Production of Courseware

Content for Post Graduate Courses

Paper: Penology and Sentencing
Module: Procedural Law Limitation on Death Penalty Sentencing
### Component - I (A)- Personal Details

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
<th>Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal Investigator</td>
<td>Prof(Dr) G S Bajpai</td>
<td>Registrar, National Law University Delhi</td>
</tr>
<tr>
<td>Paper Coordinator</td>
<td>Mr. Neeraj Tiwari</td>
<td>Assistant Professor, National Law University Delhi</td>
</tr>
<tr>
<td>Content Writer/Author</td>
<td>Mr. Neeraj Tiwari</td>
<td>Assistant Professor, National Law University Delhi</td>
</tr>
<tr>
<td>Content Reviewer</td>
<td>Prof. BB Pande</td>
<td>Former Professor, Faculty of Law, Delhi University</td>
</tr>
</tbody>
</table>

### Component - I (B)- Description of Module

<table>
<thead>
<tr>
<th>Subject Name</th>
<th>Criminology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paper Name</td>
<td>Penology and Sentencing</td>
</tr>
<tr>
<td>Module Name/Title</td>
<td>Procedural Law Limitation on Death Penalty Sentencing</td>
</tr>
<tr>
<td>Module Id</td>
<td>Criminology/Penology &amp; Sentencing/15</td>
</tr>
<tr>
<td>Pre-requisites</td>
<td>General understanding of provisions of Code of Criminal Procedure dealing with pre-sentence hearing and death sentence. Awareness of the cases on death sentence will also be needed.</td>
</tr>
</tbody>
</table>
| Objectives   | 1. To make the learners understand about the importance of procedural safeguards in death sentence cases.  
2. To explain the learners about the legislative safeguards in death sentence cases.  
3. To apprise the learners about the judicially built safeguards in death sentence cases. |
| Key Words    | Pre-sentence hearing, special reasons, death warrant, oral hearing, execution |
Introduction

The sentence of death is treated inhumane in nature and its severity is not out of question. The irreversible nature of death sentence necessitates that proper checks are placed at pre and post sentencing stage and in no case death sentence shall be inflicted without following such protocols. In the absence of any sentencing guideline the continuous thrust of legislature and judiciary is also to create a framework which minimises the scope for arbitrary exercise of power.

At the level of legislature, the restriction on death sentence is imposed by three ways. First, by keeping the number of offences punishable with death sentence at the minimum, which are presently 12 in the Indian Penal Code, 1860. Secondly, by providing alternate punishment. The offences with death sentence do not prescribe mandatory death sentence and have alternative punishment of life imprisonment as well. Thirdly, by prescribing mandatory procedure for the award of death sentence. Section 235(2), 354(3) and 366 in the Code of Criminal Procedure, 1973 are part of such mandatory scheme.

At judicial level, the principle of ‘rarest of rare’ governs the cases of death sentence. In recent times the judiciary has also evolved some additional mechanisms to eliminate the question of individualisation in death sentence cases.

The module will take the readers through the protective regime for death row prisoners.

Learning objective:

- To make the learners understand about the importance of procedural safeguards in death sentence cases.
- To explain the learners about the legislative safeguards in death sentence cases.
- To apprise the learners about the judicially built safeguards in death sentence cases.

1. Procedural Protection at pre-sentencing stage:

First and foremost, the protection against arbitrary award of death sentence is required at the sentencing court level. The death sentence should not be awarded in a routine manner and a positive obligation must be imposed on the trial judge. These protective measures, which are discussed at length in the succeeding paras, require the trial judge to hear the accused on the nature of sentence separately after the guilt is proved. The trial judge must be asked to record special reasons for the award of death sentence.

1.1. ‘Special Reasons’ for award of death sentence:
The Code of Criminal Procedure of 1898 (old Code) made the death sentence as the rule. Section 367(5) of the old Code reflected upon the colonial mindset which had ... Section 367(5) provided:

“If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.”

Thus, if the trial court finds the accused guilty of an offence punishable with death and awards life imprisonment he has to record reasons for giving life imprisonment instead of death sentence. The sentence of death was the rule and the imprisonment for life was an exception.

Section 367(5) was deleted by the Code of Criminal Procedure (Amendment) Act, 1955. As a result of this amendment, the courts were no longer required to record reasons for awarding death sentence and therefore conferred with wide discretionary powers to impose death sentence.

