-India Legislature having legislative authority throughout the country; (ii) It created a new office of the law-member in the Government of India; and (iii) It provided for the appointment of a Law Commission in India\(^3\).

First Law Commission consisted only of three members; Lord Macaulay, the first Law Member was appointment as Chairman of the Commission. The first project assigned to the Law Commission by the Government was the codification of penal law. The Law Commission had prepared a draft Penal Code and submitted to the Government of India in 1837. It was mainly the handiwork of Lord Macaulay. The Penal Code was finally approved in 1860 and became the first piece of penal legislation.

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\(^1\) E. Stokes, The English Utilitarians and India, 51(1959).
\(^2\) 3 & 4 Will.IV, c 85.
\(^3\) Supra.
The Indian Penal code marked the beginning of the period of reforming the criminal law in India. The criminal law which was being applied was not uniform. In Bombay till 1827, the endeavor had been to apply Hindu customary criminal law to the Hindus and the Muslim criminal law to the Muslims.

II. CAPITAL PUNISHMENT UNDER THE PROVISIONS OF THE INDIAN PENAL CODE

Capital Punishment is the highest punishment provided in the Indian Law.

Under the provisions of the Penal Code this punishment may be awarded for the following offences:-

1. Waging or attempting to wage war, or abetting waging of war against the Government of India:

The Penal Code, dealing with the above offence provides for the punishment of death. It says, “Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine.”

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4 Section 121 of the Penal Code.
2. Abetment of mutiny, if mutiny is committed in consequence thereof:

The Penal Code dealing with this offence provides: “Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”

3. Giving or fabricating false evidence with intent to procure conviction of capital offence:

Section 194 of the Penal Code dealing with this offence provides as follows: “Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause any person to be convicted of an offence which is capital by the laws for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine; if innocent person be thereby convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.”

5 Section 132 of the Penal Code.
6 Section 194 of the Penal Code.
4 Murder:

The Penal Code provides the punishment for murder; it says, "Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine."

5. Abetment of suicide of child or insane person:

The Penal Code dealing with this offence provides: "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."

6. Punishment for murder by life convict

Section 303 of the Penal Code dealing with the offence of murder by life convict, provides:

"Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death."

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7 Section 302 of the Penal Code.
8 Section 305 of the Penal Code.
9 Section 303 of the Penal Code.
7. Dacoity with murder:

The Penal Code provides for the punishment of murder in respect of the accused convicted of dacoity with murder. It says,

"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."\(^{10}\)

III. Capital Punishment under Special Laws:

There are a good number of Statutes forming part of the special law of crimes in our country which provide for the punishment of death. Among these statutes the largest number are those which deal with the prevention of terrorism, maintenance of internal security and the control of organized crime. The offences for which capital punishment is provided under the special laws of this category may be discussed as follows:

(i) The Prevention of Terrorism Act, 2002

\(^{10}\) Section 396 of the Penal Code.
The background to this legislation is that the country has faced and continues to face multifarious challenges in the management of its internal security. There is an upsurge of terrorist activities, intensification of cross-border terrorist activities and insurgent groups in different parts of the country. Very often, organized crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the entire world. The reach and methods adopted by terrorist groups and organizations take advantage of modern means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means. This has enabled them to strike and create terror among people at will. The existing criminal justice system was not designed to deal with such types of heinous crimes.

In view of the precarious situation that had arisen, it was felt necessary to enact legislation for the prevention of, and for dealing with, terrorist activities.11

**Punishment for terrorist acts - (1) Whoever,**

(a) With intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as

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to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act:

(b) Is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, 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, commits a terrorist act.

(c) **Explanation.**—For the purposes of this sub-section, “a terrorist act” shall include the act of raising funds intended for the purpose of terrorism.

(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;

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall 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.

(4) Whoever voluntarily harbours or conceals, or attempts to harbor or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine:

Provided that this sub-section shall not apply to any case in which the harbor or concealment is by the husband or wife of the offender.

(5) Any person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.
Explanation.- For the purposes of this sub-section, "terrorist organization" means an organization which is concerned with or involved in terrorism. ..."12

(ii) The Explosive Substances Act, 1908.

