

CAPITAL PUNISHMENT IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT

“An eye for an eye makes the whole world blind”

- Mahatma Gandhi

All punishments are based on the same proposition i.e. there must be penalty for wrong doing. There are two main reasons for inflicting the punishments. One is the belief that it is both right and just that a person who has done wrong should suffer for it: the other is the belief that inflicting punishments on wrong doers discourages others from doing wrong. The capital punishment also rests on the same proposition as other punishments. The capital punishment debate is the most generally relevant debate, keeping in mind the situation that has been brought about by today. Capital punishment is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of capital punishment is questioned as immoral. It extinguishes the flame of life forever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other right is possible.²

The paper highlights the jurisdiction of court to award death sentence, critical analysis of existing provisions regarding death sentence and aims to provide mechanism for abolition or retention of death sentence in India and it ends with a conclusive suggestion that death sentence is not the only method of punishment and there are other less deterrent and rehabilitative methods available.

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² Bachan Singh Etc vs State of Punjab, 1982, AIR 1325, (156) (Justice P.N. Bhagwati).

INTRODUCTION

Death penalty has been a mode of punishment since time immemorial. Indian Criminal jurisprudence is based on a combination of deterrent and reformatory theories of punishment. While the punishments are to be imposed to create deterrence amongst the offenders, the offenders are also to be given an opportunity for reformation. The court while imposing death sentence has to record its special reasons as to why the court came to such a conclusion. Court of Session after passing a death sentence shall submit the proceedings to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. In case the death sentence is confirmed, the Court of Session would issue a warrant in the prescribed form to the officer in charge of the jail for the proper execution of the sentence. When the death sentence has been executed, the officer executing it shall return the warrant to the Court of Session, with an endorsement under his hand certifying the manner in which the sentence has been executed.

The Constitution states that no person shall be deprived of his life except through a lawful procedure.³ The Constitution also gives the President and the Governor of a State the right to suspend, pardon, or commute or remit death sentences.⁴ Moreover, the Constitution provides that if the High Court has reversed an order of acquittal of the accused on appeal and sentenced him to death, or if it withdrew for trial any case from a lower court in which it sentenced the accused to death, then these cases will be appealed to the Supreme Court.⁵

The landmark cases where the death sentences were awarded in India are Ranga Billa case, Indira Gandhi and Rajiv Gandhi Assassination case, Laxman Nayak case and in 2004 Hatab case of West Bengal where accused Dhananjay Chatterjee was hanged on 14 August, 2004, on his birthday, after Supreme Court confirmed the death sentence awarded by the lower courts. The President also declined his plea for pardon.

In the year 2003 government laid a Bill in the Parliament, which proposed to add a provision of death penalty in Drugs and Cosmetics Act. After the new government came into power in

³ The Constitution of India, part III, art. 21.

⁴ The Constitution of India, part V, ch. I, art. 72.

⁵ The Constitution of India, part V, ch. IV, art. 134(1).

June 2004, President Dr. A.P.J. Abdul Kalam suggested that Parliament should consider the abolition of death sentence altogether.⁶

On 31st August 2015, the Law Commission of India submitted a report to the government which recommended the abolition of capital punishment for all crimes in India, excepting the crime of waging war against the nation or for terrorism-related offences.⁷ The report cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.⁸

JURISDICTION OF THE COURTS TO EXECUTE DEATH SENTENCES

In India Supreme Court, High Court and Sessions Court have the jurisdiction to execute death penalty. If Session Court executes the death sentence then it is subject to the confirmation from the High Court. After the award of the death sentence is passed by a Sessions court, the sentence must be confirmed by a High Court to make it final. Once confirmed, the condemned convict has the option of appealing to the Supreme Court. If this is not possible, or if the Supreme Court turns down the appeal or refuses to hear the petition, the condemned person can submit a 'mercy petition' to the President of India and the Governor of the State.⁹

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⁶ <http://www.hindustantimes.com/India/apj-abdul-kalam-the-man-who-opposed-death-penalty/story-iCaYogpIATQpaZH0TpRYgO.html>, 19th March 2017.

