

WHY IS DEATH PENALTY STILL A PUNISHMENT IN INDIA?

Written by *Senthur Pandian*

2nd Year LLB Student, Jindal global law school, Sonipat, India

ABSTRACT

The death penalty has been a very widely debated topic among the public in the recent years. Every time a gruesome crime takes place the entire nation cries for the accused to be hanged as soon as possible. The public has time and again demanded for faster trials and sentencing in these cases. However once we take a closer look into the judicial process and the lives of the accused during this process we would be able to get a better understanding of the horrors these convicts go through, I can assure you these horrors are much more punishing and tormenting than what awaits them at the gallows. Whenever the constitutional validity of the death penalty is brought up it's said this issue was dealt with in the landmark judgement of *Bachan Singh vs State of Punjab*ⁱ. The following case was the first time the constitutional validity of the death penalty was questioned. It was held that the death penalty was constitutionally valid under article 21 of the Indian constitution which states that "No person shall be deprived of his life or personal liberty except according to procedure established by law"ⁱⁱ. It was said that since the death penalty was given by procedure established by law it is constitutionally valid. It was also held in *Bachan Singh vs State of Punjab* that the death penalty was only to be given in the "Rarest or rare" cases. That might seem like a satisfactory answer, until you start looking at the finer details about the death penalty in India Yes, the death penalty might be constitutionally valid under article 21 of Indian constitution because it follows a procedure established by law, But what if the whole problem with the death penalty was this procedure itself? This research focuses on the numerous errors that take place during the trials and sentencing period and how that violates the basic rights of the convicts.

PROBLEMS IN SENTENCING

Rapid sentencing in lower courts

According to the data from the death penalty report, 2016ⁱⁱⁱ from the period 2000-2015 over 1700 prisoners were sentenced to death by the lower courts. Out of these 1700 only 4.9% of the sentences were confirmed by the appellate courts and 29% of them were acquitted of all their charges and released. This shows that the lower courts did not keep up the high threshold for death penalty while sentencing these individuals. Keep in mind the process of trial and appeal is a long one and during this period of time these prisoners are locked up and not sure of their fate. This rapid form of sentencing is due to the crime centric approach of the lower courts^{iv}. It was held in *Bachan Singh*^v while keeping the “rarest or rare” doctrine in mind the court should all look at the various mitigating factors such as age, social background and circumstance of the individual which could have led the commission of the crime. Most trial courts only look at the gruesome nature of certain crimes and award these death penalties.

Same day sentencing

Sec 235(2)^{vi} of the CrPC divides the process of trial into two stages. The first stage determines the guilt and conviction, whereas the second stage deals with the sentencing. As per the data collected by the death penalty report, 2016 out of 211 cases in which death penalty was imposed in the 3 states of Maharashtra, Delhi and Madhya Pradesh 44% of them had same day sentencing^{vii}. That means there was no separate hearing for the sentencing in which the offender’s defence can put down mitigating factors that can affect the sentencing. The judge is supposed to look and mitigating and aggravating factors while deciding between life imprisonment and death penalty, if the sentencing was done on the same day as conviction the lack of adequate information about the accused makes it impossible for a trial judge to determine the sentence as per fair trial norms.^{viii}

Time period for commuting death sentence

As we saw earlier out of out of 1700 cases in which death sentence was given only 4.6% were accepted by the high courts. After a death sentence is passed in the lower court it is mandatory that the case must be referred to the high court for conformation according to sec 366(1) of

CrPC^{ix}. However, the process of trial and the time it takes to reach the appellate courts is very long one. The average duration of trial in Indian courts is around 6 years and the average time for high court proceedings is 4 years.^x

During this period the prisoners are not aware of their fate, they are haunted by thought of the gallows every single day.

Human error

We must also count the fact that criminal investigation and trials are subject to human error, a good example for this is the Ankush maruthi shinde and ors vs the state of Maharashtra.^{xi} In the following case 6 men were convicted and sentenced to death by the Nashik sessions courts. The death sentence was upheld by the high court as well as the Supreme Court in the period 2006 to 2009. However, the Supreme Court took another look into the case in 2019 and found an error in the evidence and ordered to set these men free. These 6 men were incarcerated for a period of 10 years and were on the brink of execution. Such an event clearly shows how our criminal justice is severely flawed.