This Act extends to the whole of India and applies also to citizens of India outside India. In this Act, -

(a) the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;

Punishment for causing, explosion likely to endanger life or property Any person who unlawfully and maliciously causes by:

(a) Any 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 imprisonment for life, or with rigorous imprisonment of either description which shall not be less than ten years, and shall also be liable to fine;

12 Section 3 of the Prevention of Terrorism Act, 2002.
(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.\(^\text{13}\)

(iii) The Terrorist and Disruptive Activities (Prevention) Act, 1987

This is an Act enacted in the year 1987 to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto. It lays down the following provisions for the punishment and measures for coping with terrorist and disruptive activities:

**Punishment for terrorist acts** (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to

\(^{13}\) Section 3 of the Explosive Substances Act, 1908.
kill or injure such person in order to compel the Government or any other person to do 
or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, 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 fine

(ii) 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.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or 
incites or knowingly facilitates the commission of, a terrorist act or any act 
preparatory to a terrorist act, shall 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.

(4) Whoever harbours or conceals, or attempts to harbor or conceal, any terrorist 
shall 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.

(5) Any person who is a member of a terrorist gang or a terrorists organization, 
which is involved in terrorist acts, shall 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.

(6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall 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. 14

(iv) The Narcotic Drugs and Psychotropic Substances Act, 1985

This Act was passed by the Union Parliament to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operations relating to Narcotic Drugs and Psychotropic substances, [to provide for the forfeiture of property derived from, or used in, illicit traffic in Narcotic Drugs and Psychotropic Substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic substances] and for matter connected therewith. The Act has laid down the following punishment for certain offences punishable under the Act :-

14 Section 3 of the Terrorist & Disruptive Activities (Prevention) Act, 1987
31-A. 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 27-A 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 transshipment, or 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, ...15

IV. CAPITAL PUNISHMENT UNDER THE LOCAL LAWS

(i) The Karnataka Control of Organized Crimes Act, 2000

This is an Act passed by the Karnataka State Legislature in the year 2001 to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto.

15 Section 31- of the Narcotic Drugs & Psychotropic Substances Act, 1985
According to the provisions of this Act an "Organized crime" means continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

**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; also be liable to a fine, which shall not be less than one lakh rupees;

(ii) 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 be liable to fine, which shall not be less than five lakh rupees.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall 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 a fine, which shall not be less than five lakh rupees.
(3) Whoever harbours or conceals or attempts to harbor or conceal, any member of an organized crime syndicate shall 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 a fine, which shall not be less than five lakh rupees.

(4) Any person who is a member of an organized crime syndicate shall 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 a fine which shall not be less than five lakh rupees.\(^{16}\)

(ii) The Maharashtra Control of Organized Crimes act, 1999

This is an Act passed in the year 1999 to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto.

**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 lac;

\(^{16}\) Section 3 of the Karnataka Control of Organized Crimes act, 2000.
(ii) 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 a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs. ¹⁷

(iii) The Rajasthan Dacoity Affected Areas Act, 1986

The Government of Rajasthan felt that the menace of organized and unorganized gangs of dacoits is causing concern and needs to be tackled effectively. It is, therefore, necessary to break the chain of vested interests assisting such gangs and to control them. For that purpose, provisions are to be made for specifying certain offences in the dacoity affected areas of Rajasthan in order to curb the commission of scheduled offences and for speedy trial and punishment thereof. Properties acquired through the commission of such offences are also intended to be attached. The Rajasthan Legislative Assembly enacted in the year 1985 the Rajasthan Dacoity Affected Areas Act, which contained the following provisions:

¹⁷ Section 3 of the Maharashtra Control of Organised Crimes act, 1999
Punishment for offence against public servant.- A scheduled offender who commits the offence of murder of more than one person or a scheduled offence against a public servant or against a member of the family of a public servant, shall,-

(a) If such offence is punishable with death or with imprisonment for life under the Indian penal Code, 1860 (Central Act XIX of 1860) be awarded such punishment as is provided for that offence in the Code; and

(b) In other cases, be punished with imprisonment which may extend to ten years and with fine. ...\(^\text{18}\)

Besides these Statutes on prevention of terrorism and threats to internal security capital punishment is also provided under certain other special laws, the Indian Air Force Act, 1950\(^\text{19}\) the Army Act 1950\(^\text{20}\), the Navy Act etc. which constitute the defence laws of our country. Under Defence Laws death punishment can be awarded for less serious offences if committed during action. The nature and scope of the Defence Laws may be discussed thus:

(iv) Capital Punishment under the Defence Laws:

As a rule the members of the Armed Forces of the Union of India are subject to the provisions of military laws., But in certain situations an ordinary member of the

\(^{18}\) Section 9 of the Rajasthan Dacoity Affected Areas Act, 1986.

\(^{19}\) Sec. 34, 37.

\(^{20}\) Sec. 34 to 39, 43, 44, 49, 50 and 59.
public renders himself liable to be tried by the Courts Martial for violation of the provisions of the defence laws.\textsuperscript{21} Hence he can be sentenced to death without a trial according to accepted principles of Natural Justice which is guaranteed to him under the Code of Criminal Procedure.

