CHAPTER V

EXISTING LEGAL POSITION OF CAPITAL PUNISHMENT IN INDIA
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Before independence Capital Punishment was provided in only one statute in India which even after numerous amendments still exist without revision. The importance of this great penal law of India, the Indian Penal Code of 1860, since its enactment can be imagined from the fact that it could not be revised even after 130 years of its inception.

Indian Penal Code, 1860:

The Indian Penal Code, 1860 under its Section 53 prescribes five forms of punishment.¹ Under this Code punishment to death is first in order. In addition to death penalty other similar cruel and unusual punishments in practice are flogging, feltering and solitary confinements. Though flogging under Indian Penal Code is now no more in existence. But Jammu and Kashmir being a state of the country still continues this barbaric penal provision under its Ranvir Code.

The present position will continue till Article 370 of the Indian Constitution persists. From a keen perusal of this Article it is clear that the Parliament can make law only on the subjects

¹ Indian Penal Code, 1860, Section 53: The punishment to which offenders are liable under the provisions of this Code are—First, Death. Secondly, Imprisonment for life. Thirdly, Penal Servitude Removal of (Deletet, Penal Discrimination Act, 1949 with effect from 6 April, 1949) Fourthly, Imprisonment with or without description, namely (1) Dangerous, that is, with hard labour; (2) Simple Contd...
which are mentioned in the instrument of accession made by the Maharaja Hari Singh on March 5, 1948. On November 25, 1949 Prince Karan Singh, son of Maharaja Hari Singh, made a proclamation upon which this Article 370 was inserted in the Constitution of India. The subjects on which the Parliament can make law are (1) defence (ii) communications (iii) coinage and (iv) foreign affairs. Moreover, the President of India can also include other subjects after consultation with the Government of Jammu and Kashmir. In addition to this, with the prior approval of that Government other more subjects can also be included for the Parliament to make law on them.

As regard to the death sentence discussed earlier there are only 8 capital offences for which this harsh, cruel and inhuman punishment can be imposed.

Out of these eight offences two are known as political offences discussed under Section 121\textsuperscript{2} and Section 132\textsuperscript{3} of the Indian Penal Code, 1860. For imposition of death sentence or life imprisonment on the offender under the former section the lawful Government is to prove either of the three crimes against it:

(i) waging war or
(ii) attempt to wage such war or
(iii) abetting waging of such war

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Fifthly, Forfeiture of property
Sixthly, Finc.

2. Supra Chapt.II Note 65.
3. Supra Chapt.II Note 66.
Here the words "waging war" have the same meaning as "levying war" in English statutes. The words seem naturally to import, a levying of war by one who, through off the duty of allegiance, arrays himself, often in defiance of his sovereign in like manner any by the like means as a foreign enemy would do having gained footing within the realm. The waging of war is an attempt to accomplish by violence any purpose of a public nature. When a multitude of persons rise and assemble to attain by force and violence any object of a public nature, it amounts to levying war against the government. It is not the number of the persons, but the purpose and intention, that constitutes the offence and distinguishes it from riot or any other rising for a private purpose.

In Emperor Vs. Ganesh Damodar Savarkar the accused published a book of poems, the general trend of which evinced a spirit of blood thirstiness and murderous eagerness directed against the Government, conveyed the urgency of taking up the sword and made an appeal of bloodthirsty incitement to the people to take up the sword, form secret societies and adopt guerilla warfare for the purpose of rooting out the British rule, it was held that the accused committed the offences of abetting the waging of war by the publication of the poem charged, and that the court was entitled to look into the poem other than those forming the subject

matter of the charge for the purpose of finding out the intention of the writer and the design of the publication. Justice Chandravarkar in the case pointed out that under Indian Penal Code the waging or levying of war and the abetting of it are put upon the same footing. It was further observed:

"Wage war must therefore be taken to mean the taking part in the open and avowed hostilities of an invading army, or guerella warfare or in an armed insurrection, revolution, or mutiny".

A person taking part in an organised armed attack on the Constituted authorities, that attack having for its object the subversion of Government and the establishment of another in its place, would be guilty of the offence of waging war.  

Chief Justice Jenkins in Berendra Kumar Ghose Vs. Emperor observed that the argument on behalf of the crown that the framers of the Indian Penal Code intended to reproduce the English law of treason in its entirety, not only the statute law but also interpretation placed on it by the cases, was not true. Any one who has studied the history of Section 121 of the code must be knowing that it was a law of the land even prior to the code and literature or the subject.

The second political offence punishable with death sentence is that of abetment of mutiny if mutiny is committed in consequence

7. Ibid., at 395.
thereof Section 132 of the Indian Penal Code, 1860, under chapter VII, which deals with offences relating to the Army, Navy and Air Force.

This section deals with aggravated form of abetment of mutiny. The previous section of the Code i.e. Section 131 does not require any actual mutiny, it requires only abetment of mutiny or attempting to seduce a soldier, sailor or airman from his duty. Section 132 of the Code, however, requires the abetment of the commission of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, and provides that if the mutiny is committed in consequence of that abetment, the offence is punishable with death, imprisonment for life or imprisonment up to ten years and fine.