Meanwhile, the Law Commission in 35th Report has recommended insertion of a provision requiring courts to record reasons for imposing a sentence of death or the lesser sentence of life imprisonment in a capital case.¹ The Law Commission has opined that such provision can act as a safeguard to ensure that the trial court examines the case as elaborately from the point of view of sentence as from the point of view of guilt. It will gain the trust of the public that the discretion in sentencing is being judicially exercised.² The Law Commission in 41st Report has reiterated requirement for such provision.³

Giving statutory colour to the recommendation of Law Commission, the Legislature has enacted the Code of Criminal Procedure, 1973 (new Code) and introduced a vital procedural requirement in section 354. Sub clause (3) of section 354 requires recording of ‘special reasons’ for awarding death sentence. The legislative guideline provided in section 354(3) obliges the court to explain its choice of sentence. The ‘special reason’ clause acts as a sufficient safeguard against arbitrary imposition of death penalty.

¹ Law Commission of India, 35th Report, 1967, Para 8 at p. 357.
² Ibid.
The Constitution Bench in Bachan Singh v. State of Punjab⁴ has read section 354(3) as part of due process framework on the issue of death sentence and urged that courts must give a liberal and expansive construction to the mitigating factors within the sentencing policy outlined in section 354(3). The Court has further observed that the legislative policy enshrined in section 354(3) is that ‘life imprisonment is the rule and death sentence an exception’.⁵

The Bench has evolved the ‘rarest of rare’ principle for imposition of the death sentence and stated that ‘special reasons’ in section 354(3) means ‘exceptional reasons’ founded on the exceptionally grave circumstances of the particular case relating to the crime and the criminal. The Bench thus concluded that the extreme sentence of death should not be inflicted save in the ‘rarest of rare’ cases when alternative option is unquestionably foreclosed.⁶

The relevance of sentencing policy in sections 235(2) and 354(3) was highlighted by the Supreme Court in Mithu v. State of Punjab⁷ where the Court was confronted with the constitutionality of section 303 of IPC which provided for mandatory death penalty. While holding the provision unconstitutional the Court has noted that:

“The mandatory nature of death sentence deprives the convict of the opportunity under section 235(2) to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.”⁸

1.2. Pre-sentence hearing:

Under the old Code the accused was not given any statutory opportunity to establish the mitigating circumstances at post conviction stage which may be relevant to decide the nature of punishment. The Law Commission in its 41st report recommended for insertion of a new provision which may afford a convict right of hearing before the sentence is passed.⁹ This was the most significant contribution made by the Law Commission which acknowledged the cardinal feature of natural justice and procedural fairness in sentencing.

The position was substantially changed with the introduction of sections 235(2) and 248(2) in the new Code which provide convict with an opportunity to place before the court necessary information to determine the mitigating circumstances and decide the appropriate punishment in given case.

The choice of sentence should be made after following the procedure laid down in section 235(2). Keeping the sentencing policy enumerated in section 235(2), courts are required to make distinction between its formation of opinion on the conviction for the crime and on the punishment which may be imposed for the crime. The nature of proof bears only upon the question of conviction whereas the punishment is decided considering all extenuating circumstances.

The importance of ‘right of hearing’ in section 235(2) has been explained in many cases. Its importance can hardly be overemphasised in cases of death sentence.

⁴ AIR 1980 SC 898.
⁵ Bachan Singh, para 209.
⁶ Bachan Singh, para 161.
⁸ Id. Para 18
⁹ Supra note 3 at para 23.2 at p. 186 and proposal number 23 in concluding remarks.
As early as in 1976, the Supreme Court in Santa Singh v. State of Punjab\(^{10}\) got the opportunity to explain the nature and scope of ‘right of hearing’ under section 235(2). In this case the Sessions Judge did not give convict the opportunity to be heard on sentence and by one single stroke convicted and sentenced him to death. Surprisingly, the High Court has confirmed the conviction and sentence passed by the Sessions Judge.

The Bench has opined that section 235(2) is ‘in consonance with the modern trends in penology and sentencing procedures which regard crime and criminal equally important is justice delivery process. The provision is an acknowledgment of the fact that sentencing is as important stage in the criminal justice administration as the adjudication of guilt and in no case it should be consigned to a subsidiary position. It seeks to personalise the punishment so that the reformist component remains as much operative as the deterrent element. It is for this reason the facts of social and personal nature, may be irrelevant for guilt determination, should be brought to the notice of the court at the time of actual determination of sentence.’\(^{11}\)

After dwelling upon these aspects, the Bench explained the meaning of ‘hearing’ in section 235(2). The Bench has expressed that ‘hearing’ contemplated in section 235(2) does not confine to oral submissions but it is intended to give an opportunity to both the parties to place before the court facts and material relating to various factors bearing on the question of sentence.

