

Chapter-1

Introduction

Human life is perhaps the most precious gift of the nature, which many describe as the Almighty. This is the reason why it is argued that if you cannot give life, you do not have the right to take it. Many believe that capital punishment should not be imposed irrespective of the nature and magnitude of the crime. Others think that death penalty operates as a strong deterrent against heinous crimes and there is nothing wrong in legislative prescription of the same as one of the punishments.

Capital punishment, commonly known as the death penalty, is the legal requirement for a convicted criminal to be put to death. The death penalty is not the same thing as executions that happen outside of a courtroom. Capital punishment is sometimes called “the death penalty”, even though a sentence of death does not have to be carried out (even if it is upheld on appeal) because it could be changed to a sentence of life in prison instead.

Capital punishment is shorthand for “the ultimate penalty.” The most terrible, cruel, and disgusting acts against humanity deserve this penalty. A death sentence has always been implied by capital punishment, even though the definition of the scope of such offences varies from nation to nation, state to state, and generation to generation. In the fields of law, criminal justice, and penology, the term “capital sentence” is usually used to mean a sentence of death.

The Origins and Development of the Death Penalty

In the Code of King Hammurabi of Babylon, the death penalty was instituted for 25 distinct offences (about the 18th century B.C.). The Draconian Code of Athens, which said that all crimes should be punished by death, is another place where the idea of the death sentence came from.¹

Punishment included suffocation, drowning, beating to death, impalement, and burning alive for the guilty. Around the year 1000 A.D., hanging became the preferred method of execution in Britain. Under William the Conqueror’s rule a century later, hanging was allowed only during times of war”. Over time, even the United Kingdom stopped routinely imposing the death penalty. Murder rates are lower in nations where the death penalty is not in force than in those where it is. The idea that the death penalty is barbaric and demeaning is gaining traction in countries all across the globe. As a whole, it poses a threat to society and promotes violence, while also falling short in its endeavour to promote public security and prevent criminal activity. The death sentence has been abolished in all of the world’s main religions, civilizations, and regions. The UN reports that over 150 nations have either stopped using it entirely or outlawed it entirely.

¹ Roger Hood and Carlyn Hoyle, *The Death penalty : A Worldwide perspective* (5th Edition, Oxford University Press, 2015).

In 1861, the Indian Penal Code was enacted, and¹ it included the death penalty for murder. Some members of the Constituent Assembly proposed eliminating the death penalty as part of the Indian Constitution-drafting process between 1947 and 1949". However, this idea was never codified into law.¹ Over the next two decades, many private member bills seeking to outlaw the death penalty were introduced in the Indian Parliament (Lok Sabha and Rajya Sabha), but none of them passed".² It was estimated that between 3,000 and 4,000 people were put to death between the years 1950 and 1980. There is less reliable data available on the number of people sentenced to death and put to death between 1980 and the mid-1990s. It is estimated that yearly hangings averaged a handful. The Supreme Court declared in the 1980 Bachan Singh verdict that the use of capital punishment should be reserved for the most exceptional cases. However, it is unclear what constitutes the phrase "rarest of the rare."

History

The term "capital punishment" is used to describe a kind of punishment in which an offender is legally required to lose his or her life after being found guilty of a specific offence and being subjected to a fair trial. There is a lot to say about whether or not the death penalty should exist, and the discussion has branched out to include many different points of view. Legal, social, and human rights considerations are only a few examples. The growth of human rights and the portrayal of capital punishment as an extraordinarily severe punishment, taking away the right to life of the person, have both contributed to a shift in the legal community's view of the legitimacy of the death penalty. The process of putting an inmate to death once a death sentence has been handed down has likewise evolved through time, and contemporary approaches to this kind of punishment still vary widely from one region to the next. Hanging and gunshot are the two techniques of execution in India. Capital punishment may be carried out by a method of hanging the criminal by the neck until he dies, as specified in the Code of Criminal Procedure, 1973/Now Bharatiya Nagarika Suraksha Sanhita, 2023. For offences warranting the death penalty, the court martial may choose between hanging and shooting as provided by the laws governing military penalties.

The use of the death penalty was commonplace in the past. The death penalty has been practised in almost every nation on the globe. Capital punishment has never been abandoned as a form of punishment throughout the history of human civilisation. Under the rules of Draco (7th century BCE), capital punishment was commonly utilised in ancient Greece for murder, treason, arson, and rape. Plato, however, thought that capital punishment should be reserved for the incorrigible. Even though Roman citizens were not put to death for some crimes for a short time during the republic, the Romans often used the guillotine for a wide range of offenses.¹

¹ Capital Punishment, available at: <http://www.britannica.com/topic/capital-punishment>.

² Durga Das Basu, Comparative constitutional Law (Lexis Nexis Publication, 2014).

According to Sir Henry Marine, ¹Despite death penalty, rarely being used due to the widespread use of exile and the interrogation system, the Roman Republic did not outright abolish it," which lends credence to this idea.

The number of crimes and criminals in India is staggering. The severity of a punishment meted out in India is determined solely by how seriously the offender is thought to deserve it. There are two main justifications for carrying out the punishment: (a) the offender must suffer, and (b) punishing one wrongdoer demotivates others who share their values. In India, penalties range from death to life in prison to fines to jail time with or without a fee. The author of this piece mostly analyses the application of the death sentence.

