CONSULTATION PAPER
ON
MODE OF EXECUTION OF DEATH

SENTENCE AND INCIDENTAL MATTERS

BY

LAW COMMISSION OF INDIA

Questionnaire is at the end.

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CHAPTER 1

INTRODUCTION

"State should not punish with vengeance". Emperor Ashoka

Death penalty has been a mode of punishment since time immemorial. The arguments for and against have not changed much over the years. Crime as well as the mode of punishment correlate to the culture and form of civilization from which they emerge. With the march of civilization, the modes of death punishment have witnessed significant humanized changes. However, in India not much has been debated on the issue of mode of execution of death sentence.

The Law Commission of India has taken up the subject *suo moto* due to the technological advances in the field of science, technology, medicine, anaesthetics and since more than three decades have passed by after the 35th Report of the Law Commission on Capital Punishment, 1967 with reference to the mode of executing death penalty. The various modes of execution of death sentence as prevalent at that time in 1967 were studied by the Law Commission. The Commission in Topic 58(c) paragraph 1149, concluded ;

"*We find that there is a considerable body of opinion which would like hanging to be replaced by something more humane and more painless….."*

However, the Commission was not able to arrive at any firm conclusion on this point as explained in Paras 1150 and 1151.

"1150. *The matter is, to a certain extent, one of medical opinion. That a method which is* **certain*, humane, quick and decent*** *should be adopted, is the general view, with which few can quarrel. It is true that the really agonizing part is the anticipation of impending death. But society owes to itself that the agony at the exact point of execution be kept to the minimum. It is, however, difficult to express an opinion positively as to which of the three methods satisfied these tests most, particularly when the two other methods are still untried. We are not, at present, in a position to come to a firm conclusion on this point. Progress in the science of anesthetics and further study of the various methods, as well as the experience gathered in other countries and development and refinement of the existing methods, would perhaps, in future, furnish a firm basis for conclusion on this controversial subject.*

1151. We do not therefore recommend a change in the law on this point. We should, however, state here that we do not subscribe to the view that the substitution of any other method will reduce the deterrent effect of the penalty of death."

Also the Royal Commission in its Report on Capital Punishment 1949-1953 dealt with prevalent modes of execution of death punishment and stated that three conditions should be fulfilled in executing the death sentence (a) it should be as less painful as possible; (b) it should be as quick as possible; and (c) there should be least mutilitation of the body. It observed at pages 256-61 as follows:

> "in carrying out this task the Commission did not confine itself to the four main methods of execution, (lethal gas, shooting, electrocution, guillotine). It persuaded enquiry whether there was any method still untried that would inflict death as painless and certain as hanging but "with greater decency and without the degrading and barbarous association with which hanging is tainted…
>
> The Commission decided for various reasons that if lethal injection were to be constituted as method of judicial execution in the same case…..The question should

be periodically examined especially in light of progress made in the science of anesthetics" (p.261)

It is now accepted that death punishment is qualitatively different from any other punishment in as much as it is irreversible and if an error is committed, there is no way to rectify the error. However, in ***Bachan Singh's*** case (AIR 1982 SC 1325), the constitutional validity of death sentence was upheld by the Constitutional Bench of the Supreme Court of India by majority of 4:1 with Hon'ble Justice P.N. Bhagwati, dissenting.

Nevertheless, the Indian society, being one of the oldest civilizations in the world owes to itself that the agony at the exact point of execution should be kept to the minimum. This is more so when execution is the result of a judicial verdict. The execution of death sentence in India is discussed in Chapter 4 of this paper.

The Law Commission, in pursuance of the observations made in the 35th Report, decided to conduct study of various modes of execution of death sentence and to suggest any reforms if needed in the present system of execution of death sentence in India. The purpose of this Consultation Paper is not whether the death punishment should be abolished or be retained but this is strictly confined to three issues, namely,: *(a) the method of execution of death sentence, (b) the process of elimination of difference in judicial opinion among Judges of the apex Court in passing sentence of death penalty, and (c) the need to provide a right of appeal to the accused to the Supreme Court in death sentence matters.* In this paper, the Commission has referred to the cases decided by the Hon'ble Supreme Court of India, various enactments, the reports of various Commissions, history of various modes of execution, various books, articles, newspaper reports, contemporary developments and concerned web sites on these aspects.

CHAPTER 2

METHODS OF EXECUTION THROUGH AGES

Various modes and methods of inflicting death sentence upon the convict as practiced in different societies are examined in this chapter. This study is not an exhaustive of all the modes of execution but covers some of the important practices followed.

Since Middle Ages death sentence was the common practice throughout the world and was inflicted in the case of conviction for large number of crimes, including petty offenses involving property. In England, during the 18th century, death was the punishment for several specific offences which were about a hundred. The death penalty was executed in various ways. Several methods of execution of death sentences involved torture, burning at the stake, breaking on the wheel, slow strangulation, crushing under elephant's feet, throwing from a cliff, boiling in the oil, stoning to death etc. With the emergence of various principles relating to fair procedure contained in the contribution of several democratic countries and with the strong, growth of human rights movement, such severe death punishments involving torture began to die out in the 18th century. The number of offences punishable by death was also reduced in all leading countries. Also, penalties involving torture disappeared with the idea that punishment by way of death sentence should be swift and humane, whether by guillotine, hanging, the

garotte, or the headman's axe. Some of the important practices of death penalty are as follows[1] :-

(a) BURNING AT THE STAKE

'Burning' dates back to the Christian era. Burning at the stake was a popular death sentence and means of torture, which was used mostly for heretics, witches, and suspicious women. It was in the year 643 AD, an Edict cssued by Pope declared it illegal to burn witches. However, the increased persecution of witches throughout the centuries resulted in millions of women being burned at the stake. The first major witch-hunt occurred in Switzerland in the year 1427 AD. Throughout the 16th and 17th Centuries, witch trials became common throughout Germany, Austria, Switzerland, England, Scotland, and Spain during the Inquisition. Soon after, witch trials began to

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[1] The source of the present description is based on the secondary source of data. The Law Commission owes the origin of present information from the various reports of the studies conducted by various Commissions, e.g. the New York Commission of Inquiry, 1888, Royal Commission on Capital Punishment 1949 - 1953. The reliance is also placed on newspaper reports, articles, books. For more information, please find reference as follows

(1) Scott - Story of Capital Punishment, Oxford University Press (SC Judges Library, classification No.343.253).

(2) The Library of Criminology, Elizabeth Orman Tuttle, London Stevenes,Soursluit, Chicago Querd, Books 1961

(3) Administration of Death Penalty in U.S. International Commission of Jurists, Report of Mission, June 1996

Related websites:

1. http://lastmile.inftykitten.com/intoduction.html.
2. http://worldbook.bigchalk.coml320440.htm
3. http://cehat.org/publications/edo3.html
4. http://www.deathrowbook.com

decline in parts of Europe, and in England and the death penalty for witches was abolished. The last legal execution by burning at the stake took place at end of the Spanish Inquisition in 1834.

(b) THE WHEEL

The wheel as a method of torture and execution could be used in a number of ways. A person could be attached to the outer rim of the wheel and then rolled over sharp spikes, or down a hill, to his death. Also, the wheel could be laid on its side, like a turntable, with the person tied to it. The wheel would turn, and people would take turns beating the victim with iron bars, breaking his bones and eventually causing his death. This method was used throughout Europe, especially during the Middle Ages.