The Bench has emphasised that non-compliance of this mandatory provision cannot be treated as a mere irregularity. It goes to the root of the matter and the illegality resulted from non-compliance shall vitiate the sentence.\(^{12}\)

The Constitution Bench in Bachan Singh has very aptly put the object of ‘right of hearing’ in section 235(2) in the following words:

“Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing. at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.”\(^{13}\)

Again in the case of Allauddin Mian v. State of Bihar\(^{14}\) Justice Ahmadi has highlighted the purpose section 235(2) serves. First, it satisfies the rule of natural justice inasmuch as it gives accused an opportunity of being heard on the question of sentence and secondly, it assists the Court to determine the sentence to be awarded.\(^{15}\) The provision should not be treated as a mere formality and should be followed in letter and spirit. The convict must be given real and effective opportunity to place extenuating circumstances before the court.\(^{16}\)

---

\(^{10}\) AIR1976SC2386.

\(^{11}\) Id. at para 3 and 4.

\(^{12}\) Id. at para 6 and 7.

\(^{13}\) Supra note 4 at para 209.

\(^{14}\) AIR1989SC1456

\(^{15}\) Id. at para 10.

\(^{16}\) Ibid.
The Bench further stated that as a general rule the trial court after recording conviction should adjourn the matter to a future date for hearing on sentence. Both the prosecution and the defence should be informed to place the relevant material bearing on the question of sentence before the court on the given date.\textsuperscript{17}

Same Bench in Anguswamy v. State of T.N.\textsuperscript{18} has held that:

“Section 235(2) does not absolve the court of its obligation to apply its judicial mind on the question of sentence but casts additional obligations (i) to give the offender and opportunity to make a representation on the question of sentence; and (ii) to take into consideration such representation while determining the appropriate sentence.”\textsuperscript{19}

In the case of Malkait Singh v. State of Punjab\textsuperscript{20} the Supreme Court reiterated the principles laid down in Santa Singh and Alluddin Mian cases and emphasised that

“Courts must avoid passing the conviction and sentencing orders on the same day. It amounts illegality. Sufficient time must be given to both the parties on the question of sentence, to adduce evidence to determine the maximum or minimum punishment in the given case.”\textsuperscript{21}

Recently, in the case of Rajesh Kumar v. State\textsuperscript{22} the Supreme Court has ruled that section 235(2) and section 354(3) should not be seen in isolation and must be construed as supplementing each other and ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court. The Court has observed that:

“The object of hearing under section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with section 235(2). Special reasons can only be validly recorded if an effective opportunity of hearing contemplated under section 235(2) is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed.”\textsuperscript{23}

In the case of Mukesh v. State\textsuperscript{24}, popularly known as Nirbhaya case, it was brought to the notice of the Supreme Court that neither the trial court nor the High Court has followed the mandate under section 235(2) of the new Code. the accused were not given opportunity to be heard on sentencing at the trial level. Therefore, the question before the Court was to decide whether in such situation it is desirable to remand the case back to the convicting court to hear the convict on sentence or such opportunity can be provided at the appellate level as well.

The case of Santa Singh has made it categorically clear that non-compliance of the mandate under section 235(2) goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually the Bench in Santa Singh has set aside the sentence and remanded the matter back to the Sessions Court to pass an appropriate sentence after following the command under section 235(2).\textsuperscript{25}

\textsuperscript{17} Ibid.
\textsuperscript{18} (1989)3SCC33.
\textsuperscript{19} Id. at para 3.
\textsuperscript{20} (1991)4SCC341.
\textsuperscript{21} Id. at para 18.
\textsuperscript{22} (2011)13SCC706
\textsuperscript{23} Id. at para 52.
\textsuperscript{24} 2017SCC Online SC 90.
\textsuperscript{25} Supra note 10.
The Supreme Court in Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra has remanded the matter back to the High Court for not properly appreciating the object and purpose behind section 235(2).