The most terrible crimes against humanity have been met with the death sentence. The legality of putting someone to death varies widely from one State and one country to the next. Capital punishment has been called unethical by a number of human rights groups. Human Rights Watch has raised concerns that the death sentence violates people's freedom of expression. The death penalty is a sentence of death in the fields of law, criminal justice, and punishment. In India, criminal law is based on a synthesis of two different schools of thought. The Constitution empowers the President and the Governor to stop or get rid of the death penalty in some situations. In India, the death penalty is reserved for the worst of the worst crimes. Murder, armed robbery with murder, waging war against the State, aiding rebellion, etc. all amounts to death sentence. When the court decides that life in prison would be insufficient punishment, the capital penalty may be imposed

There is a large body of writing that examines the history of death punishment in India and its place in contemporary law, as well as a similarly large body of writing that details the growth of the current Indian legal system. Because of political shifts in India, the country's legal system has seen significant transformations in recent centuries. With early stages of Hindu philosophising, Islamic law became the dominant legal system after the Mughal conquest and the foundation of its empire.

After the Mughal Empire fell, the British imposed on Indian society a new, more formal legal system. They did this by setting up legislatures and courts². Famous authors and thinkers like Kalidasa and Kautilya, as well as holy works of Hindu philosophy like the Mahabharata, attest to the use of death punishment in the past. Even though Ahimsa was a very important part of the law at the time of Buddha, there is no record of the death penalty being done away with.

Also, the Mughal empire's rise meant the introduction of Islamic law, with the emperor presiding over criminal trials in line with the canons and requirements of Sharia. In accordance with Islamic law, the fundamental function of punishment is to discourage criminal behaviour and put an end to criminal conduct. For this reason, most forms of retributive justice for criminals were historically carried out

¹ Capital Punishment, available at: <http://www.britannica.com/topic/capital-punishment>.

² A.R Blackshield, "Capital Punishment in India", 21 Journal of the Indian Law Institute 137±226 (1979) available at <https://www.jstor.org/stable/43950631>.

in broad daylight as an educational tool for the general populace. Islam calls for the death penalty in cases of deliberate murder. An illustrative verse from Surah 2:179 of the Holy Quran is provided to demonstrate this idea. The death penalty ensures peace and safety for everyone in our area, so we trust that you would not dare to break it.

In Islamic law, crimes were classified into three types: those committed against God, the sovereign, and individuals. Similarly, the penalties are broken down into four classes: Kisa, Diya, Hadd, and Tazeer. Kisa is mostly a kind of vengeance, and the idea of punishment as vengeance has long been present in Hindu law. Diya, also known as “blood money,” was used to compensate a crime victim. Hadd meant particular punishments for certain crimes, and its primary function was to provide sanctions for offences committed against God or the State. Last but not least, tazeer was a kind of punishment handed out at the discretion of the judges, with no set rules or regulations beyond what the court had decreed. The difficulty emerged when the lines between these categories began to blur, despite the fact that they were originally drawn to simplify the legal system and facilitate speedy adjudication. For instance, the victim of a crime might choose whether to get Kisa or Diya as retribution. In response, the legislation became quite hazy in terms of sanctions, but the existence of the death penalty was never seen to be in jeopardy. Because revenge killings were so common, the standard punishment for murder was changed from life in prison to the death penalty.

The British reformed Islamic criminal law in India and introduced English concepts because of the country’s legal ambiguity. Many British jurists, like Warren Hastings, have spoken out against Islamic criminal law, calling it “based on the most fragile premise and an abhorrence of killing.” Rankine characterised the early Muslim legal systems in Bengal, Bihar, and Orissa as “if regarded as a whole, exceedingly difficult, technical, and esoteric,” highlighting their complexity and obscurity. Uncertainty and complexity in the law slowed down the delivery of justice, prompting British reform. Because doing so would cause chaos and impede the British from advancing their colonial and imperial agenda, the change in criminal law was not meant to entirely dismantle the system and construct a new one. The British implemented improvements in civil law, which were taken over by English judges, but left criminal law to the discretion of Muslim law and jurisprudence. This occurred in 1772. On the other hand, after a period of time in power, Lord Cornwallis made significant changes to Indian criminal law in 1790. One of these changes was the elimination of the exception to the death penalty for murder committed “without drawing blood from the victim” under Islamic law. Cornwallis thought this went against the notion of law he had learned about in British criminal law, which was based on the concept of natural justice.

The development of the death penalty in British law is particularly relevant here since it sheds light on how the English concepts were adapted for use in India at the time. From its inception in the early Anglo-Saxon era until its abolition in 1965, hanging was the most common form of capital punishment. This became the standard method of death penalty application in India. In England, however, the

procedure of hanging became highly ritualised in the late 13th century via the use of the processes of “drawing, hanging, and quartering.” The condemned person would be dragged to the scene of execution, where they would be hanged until they die, after which their bodies would be dismembered and sometimes even put on display. For heresy and later treason, burning at the stake evolved as a means of death as well, although by 1790, hanging had mostly supplanted burning as the primary method of execution. A lot of similarities can be found between the two nations’ histories of death punishment up to a certain time. Despite the similarities between the British Isles and India with regard to the means of putting certain criminals to death, the penalties themselves varied greatly. Beheading, hanging, and embowelling were common methods of execution for the English nobility.