No death sentence has ever been executed under this section since the enactment of this Indian Penal Code, 1860 in the country and perhaps no case under this section came before any Indian judiciary for consideration.

Under Section 194 of the Indian Penal Code, 1860 it is necessary that evidence should have been given in the court of justice. The penalty of death can be imposed on the accused only if an innocent person is convicted and executed to death in consequence of such a false evidence.

10. Supra Chap.II Note 66.
11. Supra Chap.II Note 67.
Section 302 of the Indian Penal Code provides death sentence to the accused who commits murder defined under Section 300 of the Code.

Section 303 of the Code is however mandatory in providing punishment of death sentence to the accused already undergoing a sentence of life imprisonment. A perusal of the section shows that it would cover the case of a person who, being under sentence of imprisonment for life, commits murder.¹²

In Mithu Vs. State of Punjab,¹³ the Section 303 of the Code was held unconstitutional as violative of Articles 14, 19 and 21 of the Constitution of India.

As regards Section 305 of the Indian Penal Code, 1860 it lays down the offence of abetment of suicide of child or insane person. Speaking for the object of this section the First Law Commission in its First Report said:

"It seems to us that the rule would fail to be applied under these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission, of his duty intentionally given him the opportunity, or permitted him to obtain the means of killing himself. It would apply also, we conceive, in the case of person seeing another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him, if, as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferable from

¹³ Supra Chap. II Note 64.
the circumstances. In the former case collateral proof of
the intention would be the requisite. But we apprehend
that it is active aid which is principally intended in these
clauses, and to which the higher penalties are meant to be
applied". 14

The offence itself is unpunishable but its abetment is
punishable under this section and attempts are punishable under
Section 305. The abetment of a suicide by person of
age or of impaired mental faculties is punishable which may ex-
tend to death sentence while in case of persons of a normal type
punishment may extend upto 10 years imprisonment. 15

"Mayne in this regard observes :

"Suicide is the only offence for which it is impossible
to punish the principal offender. He is already beyond
the reach of human law; those who instigate him, or help
him in the act, remains. According to English law then
would be either principals or accessories before the fact
to murder. Even where two persons agreed to commit suicide
together, if the means employed only took effect upon one
the survivor was held guilty of murder. Under the Penal
Code, a person who takes an active part in the suicide of
another, as by actually shooting him, or administering
poison to him, would commit culpable homicide not amounting
to murder under explanation 5, if the person, being over
eighteen years of age, gave such a consent as is defined by
Section 90. If he was younger than eighteen, or if his
consent did not come within Section 90, he would be guilty
of murder. If, however, he did not actually cause the death,
but abetted it within the meaning of Section 107, he would be
punishable under Section 305 or 306, according as the person
actually committing suicide was or was not capable of murder".

Section 307 of the Indian Penal Code, 1860 deals with attempt
to murder. The penalty of death under this Section can be imposed

only if when any person offending under this section is under sentence of imprisonment for life. This paragraph in fact was not in the original text. This was added by the criminal law Amending Act XXVII of 1870 vide its Section 11. The section can be divided into three parts. First, if any person does any act with such intention or knowledge, and under such circumstances, that if he had, by that act, caused death, he would be guilty of murder punishable with imprisonment which may extend to 10 years. Victim may not receive any hurt. The second part says that if hurt is caused to any person by such act, the offender will be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned. It is obvious that if no hurt is caused a lighter punishment is provided in the first part. Then, the third part of the section provides that if the offender is already under sentence of imprisonment for life and if hurt is caused, he may be punished with death.17

Committing of dacoity is a planned offence. Every person who has taken part in dacoity must have known that the gun, which, one of them was armed with was intended to be used and every one of them is liable for the murder caused by the shot of the gun by reason of the provisions, of Section 396 of the Indian Penal Code, 1860.18

In *R Vs. Umrao*, 19 the Allahabad High Court and in *R Vs. Girja Laxmappa*, 20 the Bombay High Court held that this is not a section creating a separate and distinct offence. It is a section which provides a particular punishment for those who jointly commit dacoity where murder is committed, in so committing dacoity we are also of the opinion that to establish a liability to the punishment provided in this section, it is necessary to prove that the person said to be liable was one of the persons who were jointly committing dacoity, and was present when the act of murder in the dacoity was committed.

In order to bring a person under this section it must be shown that the accused was one of the persons who were jointly committing dacoity and was present at the time when the murder was committed. The word "present" however, need not be strictly construed. If the murder be committed inside a house, it is not necessary that all the dacoits be inside the house at the time the murder is committed so long as all the accused were engaged in the dacoity in the course of which the murder was committed by one of them. 21 If the murder be committed while the dacoits are carrying off the booty it is murder committed in the course of commission of dacoity. 22

In addition to the provisions relating to capital offences for which death penalty can be inflicted on the accused under the

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Indian Penal Code, 1860, there are other criminal statutes which have recently been enacted to prevent and control the great socio-economic and social welfare offences to maintain the communal harmony.