(c) GUILLOTINE

The guillotine became a popular form of execution in France in the year 1789, when Dr. Joseph Guillotine proposed that all criminals be executed by the same method and that torture should be kept to a minimum. Decapitation was thought to be the least painful and most humane method of execution at that time. Guillotine suggested that a decapitation machine be built. Subsequently, the decapitation machine came to be named after him. The machine was first tested on sheep and calves, and then on human corpses. Finally, after many improvements and trials, the blade was perfected, and the first execution by guillotine took place in the year 1792. It was widely used during the French Revolution, where many of the executions were held publicly outside the prison

of Versailles. King Charles I was also executed in the same way in England. The last public execution by guillotine was held in France, in June 1939. The last use of the guillotine came in 1977 in France, and the device has not officially been used since. Though the guillotine is less painful, it is not acceptable today as it is primitive and involves the mutilation of the condemned person. After France was admitted to the European Union, death sentences itself has since been abolished in France.

(d) HANGING AND THE GAROTTE

Hanging was a very common method adopted for execution among the various methods available. The prisoner could simply be hanged with a noose, which could lead to death by fracturing the neck. However, if torture was also intended, there could be methods other than hanging with a noose.

In medieval times, if torture was intended, a person would be drawn and quartered before being hanged. For extremely serious crimes such as high treason, hanging alone was not considered enough. Therefore, a prisoner would be carved into pieces while still alive before being hanged. The Garotte was also a popular method of torture, and was similar to hanging. A mechanical device such as a rack or a gag would be tightened around the person's neck, causing slow strangulation, stretching, and obstruction of blood vessels. A device could also be placed in a prisoner's mouth and kept in place by tying and locking a chain around his or her neck.

Hanging is one of the oldest methods of execution and today it is used in some countries as a form of execution. Delaware, New Hampshire and Washington authorize hanging as a form of execution; depending on the convict's sentencing date he or she may be allowed to choose between hanging or lethal injection. Since 1976, three prisoners have been hanged in the United States. Prior to the execution the prisoner must be weighed. The "drop" must be based on the prisoner's weight, to deliver 1260 foot-pounds of force to the neck. The prisoner's weight in pounds is divided into 1260 to arrive at the drop in feet. The noose is then placed around the convict's neck, behind his or her left ear, which will cause the neck to snap. The trap door then opens, and the convict drops. If properly done, death is caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation. This lengthy measuring process is to assure almost instant death and a minimum of bruising. If careful measuring and planning is not done, strangulation, obstructed blood flow, or beheading often result. The death by hanging however according to most of the medico-jurisprudential writers is result of asphyxia or strangulation and fracture of the neck is an exception (both in judicial as well as suicidal hanging).

(e) HEADMAN'S AXE

This form of execution was quite popular in Germany and England during the 16th and 17th centuries, where decapitation was thought to be the most humane form of capital punishment. An executioner, usually hooded, would chop off the person's head with an axe or sword. The last beheading took place in 1747 in United Kingdom. Later on, and before capital punishment was abolished recently, with a greater interest in humanitarianism, capital punishment became less gruesome than the beheadings and

torture that were commonplace centuries before. Lethal injection and electrocution have become the preferred methods of execution in many countries mostly because these methods appeared to be less offensive to the public and more humane for the prisoner.

(f) FIRING SQUAD

There is no fixed procedure when it comes to execution by firing squad. Usually the convict is tied to the pole, with hands and is blind folded and a cloth patch is put on heart, or is tied to a chair. In most cases, a team of five executioners is used to aim at the convict's heart. In some countries few of the rifles are loaded with blank bullets and the shooters are not told about it so that the true killer is unknown. Several countries like the Russia, eastern European countries like China, Thailand use this method. It is significant to note that shooting by firing squad is also permitted in India when a death sentence is given by court marshal (This is discussed in detail subsequently). In some states in United States like Utah and Oklahoma, choice is given to the convict whether he should be shot to death by firing squad or by lethal injection. Gary Gilmore in 1977, and John Taylor in 1996 were executed by firing squad in Utah,

It is significant to note that the leaders of the third Irish of Germany, who were given death punishment by hanging at the Nuremberg trials, asked for execution to death punishment by firing squad as the former was degrading and they wanted a military death. This reflects that death by hanging is not a dignified method of execution.

(g) GAS CHAMBER

In an execution using lethal gas, the prisoner is restrained and sealed in an airtight chamber. When given the signal the executioner opens a valve, allowing

hydrochloric acid to flow into a pan. Upon another signal, either potassium cyanide or sodium cyanide crystals are dropped mechanically into the acid, producing hydrocyanic gas. The hydrocyanic gas destroys the body's ability to process blood hemoglobin, and unconsciousness can occur within a few seconds if the prisoner takes a deep breath. However, if he or she holds their breath death can take much longer, and the prisoner usually goes into wild convulsions. Death usually occurs within six to 18 minutes. After the pronouncement of death the chamber is evacuated through carbon and neutralizing filters. Crews wearing gas masks decontaminate the body with bleach solution, and it is out gassed before being released. If this process was not done, the undertaker or anyone handling the body would be killed. Nevada was the first state to sanction the use of the gas chamber, and the first execution by lethal gas took place in February, 1924. Since then it has been a means of carrying out the death sentence 31 times. Five States in the U.S.A. authorize the use of the gas chamber as an alternative to lethal injection, viz. Arizona, California, Maryland, Missouri, and Wyoming. In most cases the prisoner is allowed to choose the method of execution, depending on his or her date of sentencing. Eleven people have been executed by lethal gas in the United States since 1976. This method however is expensive and cumbersome. It is also a reminder of hundreds of thousands of Jews who were killed in gas chamber by the Nazi Germany.

(h) ELECTROCUTION

In a typical execution using the electric chair, a prisoner is strapped to a specially built chair, their head and body shaved to provide better contact with the moistened copper electrodes that the executioner attaches. Usually three or more executioners push buttons, but only one is connected to the actual electrical source so

the real executioner is not known. The jolt varies in power from State to State, and is also determined by the convict's body weight. The first jolt is followed by several more in a lower voltage. In Georgia, executioners apply 2,000 volts for four seconds, 1,000 volts for the next seven seconds and then 208 volts for two minutes. Electrocution produces visibly destructive effects on the body, as the internal organs are burned. The prisoner usually leaps forward against the restraints when the switch is turned on. The body changes color, swells, and may even catch fire. The prisoner may also defecate, urinate, and vomit blood. The first electric chair designed for an execution was created by George Westinghouse at the turn of the century. Westinghouse was propositioned by the New York City Correctional Institution to design an electric chair, because many felt that the present form of execution, hanging, had become too inhumane and out-dated. Westinghouse told the correctional institution that the chair's power source was so deadly it would only take five seconds of 1,000 volts to cause death. However, the first man executed did not die after five seconds, but instead took four minutes of a steady stream of power to finally be pronounced dead. During these four minutes the convict started to smoke, both the hair on his arms and head ignited in flames, and blood spilled from every orifice in his face. After this display, the electric chair was considered a failure. Today the electric chair is modernized and is used in eleven States of U.S.A. Arkansas, Kentucky, Ohio, Oklahoma, South Carolina, Tennessee, and Virginia States of U.S.A. authorize both lethal injection and electrocution, allowing some inmates to choose the method. Alabama, Florida, Georgia, and Nebraska, however, use electrocution as their sole means of execution. Since 1976, 144 people have been executed by electric chair.

(i) LETHAL INJECTION

Death by lethal injection involves the continuous intravenous injection of a lethal quantity of three different drugs. The prisoner is secured on a gurney with lined ankle and wrist restraints. A cardiac monitor and a stethoscope are attached, and two saline intravenous lines are started, one in each arm. The inmate is then covered with a sheet. The saline intravenous lines are turned off, and Sodium Thiopental is injected, causing the inmate to fall into a deep sleep. The second chemical agent, Pancuronium Bromide, a muscle relaxer, follows. This causes the inmate to stop breathing due to paralyses of the diaphragm and lungs. Finally, Potassium Chloride is injected, stopping the heart.

