



EXECUTION OF DEATH PENALTY; A MERE DREAM FOR THE PEOPLE OF INDIA

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INTRODUCTION:

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 opportunity for reformation. The courts while imposing death sentence have to record its special reasons as to why the court came to the conclusion. The actual pronouncement is no big deal but the actual execution is the real disaster.

The Death Penalty India Report (DPIR) was launched on 6 May 2016 and contains the findings of the Death Penalty Research Project (DPRP) which was conceived in June 2013, with an aim to address the glaring absence of empirical research on the death penalty in India.

Capital Punishment is laid down as a penalty in several legislative Acts, such as:

- Indian Penal Code, 1860
- Under the IPC eleven offences are punishable by death. For ex-Murder, Abetment of suicide by a minor or insane person, Dacoity with murder etc.
- Army Act, 1950, the Air Force Act, 1950 and the Navy Act 1956

- A death sentence may also be imposed for a number of offences committed by members of the armed forces.

- The Commission of Sati (Prevention) Act, 1987

- Prescribes punishment by death for any person who either directly or indirectly abets the commission of sati (immolation of a widow).

- The Narcotics, Drugs and Psychotropic Substances (Amendment) Act, 1988

Introduced the death penalty as a punishment for financing, or engaging in the production, manufacture or sale of narcotic or psychotropic substance of specified quantities (e.g. opium 10 kgs, cocaine 500 gms) after previous convictions.

- The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

- Introduced the death penalty for fabricating or providing false evidence that results in the conviction and execution of an innocent member of a scheduled caste or scheduled tribe.

INTERNATIONAL SCENARIO:

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. 58 countries are regarded as retentionist, who still have the death penalty



on their statute book, and have used it in the recent past.¹

DEATH PENALTY IN INDIA:

HISTORY:

- The Government's policy on capital punishment in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided".²
- At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 ('Cr.P.C. 1898'), and the Indian Penal Code, 1860 ('IPC'). The IPC prescribed six punishments that could be imposed under the law, including death.
- For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

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.

- In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death

penalty was no longer the norm, and courts did not need special reasons for non-execution of the capital punishment.

- The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

ESSENTIAL LEGAL DEVELOPMENT IN 2018:

- 162 persons were sentenced to death by trial courts in 2018 and 426 prisoners were under the sentence of death as on 31st December 2018. In 2018, the Supreme Court confirmed 3 death sentences under its review jurisdiction in the December 2012 Delhi gangrape case.
- After taking over as the Chief Justice of India in October 2018, Justice Ranjan Gogoi made hearing of death sentence cases a priority and constituted four 3-judge benches towards that end of 2018 also saw the legislative expansion of the death penalty for non-homicide offences.
- The Parliament amended the Indian Penal Code (IPC) through the Criminal Law Amendment Act of 2018 (CLA) in August, 2018 to provide for the death sentence as a

¹ Indian Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39

² *Ibid.* pp. 104-105



possible punishment for rape and gang-rape of girls below the age of 12 years.

- In January 2019, the Union Cabinet approved and introduced in the Lok Sabha amendments to the Protection of Children from Sexual Offences Act, 2012 (POCSO) which brought in the death sentence as a possible punishment for penetrative aggravated sexual assault with children below the age of 18 years.
- In August 2018, the Cabinet also approved a bill providing death penalty or life imprisonment for crimes involving maritime piracy or piracy at sea. In contrast to the legislative expansion of the death penalty, the Supreme Court indicated its growing concern with the judicial administration of the death penalty by commuting 11 death sentences between November - December 2018.
- Law Amendment Act, 2018 by introduction of the death sentence as a possible punishment for rape of girls below 17 years. This was followed by amendment of Protection of Children from Sexual Offences Act, 2012 in January 2019 which brings in the death sentence for aggravated penetrative sexual assault with children below the age of 18 years.
- These concerns found their sharpest articulation in Justice Kurian Joseph's dissenting opinion in *Chhannu Lal Verma v. State of Chhattisgarh*³ where he observed that the time had come to reconsider the need for the death penalty as a punishment, especially its purpose and practice.

- The Supreme Court moved in the opposite direction. Out of the 12 death penalty cases heard in the Supreme Court in 2018, death sentences were commuted in 11 cases to life imprisonment of different kinds.⁴

PROCEDURE WHEN DEATH SENTENCE IS IMPOSED⁵

The court has to record special reasons for imposing death sentence.

