

# **CAPITAL PUNISHMENT IN INDIA: THE GROUND REALITY?**

## **Introduction**

A society tolerant of crime serves no purpose other than promoting the criminal behavior among its citizens. Intolerance towards crime can be gauged from the law and order situation of the concerned society, and hence to prevent such an outcome the laws normally do provide for various types of punishments namely in the category of fine, forfeiture of property, imprisonment and death sentence. Some societies also include stoning, lashing etc. in their repertoire of punishments, but none is as harsh or debatable as the capital punishment or the death sentence. Capital punishment found place even in the ancient times, where it was used more frequently. Usually the most heinous crimes like murder are punished with such a harsh sentence.

India penal laws allow the passing of death sentence by its judiciary, however, these sentences are subject to appeal till the Supreme Court and after that can be submitted by way of mercy petition before the President of the country or the Governor of the State as the case may be. The world over most of the legal systems are in a quandary regarding the abolition of the death sentence; some like Netherlands have abolished it, while others like India have chosen to retain it. Of the majority of the death sentences passed by the Indian courts very few are actually executed and most of them are overturned during appeal. In my research I will be stressing upon the situation of capital punishment in our country along with the role of Supreme Court in setting new benchmarks for the imposition and execution of the death sentence.

## **Capital Punishment in India: Scope and Operation**

### Scope:

The Indian laws lay down a variety of offences for which the judiciary may impose death sentence. However, what is important to note here is that in all the offences listed below the judiciary, it has discretion to impose death sentence. It is not the only option available to it. In *Mithu v. State of Punjab*<sup>1</sup> the Supreme Court held that mandatory imposition of death penalty is

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<sup>1</sup> 1983 SCR (2) 690.

unconstitutional. In offences where death penalty has been prescribed as mandatory, even there the Supreme Court has not applied it uniformly at time of sentencing the accused. It has often been influenced by the rarest of rare principle laid down in *Bachan Singh v. State of Punjab*.<sup>2</sup> Hence, the imposition of death sentence has been a rarity and is not followed as a norm. Following are the offences for which the Indian laws provide for death sentence either as an alternative to life imprisonment or in some cases as a mandatory requirement:

#### I. Offences under the Indian Penal Code, 1860.

The most commonly recognized offence for which capital punishment is prescribed is murder under Section 302, IPC. Apart from this other offences which are punished with death sentence are:<sup>3</sup>

- Section 121 of Indian Penal Code, 1860: Waging War against the Government.
- Section 132 of Indian Penal Code, 1860: Abetment of Mutiny
- Section 194 of Indian Penal Code, 1860: Giving or fabricating false evidence leading to procure one's conviction for capital offense.
- Section 305 of Indian Penal Code, 1860: Abetment of suicide by child or insane person
- Section 307 of Indian Penal Code, 1860: Attempt to murder by a life convict, if hurt is caused
- Section 396 of Indian Penal Code, 1860: Dacoity with murder
- Section 364A of Indian Penal Code, 1860: Kidnapping for ransom

After the 16<sup>th</sup> December Delhi gang rape incident The Criminal Law (Amendment) Act, 2013, was enacted, under which if a person who in the course of a sexual assault inflicts injury that causes the victim to die or to be left in a “persistent vegetative state” is to be punished by death. Repeat offenders of gang rape are also punishable by death.<sup>4</sup>

#### II. The Army Act, 1950, The Air Force Act, 1950 and The Navy Act 1956.

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<sup>2</sup> 1983 1 SCR 145

<sup>3</sup> Available at:

[http://www.lawnotes.in/Offenses\\_punishable\\_with\\_death\\_sentence\\_under\\_Indian\\_Penal\\_Code,\\_1860](http://www.lawnotes.in/Offenses_punishable_with_death_sentence_under_Indian_Penal_Code,_1860) (last accessed on 16.3.2014).

<sup>4</sup> *Death Penalty Worldwide*, Available at: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India> (last accessed on 16.3.2014).

Among the members of the armed forces the following offenses are punishable by death: committing, inciting, conspiring to commit, or failing to suppress mutiny; desertion or aiding desertion; cowardice; treacherous acts; committing or inciting dereliction of duty; aiding the enemy; inducing individuals subject to military law not to act against the enemy; imperiling Indian or allied military, air, or naval forces in any way.<sup>5</sup>

### III. The Commission of Sati (Prevention) Act, 1987

Under Section 4 of this Act, if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine.<sup>6</sup>

### IV. The Narcotics, Drugs and Psychotropic Substances Act 1985.

After the 1988 Amendment, a new Section 31 A was added which introduced the death penalty as a punishment for financing, or engaging in the production, manufacture or sale of narcotics or psychotropic substance of specified quantities (e.g. opium 10 kgs, cocaine 500 gms) after previous convictions.<sup>7</sup>

### V. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Act under S. 3 (2) (i) 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.<sup>8</sup>

Even though there are so many laws which provide for death penalty after the courts give special reasons for their decision yet, this sentence is not passed routinely. The judiciary has to satisfy

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<sup>5</sup> Supra note 4.