Police brutality

The condition of police brutality was brought into light this year with a horrific incident that took place in Tamil Nadu, where a father and son were beaten up in custody and died due to the injuries. In that case the father and son barely even committed a crime then you can imagine the fate of these who are alleged to commit such heinous crimes. Even though police statements and confessions are inadmissible in the torture is often used to collect testimonies from the accused in the pre-trial stages.^{xii}

SOCIO-ECONOMIC BACKGROUNDS OF OFFENDERS

When we look at the social and economic background of the 411 prisoners who are currently on death row, 74% of them are economically vulnerable and belong to marginalised communities^{xiii}. Does this mean only people from such backgrounds commit such heinous crimes? Justice Bhagwati provided a dissenting opinion in the Bachan Singh case that “Death

sentence has a certain class complexion or class bias in as much it is largely the poor and the downtrodden who are victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows.^{xiv}”

Poor legal representation

Given that most of the offenders are economically vulnerable one would think they take the counsel of legal aid lawyers but around 70% of them hired private lawyers in their trials. Once they are convicted in the lower court and incarcerated they have very little access to meet their lawyers since they are kept in solitary confinement. Since most have them have very little knowledge about the legal process and laws, they're fate entirely depends on these lawyers. Most lawyers stop representing them due to the nature of the crime committed and its stigma in the community. According to a survey in the death penalty report there seems to be a complete lack of engagement between the lawyers and clients in most cases^{xv}. This is mainly due to the extremely low fees and in most cases these offenders can't afford that too.

DEHUMANISING CONDITIONS IN PRISON

One of the most concerning aspects of the death sentence is the appalling conditions that these convicts on death row are kept in. They are usual segregated and treated cruelly by the jail authorities.

Solitary confinement

Most of the prisoners in the death row are segregated and kept in solitary confinement. They are not given access to the amenities that are given to other prisoners such as games, newspaper etc. It has been held in *Sunil Batra vs Delhi admin*^{xvi} that prisoners should not be segregated in such a manner and get the same amenities as others. In another Supreme Court judgement *Ajay Kumar Pal v. Union of India*^{xvii} it was held that prisoners should not be kept in solitary confinement until the mercy petition filed before the executive is rejected and if such measures are carried out it be a violation of article 21 of the Indian constitution^{xviii} which deals with right

to life. Even though all these judgements advice against solitary confinement most jail authorities do not seem to care about it^{xix}.

Bureaucratic delays

After the death sentence is confirmed by the courts the offender has the option of filing a mercy petition to the governor and the president. In one instance a prisoner filed a mercy petition to the governor of his state and the president of India, the governor rejected his petition in the same year. Whereas his mercy petition to the president was only rejected after a period of 6 years^{xx}. There is no time limit specified in which the president should accept or reject the mercy petition. In this instance the prisoner recalled how the thought of the gallows would haunt him every single night. Later the Supreme Court commuted his sentence to a life sentence on the ground of “undue and unexplained delay”^{xxi} in the disposal of his mercy petition. The Supreme Court held that such delay amounted to torture and is a violation of article 21.

Inhumane conditions in prison

We have seen various problems with the death penalty so far and this might be one of the biggest concerns with the death penalty. Out of the 411 prisoners currently on death the average time spent in jail was 18 years. Given that there isn't any time limit for rejecting the mercy petition these prisoners are left to wonder about their looming fate. Most of their sentences would probably get commuted to life sentences but it is a very lengthy process and most prisoners. These offenders are seen as a liability from the moment they enter the prison. Even though India has a very low rate of execution and their sentences will almost certainly get commuted the jail authorities look at them like some animal that has come to die in a slaughter house^{xxii}. The people from project 39A from NLU, Delhi did a survey on around 370 of the current prisoners on death row, they got to interview them and know about their whole experience in prison and the legal process behind it. Some of these interviews have shocking and horrific revelations about what goes on in prisons. Most prisoners are kept in solitary confinement and are only let out of their cells for 4 hours a day, the cell doesn't have basic amenities like a toilet^{xxiii}. These prisoners are denied of basic health needs and given the situation of their confinement have a lot of ailments. Mental health has never been seen as an important concern in India, you can then imagine the fate of these people. The prison officials

taunt them by taking them to the gallows and asking what their last wish is.^{xxiv} Not only are they mentally tortured they are physically assaulted too. They are constantly beaten up by other inmates for the nature of their crimes and are constantly tortured by the prison officials. Most prisoners felt that it was better to die than live in such bad conditions.^{xxv} Imagine keeping someone in such conditions for around 19 years, that's the average amount of time spent by prisoners on death row. One would think at least they wouldn't have economic concerns in prison but that's sadly that's not the case. Most of these prisoners already come from very poor economic conditions and they are not allowed to work in prison and they need money even in prison to buy basic necessities like postal stamps to send letters to communicate with their families. Even while visits the family members of the prisoners have to bribe the jail officials to get a little extra time to talk to them. These are only few of the incidents we are aware of as most prisoners were afraid to talk as they might get into trouble. The prisons in India give very little access to the public about what goes inside closed doors.