Since 1976, many prisoners have been executed by lethal injection in the United States. Lethal injection is now the most common method of execution in the United States with all of the 66 executions carried out during 2001 being by this method. Of the 749 executions in America upto 2000, 586 have been carried out by lethal injection, including those of seven women. China also reported 8 executions by injection during 2000.

Lethal injection was first considered as a means of execution in 1888 when New York's J. Mount Bleyer MD put it forward in an article in the Medico-Legal Journal suggesting that the intra-venous injection of six grains of Morphine should be used for execution of death sentence. The idea did not catch on and New York introduced the electric chair instead (Based on the findings of the New York Commission of Inquiry 1888). It was again put forward in 1977 by Dr. Stanley Deutsch, who at the time chaired the Anaesthesiology Department of Oklahoma University Medical School. In response to a call by an Oklahoma State senator Bill Dawson for a cheaper alternative to repairing the State's derelict electric chair, Deutsch described a way to administer drugs through

an intravenous drip so as to cause death rapidly and without pain. Deutsch wrote to the Senator Bill Dawson "Having been anaesthetised on several occasions with ultra short-acting barbiturates and having administered these drugs for approximately 20 years, I can assure you that this is a rapid, pleasant way of producing unconsciousness". And Oklahoma thus became the first State in the U.S.A. to legislate for it in 1977. Texas introduced similar legislation later in the same year to replace its electric chair and carried out the first execution by the method of lethal injection on December 7th 1982 when Charles Brooks was put to death for the murder. It will be relevant here to mention the observation of this execution procedure. The procedure began at 12.07 a.m. He was certified dead at 12.16 a.m. There was no apparent problem and Brooks seemed to die quite easily. At first he raised his head, clenched his fist and seemed to yawn or gasp before passing into unconsciousness. 36 American States now use lethal injection either as their sole method or as an option to one of the traditional methods.

These are *Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.*

The Philippines has also decided to use lethal injection for future executions to replace the electric chair and carried out its first execution since 1976 when Leo Echegaray was put to death for child rape on February 4, 1999 and 6 more men have been executed by this method by the end of 2000. Guatemala has also switched to lethal injection after a botched firing squad execution in 1996 and carried out three executions since then. China also has been experimenting with lethal injection although most executions continue to be by shooting. The present trend seems to be that of favoring execution by lethal injection

CHAPTER 3

FEDERAL EXECUTIONS AND TYPICAL EXECUTION PROCEDURE IN DIFFERENT STATES IN THE U.S.A.

THE FEDERAL EXECUTION

The American Federal Bureau of Prisons has lethal injection facility at the federal prison in Terre Haute, Indiana. The death house is located inside a non-descript brick building outside the main penitentiary compound, and consists of five viewing rooms surrounding the execution chamber. The chamber is a stark, hospital-like room lined with green tiles and bare except for the large gurney equipped with five Velcro restraints and a sink in one corner. The intravenous tubes pass through a small opening in the wall and into the executioner's room nearby. All but one room, the executioner's, are equipped with large two-way windows with curtains. The executioner's room is fitted with one-way glass. During an execution, prison officials will maintain an open telephone line to the Justice Department in Washington as the President of the U.S.A. has sole authority to grant last-minute clemency. Overhead, a camera linked to a monitor inside the executioner's room will watch the process to note whether the prisoner suffers any pain during the procedure. On the June 11th 2001 Timothy McVeigh, the Oklahoma City bomber became the first person to be executed under Federal law since 1963. He had placed a bomb outside the Alfred P Murrah Federal Building, killing 168 people and injuring 850. The intravenous drip that delivered the lethal chemicals went to a catheter in McVeigh's right leg. The first drug was administered at 8.10 a.m., with the second being given at 8.11 and the final one at 8.13 and he was pronounced dead at 8.14 a.m. The whole process took only four minutes. On the June 19th Juan Raul Garza, a

Mexican-American drug lord, who was also found of murder, was executed on the same gurney. The American military has also moved to lethal injection (from hanging) and now has a facility in the basement of the military prison at Ft. Leavenworth, Kansas which is currently housing six or seven inmates.

EXECUTION IN DIFFERENT STATES

Lethal injection protocols (which are confidential in nature) vary from State to State. Typically the prisoner is strapped to a gurney (which is a wheeled hospital style trolley bed) or a fixed execution table rather like an operating theatre table by leather or webbing straps over the body and legs. Their bare arms are strapped to boards projecting from the sides of the gurney. Trained technicians then insert a catheter into a vein in each arm, a process that sounds much simpler than it often is. Once the catheters are in place tubes carrying saline solution are connected to the catheter ends and the prisoner is either wheeled into the execution chamber or the curtains surrounding it are drawn back to allow the witnesses to see the procedure. When the condemned person has made any final statement the prison warden gives the signal for the execution to begin and the technician(s), hidden from view behind a two way mirror begins to manually inject the three chemicals comprising typically *15 – 50 cc of Sodium thiopental, 15 - 50 cc of Pavulon (the generic name for Pancuronium bromide) and 15 - 50 cc of Potassium chloride.* There is a short interval between each chemical during which saline solution is injected to clean the vein and prevent any chemical reaction which could block it.

Typically the actual injections will take from three to five minutes to complete. Sodium thiopental is a short acting barbiturate which causes unconsciousness quite quickly. Pavulon is a muscle relaxant that paralyses the diaphragm and thus arrests

breathing whilst Potassium chloride finishes the job by causing cardiac arrest. In most cases the prisoner is unconscious in about a minute after the Sodium thiopental has been injected and is dead in around eight minutes, with no obvious signs of physical suffering. In some States, a fully automated lethal injection machine is used that runs off a 12 volt battery. It injects the chemicals in the right order and amount once the catheters are in place. The machine has six syringes activated by mechanical plungers. Three syringes hold the lethal drugs; the other three contain harmless saline solution. Two buttons control the machine, one for the lethal syringes and one for the identical looking harmless ones. The two executioners each press a button and the syringes release the drugs into the vein. The condemned prisoner thus is put to death while in sleep by this swift and painless method.

CHAPTER 4

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 Procedure1973 i.e. hanging by neck till death. It is also provided under The Air Force Act, 1950, The Army Act 1950 and The Navy Act 1957[2] that the execution has to be carried out either by hanging by neck till death or by being shot to death (as has been explained in detail herein below).

[2] Chapter VI of The Air Force Act, 1950 in 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 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

A. Code of Criminal Procedure, 1973, and the Prison Manual

Section 368(1) of the Code of Criminal Procedure, 1898 provided for hanging by neck till death. This has not been amended by the Code of Criminal Procedure, 1973. Section 354(5) reads as under:-

> *"When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead."*

The execution of the death penalty in India, under the Code of Criminal Procedure, is thus carried out with hanging by neck till death during the last over hundred year. The execution of the death penalty is carried out in accordance with section 354(5) of the Code of the Criminal Procedure, 1973, and Jail Manuals of the respective States. For example, Chapter XXXI, Jail Manual of Punjab and Haryana provides for the various steps leading to the execution of the death sentence:-

"**Paragraph 847(1)** *Every prisoner under the sentence of the death shall immediately on his arrival in the prison after sentence, be searched by, or by order of the Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession*."

"**Paragraph 847(2)** *Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."*

After such admission of the prisoner in the jail, the Deputy Superintendent is required to examine the cell and has to satisfy himself that it is secure and has no article which can be used as a weapon or instrument with which the prisoner can commit

suicide. The said Deputy Superintendent also has to ensure that there is nothing in the cell which in his opinion is inexpedient to permit its remaining in such cell.