According to the Defence laws the Courts-Martial constituted under the Act can pass a sentence of death on a person found guilty under the Act. The abetment of the offences punishable with death is also punishable with death under Sec. 68 if the act abetted is committed. Some of the common offences that are punishable with death by the courts Martial are misconduct in action, delaying the service, disobedience in action, cowardice and sleeping over duty. Spying by the member of the forces or by an ordinary person who is not otherwise subject to the defence laws, is also punishable with death.

V. SAFEGUARDS TO PERSONS CONVICTED OF CAPITAL OFFENCES

(i) Safeguards under the general law of crimes:

The Penal Code contains the safeguards which may be pleaded when an allegation of an offence is made against a person, the important among these safeguards are the safeguards known as General Defences.

\textsuperscript{21} Sec. 38 of the Indian Navy Act, 1957.
(ii) Safeguards under the Procedural Law of Crimes:

The Code of Criminal Procedure, 1973 provides certain safeguards to the persons who are convicted of the capital punishment. The objects of these safeguards is to protect a person from being penalized arbitrarily. The whole sentencing process in capital cases is replete with safeguards for the accused.

(i) Death Penalty now is an Exceptional Punishment  Death penalty has become an exceptional punishment for all the eight offences which are punishable in the alternative with 'death' because Section 354(3) of the Code of Criminal procedure, 1973, now requires the court to assign “special reasons” for such sentence. Accordingly, death sentence is rarely resorted to only in extremely heinous cases, e.g., pre-planned, calculated cold-blooded murder or a murder diabolically conceived and cruelly executed.

(ii) Accused's right of Pre-Sentencing Hearing  Section 235(2) of the Code of Criminal Procedure, 1973, is a new advancement in penological direction inasmuch as it confers on the accused person a right of pre-sentencing hearing in all cases where death penalty is prescribed as an alternative punishment.

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22 On the other hand, 'death' was the normal punishment for such offences under the code of 1898 as sec 367(5) required the Court to state reasons for not passing such sentences.
Under this provision, the accused now, in such cases can produce evidence or material before the judge relating to the various factors bearing on the question of sentence or which have a bearing on his (accused) choice of sentence. For example, the accused can make his submission on point of sentence that he is the only bread-earner in his family, or he can plead extreme youth on his part for not awarding death sentence.

(iii) Individualization of Sentence

Moreover, Sections 235(2) and 354(3) of the Code of Criminal procedure, 1973, jointly require the court to give due consideration to the circumstances connected with the crime as well as to the circumstances of the criminal, in fixing the degree of punishment or making the choice of sentence for various offences including capital offences\textsuperscript{24}. Thus, the question of sentence is completely individualized under our penal system.

(iv) Confirmation of Sentence by High Court

Every provision relating to submission of death sentence for confirmation in the Code of Criminal procedure, 1973 (Sections 366—370) seeks to ensure that the entire evidence material hearing on the innocence or guilt of the accused and the question of sentence must be scrutinized by High Court with utmost care and caution.

\textsuperscript{24} Bachhan Singh vs. State Punjab, (1980) 2 SCC 684 at page 739,
Under these provisions, the High Court has complete powers to direct further enquiry to be made or additional evidence to be taken; to confirm the sentence of death or pass any other sentence warranted by law; or to annual or alter the conviction or order a new trial or acquit the accused.

(v) Appeal to Supreme Court

Section 379 of the Code of Criminal procedure, 1973 and Article 136 of the Indian Constitution stand to safeguard the accused by way of appeal to the Supreme Court when he is sentenced to death by way of appeal to the Supreme Court when he is sentenced to death by the High court by reversing his acquittal in appeal or when his sentence of death awarded by the Sessions Judge is confirmed by the High Court.

(vi) Pregnant Woman and Death Sentence

When a woman is sentenced to death many other factors come to fore. The important question amongst them is if she is pregnant at the time of pronouncement of sentence of death, shall it be commuted or just postponed according to the given provision of Cr. P.C.\(^\text{25}\)

Art 39(f) of the Constitution provides that the State shall direct its policy towards securing that children are given opportunity and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and

\(^{25}\)Sec 416, Code of Criminal Procedure.
youth are protected from exploitation and against moral and material abandonment. However, the Criminal Procedure Code, 1973 has a provision which goes against the spirit of article 39(f) of the Constitution which imposes a death sentence on pregnant woman. Such a sentence would result in the killing of the foetus also. If the mother is executed, after the child is delivered, it will orphan the child and the child will suffer for no fault of hers. Sec 366 of the Cr. P. C. is the relevant provision which says that “when any person is sentenced to death by a Court of Session, the sentence shall not be executed unless it is confirmed by the High Court. When the sentence is confirmed by the High Court the court of sessions shall issue a warrant to the superintendent of the prison in which the prisoner is confined to cause the sentence to be carried into effect.26 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.27 The word ‘May’ in Section 416 of the Cr. P. C. 1973 empowers the Court with discretionary powers. The court may execute the death sentence after the woman gave birth to the child or may commute the sentence to imprisonment for life.