The Arms (Amendment) Act, 1968:

This Act makes a provision for capital punishment as a mandatory punishment. The present law in this area is the Arms Act 1959 which as it originally stood made no provision for death as a form of punishment. But with the substitution by the Arms (Amendment) Act 1968, mandatory sentence of death under Section 2723 of the Act was inserted.

An essential ingredient of sub-section (3) of section 27 is the causing of death by use of a prohibited arm or prohibited ammunition. It may be noted that sub-section (3) is an aggravated offence as compared to sub-section (1) and (2) of section 27. In sub-section (1) violation of the obligation to obtain a licence for use, manufacture or sell of any arm of a prescribed nature under section 5 is punished by imprisonment for 7 years maximum. Sub-section (2) provides a harsher penalty of seven years minimum sentence which may extend to life imprisonment for the offence of acquisition or possession of prohibited arm or prohibited ammunition contrary to section 7 of The Amended Act. But under Sub-section (3), if the use of the prohibited arm or prohibited ammu-

23. Supra Chap.II Note 76.
nition, or any act in contravention of section 7 results in death of anybody then the courts are statutorily bound to pass the sentence of death. No doubt causing of death by the use of prohibited arm or prohibited ammunition is an aggravated form of offence under the Arms law, but the lack of discretion to the courts appears to be unconstitutional.  

![Image]

The Commission of Sati (Prevention) Act, 1987:

This Act aims at an effective prevention of the commission of Sati, its glorification and for other related matters. Part II of this Act enumerates the punishments for offence relating to Sati. Section 3(2) deal with abetments of Sati. One significant aspect of this Act is that while it made the act of Sati a punishable offence, the abetment of the offence carries the maximum penalty of death. Under Section 3 a person who attempts to commit Sati is to be punished at most with one year imprisonment or with fine or both. In this circumstance while the offender gets a ridiculous one year imprisonment the abettors of the offence may be sentenced to death.

The reason behind this may be the fact that most commissions of Sati are as a result of force—physical or mental pressure,

24. Supra Chap. II Note 64.
25. The genesis of this Act appears to be the agitations and controversy that rocked the country after one Roop Kanwar from Rajasthan was burnt alive in the funeral pyre of her late husband.
26. Section 7(c) defined 'Sati' as meaning the burning or burying alive of—
(i) any widow along with the body of her deceased husband or any other relative or with any article object or thing associated with the husband or such relative, or
brought to bear upon the widow. This is understandable in a society where the in-laws of the widow and even the widow's own parents instigate or encourage her to believe that dying or being buried with the late husband behaves some spiritual benefit to her husband or family as a whole. Therefore to stamp out Sati, the act of abetting is to be strongly dealt with.

The Act received the assent of the President on 3rd September 1987 and published in Gazette of India, provides for the sentence of death as an alternative punishment. Section 3(2) provides that a person committing a terrorist act which results in the death of a person will be punishable with death or imprisonment for life.

The enactment of this Act was felt necessary for the separatist forces which have become a threat against the unity of India. The Act aims at the prevention and control of the terrorist and disruptive activities and other allied matters. Under the Act the extreme penalty of death is recognised for those involved in the terrorist activities which are marked as an attempt to undermine the harmony amongst different communities. Opinions however, may differ as to various points of this matter. For instance who is a terrorist? What is terrorism and as to whether violence by the state itself does not amount to terrorist act? The fact remains that a situation in which a certain section of a society takes the laws into their hands by attempting to overawe the Government or terrorise innocent citizens by a resort to violence using lethal

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(ii) any woman alongwith the body of any of her relative irrespective of whether such burning or burying is claimed voluntary on the part of the widow or the woman or otherwise.
weapons does certainly infringe on the Sovereign responsibility of the state to maintain peace and order and ensure the safety of the people. Like the offence of sedition and murder, terrorist activity is a serious offence and any person convicted as charged may be awarded the extreme penalty of death. The enforcement of the Act has given fruitful results.

The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988:

This is a recent legislation providing death penalty in the country. This Act was passed by the Lok Sabha on the 16th day of December 1988. This received the assent of the President on January 6, 1989 and published in the Gazette of India on January 9, 1989. The Act amended the Narcotic Drugs and Psychotropic Substances Act, 1985 which is the principal Act on the subject.

The Act provides for stringent punishment ranging in some cases from a minimum of 10 years to a specified period of 20 years. In 1985, an enhanced penalty of up to 30 years was provided for second time offenders. In 1988, the NDPS Amendment Act introduced the death penalty, for certain offences after previous conviction.

From a keen perusal of the provisions laid down under Section 31A sub section (1) of this Act the penalty of death is provided on second conviction of a person for certain specified drug offen-

ces. It is worth noting that this section enacts a mandatory penalty of death sentence on second conviction. This section can be put on the same footing as provided under section 303 of the Indian Penal Code, where minimum punishment has been provided death penalty. Like this section 31A sub section (1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is expected to be declared as unconstitutional as the Supreme Court did in Mathu Vs. State of Punjab. Under the later section also court has not been left with any choice to vary the punishment with the varying circumstances of committing the offence.