Paragraph 848 Cell to be examined - *Every cell in which any convict who is under sentence of death, is at any time to be confined shall, before such convict is placed in it, be examined by the Deputy Superintendent, or other officer appointed in that behalf, who shall satisfy himself that it is secure and contains no article of any kind which the prisoner could by any possibility use as a weapon of offence or as an instrument with which to commit suicide, or which it is, in the opinion of the Superintendent, inexpedient to permit to remain in such cell.'*

The Manual also describes the various restrictions pertaining to the use of the apparels etc. Paragraph 851 provides that the condemned prisoner shall not be provided Munj mat or bhabbar mat. This clause is intended to avoid presence of any substance which can be used by the prisoner as instrument for committing suicide.

"Paragraph 851 *Munj mat not to be issued - Prison clothing, bedding and necessaries shall be issued to condemned as to other convicts, with the exception of the Munj or bhabbar mat which shall be withheld and an extra blanket substituted."*

The para 854 provides that such prisoner shall be under the constant surveillance of the guard, and further that he should not be allowed to meet or communicate with any person except those persons authorized by the Superintendent. Paragraph 855 provides for raising of the alarm in case the prisoner tries to commit suicide.

Paragraph 855 : Management of keys, Conditions under which the door may be opened

(1) *The keys of the cell in which a condemned prisoner is confined shall be kept by the head warder on duty who, on hearing the alarm, shall proceed to such cell which, in case of emergency such as attempt by the prisoner to commit suicide, he shall enter and with the help of the sentry fregrate it.*

(2) *At no other time shall the door of the cell in which a condemned prisoner is confined, be opened without first handcuffing the prisoner and so securing him against the possibility of using violence or, if he declines to be handcuffed, unless at least three members of the establishment are present.*

(3) *The locks in use in a condemned cell shall be such as cannot be opened by any keys in use in the jail, other than those properly belonging to them.*

The condemned prisoner and the cell in which he is residing are required to be searched twice a day by Deputy Superintendent. The paragraph also provides for maintenance of a journal of such searches and results thereof.

Paragraph 858 Condemned prisoners to be searched twice daily - *Morning and evening daily, the Deputy Superintendent or, under his directions, the Assistant Superintendent, shall carefully search every condemned prisoner and the cell he occupies, with his own hands and make a note of his having done so and of the result in his Journal.*

Paragraph 859 casts duty on Deputy Superintendent and other officers to examine the food given to such condemned prisoner. It is enunciated that the ordinary diet of a labouring convict should be provided to the condemned prisoner.

Para 859 - ***Diet. Precautions to be taken*** - *(1) A prisoner under sentence of death shall be allowed the ordinary diet of a labouring convict.*

(2) All food intended for consumption by a condemned prisoners shall be examined by the Deputy Superintendent, Assistant Superintendent or Medical Subordinate, who may withhold any article he regards with suspicion and report the circumstances to the Superintendent. The food shall be delivered to the prisoner in the presence of one or other of these officers.

The provisions regarding the execution of a pregnant woman, exceptions in cases of female, allowing the prisoner to make use of books etc. are elaborately discussed in Paragraphs 859 to 864. The elaborate description of the rope to be used for the purpose of hanging, its testing etc. is provided in Paragraph 866.

Paragraph 866 Description and testing of rope. - (1) *A Manilla rope one inch in diameter shall be used for executions. At least two such ropes in serviceable condition shall be maintained at every jail where executions are liable to take place.*

Note - The rope should be 19 feet in length, well twisted, and fully stretched. It should be of equal thickness, capable of passing readily through the noose-ring and sufficiently strong to bear a strain of 280 lbs. with a 7 foot drop.

(2) The ropes shall be tested in the presence of Superintendent, at least a week before the date fixed for the execution and if they fail to pass the test, others shall be obtained at once and tested when received.

(3) Ropes that have been tested shall be locked up in a place of safety.

(4) On the evening before the execution is to take place, the gallows and rope should be examined to ascertain that they have received no injury since being tested.

Note - The rope shall be tested by attaching to one end a sack of sand or clay equal to one and a half times the weight of the prisoner to be executed and dropping this weight the distance of the drop to be given to the prisoner.

The above provision provides for the testing of the rope to be used for the execution at two occasions firstly at least before a week form the date of the execution and secondly on the evening before such execution is to take place. It provides for the maintaining at least two Manilla ropes of one inch diameter in serviceable condition. The method for testing such rope is by attaching the sack of clay or sand to one end which is equivalent to one and half times of the weight of such prisoner. The length of the drop to be kept same as required for the condemned prisoner.

The actual execution process with such background of preparations etc. made has to be carried out in accordance with Paragraphs 868 to 873. It is briefly as follows:-

1. Officers to present at the execution: the officers required to be present at the execution are, Superintendent and Medical officer of the jail and Magistrate of the District. (Paragraph 867)
2. The execution is to be carried out by the public executioner wherever service of such executioner are available. If such services are not available then some trustworthy individual who is locally trained is to be assigned this job. The duty is entrusted to the Superintendent to satisfy himself that the person so assigned is competent to fulfill the job.
3. Regulation of the drop: it is most important factor in deciding the regulation of the death sentence to be executed. The slightest error in deciding the length of the drop may lead to the lingering death of the condemned man. The drop is regulated according to the height, weight and physique of the

prisoner. The Superintendent may also take the advice of the Medical Officer in this regard. Paragraph 871 provides for the comparative chart for general guidance of the Superintendent as follows:-

Paragraph* 871. *Regulation of the "drop" - *The following scale of drop proportioned to the weight of the prisoner, is given for general guidance, the Superintendent must use his discretion and be guided by the advice of the Medical Officer and the physical condition of the prisoner :-*

For a prisoner under 100 lbs weight 7

For a prisoner under 120 lbs weight 6.

For a prisoner under 140 lbs weight 5- 1/2.

For a prisoner under 160 lbs weight 5.

Note: The last figures namely 7, 6, 5-1/2, 5 denote the height of the drop in terms of feet.

Note:- The "drop" is the length of the rope from a point on the rope opposite the angle of the lower jaw of the criminal as he stands on the scaffold, to the point where the rope is embraced in the noose after allowing for the constriction of the neck that takes place in hanging.

Time of the execution: The time of the execution is provided in the early hours of the day. However the time varies as per the chart in the Paragraph 872. ***Paragraph* 872. Time of executions*. Procedure to be adopted - (1)*** *Executions shall take place at the following hours:-*

November to February	*8 AM*
March, April, September and October	*7 AM*
May to August	*6 AM*

4. The Superintendent, Deputy Superintendent will reach to the cell of the condemned prisoner and will ensure that the identity of such condemned prisoner. The warrant of death will be read over to him and the signatures required on the various documents such as will etc. may be placed by the prisoner in the presence of the Superintendent. Then the Superintendent will move towards the scaffold. In the presence of the Deputy Superintendent the convict will be pinioned behind his back and his legs irons (if any) will be struck off.
5. Marching towards death: The condemned prisoner shall be marched to the scaffold under the charge of the Deputy Superintendent. He will be guarded by Head warder and six warders, two proceeding in front, two behind and one holding either arm.
6. After reaching at the scaffold {where the Superintendent, District Magistrate, Medical Officer already at their respective places} the warrant should be read in the vernacular to the convict and he be made over to the executioner.
7. The warders holding the arm of the convict also shall also mount the scaffold with the convict and place him under the direct beam to which rope is attached.
8. The executioner shall next strap his legs tightly together, place the cap over his head and face and adjust the rope tightly around his neck. The noose should be placed one and half inches to the right or left of the middle line and free from the flap of the cap.