<sup>6</sup> Sati refers to a funeral practice within some Indian communities in which a recently widowed woman immolates herself, typically on her husband's funeral pyre. The practice was outlawed by the British colonial masters in 1829 within their own territories in India. The custom is still today occasionally adhered to, despite a 150 year old ban, a recent case from India in 2008, when 75-year old Lalmati Verma allegedly jumped onto her husband's funeral pyre. The Indian Sati Prevention Act from 1987 makes it criminal to aiding, abetting, even only glorifying the act of Sati. Available at: [http://en.wikipedia.org/wiki/Sati\\_\(practice\)](http://en.wikipedia.org/wiki/Sati_(practice)) (last accessed on 16.3.2014).

<sup>7</sup> Satish Kumar, *Death Sentence*, Available at: <http://www.legalserviceindia.com/articles/dsen.htm> (last accessed on 16.3.2014).

<sup>8</sup> Ibid.

itself with a number of requisites like the age, any illness mental or otherwise that the accused suffers from, the reasons behind the crime, pregnancy of the woman accused, the potential of danger to the society from the accused etc. after taking into considerations all these factors together with the offence committed and its gravity the judiciary can pronounce the verdict of death sentence. In the last few decades there has been an increase in the number of death sentences passed but a very prominent decrease in the number of actual executions that took place. The last two executions to take place in India were on 8<sup>th</sup> February 2013 hanging of Muhammad Afzal. He was convicted of plotting the 2001 attack on India's Parliament, and the hanging of 2008 Mumbai attack gunman Mohammad Ajmal Amir Qasab on 21<sup>st</sup> November 2012. Prior to these hangings, the last execution in India had taken place in 2004, when Dhananjoy Chatterjee was executed for the murder and rape of a 14-year old girl. This, in turn, was the country's first execution since 1995.<sup>9</sup>

#### Operation:

Once, the judiciary pronounces the capital punishment to an accused, there is a definite procedure to be followed before the said sentence can be implemented. A death sentence is executed by hanging the convict or by shooting him/her as provided by The Air Force Act, 1950, The Army Act 1950 and The Navy Act 1957.<sup>10</sup> A sentence of death once passed by the Court of Session needs to be confirmed by the High Court of the State concerned under Section 368 of the Code of Criminal procedure, 1973. The High Court while dealing with confirmation may order further inquiry be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person.<sup>11</sup> 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.<sup>12</sup>

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<sup>9</sup> Supra note 4.

<sup>10</sup> Available at: <http://statutory-law.knoji.com/statutory-law-what-crimes-merit-a-death-sentence-under-military-law-in-india/> (last accessed on 16.3.2014).

<sup>11</sup> Supra note 7.

<sup>12</sup> Ibid.

If an appeal is made to the High Court against acquittal then it can convict a person and pass sentence of death under Section 386(a), of the 1973 Code.<sup>13</sup> There is no automatic right of appeal to the Supreme Court. 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.<sup>14</sup> In these cases, the High Court or the Supreme Court must grant 'special leave' to file an appeal with the Supreme Court.<sup>15</sup> However, sentences passed by courts-martial under the Army, Navy, or Air Force cannot be appealed to a higher court.<sup>16</sup>

Beyond the Judiciary the Executive also plays a very important role with regard to the situation and execution of capital punishment in India. Under the Constitution, powers of pardon are vested in the President of India under Article 72 and/or the Governor of a State under Article 161.<sup>17</sup> They exercise their power on the advice and the information provided by the Union and the State home ministry as the case may be.

The following table gives us a comprehensive idea about the mercy petitions filed before the Presidents of the country since 1997.<sup>18</sup> The figures are an estimate till January 2014.

PRESIDENT	Mercy Petitions Pending at the Start of Tenure	Mercy petitions Received During Tenure	Mercy petitions Decided During Tenure	Mercy petitions Commuted During Tenure
K.R. Narayanan (1997-2002)	1	14	0	0
A.P.J. Abdul Kalam	15	10	1	1

<sup>13</sup> 187<sup>th</sup> Report on Mode of Execution of Death Sentence and Incidental Matters, *Law Commission of India*, (2003), p.57.

<sup>14</sup> Section 379, *Code of Criminal Procedure*, 1973.

<sup>15</sup> Supra note 4.

<sup>16</sup> Ibid.