(iii) Safeguards under the Constitution and the Statute Law

(a) Pardoning power under the Constitution:

The Rationale of Pardoning Power:

Quite a good number of rules in the sphere of criminal law deal with the exercise of pardoning power and related matters. Originally, the pardoning power was

26 Sec 413, Code of Criminal procedure.
27 Sec 416, Code of Criminal Procedure.
The rationale of the pardoning power was felicitously enunciated by Justice Holmes of the United States Supreme Court in the case of Biddle v. Perovich as follows:

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judged fixed."

A pardon is granted on the theory that the convict has seen the error of his ways, that society will gain nothing by his further confinement and that he will conduct himself in the future as an upright, law-abiding citizen.

While in some systems of government the pardoning power is part of the constitutional scheme, in some others it is provided by the statutes, but in certain systems it is part of the traditional power of the Executive called the Prerogative power.

In England, the pardoning power has been exercised from time immemorial, and has always been regarded as a necessary attribute of sovereignty. There are quite a good number of subjects in regard to which the prerogative powers may be exercised by the Executive in matters of criminal justice, such as, the power to grant parole, the power to sanction prosecution or withdraw the prosecution, the power to suspend, postpone or commute the sentence etc. Prerogative powers in England

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30 71 L. Ed. 1161 at 1163.
originally were considered to be discretionary powers in regard to which there could hardly be a judicial review. But with the passage of time various discretionary powers have been brought under the scope and ambit of judicial review, so also the pardoning power of the Executive.

In United States of America, at the Federal level the President of United States exercises the power under the Constitution and at the State level the Governors of the States exercise such a power either under the State Constitutions or the relevant Statutes. In some States an administrative agency called the Board of Criminal Justice of which the Governor is always a member may exercise the pardoning power. In some cases, the Governor’s power is so limited as to render an arbitrary exercise impossible.

Side by side with the rules relating to pardon, there are certain matters which the courts consider to be relevant in examining the justification or otherwise of the exercise of pardoning power. On various occasions the courts were called upon to pronounce the principles as to the manner in which the Executive could exercise its pardoning power. The statutory provisions sanctioning the pardoning power and the judicial decisions on the subject act as the corpus juris of the pardoning power of the Executive in India.

In India, the Constitution provides for the pardoning powers of the President at the Union level and of the Governors at the State level.
Article 72 of the Constitution dealing with the powers of the President says, "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—

- In all cases where the punishment or sentence is by a court martial;
- 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;
- In all cases where the sentence is a sentence of death."

Article 161 of the Constitution dealing with the pardoning powers of the Governors says, "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.

(ii) Pardoning Power under the Statutes

While the Constitution provides for the powers of the chief executive at the Union and the State levels, the Statutes dealing with the substantive and procedural matters of criminal justice provide for the powers of the Government to exercise the pardoning powers.
an aspect of the prerogative power of the Executive and was exercised de hors the Statute. But today there are a good number of provisions in regard to this matter in the Constitution and various Statutes.

According to the Corpus Juris Secundum, "the pardoning power is founded on considerations of public good and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment will be as well promoted by a suspension as by an executive of the sentence. It may also be used to the end that justice be done by correcting injustice as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law."\(^{28}\)

The American Jurisprudence explaining the philosophy of pardoning power says, "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 a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."\(^{29}\)

\(^{28}\) Corpus Juris Secundum, Vol. 67-A, pages 16 and 17.
\(^{29}\) 59 American Jurisprudence, page 5.
The Indian Penal Code, 1860, which is a general law of crimes dealing the substantive matters of criminal justice, provides in Sections 54 and 55 of the Indian Penal Code confer power on the appropriate Government to commute sentence of death or sentence of imprisonment for life as provided therein.31

The Code of Criminal Procedure which is also a general law dealing with procedural matters of criminal justice, contains the following provisions about commutation of offences by Government:-

1. Sec.432: Power to suspend or remit sentences: (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

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

31 Sections 54 and 55 of the Indian Penal Code, 1860
3. If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

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

5. The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with;

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by other person on his behalf shall be entertained unless the person sentenced is in jail, ....”