9. The warders holding the condemned man's hand to withdraw at that time and at the signal from the Superintendent the executioner shall draw the bolt.
10. The body of such condemned prisoner should remain suspended half an hour and shall not be taken down till the medical officer declares the life extinct. The Superintendent is required to return the warrant with the endorsement to the effect that the sentence has been carried out.

Executions in Accordance with Army Act, Air Force Act and Navy Act

The Army Act and Air Force Act also provide for the execution of the death sentence. The procedure of execution of death sentence are though not explained in detail but the relevant provisions as has been mentioned in this consultation paper are important from the view of provisions pertaining to the confirmation and revision petition too. The various provisions under these Acts can be stated here as under,

The Air Force Act, 1950

The Air Force Act, 1950 also provides for the awarding of the death sentence and its executions relating to some offences provided there under[3] explained in detail.

The Death Sentence as provided under The Air Force Act, 1950 will be relevant for the purpose of studying the execution of the death penalty awarded according to the provisions of the Act. Section 34 of the Act provides for the various offences contemplated for which the death penalty can be awarded. It provides as,

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

This section empowers the court martial to award the death sentence for the offences mentioned in section 34 (a) to (o) of The Air Force Act, 1950. These punishments however are subject to provisions as enunciated in Chapter XII which

[3] Chapter VI of The Air Force Act, 1950 in Section 34 provides for the offences in relation to the enemy and punishable with death, Section 37 is on mutiny and provides for the infliction of death sentence in case the accused is convicted. Chapter VII provides for the various punishments and the competent court-martials to pass it, section 73 provides for the punishments awardable by Court martial. Chapter XII provides for the Confirmation and Revision provisions. Chapter XIII provides for the Execution of Sentences, section 163 deals with the form of the sentence of Death.

contains procedure for the Confirmation and Revision provisions. The provision in Chapter XIII provide for the Execution of sentences.

SECTION 163 provides for the **form of the sentence of death** as:-

"*In awarding a sentence of death, a court-martial shall, in its discretion, direct that the offender shall suffer death by being hanged by the neck until he be dead or shall suffer death by being shot to death"*.

This provides for the discretion of the Court Martial to either provide for the execution of the death sentence by hanging or by being shot to death. This section provides for the procedure and method in which death sentence is to be carried out in accordance with the provisions under the Act. It is important to note that The Air Force Act, 1950 provides for the execution of the death by being "shot to death." This method though not being prescribed under the Code of Criminal Procedure, is provided in The Air Force Act, 1950 for the execution of the Death sentence. This means that the execution procedure in India also permits the execution of the Death sentence up to certain extent by another method namely by being shot to death. This is with the objective to provide for the easy simple method of the execution in case of the convicted offender of the offences mentioned in the Act[4].

It is worth mentioning that unless the punishment is confirmed by the concerned authorities under the Act[5] convict will not be executed. It provides for the findings and the order to be confirmed by the Central Government or any officer empowered by the same in this behalf[6]. This provides for the mandatory review of the all the decisions of the Court Martial by the central government. This enables the Central Government to scrutinize the irregularity pertaining to the procedure or the finding of the Court Martial.

[4] Section 34 (a) to (o) of The Air Force Act, 1950.
[5] Chapter XII of The Air Force Act, 1950.
[6] Section 153 of The Air Force Act, 1950

The Army Act, 1950, The Navy Act 1957 also provide for the similar provisions as in The Air Force Act, 1950. The provisions that are similar in nature to that of in The Air Force Act, 1950 also provide for the option of the execution of the death penalty by being shot at death[7].

After referring to these relevant provisions in these Acts inference can be drawn that the shooting as one of the method provided for execution of the death penalty under the Act aims to make it simple and easily executed with the availabilities of the weapons and equipments in these forces. The form of the shooting a condemned man necessarily involves less agony as that in the case of the hanging where there is procedure as to weighting, measuring of the height, etc. in order to determine the length of the drop specific restrictions are also put as to wearing certain kinds of apparel, etc.

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

[7] The provisions relating to awarding the Death penalty in The Army Act, 1950 are enunciated in Chapter VI Section 34 (a) to (l) relates to offences in relation to the enemy and punishable with death, Section 37 deals with Mutiny and provides for the infliction of death sentence in case the accused is convicted. Chapter VII pertains to Punishments awardable by Court Martial, Chapter XII is on Confirmation and Revision, Chapter XIII is on Execution of Sentences, Section 166 deals with form of Sentence of Death. Section 147 of The Navy Act 1957 provides for the Form of Death Sentence.

CHAPTER 5

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.
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 with in 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.

In light of the above safeguards and views, it is important to note here the view taken by Justice Bhagwati (in dissenting Judgment) in **Bachan Singh** v. **State of Punjab** (1982) 3 SCC 25). The said view is as follows:-

" ….29. The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of

execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan (Vide David Pannick on Judicial Review of Death Penalty, p. 73), the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security prison in the United States of America, describes the hanging process with brutal frankness in lurid details :

> The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor

> while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness-room. The prisoner remains dangling from the end of the rope from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heartbeat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe.

If the drop is too short, there will be a slow and agonising death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote :

> The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer.... Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia.

These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it

may be regarded by some as more humane than electrocution or application of lethal gas."

These observations of Bhagwati, J., are clearly in light of the fact that most of the developed as well as developing countries have replaced the execution by hanging by the intravenous lethal injection or by shooting. The description of these kinds of the double executions prove it that the death penalty by hanging involves immense pain and suffering. It is with these views and the observations made in the various execution by the lethal injection that the lethal injection is the most acceptable and humane method of executing of the death sentence. This mode involves less pain and suffering to the convict undergoing the death sentence. The death as result of the hanging in the most of the cases is because of the asphyxia or strangulation which causes the lingering and painful death of the condemned person. We may here again mention the extracts from justice Bhagwati's (supra) judgment:

"30. If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilized society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong-doer. That is not a permissible penological goal."

It is important to state here that the Law Commission of India is aware that the views expressed by the learned judge in the above mentioned case are not a result of any special bias as is clear from what is stated in the Para 38 of the judgment:

> "I may make it clear that the question to which I am addressing myself is only in regard to the proportionality of death sentence to the offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State."

It is also important to mention here the viewpoint adopted by the Supreme Court in the case of Deena v. Union of India, 1983 (4) S.C.C. 645 with regard to the lethal injection based on the information and practice of the lethal injection prevalent more than two decades ago. It was observed as follows,

> "76. What remains now to consider is the system of lethal injection. The Royal Commission has discussed that method in paragraphs 735 to 749 of its Report. Lethal injection is by and large an untried method. But that is not its most serious defect. The injection is required to be administered intravenously, which is a delicate and skilled operation. The Prison Medical Officers who were interviewed by the Royal Commission, doubted whether the system of lethal injection was more humane than hanging (see paragraph 739 of the Report). The British Medical Association told the Commission that no medical practitioner should be asked to take part in bringing about the death of a convicted murderer and that the Association would be most strongly opposed to any proposal to introduce a method of execution which would require the services of a medical practitioner, either in carrying out the actual process of killing or in instructing others in the technique of that process. The Commission expressed its conclusion in paragraph 749 by saying that it could not recommend that, in the

present circumstances, lethal injection should be substituted for hanging since they were not satisfied that executions carried out by the administration of lethal injections would bring about death more quickly, painlessly and decently in all cases. The Commission, however, recommended, unanimously and emphatically, that the question should be periodically examined, specially in the light of the progress made in the science of anesthetics.[8]"

This was also, as mentioned earlier, the opinion of the Law Commission of India expressed in its 35th Report of 1967.