<sup>17</sup> Article 72 of 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. Article 161 gives the Governor of a State 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

<sup>18</sup> Source C. Raj Kumar, Putting a full stop to death sentence: Humanising capital Punishment, *The Hindu*, 6 February 2014, Available at: <http://www.jgu.edu.in/sites/default/files/article/6%20feb%202014%20the%20hindu.pdf> (last accessed on 16.3.2014).

(2002-07)				
Pratibha Patil (2007-12)	24	18	24	23
Pranab Mukherjee (2012-Present)	18	Not Known	21	1

Over the years it has been witnessed that the executive is taking inordinate delay in deciding the mercy petitions filed before it as a result causing undue suffering and torment to the convicts. The problem is further aggravated when a convicted person dies because of medical reasons before his mercy petition could be disposed of. On 2 June 2012, the then President Pratibha Patil commuted the death sentences of a number of convicts to life in prison. A few days later it came to light that one of the beneficiaries of her mercy, Bandu Tidke had died almost five years ago in 2007. He was sentenced for the rape and murder of a 16-year-old girl and was 31 years old and HIV positive when he died.<sup>19</sup> This brings to the light the abnormally long time taken to decide these mercy petitions.

### **Supreme Court and Capital Punishment**

In *Shatrughan Chauhan and Anr v. Union of India and Ors*<sup>20</sup>, the Supreme Court delivered a landmark judgment. A three Judge bench, allowed all the 13 Writ Petitions filed by 15 Death Convicts in various cases. The Bench consisting of Chief Justice P.Sathasivam, Justice Ranjan Gagoi and Justice Shiv Kirti Singh commuted the death sentence imposed on Suresh, Ramji, Bilavendran, Simon, Gnanprakasam, Madiah , Praveen Kumar, Gurmeet Singh, Sonia, Sanjeev, Sundar Singh, Jafar Ali, Magan Lal Berala, Shivu and Jadeswamy. The Supreme Court also overruled the two Judge bench Judgment in *Devender Pal Singh Bhullar* case which held that a death sentence imposed on a prisoner who was convicted for a terrorist act cannot be commuted

<sup>19</sup> Uday Kumar and Ravi Uppar, President Pratibha Patil gives life to dead man, *The Times of India*, 23 June 2012, <http://timesofindia.indiatimes.com/india/President-Pratibha-Patil-gives-life-to-dead-man/articleshow/14349473.cms> (last accessed on 16.3.2014).

<sup>20</sup> Writ Petition (Criminal) No. 55 of 2013.

on the ground of delay.<sup>21</sup> The judgment laid down the following guidelines on various procedures to be followed before executing a death convict. They are:

1. Solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional.
2. Legal aid should be provided to the convict at all stages, even at the stage of filing of mercy petitions or after availing judicial remedies after the mercy petition is rejected.
3. When any such petition is received or communicated by the State Government after the rejection by the Governor, necessary material concerning it should be forwarded by the authorities to the Ministry of Home Affairs within a stipulated time period. After getting all the details, it is for the Ministry of Home Affairs to send the recommendation/their views to the President within a reasonable time and if there is no reply from the President's office then it should send periodic reminders. Unexplained and inordinate delay can become a ground for commutation of death penalty to life imprisonment.
4. The rejection of the mercy petition by the Governor should immediately be communicated to the convict and his family in writing.
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6. 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.
7. It has been observed that in some cases, death-row prisoners lose their mental balance on account of prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.
8. copies of relevant documents like court papers, judgment copies etc., should be furnished to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.
9. It is necessary for prison authorities to facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

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<sup>21</sup> Supreme Court issues landmark guidelines relating to Death Penalty, *Live Law News Network* 21 January 2014, Available at: <http://www.livelaw.in/supreme-court-issues-landmark-guidelines-relating-to-death-penalty/> (last accessed on 16.3.2014).

10. It is an obligation of the prison authorities to make available a post mortem report to the family of the deceased convict will ensure just, fair and reasonable procedure of execution of death sentence.

## **Conclusion**

Capital punishment is the ultimate method of punishing an individual if found guilty of any of the crimes mentioned before. However, it is not the first resort any longer. The Supreme Court had long adopted the rarest of the rare category test to judge whether the accused should be handed out death sentence or life imprisonment. However, after its latest verdict in Shatrughan Chauhan case it has laid down even more restrictions on handing out death sentences. The abolitionists are happy, since according to them it puts India on the path where one could hope that in the near future there would be very few takers for the retention of death sentence. However, the other section of the society feels that mere delay in deciding a mercy petition is not a ground strong enough to commute death sentence to life imprisonment, especially of the crime earlier fit in the rarest of rare category. The researcher however is of the view that this judgment may instead force the executive to decide mercy petitions in a rationale time period thereby putting an end to the agony of hundreds of life which are hanging by a thin thread of hope.

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