The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989:

This Act bears witness to legislative recognition of judicial fallibility. Section 3(2)(i) of the Act provides that any person not being a member of Scheduled Caste or Scheduled Tribe if falsely make or give any evidence by which any member of Scheduled Caste or Scheduled Tribes is punishable with life imprisonment or the knows that by such evidence guilt is likely to be proved, such aducing person shall be punished with life imprisonment and fine. And if any member of Scheduled Caste or Scheduled Tribe is proved guilty on this evidence and hanged, the false evidence making or giving person shall be punished with death.

28. Supra Chap.II Note 64.
The Act recognises that fabricated or false evidence could result in the conviction and execution of 'an innocent' member of a Scheduled Caste or Scheduled Tribe. As a warning to such fabricators, and presumably hoping that it will act as a deterrent, the Act imposes the punishment of death, and only death.

On the analysis of the cases of capital punishment discussed earlier we find that under Sections 121, 194 (para 2nd) and Section 302 of the Indian Penal Code Section 3(1) of the Commission of Sati (Prevention) Act, 1987 and Section 3(2)(i) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is a choice before the trial judge to choose either of the punishment between death sentence or life imprisonment. Section 303 and 307 (para 2nd) of the Indian Penal Code and section 31A sub section (1) of the Narcotics Drugs and Psychotropic Substances (Amendment) Act, 1988 and Section 27 of the Arms (Amendment) Act, 1988 make the sentence of death mandatory for the accused. Section 303 of the Indian Penal as spoken earlier has been declared unconstitutional under Articles 14, 19 and 21 of the Constitution. On the ground that it leaves no discretion to judges regarding punishment. It does not contemplate the circumstances in which the offence is caused. It takes away the life of the accused arbitrarily. Section 307 (paragraph 2nd) is somewhat different from Section 303 of the Code because in the former section the word "may" has been used while in the letter it is "shall". The former is discretionary while the later is mandatory.

29. Supra Chap.II Note 64, p.473.
To stop the increasing racketeering in Narcotic Drugs and Psychotropic Substances leaving their life taking effects on the society, reducing working strength of the addicts and increasing extraordinary economic burden of the Government it has been provided that if a person repeats the commission of or attempts to commit, or abetment of or criminal conspiracy to commit any of the offence punishable under Section 15 to Section 25 or Section 27A of this Act relating to engaging in production, manufacture possession, transportation, import into India, export from India or transshipment of narcotic drugs and psychotropic substances of the various kinds as discussed in the sections or financing directly or indirectly any of these activities specified in clause in Section 31A(1)(a) of the Act shall be punishable with death.

Generally the only context in which capital punishment is of any practical importance is that of Section 302, which provides that accused of murder shall be punished with death or imprisonment for life and shall also be liable to fine.

The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that in proportion to the actual pain which it causes as the punishment of imprisonment for life in this country. Prolonged imprisonment may be more painful in the actual endurance; but it is not so much dreaded before

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30. The words "Transportation for life" have been now replaced by imprisonment for life by Criminal Law Amendment Act, 1955, (Act No.26 of 1955).
hand; nor does a sentence of imprisonment strike either the
offender or the bystanders with so much horror as a sentence of
exile beyond what they called the Blackwater. This feeling we
believe arises from the mystery which used to overhang the fate
of the transported convict. This separation resembles that which
takes place at the moment of death. The criminal is taken for
ever from the society of all who are acquainted with him, and
conveyed by means of which the natives have but an indistinct
notion, over an element which they know nothing, and from which
he is never to return. It is natural that his fate should impress
them with a deep feeling of terror. It is on this feeling that
the efficacy of the punishment depends and this feeling would be
greatly weakened if transported convicts frequently return, after
an exile of seven or fourteen years, to the scene of their offen-
ces, and to the society of their former friends.31

The authors of the Penal Code say:

"We are convicted 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 so dear as life. And we are of the opinion that to put
robbers, ravishors and mutilators on the same footing with
murders 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 a strong motive to murder, inasmuch as by murder he may often hope to remove only witness
of the crime which he has already committed. If the punish-

ment of the crime which he has already committed be exactly
the same with the punishment for murder, he will have to
restaining motive. A law which imprisons for rape 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 a strong motive to
follow up his crime with a murder."

Death Sentence Not Exclusive But Alternative:

Only at two places i.e. under section 303 and section 307
in the Indian Penal Code death punishment is prescribed as an
exclusive punishment but in rest part, there is always a provi-
sion for life imprisonment or imprisonment as an alternate puni-
ishment. Moreover, such sentences are guided by procedural requi-
rements. For instance section 302 of the Indian Penal Code provi-
des a choice between the death penalty and life imprisonment for
the offence of murder; and section 235(2) of Criminal Procedure
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.
The record 'special reasons in case of choice of death', provides
the legal framework and is relevant for the application of the
death sentence.