**Section 433: Power to Commute Sentence:** The appropriate Government may without the consent of the person sentenced, commute-
(a) a sentence of death, for any other punishment provided by the Indian Penal Code, 1860;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.”

(iv) Section 433-A: Restrictions on powers of remission or commutation in certain cases:

“Notwithstanding anything contained in Section 432 where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.”

Section 434 confers concurrent power on the Central Government in case of death sentence. Section 435 provides that the power of the State Government to remit or commute a sentence where the sentence is in respect of certain offences specified
therein will be exercised by the State Government only after consultation with the Central Government."

(a) The situations in which the Executive at the Union or the State level may exercise the powers laid down in the above provisions:

Sections 434 and 435 dealing with the powers of the Executive at the Union and the State level in regard to the powers enshrined in the above provisions of the law provide as follows:

**434 Concurrent Power of Central Government in case of death sentences:**

The powers conferred by Sections 432 and 433 upon the State Government may, in the case of sentence of death, also be exercised by the Central Government.

**435 State Government to act after consultation with the Central Government in certain cases:**

1. The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

2. which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any
other agency empowered to make investigation into an offence under any
Central Act other than this Code, or

3. which involved the misappropriation or destruction of, or damages to any
property belonging to the Central Government, or

4. which was committed by a person in the service of the Central Government,
while acting or purporting to act in the discharge of his official duty,

a. Shall not be exercised by the State Government except after consultation with
the Central Government.

5. No order of suspension, remission or commutation of sentences passed by the
State Government in relation to a person, who has been convicted of offences,
some of which related to matters to which the executive power of the Union
extends, and who has been sentenced to separate term of imprisonment which
are to run concurrently, shall have effect unless an order for the suspension,
remission or commutation, as the case may be, of such sentence has also been
made by the Central Government in relation to the offences committed by
such person with regard to matters to which the executive power of the Union
extends.

The President, the Governor, the Central Government and appropriate State
Governments have power to grant pardons or to commute the sentence of death, under
Articles 72 and 161 of the Constitution and certain relevant provisions of the Code of Criminal procedure, 1973. The President of India is authorized to grant pardon or commute the sentence of death under Article 72 of the constitution. The Governors also have concurrent powers to commute the death sentence under Article 161, similarly, the appropriate State Governments and the Central Government have powers to commute the death sentence respectively under Sections 433 and 434 of the Code of Criminal Procedure, 1973.

These executive clemency provisions, in the words of Taft, C.J., ...exist, to afford relief from undue harshness or evident mistake in the operation or enforcement of the Criminal Law because administration of justice by courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt.32

It may be observed that the sentence of 'death' as it is administered, is inflicted very sparingly with utmost care and caution to minimize mistakes and mitigate harshness in the operation or enforcement of the criminal law in India.

VI. SAFEGUARDS UNDER THE HUMAN RIGHTS LAW

(i) Obligation of States to be Transparent In 1998 the UN Commission on Human Rights called upon all states that retained the death penalty, “to make available to the public information with regard to the imposition of the death penalty”.

A similar resolution was also passed in 2003. The UN Economic and Social Council (ECOSOC) too, in 1989, urged member states,

"to publish, for each category of offence for which the death penalty is authorised, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted".

The UN special rapporteur on extrajudicial summary or arbitrary executions has also focused on transparency as a key concern at the 2005 Commission of Human Rights in Geneva. The rapporteur, Philip Alston noted,

In a considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little, if any information is provided to those who are to be executed or to their families. Such secrecy is incompatible with human rights standards in various respects. It undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages.
The special rapporteur further observed,

Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty. For a government to insist on a principled defence of the death penalty but to refuse to divulge to its own population the extent to which, and the reasons for which, it is being applied is unacceptable. The commission should, as a matter of priority, insist that every country that uses capital punishment undertake full and accurate reporting of all instances thereof, and should publish a consolidated report prepared on at least an annual basis.

The special rapporteur thus recommended,

Transparency is essential wherever the death penalty is applied. Secrecy as to those executed violates human rights standards. Full and accurate reporting of all executions should be published, and a consolidated version prepared on at least an annual basis.

(i) The International Covenant on Civil and Political rights, 1966 is the first important instrument to which a reference is necessary at this juncture.
Article 6 of this Covenant says,

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the convention on the Prevention of Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

The Second Optional protocol to the International covenant on Civil and Political rights aiming at the abolition of death penalty has the following provisions on the subject.

Article I.

1. No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.

2. Each State shall take all necessary measures to abolish the death penalty within its jurisdiction.

33 (1976) 999 UNTS 171.
Article 2.

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.