

Capital Punishment and its Execution in India- *with special reference to the execution of death sentence in Nirbhaya's gang rape and murder case*¹

Abstract

The rape and murder case of a 23-year-old paramedic student on a moving bus on the busy roads of Delhi on the night of 16 December 2012 jolted the conscience of the country very rudely. It was this incident, referred to as the Nirbhaya case, which brought forth numerous questions right from the security of women in the country to the efficacy of the criminal justice system of our country. Another major debate which evoked in the aftermath of this incident dealt with the idea of the death penalty and challenges to its execution in India. Through this article, the author aims to address these issues with a special emphasis on the Nirbhaya case. The author follows the timeline of that horrific incident while highlighting the loopholes in the criminal legal system of the country. The author also deals with the aspect of the abolition of the death penalty in light of the ever-increasing support for the same, nationally as well as internationally.

Key Words: Death Penalty, Abolition of Capital Punishment, Nirbhaya Case, Execution of Death Sentence

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Introduction

ⁱMarch 20, 2020 was a significant day for India when all the four convicts in the Nirbhaya gang rape and murder caseⁱⁱwere hanged to death. ‘Nirbhaya’, meaning the fearless, is the pseudo name given to the victim of the appallingly horrendous crime committed against the 23 year old paramedic student on the gory night of December 16, 2012- a night which changed India in ways more than one.

The general sentiment in the country regarding that execution was jubilant. People were found celebrating the perceived sense of justice delivered to the victim and her parents whose fight for justice took birth the day their daughter died. However, two major debates were ignited by the execution of the convicts in the case. The first deals with the question of efficacy of the death sentence as a means of punitive action against criminals. The second debate, on the other hand, concerns with the ⁱⁱⁱdelay in the execution of death sentence primarily on account of the numerous petitions filed by the lawyer of the accused to stall the death sentence.

This article addresses both the questions separately, beginning with the efficacy of death penalty as a means of deterrence.

Capital Punishment

Death penalty, which is the execution of an offender sentenced to death after conviction by a court of law for a criminal offense, is the most severe form of punishment. ^{iv}The views may have changed about it now but there was hardly a country in the world where capital punishment did not exist in the ancient times. Originally, it was also attributed to the belief of ‘eye for an eye’, but eventually began to be considered as a means of deterrence from grave offences.

Death penalty or capital punishment is a controversial subject all over the world. ^vMany human rights activists, international bodies, non-governmental organizations etc. have unanimously condemned the idea of capital punishment. It is not only deemed to be an absolute violation of the right to life of an individual but also considered to be unjust to the kith and kin of the convict sentenced to death. Many people have also questioned the idea of executing the accused who could be the sole breadwinner of a family. ^{vi}Therefore, nearly 140

countries in the world have abolished the capital punishment for either all or some of the offences. Some of such countries are Argentina, Australia, Austria, Canada, Denmark, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Mauritius, Mexico, , Nepal, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Poland, Portugal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland etc. However, there are still many nations in the world which award a death penalty in heinous offences such as India, China, Indonesia and the United States of America.

International Outlook

Internationally, the International Covenant on Civil and Political Rights ('ICCPR'), which has been ratified by India, is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR, although, does not advocate abolition of the use of the death penalty but ^{vii}contains guarantees in favour of the right to life and the important safeguards to be followed by signatories who retain the death penalty. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with the curtailment of death penalty and is open to signatures from all countries in the world. ^{viii}It came into force on July 11, 1991, and has 89 states parties and 40 signatories.

Additionally, several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. ^{ix}In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.” ^xIn 2008, the GA reaffirmed this resolution, which was further reinforced in subsequent resolutions in ^{xi}2010, ^{xii}2012, ^{xiii}2014, ^{xiv}2016, ^{xv}2018 and ^{xvi}2020. Many of these resolutions noted that, “a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.” ^{xvii}Also various reports of the UN Secretary General to the Human Rights Council have highlighted the continued use of death penalty while acknowledging “the negative impact of a parent’s death sentence and his or her execution on his or her children.” The latest UN resolution passed in the year 2020 dealt with certain other matters such as preclusion of juveniles below the age of 18, pregnant women and persons suffering from mental or physical incapacities from death penalty, access to legal counsel for those convicts facing

death penalty and improvement in prison conditions at par with international standards. Gradually, more and more nations are joining the bandwagon advocating abolition of death penalty. ^{xviii}The number of States which voted in favour of the abolition resolution has increased to 123 in the year 2020 as compared to the year 2007 when 104 States had voted in favour of such abolition. However, India has not voted in favour of these resolutions, as yet.

India's tryst with death penalty

India has had a history of death penalty with political prisoners being sentenced to death in the pre-modern era. The methodology of capital punishment eventually eased its way into the modern era without much opposition. ^{xix}One of the first Indian opponents of capital punishment was Shri Gaya Prasad Singh, member from Bihar Legislative Assembly, who introduced the first ever Bill in the Legislative Assembly in 1931 seeking abolition of the capital punishment for the offences under the Indian Penal Code. The motion was, however, rejected and India continued to have death penalty in its Penal Code. After attaining the Independence also, when India began formulating its own penal laws, capital punishment was retained.