The sentencing discretion accorded by Section 302 of Indian
Penal Code can be understood in two ways. The first relates to

32. Notes appended to the Draft Penal Code, 1836, p.93. Source 1
the range 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. Sections 303 and 307 of Indian Penal Code relate to two offences for which the death penalty is the sole form of punishment. Section 302 of the Indian Penal Code is the second pattern where death penalty is with only one alternative, i.e. life imprisonment.

The third pattern is followed in respect of offences under Section 132, 194 etc., of the Indian Penal Code where death penalty is the maximum to be applied alongwith a wide range of other minimum sentence. In respect of the rules or guidelines for the operation of the choice out of the range of sentences, the Penal Code is fairly bold. The question of when or why is left to judicial discretion in every case. The awe some either/or of the section spells out no specific indicators and law in this fatal areas cannot afford to be conjectural. Guided missiles, with lethal potential, in unguided hands, even judicial, is 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 prag-

33. Pande, B.B., "Face to Face with death sentence", Supreme Court Cases, p.47.
34. Ibid.
35. Supra Chap.IV Note 10, p.920.
metic concreteness that inhibits ad hominem responses of individual judges and with penal conformance with Constitutional norms and world conscience.

The principle behind the 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 "wilful exposure" of life to peril that seems to constitute the basis of a provision for the sentence of death.37

This principle is clearly evident in the offences under Section 302 of the Indian Penal Code and is reflected in the other offences also. Thus, the offence under Section 121 of the Code is a capital one, because it threatens the very existence of an organised Government, which is essential for the protection of human life. The offence under Section 132 of the Code is, again, a capital one, because it aims at the destruction of the very forces which are intended to protect the machinery of the state in the last resort. Again, the offence under Section 194 of the Code (second paragraph) is punishable with death, on the logic that the person concerned gave false evidence with the intention of, or knowledge of likelihood of deprivation of innocent human life. In the case of offences under Section 305 of the Code the crime is

37. 35th Law Commission Report, para 77, p.34.
really one of homicide, but committed indirectly; the offender does not take the life with his own hands, but encourages a person who cannot look after his own interests, to end his life.

The hand that does the actual act of killing is merely a tool in the hands of another. The person killing himself is one around whom the law is compelled to throw its special cloak of protection. 38

The offence under Section 307, Indian Penal Code is one where the attempt is not successful; the disregard of the sanctity of human life is, however, apparent here also, as is reinforced by the requirement that the act must be such that if the offender, by that act caused death, the offender would be guilty of murder (first paragraph of Section 307). The sentence of death, however, can be awarded only where hurt is caused and the person offending is already under sentence of imprisonment for life (second paragraph of Section 307). The last requirement is merely an illustration of the proposition that the law has not ruled out the consideration of the individual. 39

The offence under Section 396, Indian Penal Code is a specific case of vicarious liability in respect of the sentence of death, but even here it would be difficult to discern the principle of protection of human life; the section requires that

38. Ibid, p.35.
there must be five or more persons who are co-jointly committing "dacoity" (as defined in Section 396 read with Section 391 of the Indian Penal Code and that one of such persons must commit murder in so committing dacoity. Joint liability under this Section does not arise unless all the persons are co-jointly committing dacoity and the murder was committed in so committing a dacoity.\textsuperscript{40}

The Indian Penal Code fabricated in the imperial foundry well over a century ago has not received anything but cursory parliamentary attention in the light of the higher values of the National charter which is a testament of social justice. Our Constitution respects the dignity and, therefore, the divinity of the individual and preservation of life of everyone. While doing so, the code of Criminal Procedure instructs the court as to its application. The changes which the Code has undergone in the last 25 years clearly indicate that the parliament is taking note of contemporary criminological thought and movement.

\textbf{Joint Liability And Capital Punishment :}

There are various sections in the Indian Penal Code where a person is held liable to capital offence though the actual offence was committed by another person. This may be termed as 'vicarious' or 'constructive liability'. These sections are-\textsuperscript{41}

\begin{footnotesize}
\textsuperscript{40} Ibid, p.36.
\textsuperscript{41} Indian Penal Code 1860, Section 34: Acts done by several persons in furtherance of common intention: when a criminal act is done by several persons in furtherance of common intention of all, each of such persons is liable for that act in the same manner, as if it were done by him alone.
\end{footnotesize}
The constructive liability of the offender has been discussed under Sections 109 to 115, 120 B, 154, 155.

42. Ibid, Section 109: Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
Ibid, Section 110: Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.
Ibid, Section 111: When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it, provided that the done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.
Ibid, Section 112: If the act for which the abettor is liable under Section 111 is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.
Ibid, Section 113: If a different effect is caused by the act abetted than that intended by the abettor, the abettor is liable for the effect so caused, provided he knew that it was likely to cause that effect.
Ibid, Section 114: Whenever any person who, if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.
Ibid, Section 115: (a) Whoever abets the commission of an offence punishable with death or imprisonment for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by the Code for punishment of such abetment, (b) and if any act is done in consequence of the abetment and which causes hurt to any person, the abettor is liable to with fine.