1. Confirmation by High Court:

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. The court passing the sentence shall then commit the convicted person to jail custody under a warrant.

2. Enquiry and Additional Evidence:

The High Court while dealing with confirmation may order further inquiry be made into, or additional evidence taken upon, any point bearing upon, any point bearing upon the guilty or innocence of the convicted person.

3. No order for confirmation:

No order for confirmation shall be made until the period allowed for preferring an appeal has expired, or if any appeal is presented within such period, until such appeal is disposed of.

³ Nov 28, 2018 - 5898-5899 OF 2014

⁴ <https://static1.squarespace.com/static>

⁵ <http://www.legalserviceindia.com/articles/dsen.htm>



-In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall when such court consists of two or more judges, be made, passed and signed by at least two of them.

4. Copy of Order Sent to Court of Session:

In cases submitted by the court of session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his official signature, to the court of session.

Where a person is sentenced to death and an appeal from its judgment lies the execution of the sentence will be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of.

Mode of Execution

The issue regarding the constitutionality of hanging as a mode of execution came up before the Supreme Court in *Deena v. Union of India*⁶, though the court asserted that it was a judicial function to probe into the reasonableness of a mode of punishment, it refused to hold the mode of hanging as being violative of Article 21 of the constitution.

This issue was once again raised in *Shashi Nayar*⁷ the court held that since the issue had already been considered in *Deena*, there was no good reason to take a different view.

Legality of Death Sentence:

⁶ [1993] 4 SCC 645

⁷ 1992 SCC [CRI] 24

In the case of *Jagmohan V/s State of U.P.*⁸, the question of constitutional validity of death punishment was challenged before the SC, it was argued that the right to live was basic to freedom guaranteed under Article 19 of the constitution. The S.C. rejected the contention and held that death sentence cannot be regarded as unreasonable per se or not in the public interest and hence could not be said to be violative of Article 19 of the constitution.

Grounds when Death Sentence be granted:

As have been stated earlier, after Cr.P.C., 1973, death sentence is the exception while life imprisonment is the rule. Therefore, by virtue of section 354(3) of Cr.P.C., it can be said that death sentence be inflicted in special cases only. The apex court modified this terminology in *Bachan Singh v. State of Punjab*⁹ and observed- "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.""

'Rarest of rare cases'

To decide whether a case falls under the category of rarest of rare case or not was completely left upon the court's discretion. However the apex court laid down a few principles which were to be kept in mind while deciding the question of sentence. One of the very important principles is regarding aggravating and mitigating circumstances. It has been the view of the court that while deciding the question of sentence, a balance sheet of aggravating and mitigating circumstances in that particular case has to be

⁸ 1973 SCC [CRI] 169

⁹ AIR 1980 SC 898



drawn. Full weightage should be given to the mitigating circumstances and even after that if the court feels that justice will not be done if any punishment less than the death sentence is awarded, then and then only death sentence should be imposed.

Again in *Machhi singh vs. State of Punjab*¹⁰ the court laid down:- " In order to apply these guidelines inter alia the following questions maybe asked and answered: -

- (a). Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b). Are there circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offenders?"

Mitigating Circumstances for the accused:

The court in its discretion, may take into consideration, the following circumstances as mitigating, on the basis of which the lesser punishment can be imposed:

1. That the offence was committed under the influence of extreme mental or emotional distribution;
2. If the accused is young or old, he shall not be sentenced to death;
3. The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;
4. The probability that the accused can be reformed and rehabilitated ;The state shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above;
5. That in the facts and circumstances of the

case, the accused believed that he was morally justified in committing the offence;

6. That the accused acted under the duress of domination of another person;
7. That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

- Conviction of a minor:

The ordinary sentencing applicable to adults will no longer be applicable in the case of juveniles. The Juvenile Justice Act defines the term juvenile as a boy who has not attained the age of 16 years, or a girl who has not attained the age of 18 years. As per sec. 22 of the said Act, no delinquent juvenile shall be sentenced to death.

- Conviction of A Pregnant woman:

Section-416 of Cr.pc. provides if a woman sentenced to death is found to be pregnant, the High court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life.