⁷ Law Commission of India, "The Death penalty", Report No.262, 2015.

⁸ "End death penalty, keep it only for terror: Law panel tells government", Law Commission of India, Report no. 262, "The death Penalty", 2015.

<http://lawcommissionofindia.nic.in/reports/report262.pdf>, 19th March 2017.

⁹ Devinder Pal Singh Bhullar vs. National Capital Territory of Delhi (2013) 6 SCC 195

The Code of Criminal Procedure (1898) called for the method of execution to be hanging. The same method was adopted in the Code of Criminal Procedure (1973).¹⁰ Section 354(5) of the Criminal procedure reads as "When any person is sentenced to death, the sentence shall direct that the person be hanged by the neck till the person is dead."

In a case On 5 March 2012 a session's court in Chandigarh ordered the execution of Balwant Singh Rajoana, a convicted terrorist from Babbar Khalsa, for his involvement in the assassination of Chief Minister of Punjab Beant Singh.¹¹ The sentence was to be carried out on 31st March 2012 in Patiala Central Jail,¹² but the Centre stayed the execution on 28th March due to worldwide protests by Sikhs that the execution was unfair and amounted to a human rights violation.

CONFIRMATIONS OF DEATH SENTENCES

The Code of Criminal Procedure, 1973 under Section 28(2)¹³, directs that a death sentence can be passed only by a Sessions judge or an additional sessions judge. Further, the Code makes sure that a sentence of death passed by a court of sessions (comprising either of the Sessions or the Additional Sessions Judge) shall be subject to confirmation proceedings before the High Court exercising jurisdiction over it. Therefore, it is safe to conclude that the death sentence carried out by a Sessions court is provisory and is subject to the automatic guidance of the relevant High Court. Sections 366 to 371 of the Code outline the confirmation proceedings before the High Court. In Bachan Singh's case¹⁴, the Apex Court noted that these provisions ensure that "the entire evidential material bearing on the innocence as or guilt of the accused and the question of sentence must be scrutinised with utmost caution and care by a superior court" considering that the outcome of the case would determine the life of an individual. It is interesting to note that similar confirmation provisions were also found in the old criminal procedure code of 1898 from Sections 374 to 380.

The confirmation process

¹⁰ "The Code of Criminal Procedure, 1973 Act No. 2 of 1974"(PDF). 25 January 1974. Retrieved MAR 16, 2017.

¹¹ "Punjab govt to challenge order to hang Beant Singh's killer", TOI, 27 March 2012.

¹² "Punjab on high alert as court orders execution of Beant Singh's killer", TOI, 27 March 2012.

¹³ "The Code of Criminal Procedure, 1973 Act No. 2 of 1974"(PDF). 25 January 1974. Retrieved MAR 16, 2017.

¹⁴ 1980 SCC (Cri) 174.

Once the Sessions Court passes the death sentence, it is obliged to cite the proceedings of the case to the High Court under Section 366(1) of the Code. Under Section 366(2) of the Code, a sentence of death cannot be executed unless it is confirmed by the High Court. As opposed to the 1898 Criminal Code, the 1973 Code includes a provision that authorises the Sessions Court to send the convicted person to judicial custody. The Supreme Court has clarified in *Sunil Batra*¹⁵ that this custody cannot be considered equivalent to an imprisonment. The logic behind the provision is assumably that the incentive to avoid the legal process for a convicted person (sentenced to death by a sessions court) is very high and therefore the provisions seeks to address scenarios wherein the convict is not available for execution of the sentence.