43. Ibid, Section 120B: Whoever is a party to a criminal conspiracy to commit an offence punishable with death imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished as an abettor of such offence; in other cases he shall be liable to imprisonment not exceeding six months, or with fine or with both.

44. Ibid, Section 154: Owner or occupier of land on which an unlawful assembly is held or riot committed—Fine up to Rs. 1000.

45. Ibid, Section 155: Liability of person for whose benefit riot is committed or of his agent or manager for failing to use lawful means for preventing riot—Punishable with fine.
396, 400 and 402 of the Indian Penal Code. The constructive liability in all these cases is justified on the ground his physical participation is indirect. The mens rea, in this context, is represented by the requirement of "common intention" or of aid, conspiracy of instigation which constitutes "abetment" or of conspiracy simpliciter, or of "common object" or "co-joint" commission of a dacoity.

There are two special cases of constructive liability which is called for special attention. The first is Section 34 and the other is Section 149 of the Indian Penal Code. Section 149 creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object—namely, one of those named in Section 141 and then the doing of acts by members of it in prosecution of that object.

46. Supra Chap. II Note 72.
47. Ibid, Section 400: Punishment for belonging to a gang of dacoits—imprisonment for life, or up to ten years and fine.
Ibid, Section 402: Assembling for the purpose of committing dacoity—Punishment as in above.
48. Supra Note 41.
49. Ibid, Section 149: If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the member of that assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.
There is a difference between object and intention, for though their object is common, the intention of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combination of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but Section 149 of the Indian Penal Code cannot at any rate relegate Section 34 of the Code to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all. 50

Section 34 of the Indian Penal Code refers to cases where several persons both intend to do and do an act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases Section 149 of the Code may be applicable but Section 34 is not. On the other hand, if several persons numbering five or more, both do an act and intend to do it, both Section 34 and Section 149 may apply, since the singular "member" in Section 149 include the plural. 51 The basis of constructive guilt under Section 149 is

50. Supra note 9.
51. Unless the contrary appears from the context words importing the singular member include the plural number, and words importing the plural number include the singular number.
mere membership of an unlawful assembly; the basis under Section 34 is participation in some action with the common intention of committing a crime. In a case to which Section 149 does not apply, all the accused persons can be found guilty of the offence constructively under Section 34 only on a finding that each of them took some part or other in or towards the commission of the offence. Thus there is a clear distinction between Section 34 and this section.

The essential condition for the operation of either section is that the intention in one case and object in the other should be common and if the act is in excess of or beyond the intention or object of the members, they cannot be constructively liable for it.

Whereas Section 34 does take into account, the fact of the participation of every individual offender in the offence which is therein described as "a criminal act" as well as his mental state which is therein commoted by the word "intention", Section 149 completely ignores both these factors. Whereas Section 34 is merely declaratory of a rule of criminal liability and does not create a distinct offence, Section 149 is not merely a declaratory provision and does create a distinct offence.

The Criminal Procedure Code, 1973:

Under the Criminal Procedure Code, 1973 there are a number of sections which are concerned with the capital punishment. But these sections deal merely with the procedure and not with the
substantive law.

Section 235(2) of the Code provides the accused person a right of pre-sentencing hearing, at the stage of which he can bring on second material or evidence, which may not be strictly relevant to or concerned with the particular crime under enquiry, but nevertheless, have, consistency with the policy underlined in Section 354(3), a hearing on the choice of sentence. The legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences including one under Section 302 of the Indian Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.52

The mandate of Section 235(2) must be obeyed in its letter and spirit.53 The Session Judge should postpone the proceeding after passing the conviction and give an opportunity to the accused to produce evidence of circumstances which may lead the court to pass a lesser sentence.54 The humanist principle of individualising punishment to suit the person and his circumstances is best served by hearing the offender on the nature of quantum of penalty to be imposed.55

52. Supra Chap.IV Note 11, p.939.
55. Supra Chap.IV Note 27.
Non compliance with the provisions of Section 235(2) is not a mere irregularity curable under Section 465 of the Criminal Procedure Code, 1973, but it vitiates the sentence. However, where minimum sentences prescribed for the offence has been awarded without hearing the accused under this section, breach of the provision will not vitiate the conviction or the sentence.

In Bhagireth Vs. State of Madhya Pradesh, the court observed that the object of this sub section (2) of Section 235 is to give a fresh opportunity to the convicted person to bring to the notice of the court such circumstances as may help the court in awarding an appropriate sentence having regard to the personal, social and other circumstances of the case.

This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgement was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce materials and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislatures therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity

57. Ibid.
58. AIR 1976 SC 975.
59. Supra Chap.IV Note 14.
should be given to the accused to be heard in regard to the sentence.