In light of these observations it is important to note that administering of lethal injection is not regarded as the practice of medicine and most of the states in the U.S.A. are being able overcome this issue. One of the solution to this problem as has been adopted is that of training persons having the knowledge of the medicine and related field specifically for this purpose, and to be designated by the appropriate authority in this behalf (similar practice adopted in various States of U.S.A. e.g. New Jersey, Montana, Idaho etc.).

New Jersey

Doctors are however, excluded in the New Jersey statute from administering the lethal dose. The statute provides that the Commissioner of Department of Corrections, " shall designate persons who are qualified to administer injections and who are familiar with medical procedure other than licensed physician ……. To assist in carrying out of executions, but the procedure and equipments shall be designed to ensure that the identity of the person actually inflicting the lethal substance is unknown even to the person himself…….. N.J. Statute Ann.# 2C; 49-2

Montana

In Montana doctors are not prohibited from carrying out executions according to the statute, "An execution carried out by lethal injection must be performed by person selected by warden and trained to administer the injection. The person administering

[8] .This issue from Law Commission's 35th Report On Capital Punishment 1965 has been already been dealt in the introduction to this report.

the injection need not be physician, registered nurse, or licensed practical nurse or registered under the laws of this or any other state…..

Idaho

In Idaho State prescribes that any infliction of punishment of death by administration of the required lethal substance or substances in the manner required by this section should not be construed to be practice of medicine.

It may be mentioned here that in Dena's case (supra) the Supreme Court upheld the constitutional validity of Section 354(5) of Code of Criminal Procedure of 1973 for carrying out of death sentence by hanging by neck till he is dead as the best available method in India to electric chair, shooting or lethal injection. As mentioned earlier in the Punjab and Haryana Jail Manual, the procedure of hanging starts a day earlier as the condemned person is weighed. Furthermore, his hands and legs are tied and the black mask is put on his head before he is hanged. This causes further punishment although the judgment held that no further agony should be caused. It may be noted that hands and legs are tied and the mask is kept not for the benefit of the condemned person but people who are present in carrying out the death punishment by hanging cannot bear the last sight of restlessness of the condemned person. Furthermore, because many times tongue and eyes are protrude and that is why black mask is placed on his head. As the person is kept hanging and as there is no provision for postmortem, it is not known whether death was caused by painful strangulation or instantaneously by breaking of the spinal cord.

It may also be mentioned that the Supreme Court observed that method of shooting to death was practiced in dictatorship. But this is not so. The Army, Navy and Air Force Acts in India give discretion that Court Marshal tribunal that the condemned person be hanged to death or are being shot to death, as mentioned earlier. It may be further noticed that since hanging has been given up in several states in the United

States of America and has been substituted by electrocution, or lethal injection and in thirty four States the execution is carried by lethal injection. These methods being more civilized have been adopted and hanging has been abolished by most of these states in the U.S.A

There is also significant increase in the number of countries those who have adopted the method of execution by lethal injection and today thirty five States use this method.

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.

death		
6. Most of the time may involve enormous pain	6. Pain may hardly be involved.	6.Pain only as 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.

CHAPTER 6

RIGHT OF APPEAL TO THE APEX COURT IN CASES WHERE DEATH SENETENCE HAS BEEN AFFIRMED BY THE HIGH COURTS AND THE PROCESS IN APEX COURT RELATING TO PASSING OF DEATH SENTENCE

After examining this issue what remains to be examined is the process of the confirming the death penalty.

As has been provided in ECOSOC resolution as to safeguard No. 6 as,

" Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction and steps should be taken to ensure that such appeals shall become mandatory"

The similar view has also been expressed by Justice Bhagwati, in Para 82 in Bachan Singh v. State of Punjab (supra) of dissenting judgment as,

"82. Before I part with this topic I may point out that the only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting en banc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any

curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and therefore, from a practical point of view death penalty would be almost non-existent. But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformative and rehabilitative therapy, he can never be claimed for the society, then he may be awarded death penalty. If this test is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands today."

The Law Commission is quite aware in difficulties of formulating standard guidelines for channelizing the discretions of the courts as observed by Mr. Justice Harlan in McGautha Vs. California (402 US 183) at Page 3.

"Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by... history... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

Justice Bhagwati in *Bachan Singh case* (supra) has made these observations pertinent to the arbitrariness involved in awarding the death sentence. He observes as follows:-

> "70. Now this conclusion reached by me is not based merely on theoretical or a priori considerations. On an analysis of decision given over a period of years we find that in fact there is no uniform pattern of judicial behaviour in the imposition of death penalty and the judicial practice does not disclose any coherent guidelines for the award of capital punishment. The judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is apparent from a study of the judicial decisions that some judges are readily and regularly inclined to sustain death sentences, other are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of capital punishment. If a case comes before one Bench consisting of Judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another Bench consisting of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment. The former would find and I say this not in any derogatory or disparaging sense, but as a consequence of psychological and attitudinal factors operating on the minds of the Judges constituting the Bench - 'special reasons' in the case to justify award of death penalty while the latter would reject any such reasons as special reasons. It is also quite possible that one Bench may, having

regard to its perceptions, think that there are special reasons in the case for which death penalty should be awarded while another Bench may bona fide and conscientiously take a different view and hold that there are no special reasons and that only life sentence should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong, because the exercise of discretion in a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude and approach of the judges constituting the Bench, their value system, the individual tone of their mind, the color of their experience and the character and variety of their interests and their predispositions. This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented Bench structure of our courts where Benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, some times before another sometimes before a third and so on. Professor Blackshield has in his article on "Capital Punishment in India" published in Volume 21 of the Journal of the Indian Law Institute (At pp. 137-226 (Issue of April-June, 1979)) pointed out how the practice of Bench formation contributes to arbitrariness in the imposition of death penalty. It is well known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges on Benches which hear capital punishment cases has actually decreased. Most cases are now heard by two-Judge Benches. Professor Blackshield has abstracted 70 cases in which the Supreme Court had to choose between life and death while sentencing an accused for the offence of murder and analysing these 70 cases he has pointed out that during the period April 28, 1972 to March 8, 1976 only 11 Judges of the

Supreme Court participated in 10 per cent or more of the cases. He has listed these 11 Judges in an ascending order of leniency based on the proportion for each Judge of plus votes (i.e. votes for the death sentence) to total votes and pointed out that these statistics show how the judicial response to the question of life and death varies from judge to judge. It is significant to note that out of 70 cases analysed by Professor Blackshield, 37 related to the period subsequent to the coming into force of Section 354, sub-section (3) of the Code of Criminal Procedure, 1973. If a similar exercise is performed with reference to cases decided by the Supreme Court after March 8, 1976, that being the date up to which the survey carried out by Professor Blackshield was limited, the analysis will reveal the same pattern of incoherence and arbitrariness, the decision to kill or not to kill being guided to a large extent by the composition of the Bench. Take for example Rajendra Prasad case ((1979) 3 SCC 646) decided on February 9, 1979. In this case, the death sentence imposed on Rajendra Prasad was commuted to life imprisonment by a majority consisting of Krishna Iyer, J. and Desai, J., A.P. Sen, J. dissented and was of the view that the death sentence should be confirmed. Similarly in one of the cases before us, namely, Bachan Singh v. State of Punjab ((1979) 3 SCC 727) when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasam, J. was definitely of the view that the majority decision in Rajendra Prasad case ((1979) 3 SCC 646) was wrong and that is why he referred that case to the Constitution Bench. So also in Dalbir Singh v. State of Punjab ((1979) 3 SCC 745), the majority consisting of Krishna Iyer, J. and Desai, J. took the view that the death sentence imposed on Dalbir Singh should be commuted to life imprisonment while A.P. Sen, J. struck to the original view taken by him in Rajendra Prasad case ((1979) 3 SCC 646) and was inclined to confirm the death sentence. It will thus be seen that the

exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the Judges constituting the Bench.