CONCLUSION

The death penalty, the highest punishment that can be given to any individual according to the law and this is how it is carried out. So many problems with the judicial process and violation of basic legal practices. The states inability to provide proper legal representation for such important cases where a life of an individual is on the line. The main argument for the death penalty is retribution and deterrence, with that in mind death penalty has been added as a punishment to non-homicidal offences like rape. Even though such measures are being carried out, the number of rapes still seems to be rising. I think the Indian judicial system is barking at the wrong door in this scenario. Judiciary plays to the whims of the public and grant death sentences just to silence them in sensational cases. In cases like that it is just vengeance served in the name of retribution, at the end it all comes to the ideology of "An eye for an eye" and we all know where that would take us. What is even more concerning is the group of people who are the most affected by it. Does this mean only the poor and downtrodden people of our society commit crimes for which they must die? They are put in such situations due to their lack of knowledge about the legal system their own rights. Given the fact that almost all their

statements are collected by the police by torture and they are not aware of the fact that these statements extracted by the police inadmissible in the court so they end up self-incriminating themselves. The main concern about the death penalty isn't the part where you execute a person because that part barely happens in India. Since 2000 only 8 executions have been carried out till now. When a person is sentenced to death in India it doesn't mean he's going to die in the gallows one day, it just means he is going to be incarcerated in horrific conditions for an average period of two decades during which his basic rights such as protection from torture and right to life are outrightly violated. India really needs to take a look the state of it crumbling capital punishment situation. We need to take another look at the golden rule of "Rarest of the rare" which was held in a judgement 40 years ago. We should focus less on the question of if someone deserves to die and shift our attention to do we deserve to kill? After evaluating all the flaws in the legal procedure and the inhumane conditions that the prisoners are put through it clearly shows that the death penalty in India has its set of inherent flaws. India has not signed any international treaties on the abolition of the death penalty. India remains as one of the 56 countries that still retain capital punishment. The road to abolishing this punishment is a long one and I'm not sure if we're anywhere close to it in India. I'd like to quote the words of US justice Thurgood Marshall "The death penalty is no more effective a deterrent than life imprisonment. It is also evident that the burden of capital punishment falls upon the poor, the ignorant and the underprivileged members of society^{xxvi}". That is the exact situation in our country as of now. The process of death sentence is arbitrary in nature and discriminatory. It violates basic human rights and the conditions which these people are kept in violates article 21^{xxvii} of the Indian constitution. The men in death row might not get executed in the end but a part of their soul dies every single day in this long treacherous process. It's about time we really ask ourselves is there need for such a cruel and ancient punishment in our rule books? And why is the death penalty is still a punishment in India?

ENDNOTES

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- ⁱ Bachan Singh vs State of Punjab
- ⁱⁱ Article 21 in The Constitution of India 1949
- ⁱⁱⁱ National Law University, Delhi, Death Penalty India Report (VOLUME 1) (page28)(NLU Delhi Press 2016)
- ^{iv} *Anup Surendranath, Neethika Vishwanath, and Preethi Pratishruti, "Enduring gaps and errors in capital sentencing in India" NLSI review (September 2020)*
- ^v Supra note1
- ^{vi} THE CODE OF CRIMINAL PROCEDURE, 1973 s.235(2)
- ^{vii} Supra note 3 (page 40)
- ^{viii} Neethika Vishwanath "Trial Courts Pass Death Verdicts They Should Not" Article 14 (June 2020)
- ^{ix} THE CODE OF CRIMINAL PROCEDURE, 1973 s.366(1)
- ^x Supra note 3 (page 50)
- ^{xi} Ankush maruthi shinde and ors vs the state of Maharashtra
- ^{xii} Anup Surendra Nath and Neethika Vishwanath "Police violence and how some lives don't matter" The Hindu (4th July 2020)
- ^{xiii} Supra note 3(page 104)
- ^{xiv} Bachan Singh vs State of Punjab
- ^{xv} Supra note 3(page 130)
- ^{xvi} Sunil Batra v Delhi Admin and ors (1978) 4 SCC 494,
- ^{xvii} Ajay Kumar Pal v. Union of India (2014)
- ^{xviii} Supra note 2
- ^{xix} Himanshu Agarwal "Conditions in death row are a recipe for mental health disasters" The wire (1, December, 2016) available at < <https://thewire.in/rights/death-row-mental-health>> last visited on (1/11/2020)
- ^{xx} Supra note 3 (page 44)
- ^{xxi} Ibid
- ^{xxii} Hari Kumar and Ellen Barry "Death Sentences in India Usually End in Question Marks "" The New York times (6, May,2016) available at < <https://www.nytimes.com/2016/05/07/world/asia/india-death-sentences-executions.html> > last visited on (1/11/2020)
- ^{xxiii} National Law University, Delhi, Death Penalty India Report (volume 2) (pg74) (NLU Delhi Press 2016)
- ^{xxiv} Ibid (pg 97)
- ^{xxv} Vidhi Doshi 1 "india's death row prisoners face horrific conditions" The Guardian (6, May,2016) available at < <https://www.theguardian.com/world/2016/may/06/india-death-row-prisoners-horrific-conditions-study>> last visited on (1/11/2020)
- ^{xxvi} Furman v. Georgia, 408 U.S. 238 (1972)
- ^{xxvii} Supra note 2