It has been held in a catena of cases, including in *State of Maharsashtra v. Sindhi*¹⁶ and *Juman v. State of Punjab*¹⁷, that the confirmation proceedings are a continuation of the trial at the Sessions Court. Support for such an understanding can be derived from the fact that Section 366(1) states that the “proceedings” shall be submitted to the High Court unlike the appellate provisions where the factum of appeal lies in the conviction or acquittal or the enhancement of the sentence (Section 374 read with Section 386). There is however, a fundamental distinction between the confirmation proceedings at the High Court and a trial at the Sessions Court. While the Code, under Section 273, creates a general rule that all evidences taken in the course of the trial shall be taken in the presence of the accused, Section 367 states that the general rule in case of confirmation proceedings is that, unless the High Court feels otherwise, the presence of the convicted person is not required even when new evidence is taken. The Supreme Court has suggested that the presence or the absence of the accused does not make a difference at the confirmation stage since the High Courts are duty bound to give the matters its utmost and undivided attention. Here, it is pertinent to mention that under the appellate jurisdiction, the Code in Section 391(3), grants the right to an accused (or his pleader) to be present when additional evidence is taken.

The Code also specifies that the confirmation proceedings should be conducted at least in front of a division bench of the High Court. Should there be any difference of opinion, the matter will be referred to a third judge whose decision will determine the final outcome of the case.

¹⁵1979 SCC (Cri) 155.

¹⁶(1975) 1 SCC 647.

¹⁷AIR 1957 439.

In death penalty cases, the normal practice is that the Sessions Court refers the matter for confirmation to the High Court and additionally, the convict files an appeal on his conviction under Section 374(2) of the Code. According to Section 368, the order of confirmation is not given until the appeal is disposed off by the high court. It is also clarified that there is no obligation on the convict that he must appeal his conviction to the High Court. Even if he does not, the constitutional court is duty bound to re-assess the death case.

PARDONING POWER OF PRESIDENT AND GOVERNOR

The power to pardon is one of the powers which have been conferred on the executive. Article 72 confers this power on the President and Article 161 does the same on the Governor. This power has been provided to heads of various nations. In monarchies this power is vested with the Kings of those countries and it has been exercised for centuries, but with the passage of time and the changing nature of constitutional law it has taken a new form now.

In India, the power to grant pardon is conferred upon the President of India and the Governors of States under Articles 72 and 161 of the Constitution of India.

The Constitution of India says that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.¹⁸

- (a) In all cases where the punishment or sentence is by a Court Martial;
- (b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
- (c) In all cases where the sentence is a sentence of death.

The Article 161 deals with the power of the Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. Thus, this Article empowers the Governors of States to grant pardon, reprieves, respites or remissions of punishment or

¹⁸ The Constitution of India, 1950, Part-V, Article-72.

suspend, remit or commute the sentence of a person convicted of an offence against a law relating to a matter to which the executive powers of the State extends.¹⁹ The President and the Governors are both bound by the advice of their council of ministers under Articles 74 and 163 respectively.

The object of pardoning power is to correct possible judicial errors, for no system of judicial administration can be free from imperfections. It is an attribute of sovereignty wherever the sovereignty may be to release a convict from a sentence which is mistaken, harsh or disproportionate to the crime.²⁰

*Swaran Singh v. State of U.P.*²¹ the Supreme Court invalidated the remission of sentence by the Governor because some material facts were not brought to the knowledge of the Governor. Not only this, the Supreme Court had asked the President to reassess his decision when it was of the view that the decision of the President was totally arbitrary and unfair, a three-Judge Bench held that “this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, malafide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.”

In *Satpal v State of Haryana*²² the Supreme Court quashed an order of the Governor pardoning a person convicted of murder on the ground that the Governor had not been advised properly with all the relevant materials. The Court spelt out specifically the considerations that need to be taken account of while exercising the power of pardon, namely, the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he underwent the sentence. The Court held “not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational”.

The pardoning power is in derogation of the law. Implying that if laws could always be enacted and administered so they would be just in every circumstance to which they are applied, there would be no need for the pardoning power. Therefore, the power to pardon is meant to be used in circumstances where the death sentence given is not in the interest of

¹⁹ The Constitution of India, 1950, Part-VI, Article 161.