71. The most striking example of freakishness in imposition of death penalty is provided by a recent case (Harbans Singh v. State of U.P., (1982) 2 SCC 101), which involved three accused, namely, Jeeta Singh, Kashmira Singh and Harbans Singh. These three persons were sentenced to death by the Allahabad High Court by a judgment and order dated October 20, 1975 for playing an equal part in jointly murdering a family of four persons. Each of these three persons preferred a separate petition in the Supreme Court for special leave to appeal against the common judgment sentencing them all to death penalty. The special leave petition of Jeeta Singh came up for heating before a Bench consisting of Chandrachud, J. (as he then was), Krishna Iyer, J. and N.L. Untwalia, J. and it was dismissed on April 15, 1976. Then came the special leave petition preferred by Kashmira Singh from jail and this petition was placed for hearing before another Bench consisting of Fazal Ali, J. and myself. We granted leave to Kashmira Singh limited to the question of sentence and by an Order dated April 10, 1977 we allowed his appeal and commuted his sentence of death into one of imprisonment for life. The result was that while Kashmira Singh's death sentence was commuted to life imprisonment by one Bench, the death sentence imposed on Jeeta Singh was confirmed by another Bench and he was executed on October 6, 1981, though both had played equal part in the murder of the family and there was nothing to distinguish the case of one from that of the other. The special leave petition of Harbans Singh then came up for hearing and this time, it was still another Bench which heard his special leave petition. The Bench

consisted of Sarkaria and Shinghal, JJ. and they rejected the special leave petition of Harbans Singh on October 16, 1978. Harbans Singh applied for review of this decision, but the review petition was dismissed by Sarkaria, J. and A.P. Sen, J. on May 9, 1980. It appears that though the Registry of this Court had mentioned in its Office Report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the Court specifically when the special leave petition of Harbans Singh and his review petition were dismissed. Now since his special leave petition as also his review petition were dismissed by this Court, Harbans Singh would have been executed on October 6, 1981 along with Jeeta Singh, but fortunately for him he filed a writ petition in this Court and on that writ petition, the Court passed an Order staying the execution of his death sentence. When this writ petition came up for hearing before a still another Bench consisting of Chandrachud, C.J., Desai and A.N. Sen, JJ., it was pointed out to the Court that the death sentence imposed on Kashmira Singh had been commuted by a Bench consisting of Fazal Ali, J. and myself and when this fact was pointed out, the Bench directed that the case be sent back to the President for reconsideration of the clemency petition filed by Harbans Singh. This is a classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the Bench, even in cases governed by Section 354, sub-section (3) of the Code of Criminal Procedure, 1973. The question may well be asked by the accused : Am I to live or die depending upon the way in which the Benches are constituted from time to time ? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21 ?

72. 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 failure of the legislature to supply broad standards or guidelines which would structure and the channelize the discretion of the court in the matter of imposition of death penalty. Of course, I may make it clear that when I say this I do not wish to suggest that if broad standards or guidelines are supplied by the legislature, they would necessarily cure death penalty of the vice of arbitrariness or freakishness……..But whether adequate standards or guidelines can be formulated or not which would cure the aspects of arbitrariness and capriciousness, the fact remains that no such standards or guidelines are provided by the legislature in the present case, with the result that the court has unguided and untrammeled discretion in choosing between death and life imprisonment as penalty for the crime of murder and this has led to considerable arbitrariness and uncertainty. This is evident from a study of the decided cases which clearly shows that the reasons for confirmation or commutation of death sentence relied upon by the Court in different cases defy coherent analysis. Dr. Raizada has, in his monumental doctoral study entitled "Trends in sentencing; a Study of the Important Penal Statutes and Judicial Pronouncements of the High Courts and the Supreme Court" identified a large number of decisions of this Court where inconsistent awards of punishment have been made and the judges have frequently articulated their inability to prescribe or follow consistently any standards or guidelines. He has classified cases up to 1976 in terms of the reasons given by the Court for awarding or refusing to award death sentence. The analysis made by him is quite rewarding and illuminating.

(i) One of the reasons given by the Courts in a number of cases for imposing death penalty is that the murder is 'brutal', 'cold-blooded', 'deliberate', 'unprovoked', 'fatal', 'gruesome', 'wicked', 'callous', 'heinous' or 'violent'. But the use of these labels for describing the nature of the murder is indicative only of the degree of the Court's aversion for the nature or the manner of commission of the crime and it is possible that different judges may react differently to these situations and moreover, some judges may not regard this factor as having any relevance to the imposition of death penalty and may therefore decline to accord to it the status of 'special reasons'. In fact, there are numerous cases, where despite the murder being one falling within these categories, the Court has refused to award death sentence. For example, Janardharan whose appeal was decided along with the appeal of Rajendra Prasad had killed his innocent wife and children in the secrecy of night and the murder was deliberate and cold-blooded, attended as it was with considerable brutality, and yet the majority consisting of Krishna Iyer, J. and Desai, J. commuted his death sentence to life imprisonment. So also Dube had committed triple murder and still his death sentence was commuted to life imprisonment by the same two learned Judges, namely, Krishna Iyer, J. and Desai, J. It is therefore clear that the epithets mentioned above do not indicate any clear-cut well-defined categories but are merely expressive of the intensity of judicial reaction to the murder, which may not be uniform in all judges and even if the murder falls within one of these categories, that factor

has been regarded by some judges as relevant and by others, as irrelevant and it has not been uniformly applied as a salient factor in determining whether or not death penalty should be imposed.

(ii) There have been cases where death sentence has been awarded on the basis of constructive or joint liability arising under Sections 34 and 149 (vide Babu v. State of U.P. (1965) 2 SCR 771), Mukhtiar Singh v. State of Punjab ((1972) 4 SCC 843), Masalti v. State of U.P. ((1964)8SCR 133), and Gurcharan Singh v. State of Punjab ((1963) 3 SCR 585). But, there are equally a large number of cases where death sentence has not been awarded because the criminal liability of the accused was only under Section 34 or Section 149. There are no established criteria for awarding or refusing to award death sentence to an accused who himself did not give the fatal blow but was involved in the commission of murder along with other assailants under Section 34 or Section 149.

(iii) The position as regards mitigating factors also shows the same incoherence. One mitigating factor which has often been relied upon for the purpose of commuting the death sentence to life imprisonment is the youth of the offender. But this too has been quite arbitrarily applied by the Supreme Court. There are cases such as State of U.P. v. Samman Dass ((1972) 3 SCC 201), Raghubir Singh v. State of Haryana ((1975) 3 SCC 37) and Gurudas Singh v. State of Rajasthan ((1975) 4 SCC 490) where the Supreme Court took into account the young age of the

appellant and refused to award death sentence to him. Equally there are cases such as Bhagwan Swarup v. State of U.P. ((1971) 3 SCC 759) and Ragho Mani v. State of U.P. ((1976) 4 SCC 297) where the Supreme Court took the view that youth is no ground for extenuation of sentence. Moreover there is also divergence of opinion as to what should be the age at which an offender may be regarded as a young man deserving of commutation. The result is that as pointed out by Dr. Raizada, in some situations young offenders who have committed multiple murders get reduction in life sentence whereas in others, "where neither the loss of as many human lives nor of higher valued property" is involved, the accused are awarded death sentence.