- Lesser Sentence To Co- Accused:

In cases where there are more than one accused, and murder has been committed by several persons, under section 34 of IPC, the act done by one will be considered to be acts done by all. So if a lesser sentence of life imprisonment is awarded to one accused, then the co-accused should also generally be given the same sentence, unless it can be established that the role of any one of them in the commission of the crime is more that of others.

5. Delay in execution of the death sentence

¹⁰ [1983] 3 SCC 470



Delay in execution of death sentence is a factor which may be taken into consideration for commuting the sentence of death to life imprisonment.

If upon taking an overall view of all the circumstances and taking in to account the answers to the question posed by way of the test of rarest of rare cases, the circumstances of the case are such that death penalty is warranted, the court would proceed to do so.

6. Judicial Discretion

The ultimate discretion to decide whether death sentence is to be imposed or not , have been vested in the court. There is a debate going on about the extent of this judicial discretion.

A brief analysis of the cases decided by the SC. Regarding the question of death sentence over last 25 years, will reveal how differing/dithering the judgments have been.

In the case of *Mohd. Chaman*¹¹, on the question of extent of judicial discretion, the court observed :-

"Such standardization is well nigh impossible . Firstly degree of culpability cannot be measured in any case. Secondly criminal cases cannot be categorized there being infinite , unpredictable and unforeseeable variations . Thirdly in such categorization, the sentencing procedure will cease to be judicial . And fourthly , such standardization or sentencing discretion is policy matter belonging to the legislature beyond the courts functions"

Table Of The Total Mercy Petitions Filed To The President Of India:

Mer cy Peti tions Deci ded by the Pres iden t of Indi a Sl. No.	Na me of the Pres iden t	Tenure	Nu mb er of Me rcy Peti tio ns Ac cep ted	Nu mbe r of Mer cy Peti tion s Rej ecte d	T ot al
1.	Dr. Raje ndra Pras ad	26.1.1950 – 3.5.1962	180	1	181
2.	Dr. Sarv apalli Rad hakr ishnan	13.5.1962 - 13.5.1967	57	0	57
3.	Dr. Zaki rHus sain	13.5.1967 – 3.5.1969	22	0	22
4.	Shri V.V. Giri	3.5.1969 – 20.7.1969; 24.8.196	3	0	3

¹¹ 2000 SOL CASE NO 705



		9 – 24.8.197 4			
5.	Dr. Fakrudhin Ali Ahmed	24.8.1974 – 11.2.1977	NA	NA	0
6.	Shri N Sanjeeva Reddy	25.7.1977 – 5.7.1982	NA	NA	0
7.	Giani Zail Singh	25.7.1982 – 25.7.1987	2	30	32
8.	Shri R. Venkatraman	25.7.1987 – 25.7.1992	5	45	50
9.	Dr. Shankar Dayal Sharma	25.7.1992 – 25.7.1997	0	18	18
10.	Shri K.R. Narayanan	25.7.1997 – 25.7.2002	0	0	0
11.	Dr. A.P. J. Abul Kalam	25.7.2002 – 25.7.2007	1	1	2

12.	Smt. Prati bha Devi singh Patil	25.7.2007 – 25.7.2012	34	5	39
13.	Shri Pranab Mukherjee	25.7.2012 --	2	31	33
Total			306	131	437

Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.188-189

CONCLUSION:

- The table clearly states the ground reality of all kinds of cases tried, accused convicted, the examination-in-chief and cross examination everything is the procedural aspects that the courts are complied to follow.
- However, playing court tactics has never been a new thing especially when it comes to the trial of Indian Courts. Filing lately the petition earlier to the courts and last and final resort of filing of the Mercy Petition is mostly observed to be filed only after it gets rejected or accepted of either of the co-accused. The recent scene has been observed in the Nirbhaya Gang Rape Case of 2012 where the people of India have been long waiting for the execution of death penalty.T
- The reason of setting up of the Fast Track Courts was for easy and corrective disposal of the pending cases in the criminal courts.



- The accused is also granted with Article 21 i.e. Right to life and liberty. The accused also has his/her powers which he can gain grounds for his eviction and then play with the court tactics in order to delay the execution of the mitigating factors.
- Thus, the pronouncement of death penalty > execution of death penalty > reduction in fear of people committing crimes.