²⁰ Basu, D.D: Commentary on the Constitution of India: Vol.: 255 (1981)

²¹ AIR 1998 SC 2026.

²² AIR 2000 SC 1702.

justice. The administration of justice by the Courts is not necessarily always wise or certainly understanding of circumstances, which may properly alleviate guilt.²³

It is a check entrusted to the Executive for special cases. The pardoning power is founded on consideration of public good and is to be exercised on the ground of public welfare, which is the legitimate object of all punishments, will be as well promoted by a suspension as by an execution of the sentences.²⁴

CONCLUSIONS AND SUGGESTION

The last execution to take place in India was the July 30, 2015 hanging of Yakub Memon, convicted of financing the 1993 Mumbai bombings.²⁵ Prior to these hangings, the last three executions to take place in India were the February 8, 2013 hanging of Muhammad Afzal, convicted of plotting the 2001 attack on India's Parliament, the hanging of 2008 Mumbai attack gunman Mohammad Ajmal Amir Qasab on November 21, 2012, and the hanging of Dhananjay Chatterjee in 2004 for the murder and rape of a 14-year old girl.²⁶ This, in turn, was the country's first execution since 1995.

Murder is punishable by death under Article 302 of the Penal Code,²⁷ and in *Bachan Singh v. State of Punjab*, India's Supreme Court held that the death penalty was constitutional only when applied as an exceptional penalty in "the rarest of the rare" cases.²⁸

Once the appeal process has been exhausted and the higher courts have confirmed the defendant's death sentence, the defendant can submit petitions for mercy to the state or national executive.²⁹ According to the Indian Constitution, the State Governor and the President of India both have the power to suspend, pardon, or commute or remit death sentences.³⁰ With the advice of their cabinets, these individuals can pardon those on death

²³ Myneni S.R., vol 1, 7th Edition, Allahabad Law Agency.

²⁴ Dr. Suresh V. Nadagoudar, "PRESIDENTIAL POWER TO PARDON IN INDIA: AN OVERVIEW", Volume 2 Issue 7, page cited -397, pg- 400.

²⁵ India executes Mumbai bomb plotter Yakub Memon, BBC, July 30, 2015
<http://www.bbc.com/news/world-asia-india-33713407>

²⁶ Mumbai attack Gunman Ajmal Qasab Executed, BBC, Nov 21, 2012
<http://www.bbc.co.uk/news/world-asia-india>.

²⁷ Indian Penal Code, ch. XVI, art. 302, 303, Act no. 45 of 1860, Oct. 6, 1860.

²⁸ Indian Penal Code, ch. XVI, art. 302, 303, Act no. 45 of 1860, Oct. 6, 1860.

²⁹ A lethal lottery The Death Penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006 (Summary Report), , Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008, p.5.

³⁰ The Constitution of India, part V, ch. I, art. 72, Dec. 1, 2007.

row.³¹ In addition, the executive can commute the death sentence of any offender to any other punishment provided by the Penal Code without the consent of the offender.³²

The Indian Supreme Court held in early 2014 that the executive had to consider mercy petitions within a reasonable time period.³³ The Court held that inordinate, undue, and unreasonable delay in considering mercy petitions constitutes torture in violation of Indian and international law.³⁴ It also went on to issue certain guidelines when considering mercy petitions. The Court stated that prisoners have a right to legal aid to prepare legal challenges to the clemency process and to be informed of the result of their mercy petition in writing. In addition, it stated that prison officials should ensure that prisoners receive regular mental health evaluations and be given “appropriate medical care.”³⁵

Those sentenced to death have the right to appeal against both the sentence and the conviction.³⁶ If a case was originally tried before a Court of Session, the defendant can appeal to a High Court, and if a case was originally tried before a High Court, then the defendant can appeal to the Supreme Court.³⁷ The High Court is the first appellate court for capital cases, except for certain terrorism-related cases where the Indian Supreme Court is the first court of appeal.³⁸ In order to appeal to the Supreme Court, leave must first be obtained from the High Court or the Supreme Court.³⁹

In the High Court, trials are presided over by a bench composed of at least two judges. The High Court can confirm a death sentence, commute the death sentence to another

³¹ In India, pardon can be reviewed by SC, TIN, May 19, 2010, http://www.thenews.com.pk/daily_detail.asp?id=240051

³² A lethal lottery The Death Penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006 (Summary Report), , Amnesty International India and People’s Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008, p.5.