But the Bench in Nirbhaya case relied on the decision of a three-Judge Bench in Dagdu v. State of Maharashtra where the decision of Santa Singh was considered. The Bench in Dagdu case agreed that the mandate under section 235(2) must be obeyed in letter and spirit but differed from Santa Singh on the issue of remanding the matter back to the Sessions Court to hear the convict on the question of sentence. The Bench has concluded that Santa Singh does not lay down as a rule that failure on the part of the convicting court to hear the convict on the question of sentence shall necessarily require remand of the matter back to the convicting court to provide convict with the opportunity to be heard on sentence.

The Bench in Dagdu case has clarified that the imperative language of section 235(2) leaves no room for doubt that the convict must be heard on the question of sentence but if the convicting court omits to do so and the convict raises such grievance before the higher court, it would be open to the higher court to remedy the harm and hear the convict on the question of sentence.

The Bench in Nirbhaya case considered both modes- remand the matter back to the convicting court and direct the convicts to produce the material necessary for deciding question of sentence. The Bench followed the ratio of Dagdu case and refused to remand the case back to the convicting court and has given opportunity to the convicts to file affidavits along with documents which reflect upon the mitigating circumstances.

**Procedural Protection between confirmation and execution of the Death Sentence:**

Death sentence results in deprivation of the most valuable fundamental right guaranteed by the Constitution i.e. right to life and liberty. Once a death sentence is executed it results in taking away the life of the convict. It is this irreversible nature of the punishment which requires law to take care that such deprivation is not allowed without affording reasonable protections to the convict even after the sentence is passed. Such protections may come from the statute or in some cases even the judiciary can take initiative to ensure that the procedure prescribed in the statute/Rules confirms to the procedural due process.

**Oral Hearing:**

Mohd. Arif v. Union of India is a befitting example of such judicial activism where the Supreme Court was approached to decide the question of giving ‘oral hearing’ as a matter of right in hearing the review petitions in death sentence cases.

It was observed by the Constitution Bench that Order XL, Rule 3 of the Supreme Court Rules, 1966 provides for hearing of review petition through ‘circulation’ and such procedure was upheld by another Constitution Bench in P.N. Eswara Iyer v. Registrar, Supreme Court of India.

The Constitution Bench has accepted the fact that the irreversible nature of death sentence and chances of arriving at opposite conclusions by the judicially trained minds make the cases of death

---

26 (2012)8SCC43.
27 (1977)3SCC68.
28 Id. at para 79.
29 Supra note 24 at para 10.
30 (2014)9SCC737.
sentence altogether a distinct category of cases. In such scenario if the convict, who is sentenced to death, prefers a review petition the necessity of oral hearing becomes an integral part of the ‘reasonable procedure’ and a limited oral hearing at the review stage is mandated by Article 21 in all death sentence cases.  

By doing this the Constitution Bench has carved out a separate category of cases of death sentence where oral hearing at review stage is allowed by reading the ‘just, fair and reasonable’ standard of Article 21. The Bench has fixed an outer limit of 30 minutes for oral hearing of review petition.

**Guidelines for issuance of death warrant:**

An interesting issue has cropped up in the case of Shabnam v. Union of India where the Sessions Court has issued death warrant within a week after the criminal appeals filed by the convicts were dismissed by the Supreme Court. The petitioners challenged the validity of such death warrant as being illegal and contrary to the mandate of Article 21 of the Constitution.

The Bench has noticed that the convicts have not exhausted their judicial and administrative remedies which remain open even after the dismissal of their criminal appeal. The convicts can invoke Article 137 of the Constitution to seek ‘review’ of the order passed by the Court which confirmed their death sentence. The limitation of 30 days is prescribed for filing such review. As discussed above, after the case of Mohd. Arif the review procedure in death penalty cases is given high procedural sanctity and considered as a valuable right given to death row convicts.

Alternatively, the convicts can file mercy petition to the Governor of the State and to the President. Their right to file mercy petition remains intact. The power to pardon is part of the constitutional scheme which provides a ray of hope to the death row prisoner for commutation of death sentence into life imprisonment. Such constitutional remedy cannot be snatched by executing the death sentence and the convict must be given reasonable opportunity to avail the same.