In India, like elsewhere, brahmins were often sentenced to life in jail rather than the death penalty. Lastly, the types of death sentences, how they were carried out, and the crimes for which they were given were all different in each of these regions. Yet the use of the death penalty has never been uncommon. However, during the 17th and 19th centuries, Britain implemented something called the “Bloody Code,” which established the death penalty for over 200 crimes, many of which were quite minor. Pickpocketing, tree cutting, and stealing were some of the most common property-related crimes addressed by new laws enacted between 1688 and 1815. But this sparked a firestorm of criticism for this legislation and the notion of capital punishment itself, and as human rights and individual significance grew, the death penalty’s irrevocable nature became a major source of contention. Many activists felt that pain infliction was indicative of a backward, uncivilised culture since it predated the rise of modernity and the Age of Enlightenment, which placed a premium on the value of the person. As of 1861, the death sentence was only given for murder, high treason, violent piracy, and setting fires at royal dockyards.

The courts set up by the British were the major venues for the enforcement of English law in India. Through the charter of 1726, the first of them was the Mayor Courts in the several presidencies. As appeals from the mayor’s courts lay with the governor-in-council and later the Privy Council, this charter also opened the doors to the venerable Privy Council or the King-in-council. Because of this, British law was imposed on the Indian territories. However, the Judicial Committee Act makes allowances for the judges of British High Courts in India to participate in the decision-making process of the Privy Council. It is crucial to keep this in mind since these judges did know and try to apply Indian law, but the majority of the ideas and laws they were applying came from English jurisprudence. Until a law was established by the Indian legislative assembly in 1948, the Privy Council served as India’s highest court of appeals. This continued to happen despite the federal court having been set up in accordance with the Government of India Act of 1935. In its first four and a half years of existence, the Federal Court issued just twenty-seven rulings and two advisory opinions due to its very narrow scope of authority. However, in 1942, the federal court made some fairly sweeping comments, despite the fact that its authority did not extend to the area of criminal

law and cases involving the death penalty proceeded straight to the Privy Council. Despite the fact that it has been 71 years since the Privy Council's authority was abolished, its rulings continue to be highly respected and are still binding on the Indian High Courts in the absence of a ruling to the contrary from the country's current Supreme Court. Our highest court still gives substantial weight to these rulings because of their persuasive nature.

The Benthamite codification phase of British administration in the 19th century left two main legacies: the Indian Penal Code, 1860 - and the Code of Criminal Procedure, 1898, both of which contributed to the establishment of the criminal law of death punishment in India. There are still around ten crimes under the IPC that carry a mandatory death sentence, and this has not been changed.

The Law Commission was invited to provide a report on their evaluation, and in 1959, the Law Commission was given an opportunity to provide a report on their findings. In 1969, a report was sent in on the Criminal Procedure Law, and by 1973, the new Code had been passed. There was supposed to be a report on the IPC back in 1971, but it has stayed unchanged as a law ever since. The Indian Penal Code was a watershed moment in the adoption and implementation of English criminal law in India. The IPC is a codification of modernised English criminal law, as described by its principal creator, Lord Macaulay. The following reasons must be recorded by the court:

- If an individual is found guilty of a crime that carries the death penalty but is given a sentence other than execution, the court must explain in its ruling why the accused was spared capital punishment.

Several amendments were made to Section 354(3) in the revised CrPC, 1973.

"In cases where the death penalty, life in prison, or a set number of years in prison were all possible punishments, the judge must explain why they chose that particular punishment."

That is a huge shift away from using English law in the Indian judicial system. Additionally, efforts have been made to abolish the death penalty in India since 1931, when Gaya Prasad Singh submitted a measure in the legislative assembly that was met with opposition from the British authorities. The same thing occurred in 1951, when India gained independence, when the government opposed a measure by Mukund Lai Agrawal in the Lok Sabha. In 1961, the same thing occurred, but this time a Peace Commission report was reTuested, and it was determined that, after weighing all the grounds for and against, India should not risk the experiment of abolition at this time in order to preserve law and order in the nation. The main argument is that the framers of our constitution implicitly recognised the death penalty as an appropriate sanction by giving the President and the Governor the authority to give pardons (Articles 72 and 161).

It is true that India's judicial system has not actively sought to end the use of capital punishment, but in the *Bachan Singh v. State of Punjab case*¹, it did establish

¹ AIR 1980 (SC) 898.

the idea of the “rarest of the rare” instances. Additionally, in *Mithu v. State of Punjab*¹, the Supreme Court declared that the death penalty is unconstitutional. The result has been a precipitous decline in the application of the penalty in India.

Execution of Death Sentence in India

The execution of death sentence in India is carried out by two modes, namely hanging by neck till death and being shot to death. The jail manuals of various States provide for the method of execution of death sentence in India. Once death sentence is awarded and is confirmed after exhausting all the possible available remedies the execution is carried out in accordance with section 354(5) of the Code of Criminal Procedure, 1973, i.e., hanging by neck till death². It is also provided under The Air Force Act, 1950, The Army Act, 1950 and The Navy Act, 1957³ that the execution has to be carried out either by hanging by neck till death or by being shot to death.

On Execution Methods

The Commission on this background proposes to comparatively analyse the various modes of execution of death sentence and suggest most humane, least painful, with no mutilation of body and easy to execute. This chapter aims at comparative analysis of the *Hanging, Intravenous Lethal Injection and Shooting*. This analysis is founded on some basic widely accepted norms. These are drawn from the cases decided by Hon'ble Supreme Court, findings of the Commissions and resolution adopted by the United Nations Economic and Social Council (ECOSOC) resolution as to standards and safeguards guaranteeing protection of the rights of those facing the death penalty viz; Economic and Social Council Resolution 1984/50, annex. General Assembly Resolution 29 / 118, 1984.).