³³ Shatrughan Chauhan & Another vs. Union of India & Others, Judgment, Writ Petition No. 55 of 2013, Supreme Court of India, Jan. 21, 2014.

³⁴ hatrughan Chauhan & Another vs. Union of India & Others, Judgment, Writ Petition No. 55 of 2013, para. 54, Supreme Court of India, Jan. 21, 2014.

³⁵ Shatrughan Chauhan & Another vs. Union of India & Others, Judgment, Writ Petition No. 55 of 2013, para. 259(8), Supreme Court of India, Jan. 21, 2014.

³⁶ Sanjoy Majumder, India and the Death Penalty, BBC News, Aug 4, 2005, http://news.bbc.co.uk/2/hi/south_asia/2586611.stm

³⁷ Indian Criminal Procedure Code, Ch XXXII, art 374, 1973.

³⁸ A lethal lottery The Death Penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006 (Summary Report), , Amnesty International India and People’s Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008, p.5.

³⁹ When the State Kills, Amnesty Intl. Publications, 1989, p.147.

punishment, convict the defendant for another offense, order a new trial, or acquit the defendant.⁴⁰

If a lower court does not impose a death sentence on an individual, the state can still appeal to the High Court to increase the penalty to a death sentence. There is no automatic right of appeal to the Supreme Court.⁴¹ However, in cases where the High Court increases a defendant's sentence to the death penalty after a lower trial court acquitted the defendant, the case may be appealed to the Supreme Court.⁴² In these cases, the High Court or the Supreme Court must grant 'special leave' to file an appeal with the Supreme Court.

It can be very well inferred from the above research that hypothesis of researcher is that the death penalty given by sessions court must be subject to the confirmation by high court stands wholly correct.

Life imprisonment is an alternate to capital punishment. Life imprisonment is an equally efficacious alternative to death penalty, among others, because of the fact that in a series of judgments the Supreme Court has clarified that "imprisonment for life" means "imprisonment for the whole of the remaining period of the convicted person's natural life" subject to remission by the appropriate government. Further, under Section 376E of the Indian Penal Code introduced under the Criminal Law Amendment Act, 2013, clarified that "imprisonment for life ... shall mean imprisonment for the remainder of that person's natural life". Therefore, the fear that the convicts will pose a threat to the society if not awarded death penalty stands eliminated. Further, there is no data to show that any convict on death row whose sentence has been commuted to life imprisonment has been released by the Government of India. Even if released, there is no evidence to suggest that they were involved in recidivism though a few cases exist where under trials charged with offences carrying death sentence committed murders and subsequently sentenced to death.

Commutation of death sentence into life imprisonment remains the overwhelming national option for India. Out of 5,934 convicts who were given death sentence from 2001 to 2012,

⁴⁰ A lethal lottery The Death Penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006 (Summary Report), , Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008, p.6.

⁴¹ A lethal lottery The Death Penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006 (Summary Report), , Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008, p.6.

⁴² Jurisdiction of the Supreme Court, <http://supremecourtofindia.nic.in/>, last accessed Dec. 5, 2016.

death sentences for 4,382 convicts were commuted into life imprisonment.⁴³ Death penalty negates criminal justice system's core objectives i.e. to reform and rehabilitate offenders. Therefore, a revisionist thought upon the question that 'why do we kill people who kill people to show killing people is wrong' is very much needed.

⁴³ The case for abolition of death penalty in India: ACHR's submission to the Law Commission of India on Capital Punishment, Asian Centre for Human Rights, 27 June 2014.