Finally, the Bench has concluded that such issuance of death warrant as impermissible and unwarranted and directed the courts to follow the procedure prescribed by the Allahabad High Court in Peoples’ Union for Democratic Rights (PUDR) v. Union of India before the execution of death sentence. The Allahabad High Court has prescribed following procedure:

---

32 Supra note 30 at para 30 and 32.
33 (2015)6SCC632
34 Id. at para 12.1
35 Id. at para 12.2
36 2015 Cri LJ 4141 (All).
Procedure for execution of death sentence:

The case of Shatrughan Chauhan v. Union of India\(^ {37} \) has rationalized the procedure to be followed in execution of death sentence. In this case 15 death row convicts have approached the Supreme Court under Article 32 and challenged the rejection of their mercy petitions on various grounds including the ground of undue and unexplained delay in disposing mercy petitions. Thus, the basis of these writ petitions were the supervening events which occurred after the final confirmation of the death sentence.

The three-Judge Bench has observed that:

“Prolonged delay in execution of a sentence of death has a dehumanising effect and thus has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable manner which offends the fundamental right under Article 21. Undue, inordinate and unreasonable delay in execution of the death sentence amounts to torture which is in clear violation of Article 21 and thereby entails as the ground for commutation of sentence.”\(^ {38} \)

“The right to commutation of the death penalty due to undue and inordinate delay in execution of the mercy petition is a substantive right of the convict and not merely a matter of procedure established by law.”\(^ {39} \)

\(^{37}\) (2014)3SCC1.

\(^{38}\) Id. at para 38 and 43.

\(^{39}\) Id. at para 49.
The Bench thus concluded that

“If there is undue, unexplained and inordinate delay in execution of the death sentence due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, the Supreme Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone.”

Noticing the disparity in implementing the existing laws, the Bench has formulated guidelines to safeguard the interest of death row convicts. Only those guidelines are referred hereinafter which prescribe additional procedures in execution of death sentence:

1. It is unconstitutional to keep a death row convict in solitary or single cell confinement prior to rejection of his mercy petition by the President. The rules in State Prison Manuals should not be interpreted to run counter to the ruling of *Sunil Batra* and violate Article 21 of the Constitution.

2. The Supreme Court in a series of cases has declared legal aid as a fundamental right under Article 21. Unfortunately, the State Prison Manuals do not provide for legal assistance to death row prisoners. Legal aid should be provided to the convict at all stages even after rejection of his mercy petition by the President. It will help him in preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Thus, the Superintendents of Jails are directed to intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

3. The Government of India has framed certain guidelines for disposal of mercy petitions filed by the death row convicts after disposal of their appeal by the Supreme Court. To minimise any delay in disposing of mercy petitions, it is desired that all the required materials must be forwarded in at once by the Ministry of Home Affairs and the practice of sending piece-meal records must be done away. The Ministry of Home Affairs should send the recommendation/their views to the President within a reasonable and rational time. It is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for an early decision on the mercy petition.

4. The death row prisoner is entitled to be informed in writing of the decision on his/her mercy petition. The rejection of the mercy petition by the President/Governor should forthwith be communicated to the convict and his family in writing or through some other mode of communication available. This right is corollary to convict’s right to make a mercy petition under Article 72/161 of the Constitution. Every State Prison Manual must bring rule to this effect.

5. Death row convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor.

6. Noticing the disparity in State Prison Manuals regarding minimum period between communication of the rejection of the mercy petition to the prisoner and his family and the scheduled date of execution, it is necessary that a minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution.

---

40*Id.* at para 48.
It is the obligation of the Superintendent of Jail to see that the family members of the convict receive the message of communication of rejection of mercy petition in time.

7. The judicial and administrative remedies can be realised if the death row convicts have copies of their court papers, judgments, etc. These documents are must for preparation of appeals, mercy petitions and accessing post-mercy judicial remedies which are available to the prisoner under Article 21 of the Constitution. Thus, it is necessary that copies of relevant documents should be furnished to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.

IV. Summary:

As discussed above, the safeguards to protect death row prisoners from arbitrary executions are still evolving. On the one hand, the legislature through provisions like section 235(2) and 354(3) provided the protective regime at pre-sentence stage. On the other hand, the Supreme Court in landmark cases like Arif, Shabnam and Shatrughan Chauhan has prescribed the additional safeguards at post sentence level. But these safeguards cannot be looked in isolation and require similar changes in the State Prison Manuals which still remain the source of authority for judges and prison authorities for the issuance of death warrant and execution of death sentence respectively. To bring uniformity in issuance of death warrant and execution of death sentence the guidelines issued in Shabnam and Shatrughan Chauhan must be given place in State Prison Manuals. The Model Prison Manual, 2016 partially fulfil the obligation under the abovementioned guidelines but it requires more concrete steps to reduce the arbitrariness at the minimum level.