In Santa Singh vs. State of Punjab,\textsuperscript{60} the court observed that the modern concept of punishment and penology have undergone a vital transformation and the criminal is now not looked upon as a grave menace to the society which should be got rid of but is a diseased person suffering from mental malady or psychological frustration due to subconscious reactions and is therefore to be cured and corrected rather than to be killed or destroyed.

Under Section 354(3) of the Code on the conviction of the accused 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 case of sentence of death, the special reasons for such sentence shall be stated. Prior to the amendment of Section 367(5) of the old code by Act No. 26 of 1955, the normal rule was to impose sentence of death on a person convicted for murder and if a lesser sentence was to be imposed, the court was required special reasons. By the Amendment Act 26 of 1955, this provision in Section 367(5) was omitted, with the result that the court became free to award either death sentence or life imprisonment and no longer was death sentence the rule and life imprisonment the exception. Now under the New Code of 1973 life imprisonment

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\textsuperscript{60} Supra Note 56.
is the general rule and the death is an exception and where
the court awards death sentence it shall record reasons for so
doing. A sentence of death is the extreme penalty of law and it
is but fair that when a court awards that sentence in a case
where the alternative sentence of imprisonment for life is also
available, it should give special reasons in support of the
sentence. 61

The Law Commission in its 35th Report on Capital Punishment
made recommendations that a provision be inserted in the Code
requiring the court to record reasons for sentence in capital
cases. 62 The Law Commission in its 41st Report shared the same
view and accordingly the present provision has been made in the
new code. 63

In making the choice of punishment or for ascertaining the
existence or absence of "special reasons" in that context the
court must pay due regard both to the crime and the criminal,
what is the relative weight to be given to the aggravating and
mitigating factors, dependent on the facts and circumstances of
the particular case. In many cases, the extremely crude or heasty
manner of the commission of murder is itself a demonstrated index
of the depraved character of the perpetrator. It is, therefore,
not desirable to consider the circumstances of the crime and the
circumstance of the criminal in two separate water tight compo-
ments. 64

61. Row, Sanjeev and Singhal, M.L : Code of Criminal Procedure,
64. Row, Sanjeeva and Singhal, op.cit., p.1182.
Since 'Special reasons' cannot be codified for all times to come and by the vary nature of crime shall vary from case to case, courts have found out a via media in the form of extenuating and mitigating factors. Thus, the court in aggravating circumstances may award the penalty of death and in the absence of them a lesser sentence of imprisonment for life may be preferred. Again, aggravating circumstances cannot be reduced to mathematical calculations and that they will depend upon the facts of each case. As long as the ingenuity or brutality of a criminal cannot be put forth in certain terms, those circumstances also cannot be mentioned. Furthermore, even if an attempt is made to formulate these, the presence of one single factor may not be sufficient, but all or some of them may justify the extreme punishment.

In the cases, where the two children were murdered in professional manner and the accused were menace to social order and security, where 10 murders were committed in gruesome manner where the murder is cruel, heinous and dastardly murder and there is no extemating circumstance for reducing the sentence of death to imprisonment for life, capital punishment has been held proper. However there are the following circumstances wherein punishment may be increasing or mitigating the penalty to be imposed.

Circumstances which are properly and expressly recognised by the law as an aggravations calling for increased severity of punishment consist in the manner in which the offence is
prepetrated; whether it be by forcible or fraudulent means, or by aid of accomplices or in the malicious motive by which the offender was actuated or the consequences of which the public or the individual sufferers, or the special necessity which exists in particular cases for counteracting the temptation to offend, arising from the degree of expected gratification or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case. 65 Circumstances which are to be considered in alleviation of punishment are: (1) the minority of the offender; (2) the old age of the offender; (3) the condition of the offender e.g., wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence was committed under a combination of circumstances and under the influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent. 66

In Ediga Annamma, 67 Justice Iyer has made an attempt to formulate and systematise these circumstances as under:

"Let us crystallise the positive indicators against death sentences under Indian Law currently, where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions in sufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social

pressures, warranting judicial notice, with an extenuating impact may, in special case induce the lesser penalty. Extraordinary features in the judicial process, such as the death sentence has hung over the head of the culprit excru-ciatingly long, may persuade the court to be compassionate..."

If we study the judicial decisions given by the courts over a number of years, we find judges resorting to a wide variety of factors in justification of confirmation or commutation of death sentence and these factors when analysed fail to reveal any coherent pattern. This is the inevitable consequence of the legislature to supply broad standards or guidelines which would structure and channelize the discretion of the court in the matter of imposition of death penalty. 68

Section 366 of the Criminal Procedure Code, 1973 provides that after the Court of Sessions passes the sentence of death, proceedings must be submitted to the High Court for confirmation and the convicted person must be committed to jail custody. However, this death penalty cannot be executed unless it is confirmed by the High Court. The object of this provision, indeed, is to ensure that in a case of serious nature when the life of a citizen is involved, the evidence should be properly scrutinised by a superior court. 70 The High Court must examine entire evidence itself and arrive at its independent finding. 71 The High Court, as of necessity is entitled, is bound to consider the merits of

68. Supra Chap.IV Note 11, pp.1376-79.
69. Supra Chap.IV Note 114.
the case as referred to under this case.\textsuperscript{72} Section 367 empowers the High Court, if it thinks necessary, that prior to the confirmation of the sentence, it is necessary that additional evidence should be taken for reaching at a conclusion, it may direct the court of sessions to take further evidences or it may make inquiry itself. This provision is in order to remove doubts. It is the aim of law that no innocent may be punished.