The test laid down in *Deena v. Union of India* (1983) 4 SCC 645 provides that the execution of death punishment should satisfy the threefold test viz;

1. It should be Quick and simple as possible, the act of execution should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension.

1 (1983) 2 SCC 277.

2 Section 354(5), Cr.P.C- When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

3 Under Chapter VI of The Air Force Act, 1950, Section 34 provides for the offences in relation to the enemy which are punishable with death. Section 37 provides for the infliction of death sentence in case the accused is convicted. Chapter VII provides for the various punishments and the competent court-martials are empowered to recommend such punishments. Section 73 provides for the punishments awardable by Court martial. Chapter XII provides for the Confirmation and Revision provisions. Chapter XIII provides for the Execution of Sentences, section 163 deals with the form of the sentence of Death. The provisions relating to awarding the Death penalty in The Army Act, 1950 are enunciated in Chapter VI, i.e., Section 34 (a) to (l) relates to offences in relation to the enemy and punishable with death, Section 37 relates to Mutiny and provides for the infliction of death sentence in case the accused is convicted. Chapter VII deals with punishments awardable by court-martials, Chapter XII relates to Confirmation and Revision, Chapter XIII is on Execution of Sentences, Section 166 deals with form of Sentence of Death. Section 147 of The Navy Act, 1957 provides for the Form of Death Sentence

2. The act of the execution should produce immediate unconsciousness passing quickly into the death
3. It should be decent.
4. It should not involve mutilation.

The ECOSOC whereas describes one of the important standard and safeguard against the death penalty enunciated in safeguard No.9 as,—

“Where capital punishment occurs it shall be carried out so as to inflict minimum possible suffering.”

The execution of the death sentence by hanging by rope has to be judged with reference to the objective factors such as the international standards or norms or the climate of the international opinion, modern penological theories and evolving standards of human decency. The standards of human decency with reference to death punishment is required to be judged with reference to various aspects which vary from society to society depending on the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of the theft or a sentence of stoning to death for the offence of adultery were prescribed by law, as practiced in South Africa, there can be no doubt that such punishment would be condemned as barbaric and cruel in our country, even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries. So also the standards of human decency vary from time to time even within the same society. In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the evolving standards of human decency, be regarded as barbaric and inhuman punishment wholly disproportionate to the offence.

The following table gives comparative analysis of different modes of executing death sentence:

Hanging By Neck Till Death	Shooting	Intravenous Lethal Injection
1. Simple to execute	1. Simple to execute	1. Simple to execute
2. Execution process takes more than 40 minutes to declare prisoner to be dead	2. Execution process takes not more than few minutes to declare prisoner to be dead	2. Execution process takes 5 to 9 minutes to declare prisoner to be dead
3. Less scientific equipments are required.	3. Less scientific equipments are required.	3. More scientific equipments are required, they are easily available.

4. Uncertainty as to time required for the prisoner to become unconscious	4. Instant death.	4. Unconsciousness takes place immediately after the application of anesthesia and dies in sleep.
5. May cause lingering	5. Instant death	5. Not a lingering death.
6. Most of the time may involve enormous pain	6. Pain may hardly be involved.	6. Pain only as a result of needle prick.
7. Has been abandoned by most of the countries considering it not to be a civilized mode	7. Most of the countries provide for the option of either lethal injection or shooting.	7. It is being accepted now to be most civilized mode of execution of death sentence.
8. Mutilation involved.	8. Mutilation involved.	8. No mutilation involved..
9. Not a controlled way of execution. It depends on various factors.	9. It is always under control and does not depend on the factors like physique, etc. of the convict.	9. It is the best controlled way of execution.
10. Not generally swift	10. It is comparatively swift and painless	10. It is the painless and swift method of execution.

Abolition of Capital Punishment

The campaign for the abolition of capital punishment led to the introduction of a Bill in the Lok Sabha in 1956 but the same was rejected on 23.11.1956. After two years, a similar resolution was introduced in the Rajya Sabha but, after considerable debate, the same was withdrawn. Another attempt was made in this regard in 1961 but the resolution moved in the Rajya Sabha was rejected in 1962. Notwithstanding these reversals¹, the votaries of 'no capital punishment' persisted with their demand. The Law Commission of India examined the issue from various angles and recommended that death penalty should be retained in the statute book. This is evinced from the 35th Report of the Law Commission, the relevant portions of which are extracted below:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition nor does, the commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the

¹ **Meaning of reversals:** The act or an instance of changing or setting aside a lower court's decision by a higher court.

severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

Procedure which has to be followed before the execution of the death sentence

In *Peoples' Union for Democratic Rights (PUDR) v. Union of India and Ors.* PIL No. 57810 of 2014 decided on 28.01.2015 High Court has mandated the following procedure which has to be followed before the execution of the death sentence:

"In a civilized society, the execution of the sentence of death cannot be carried out in such an arbitrary manner, keeping the prisoner in the dark and without allowing him recourse and information. Essential safeguards must be observed. Firstly, the principles of natural justice¹ must be read into the provisions of Sections 413² and 414³ of Code of Criminal Procedure/Now BNSS, 2023 and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the sessions court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided. These are essential procedural safeguards which must be observed if the right to life Under Article 21 is not to be denuded of its meaning and content."

Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 & Death Penalty

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 provides for certain procedures to be followed in relation to the imposition, confirmation, and execution

1 In English law, **natural justice** is technical terminology for the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). While the term *natural justice* is often retained as a general concept, it has largely been replaced and extended by the general "duty to act fairly".

2 **413. Execution of order passed under section 368**

When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other 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.