(iv) One other mitigating factor which is often taken into account is delay in final sentencing. This factor of delay after sentence received great emphasis in Ediga Anamma v. State of A.P. ((1974) 4 SCC 443), Chawla v. State of Haryana ((1974) 4 SCC 579), Raghubir Singh v. State of Haryana ((1975) 3 SCC 37), Bhoor Singh v. State of Punjab ((1974) 4 SCC 754), State of Punjab v. Hari Singh ((1974) 4 SCC 552) and Gurudas Singh v. State of Rajasthan ((1975) 4 SCC 490) and in these cases delay was taken into account for the purpose of awarding the lesser punishment of life imprisonment. In fact, in Raghubir Singh v. State of Haryana ((1975) 3 SCC 37) the fact that for 20 months the spectre of death penalty must have been tormenting his soul was held sufficient to entitle the accused to reduction in sentence.

But equally there are a large number of cases where death sentences have been confirmed, even when two or more years were taken in finally disposing of the appeal (vide Rishideo Pande v. State of U.P. (AIR 1955 SC 331), Bharwad Mepa Dana v. State of Bombay ((1960) 2 SCR 172) and other cases given by Dr. Raizada in foot-note 186 to Chapter III). These decided cases show that there is no way of predicting the exact period of prolonged proceeding which may favour an accused. Whether any importance should be given to the factor of delay and if so to what extent are matters entirely within the discretion of the Court and it is not possible to assert with any definitiveness that a particular period of delay after sentencing will earn for the accused immunity from death penalty. It follows as a necessary corollary from these vagaries in sentencing arising from the factor of delay, that the imposition of capital punishments becomes more or less a kind of cruel judicial lottery. If the case of the accused is handled expeditiously by the prosecution, defense lawyer, Sessions Court, High Court and the Supreme Court, then this mitigating factor of delay is not available to him for reduction to life sentence. If, on the other hand, there has been lack of dispatch, engineered or natural, then the accused may escape the gallows, subject of course to the judicial vagaries arising from other causes. In other words, the more efficient the proceeding, the more certain the death sentence and vice versa.

(v) The embroilment of the accused in an immoral relationship has been condoned and, in effect, treated as an extenuating factor in Raghubir Singh v. State of Haryana ((1975) 3 SCC 37) and Vasant Laxman More v. State of Maharashtra ((1974) 4 SCC 778) while in Lajar Masih v. State of U.P. ((1976) 1 SCC 806), it has been condemned and in effect treated as an aggravating factor. There is thus no uniformity of approach even so far as this factor is concerned.

73. All these factors singly and cumulatively indicate not merely that there is an enormous potential of arbitrary award of death penalty by the High Courts and the Supreme Court but that, in fact, death sentences have been awarded arbitrarily and freakishly (vide Dr. Upendra Baxi's note on "Arbitrariness of Judicial Imposition of Capital Punishment").

It may be mentioned in view of the fact that when death punishment is given by General Court Martial consisting of five officers it can be given only if there is two-third majority and not simple majority. Similarly, in Summary General Court Martial consisting of three officers, death punishment cannot be given unless there is unanimity.

However, to reduce the arbitrariness in imposing death punishment which is irreversible the Law Commission suggest that there should be a mandatory right of appeal in case of death punishment even if it is confirmed in reference by the High Court. The Supreme Court (Enlargement of Jurisdiction) Act, 1970 at present allows right of appeal only in cases where the High Court references the decision of acquittal by

district court and punish the accused for 10 or more years including death punishment. The Law Commission is of the opinion that in view of the above the accused under sentence of death should have the satisfaction that his appeal is heard by the highest court of the land. Furthermore, to avoid the arbitrariness in awarding death punishment the appeal should be heard by the bench comprising of five Judges of the Supreme Court.

It may be mentioned that right of appeal was guaranteed till 1979 under pre-amended Article 133 of the Constitution when the pecuniary amount was more than Rs.20,000/-. Similarly, right to appeal to Supreme Court is guaranted against the decision of the Bar Council of India as follows:-

> **"38. Appeal to the Supreme Court -** Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under Section 36 or section 37 (or the Attorney-General of India or the Advocate General of the State concerned, as the case may be) may, within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such order (including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India) thereon as it deems fit:
>
> Provided that no order of the disciplinary committee of the Bar Council of India shall be varied by the Supreme court so as to prejudicially affect the person aggrieved without giving him a reasonable opportunity of being heard. "

So also under the Representation of Peoples Act, 1951, the right of appeal is guaranteed as follows:-

"**116A**. **Appeals to Supreme court - (1)** Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by High Court under section 98 or section 99.

(2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the High Court under section 98 or section 99:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period."

Similarly, under Section 55 of the Monopolies & Restrictive Trade Practices Act, 1969, the right to appeal to the Supreme Court is guaranted as follows:-

"**55. Appeals.**-- Any person aggrieved by any decision on any question referred to in clause (a), clause (b) or clause (c) of section 2A, or any other made by the Central Government under Chapter III or Chapter IV, or, as the case may be, or the Commission under section 12A or section 13 or section 36D or section 37,may, within sixty days from the date of the order, prefer an appeal to the Supreme Court on one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908)."

If the right of appeal to the Supreme Court is guaranteed in such matters, the question arises is why should right of appeal be not guaranteed when death punishment is qualitatively different from any other punishment and is irreversible and there is scope for correcting an error.

Law commission invites views and suggestions as to whether the execution of death sentence by hanging should be replaced by any other mode which is less painful, more fast, and without mutilation of body, and also seeks suggestions on other issues mentioned in this paper. In order to obtain concretized suggestions, a Questionnaire is also prepared and annexed with the Paper. Your replies may be forwarded to the Commission within a period of one month of the issue of this Consultation Paper.

QUESTIONNAIRE

1. Section 354(5) of Cr.P.C. of 1973 provides as follows :-

"When any person is sentenced to death, the sentence shall direct that he may be hanged by neck till he is dead."

(a) Does this section be required to be amended Yes No

(b) and if so what other modes of execution do you suggest ? (Refer to Discussion Paper Chapter 4 and Chapter 5).

Lethal Injection	Shooting	Electric Chair

2. Some States in the U.S.A. give the convict the choice whether he wants to die by lethal injection or shooting. While in India, the Court Martial Tribunal, under the Army Act of 1950, Air Force Act of 1950 and Navy Act of 1957, has a discretion to give death punishment either by hanging to death or by shooting to death.

Should discretion be given to the Judges? Or	Yes	No
Should discretion be given to the Convict	Yes	No

3. Statutory right of appeal to the Supreme Court is given against judgment of the High Court in election matters, against the orders of the Bar Council of India and orders of the Commission under MRTP Act, 1969. Right of appeal is given under the Supreme Court (Enlargement of Jurisdiction) Act, 1970 in criminal cases where High Court has reversed the trial court's judgment and has sentenced a person for 10 years or more, or has given death punishment or where the High Court has withdrawn the case and given death punishment.

But no right of appeal is given in case the High Court confirms the death punishment given by the trial court.

Should the person convicted of death penalty be given right of appeal to the Supreme Court so that he has the satisfaction that his case is fully heard by the highest court of the land, especially when if there is an error, it cannot be corrected and death punishment is qualitatively different than any other punishment?

Yes No

4. In trial by Court Martial Tribunal under Army Act, 1950, Air Force Act, 1950 or Navy Act, 1957, when a death punishment is given by the General Court Martial consisting of five officers, death punishment can be implemented only if two-third members give death punishment and in the Summary General Court Martial consisting of three officers death punishment is implemented only if all the three officers agree.

(a) Should a Bench of not less than five Judges decide the case in the Supreme Court.

Yes No

If answer is 'Yes'

(b) Should the rule of majority, or rule of unanimity, or rule of two-third majority be applicable?

Rule of Majority Rule of Unanimity

Rule of Two-third Majority

(c) In case of two-third majority, should death sentence be not awarded because two other Judges did not think it a fit case for death penalty?

Yes No

5. Any other suggestion as for the mode of execution or implementation of a death sentence? (Please do not write more than 100 words)