Section 367 provides an exception to the general rule laid down in Section 273 of the Code that all evidence taken in course of trial shall be taken in presence of the accused. The High Court may take additional or fresh evidence upon the guilt or innocence of the accused. However, under Section 368 of the Code the High Court is empowered to confirm or annul the sentence whatever has been submitted to the High Court for confirmation. But no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Section 413 is concerned with the execution of order passed under Section 368 of the Code. When in a case submitted to the High Court for confirmation of a sentence of death, the Court of Sessions receives the order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. However, if High Court passes a sentence of death in appeal or revision, the court

\textsuperscript{72} Pal Singh Vs. State of Punjab, 1970 SCC
of sessions after receiving such order shall cause the sentence to be carried into effect by issuing a warrant. Section 415 of the Code, \(^{73}\) provides for the postponement of the execution of sentence of death in the case of appeal to the Supreme Court under Articles 132 and 134 of our Constitution. Section 416\(^{74}\) of the Code further provides postponement of capital punishment. Under this section if a woman sentenced to death is found to be pregnant the power of postponing of execution of the sentence of death can be exercised only by the High Court. But it is mandatory to the High Court to postpone the execution of such punishment. However, if it thinks fit, commute the death sentence to life imprisonment.

Section 432\(^{75}\) and Section 433\(^{76}\) of the Criminal Procedure Code, 1873 provide powers to appropriate Government to suspend or remit or commute sentence. Section 433 empowers the appropriate Government, without the consent of the person sentenced, to commute—(a) a sentence of death, for any other punishment provided of the Indian Penal Code, 1860. In Kartar Singh Vs. State of Punjab\(^{77}\), Supreme Court has held that if there are no mitigating circumstances, the sentence of death could not be reduced to imprisonment for life. If there are any mitigating circumstances could not be brought on record, the proper course is to bring them to the notice of the appropriate Government Section 54 of the Indian Penal Code, 1860\(^{78}\) has also provided that in every case in which

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73. Supra Chap.IV Note 108.
74. Supra Chap.IV Note 107.
75. Supra Chap.IV Note 102.
76. Supra Chap.IV Note 97.
77. AIR 1977 SC 349.
78. Supra Chap.IV Note 95.
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.

Constitution:

Constitution of India under its Articles 72\(^79\) and 161\(^80\) empowers the President of India and the Governor of the State to grant pardon, to suspend and to remit or commute sentences in certain cases.

Article 72 can be reconciled with Article 161 by limiting the power of the Governor to grant pardon to cases not covered by Article 72. If so read, the President alone has the exclusive power to grant pardons, reprieves, and respites in all cases where the sentence is a sentence of death and both the President and the Governor have concurrent powers in respect of suspension, remission and commutation of a sentence of death. In other matters, that is, in respect of offences against any law relating to a matter to which the executive power of the State extends, the Governor has all the powers enumerated in Article 161 of the Constitution, including the power to grant pardon, reprieves and respites. To put in briefly, the powers of the Governor to grant pardon, reprieve and respites in all cases where the sentence is not a sentence of death, and to suspend, remit or commute the sentence of any person, are coextensive with the executive power of the State.\(^81\)

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79. Supra Chap.IV Note 69.
80. Supra Chap.IV Note 88.
The powers conferred under Articles 72 and 161 to grant pardon, suspend, remit or commute sentences, etc. of any convict are not judicial in nature and they are to be exercised by the President or the Governor in the exercise of functions and that also in accordance with rules of natural justice. There is no obligation to hear the parties concerned before rejecting or granting a mercy petition.\textsuperscript{82} It has also been held that during the period an appeal is pending and the matter is sub judice in the Supreme Court, the Governor has no right to suspend the sentence under Article 161.\textsuperscript{83}

Article 137 of the Constitution\textsuperscript{84} expressly empowers the Supreme Court to review its judgements. This power is exercisable in accordance with and subject to the rules of the Court made under Article 145. The rules permit the review of a judgement by the Supreme Court on the grounds mentioned under order 47, Rule 1 of the Civil Procedure Code, 1908.

The judicial review, therefore, will lie on the following grounds:

1. discovery of new and important matters or evidence;
2. mistake or error apparent on the face of the record; and
3. any other sufficient reason.

\textsuperscript{82} Tara Singh Vs. Director, AIR 1958, Punj 302.
\textsuperscript{83} Supra Chap. IV Note 85.
\textsuperscript{84} Constitution of India, Article 37: Review of judgement or orders by the Supreme Court—subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgement pronounced or order made by it.