3 **414. Execution of sentence of death passed by High Court**

When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant.

of the death penalty. It is to be noted that there is no progressive difference between the colonial legislation and the BNSS in this regard.

Passing of Death Sentence

The BNSS reflects the provisions of CrPC with respect to the authority of Courts to pass a sentence of death upon a convict. It specifies the Courts which have the power to pass a sentence of death and the conditions to be followed by it while doing so.

As per Section 22 of BNSS, a sentence of death may be passed by:

1. A High Court
2. A Sessions Judge or Additional Sessions Judge subject to the confirmation by the High Court.

Additionally, Section 23 of BNSS makes it clear that a sentence of death cannot be passed by a Chief Judicial Magistrate or any other Magistrate subordinate to him for that matter. This demarcation of power is granted in order to ensure that no error or miscarriage of justice occurs while passing a sentence of death since the life of a convict once taken, cannot be compensated or given back.

Consequently, Section 393 of BNSS which provides for the language and contents of a judgment also provides the specificities of a judgment passing a sentence of death. To be precise, Sec 393(3) provides that in case of a sentence of death, the judgment must state special reasons for ordering such a sentence. This measure ensures that a sentence depriving a person of his right to life guaranteed under Article 21 must not be arbitrary and should be backed by rationality. Further, Section 393(5) states that such a judgment must also direct the mode of execution of the death penalty, i.e., hanged by the neck till death.

Generally, a certified copy of a judgment will be given on an application made by the accused. But the proviso of Section 404(2) provides that where a sentence of death is passed or confirmed by the High Court, a certified copy of the judgment shall be immediately given to the accused free of cost whether or not he applies for the same. This is based on the ideology that a person under a sentence of death must be fully informed of his situation so that he may seek all the possible recourse to save himself from capital punishment.

Again based on this underlying ideology, Section 404(4) provides that when a court sentences a person to death, and the person has the right to appeal the decision, the court must inform them of the time frame within which they need to file their appeal, should they wish to do so. This ensures that the condemned is fully cognizant of his or her right to challenge the death sentence and the extremely limited time frame the condemned has to act in doing so. Because capital punishment is the most severe consequence a human can face, this person must be given every chance to appeal the judgement and thus ensure that no miscarriage of justice takes place. The process of appeal is a checks and balances to review any legal mistakes from trial. The court then promotes the principles of fairness and due process by informing the accused of this right together with the time

frame in which they can put it to use and this is for the service of justice, with full transparency and caution.

Confirmation of Death Sentence

Chapter XXX of BNSS deals with the 'Submission of Death Sentences for Confirmation'. It comprises Sections 407 – 412 which lays down the procedures to be followed when a death sentence is submitted to the High Court for confirmation.

Section 407 addresses, in part, the question of who has the authority to finalize a death sentence. It states that if a Sessions Court passes a death sentence, the verdict must first be reviewed and confirmed by the High Court before it can be carried out. The case proceedings must be submitted to the High Court, and the sentence cannot be executed until the High Court grants its approval. Only after this confirmation, the execution can legally proceed. This provision also is a replica of Section 366 of CrPC.

So, also Section 408(1) of BNSS, 2023 which governs the confirmation of death penalty cases by the High Court, allows the High Court to, on discovering of some aspect relevant to the guilt/innocence of the accused, either direct the Sessions Court to make further inquiry or deal with the aspect itself by taking further evidences. Such orders are generally issued by the High Court when it feels that some points or factors might have gone unaddressed by the Sessions Court. Sub-section (2) enables the High Court to exempt the convict from being present in person during such inquiries or the hearing of new evidence, unless the Court otherwise directs. Sub-section (3) provides that where such application is made to the Sessions Court or any other authority who is competent under the law to entertain, hear and dispose of such application, such authority must certify its findings before submitting them to the High Court for consideration.

Section 409 of the Bharatiya Nagarik Suraksha Sanhita, 2023 outlines the powers of the High Court when a case involving a death sentence is submitted for confirmation under Section 407. The High Court has several options:

- It can confirm the death sentence passed by the Sessions Court, or impose a different sentence as long as it is legally justified.
- It can overturn the conviction made by the Sessions Court and either convict the accused of a different offense or order a retrial, either on the same charge or an amended one.
- It can also pass an order of acquittal

It is also provided that an order of confirmation of the death sentence cannot be passed by the High Court unless the time limit for preferring an appeal has expired or while an appealing is pending.

Section 410 of BNSS, mandates that in cases where the High Court consists of two or more Judges, the confirmation of a sentence, or any new sentence or order, must be signed by at least two Judges.

Also, Section 411 of the BNSS provides that in cases where the sitting judges of a case are equally divided in their opinions, Section 433 of the BNSS shall be

followed automatically, without the need for requisition by any party. The court takes action on its own (*suo motu*) to apply this procedure.

Section 433 of BNSS, 2023 provides for the steps to be taken when a Bench of the High Court differs in their opinion. In such cases, the appeal, along with the differing opinions, is submitted to another judge of the same court who will deliver his own opinion after hearing the rationale of other judges. His opinion will determine the Final Judgment or order.

It is also provided that if any of the judges believe that the appeal must be reheard or decided by a larger bench, then it shall be done.

In the event the Court of Session sends a sentence of death to the High Court for confirmation, the officer of the High Court who is designated must, as soon as practicable, send a copy of the confirmation or the order to the Court of Session, as per Section 412 of BNSS. That either on paper or digitally. This not only expedites the transmission of critical orders but also minimizes the probability of delay and is a step by the legal system towards modern technology by permitting the use of electronic communication. Yet, even after modernizing the process, the copy still has to be sealed by the High Court and signed by the officer to ensure legitimacy.

Execution of Death Sentence

Chapter XXXIV A of BNSS (Section 453 – 456) deals with the execution procedures of death sentences after confirmation/order by the High Court. This Chapter also provides for the suspension, remission, and commutations of sentences including the death sentence.

Section 453 provides for the execution of orders passed under Section 409 of BNSS. It states that when a case is submitted to the High Court for confirmation of a death sentence, and the Court of Session receives the High Court's order of confirmation or any other ruling on the matter, it is then the duty of the Court of Session to ensure that the order is carried out.

Similarly, Section 454 provides that when the High Court has passed a death sentence, either in appeal or revision, the duty to enforce it has been casted on the Court of Sessions. The Court of Session must do so by issuing a warrant to ensure the sentence is carried out accordingly.

Importantly, Section 455 of BNSS lays down the law relating to the postponement of the death sentence where an appeal to the Supreme Court is pending. Section 455(1) states that when death has been imposed on a person by the High Court and if such person has the right to appeal to the Supreme Court under Article 134(1)(a) or 134(1)(b) of the Constitution, the High Court must pass an order of postponement of such death sentence. This postponement remains in effect until the time allowed for filing the appeal has expired, or, if an appeal is filed within that period, until the appeal is resolved.

Sub-section (2) provides that if the High Court passes or confirms a death sentence and the convicted person applies to the High Court for a certificate under Article 132 or sub-clause (c) of clause (1) of Article 134 of the Constitution, the

execution of the sentence must be delayed. Such a delay may be in force unless and until the remedy to appeal to the Supreme Court based on such certificate has expired.

Finally, Sub-section (3) gives a framework to enable the person on whom the death penalty is imposed, to approach the Supreme Court under Article 136 of the Constitution.

In fact, Section 456 of BNSS provides that if a woman sentenced to death is found to be pregnant, this must be noted and the High Court is obliged to commute her sentence to one of imprisonment for life. As such, existing United States federal law and the law of most States elsewhere already provides for lesser charges during murder prosecution where pregnancy is involved.

Suspension, Remission and Commutation of Death Sentence

Section 472 of BNSS pertains to mercy petitions in death sentence cases. Sub-section (1) provides that a convict under a death sentence, or his legal heir or relative, may file a mercy petition before the President of India under Article 72 or the Governor of the State under Article 161 of the Constitution within thirty days of being informed by the Superintendent of the jail about the dismissal of his appeal, review, or special leave to appeal by the Supreme Court, or about the confirmation of the death sentence by the High Court after the allowed time for appeal has expired.

Sub-section (2) states that the petition can initially be submitted to the Governor. If rejected or disposed of by the Governor, the convict may appeal to the President within sixty days from the rejection or disposal. Further, Sub-section (3) provides that the Superintendent of the jail must ensure that every convict in a case files his mercy petition within sixty days. If that does not happen, then the Superintendent has to do the same by providing the names, addresses, case records, and other essential details to the Centre or State Govt. along with the mercy petition.

Further, sub-section (4) stipulates that on receiving mercy petition, the Central Government would call comments from State Government and consider it with case records and make a recommendation to the President as soon as possible and, in any case, within sixty days from the date of receipt of the comments of the State Government and records from jail. Also, sub-section (5) says that the President can consider, decide and dispose of the mercy petitions, provided if there are more than one convicts in a case, their mercy petitions should be decided together in the interest of justice.

After the President has passed an order regarding the mercy petition, the Central Government is required to communicate the order to the Home Department of the State Government and the Superintendent of the jail or officer in charge, as soon as possible, not beyond the time, the sub-section (6) of the section states. Lastly it states none can appeal in other courts against the orders of the President or the Governor made under Article 72 or Article 161 of the Constitution. These decisions are final, and there is no court review over any question of how the President or Governor made his decision.

Section 474 deals with the power to commute sentences. It provides that an appropriate government may, without the consent of the accused sentenced, commute a sentence of death for only imprisonment of life. This is in stark contrast to the provision in CrPC which relates to the commutation of a death sentence.

Section 475 provides that regardless of the provisions outlined in Section 473, if a person is sentenced to life imprisonment for an offense for which the law prescribes death as a possible punishment, or if a death sentence has been commuted to life imprisonment under Section 474, that individual cannot be released from prison until they have served a minimum of fourteen years. This provision is put in place to make sure that an individual serves a sentence proportionate to the offence committed while also to ensure that he undergoes rehabilitation measures while being imprisoned.

Section 476 of BNSS provides for concurrent power of the Central Government in cases of death sentences. It says that the authorities granted to the State Government under Sections 473 and 474 regarding death sentences may also be exercised by the Central Government.

Supreme Court Issues Guidelines On Death Penalty Execution & Mercy Petitions To Avoid Delay In Process¹

Court held that Sessions Court on receiving order confirming death penalty must immediately issue notice to the public prosecutor seeking information on pending appeals, review/curative petition or mercy plea and periodically monitor pending proceedings to ensure timely issuance of execution warrants once all legal avenues are exhausted.

The Court laid down detailed procedural guidelines to be followed by the executive as well as the judiciary for handling mercy petitions and execution of death sentences to prevent delays in the process.

Directions to State Governments and Union Territories

1. Dedicated Cells for Mercy Petitions

- State Governments and Union Territories must establish dedicated cells within their Home or Prison Departments to handle mercy petitions. These cells should promptly process mercy petitions within the prescribed timeframe.
- An officer-in-charge of the dedicated cell shall be nominated by designation, and the contact details will be shared with all prisons.

2. Attachment of Judiciary Officials

- An official from the Law and Judiciary or Justice Department will be attached to the dedicated cell.

3. Information Sharing and Documentation

- Prison authorities must immediately forward mercy petitions to the dedicated cell and call for information from police stations and

¹ *State of Maharashtra and Ors. v. Pradeep Yashwant Kokade and Anr.* with connected case, CrI.A. No. 2831-2832/2023, 2024 INSC 947.

investigation agencies, including details about the convict's antecedents, family, economic condition, incarceration period, and relevant legal documents.

- Jail authorities must promptly forward various documents, including police reports, FIRs, arrest and chargesheet details, committal orders, trial evidence, convict conduct reports, and judgments from the Sessions Court, High Court, and Supreme Court, along with English translations where required, to the officer-in-charge of the dedicated cell and the Secretary of the Home Department.

4. Coordination with Governor and President's Secretariats

- Mercy petitions must be forwarded to the Secretariats of the Governor or President immediately for further action.

5. Electronic Communication

- As far as possible, all communication should be conducted via email to ensure efficiency, barring cases where confidentiality is required.

6. Guidelines and Reporting

- State Governments are required to issue executive orders detailing procedures for handling mercy petitions. They must report compliance to the Supreme Court within three months.

Guidelines for Sessions Courts

The Court outlined specific responsibilities for Sessions Courts once a death sentence is confirmed by the High Court:

- Maintain a record of cases involving death sentences and ensure timely listing on the cause list after receiving High Court or Supreme Court orders.
- Issue notices to State Public Prosecutors or investigation agencies to ascertain the status of appeals, reviews, or mercy petitions.

"As soon as the order of the High Court confirming or imposing the death sentence is received by the Sessions Court, a note thereof must be taken, and the disposed of case shall be listed on the cause list. The proceedings can be numbered as Misc. Application depending upon the applicable Rules of the procedure. The Sessions Court shall immediately issue notice to the State Public Prosecutor or the investigating agency calling upon them to state whether any appeal or special leave petition has been preferred before this Court and what is the outcome of the said petition/appeal; (b) If the State Public Prosecutor or the investigating agency reports that the appeal is pending, as soon as the order of this Court confirming or restoring the death sentence is received by the Sessions Court, again, the disposed of case or miscellaneous applications should be listed on the cause list and notice be issued to the State Public Prosecutor or the investigating agency to ascertain whether any review/curative petitions or mercy petitions are pending."

- Ensure that a clear 15-day gap exists between the issuance of an execution warrant and its implementation. Convicts must be informed of their right to legal representation, and legal aid should be provided upon request. *"Copies of the order issuing the warrant and the warrant shall be immediately provided to the convicts, and the Prison authorities must explain the implications thereof to the convicts. If the convict so desires, legal aid be immediately provided to the convicts by the Prison authorities for challenging the warrant."*

The State Government must immediately apply for an Execution Warrant once the death penalty becomes final and enforceable.

Types of cases in which death penalty should be awarded instead of life imprisonment

A three-Judge Bench in *Machhi Singh v. State of Punjab*¹ held that:

Every member of the community owes a debt to the community for this protection. When ingratitude² is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

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

- (i) when the house of the victim is set aflame with the end in view to roast him alive in the house.
- (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
- (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or

¹ (1983) 3 SCC 470.

² Meaning of ingratitude: The state of being ungrateful; ungratefulness; unthankfulness.

a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

- (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.
- (b) In cases of “bride burning” and what are known as “dowry deaths” or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

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

V. Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation¹, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In *Bachan Singh v. State of Punjab*² Court held that:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the ‘crime’.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

¹ Meaning of Provocation: Words or conduct that incite a person to attack another.

² (1980) 2 SCC 684.

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

International Legal Standard: Towards Abolition

The international community increasingly called for States to limit and, ultimately, eliminate use of the death penalty. While capital punishment has not yet been prohibited under international legal law, various United Nations human rights organs and bodies have, on several occasions, reaffirm the growing international consensus in favour of abolition of death penalty.

The corner stone of contemporary human rights law is the *Universal Declaration Of Human Rights* adopted by the General Assembly of the United Nations on 10th December, 1948. The conclusion from article 3 of the universal declaration of human rights is indeed that respect for human life is non-negotiable. The drafters of universal declaration created an original norm right to life but with meaning going far beyond, a mere right not to be deprived of life except with due process. While negotiations were going on for the treaty, the death penalty was viewed virtually unanimously as a necessary evil, one whose existence could not be justified on philosophical or scientific ground.

Observations of Law Commission of India, 1967¹

The 4th Law Commission has made the following recommendations under the chairmanship of Justice J.L. Kapur in Chapter XIV of 35th Report, 1967:

Under topic 56, it has discussed the need for retaining the pardon power. It is a 'prerogative' and an illustration of 'that special pre-eminence' which the head of the State possesses. Its existence and exercise cannot in any way, be construed as interference with judiciary. Secondly, the expression 'mercy' is indicative of the scope of, as well as the justification for the power. Since the evidence placed before it ties down the hands of the Court, it is justifiable to retain the power in the executive.

Under topic 57(a), it has been observed that the principles to guide the executive in exercise of pardon power should be either humanitarian or should enable the respective authorities to take into consideration what the Courts, in the existing state of law, would not be entitled to consider. The respect for public sentiment and safety of the society should also act as the guiding principles. Under topic 57(b), it has been stated that it is not possible to codify and select special features for consideration, being numerous stolen them to codification. The powers relating to grant of pardon are co-related to the sentiments of mercy and cannot be justified for codification. Mr. Gladstone in 1907 opined that it would be neither desirable nor possible to lay down hard and fast rules as to exercise of the royal prerogative of mercy.

Under topic 57(c), the Commission found that the provision requiring the President or the Governor to consult the Supreme Court or the High Court would,

¹ <http://lawcommissionofindia.nic.in/cpds1.pdf>, Accessed on 21-11-2012.

strictly speaking, not be in harmony with the essential nature of the prerogative. Similarly, there can be no reference to a Board of Advisers.

Royal Commission Report

In the year 1949, the Government of United Kingdom appointed a Commission to report upon the various facets of the capital punishment. The Commission submitted its report in September 1953 after extensive research into the questions referred to it and after interviewing experts, visiting jails and examining the merits and demerits of hanging as a method for executing the death sentence. Chapter 13 of the Royal Commission's Report deals with the "methods of execution".

In paragraph 709, the Commission refers to five methods of execution of the death sentence which were then in vogue in the different parts of the world. Electrocution was in vogue in 23 States of U.S.A.; Guillotine in France and Belgium; Hanging in England, Scotland, the Commonwealth countries and 10 States of U.S.A.; and lethal gas in 8 States of U.S.A. Shooting was in vogue in the State of Utah in America which allowed a choice between hanging and shooting. Besides, shooting was used in almost every country as a method of execution of persons sentenced to death for offences against the Military Code. Rejecting Guillotine and shooting as methods for executing the death sentence for the reason that the former produces mutilation and the latter is inefficient, uncertain and unacceptable as a standard method of civil executions.

The Commission observes in paragraph 724 that the requirements of humanity are essentially two : (1) that the preliminaries to the acts of execution should be as quick and as simple as possible, and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension, and (2) that the act of execution should produce immediate unconsciousness passing quickly into death.

The Commission records its final conclusion in paragraph 734 of the Report by saying that after weighing all the factors carefully and bearing in mind that the onus of proof was on the advocates of change, it could not recommend that either electrocution or gas chamber should replace hanging as a method of judicial execution : In the matter of humanity and certainty, the advantage lies with the system of hanging; in regard to one aspect of the requirement of decency the other two methods were preferable; But, according to the Commission, that advantage could not be regarded as enough to turn the scale.

35th Report of the Law Commission

The 35th Report of the Law Commission of India on Capital Punishment, dated September 30, 1967 deals with "Execution of Sentences" in Chapter XV. The Commission observes in paragraph 1097 of the Report that though hanging continued to be the most prevalent method of executing the death sentence, the course of events showed that it was being slowly abandoned. Thus, while, in 1930, 17 States in U.S.A. used to employ that method, only 6 retained it in 1967. Again, while it was in force in Yugoslavia before 1950, it was replaced by the firing squad in that year. In other words, the recommendation of the Commission was that

death sentence should be executed, by the method of hanging prescribed in Section 354(5) of the Criminal Procedure Code [now under section 393(5) of Bharatiya Nagarik Suraksha Sanhita, 2023], since there were no circumstances justifying its substitution by any other method and since, no other method was shown to be more satisfactory.

In February 1978, Dr, Hira Singh, Prison Adviser to the National Institute of Social Defence, submitted his opinion to the Ministry of Home Affairs, Government of India, as follows :

In ancient days the execution of death sentence was often attended by cruel forms of torture and suffering inflicted on the offender. With the passage of time, however, the methods of execution have undergone various changes. The old practices such as beheading, drawing, stoning, impaling, precipitation from a height, etc., have been gradually replaced in all civilised countries by new methods of hanging, electrocution, gas chamber and shooting. These changes have occurred mainly on the premise that death penalty means simply the deprivation of life and as such should be made as quicker and less painful as possible. The old methods were considered inhuman. Dr. Hira Singh. concludes: ' The question of introducing electric chair in place of hanging as a mode of execution may be examined from the administrative as well as humanitarian view-points. It is often argued that death by hanging takes lesser time to execute than the other modes, though it may not be invariably true. In any case electric chair has in no way proved to be more efficient in reducing pain or suffering inflicted on the offender. In hanging the body is liable to be disfigured but in electrocution also the leg is sometimes slightly burnt. Above all electrocution involves much costlier equipment and operational preciseness than hanging. In view of such considerations there seems to be no particular advantage in switching over to the electric chair in the execution of death sentence even if such a system may outwardly look to be more sophisticated.

Idea of Death by Electric Chair in India

Power seldom fails in countries like America, U.S.S.R., and Japan. Even then, the failure of electrical energy supplied by commercial undertakings has been considered in America as an impediment in the use of the electric chair. With frequent failures of electrical power in our country, the electric chair will become an instrument of torture. One can well imagine the consequences of the use of the electric chair in the city of Calcuta or, for the matter of that, in the capital City of Delhi. For technical reasons, even the Supreme Court complex is not spared from frequent load-shedding during working hours. Lawyers, litigants and Judges have now trained themselves to suffer the inconvenience arising from failure of electricity. But, it would be most unfair to expect a prisoner condemned to death to get into the electric chair twice or thrice, for the reason that the electric current failed during the process of electrocution. It is not court's intention to blame anyone for the power crisis because it would seem that it is partly due to natural causes and is not man-made. But facts are facts and facts must be faced.