Nevertheless, India is not known for a blatant use of death penalty. Use of capital punishment in India is restricted to the 'rarest of rare cases' as propounded by the Court in the landmark judgement of Bachan Singh vs State of Punjab^{xx}. Further, it has been left completely upon the Court's discretion to decide whether a case is fit to fall under this category. The Court, in the said case, laid down two questions which, if answered in affirmative, justify the awarding of death penalty. Firstly, whether there is something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence. Secondly, if the circumstances of the crime are such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offenders. A strict compliance with these guidelines has ensured that death penalty is awarded only in exceptional cases where the crime shakes the conscience of the nation. Here are some statistics to this effect.^{xxi}Project 39: Equal Justice Equal Opportunity, the Annual Statistical Report, 2018 compiled by the National Law University, Dwarka, pegged the total number of prisoners on death row in India as on December 31, 2019 at 378 as against 426 on the same date in 2018. Most of these cases related with sexual offences i.e. 52.94% and 41.35% respectively as for the two dates. Further, 74.04% of the cases out of the total number of death penalty cases in the year 2019 had a victim that was

below 12 years of age while the same ratio for 2018 stands at 39.21%. Moreover, ^{xxii}as per the report of Centre on Death Penalty, total 720 convicts have been executed in India since 1947. Though this figure is disputed by some other studies. But, the number of death sentences have certainly fell further in the recent times. ^{xxiii}In 2019, 102 convicts were sentenced to death by Trial Courts across states, down to almost 60% from 162 in 2018, according to the annual statistics published by NLU on death sentencing.

Death Penalty – a requirement or a violation

The debate on the death penalty is not new. Since decades questions have been arising on the arbitrariness of this punishment, especially when seen in the light of being a medium of deterrence. ^{xxiv}There is no clear relationship established between the role of capital punishment and deterrence of crimes. ^{xxv}Various researches have been inconclusive in this regard. Neither death penalty has evidently deterred crimes, nor has the absence of capital punishment made a drastic difference to the crime rate in a country. There is no doubt that everyone fears death and the possibility of facing the noose might deter an ordinary person of reasonable prudence from committing a grave offence. However, the offenders can broadly be divided into three categories – firstly, those who commit a crime in the heat of the moment, secondly those who commit a crime out of their perceived helplessness believing that they are left with no other choice and thirdly those who execute a pre-planned offence. It is also true, psychologically, that whoever dares to commit a heinous offence in the heat of a moment is not expected to be conscious of the consequences. Similarly, someone who is anyway living an appalling life is not expected to fear the possibility of death in the same way that a privileged person is expected to. Therefore, death penalty is not likely to make a lot of difference to the first two categories of offenders. However, it is only the third category of offenders who may be mindful of the repercussions of their act, if caught. However, if such sharp offenders were anyway concerned about the legal action, they wouldn't be committing the offence in the first place.

Thus, presence or absence of capital punishment doesn't appear to be greatly affecting the possibility of any person committing a crime. To look at it differently, does it mean that if the death punishment itself is not deterring someone from committing a crime, nor will life imprisonment or any other punishment, least of all one that of a lesser stringency? If yes, the entire system of meting out punishment for offences is flawed and should be replaced with a more compassionate reformatory system comprising of rehabilitation centres and educational

institutions, instead of prisons. In fact, if one really focuses on the reformatory approach in the punishments, the condition of the prisons, the treatment of the inmates, the facilities and opportunities provided to the inmates aiming at their reform come into picture as well. But, it is rather fanciful to imagine that in a country still facing poverty for a substantial portion of its population, the government is obligated to employ a handsome amount of resources in providing for and rehabilitating the offenders. That the State is expected to feed the offenders well, clothe them, treat them, educate them and even pay them for the work they perform or the services they render during their stay as inmates. Even after that, there is no benchmark to decide that a person is reformed. In fact, in case a released convict does commit a crime again, then should he be liable to a stricter punishment or he should undergo the same process again is another matter to ponder over.

Another concern raised by the league favouring abolition of death penalty is that it is unfair to the family of the offender who is sent to the gallows. An executed convict could be the sole bread winner of a family who could be left without an income source in such a situation. But similar could be the situation of the family of the victim and it is indeed an added burden on the State to provide compensation to the family of the victim of such crimes. Therefore, an argument in favour of abolitionists could be that if the sole bread winner of a family is murdered by the convict, then instead of hanging the convict himself, he can be made to provide labour to the State in the prison. And the compensation to be paid to the convict shall, in fact, be used to support the family of the victim and that of the accused as well. But at the same time, there can be no denying the fact that there also needs to be a disincentive dissuading people from committing crimes, especially the heinous ones which indeed shake the conscience of the society. Further, when one person falls victim to the crime of another, it is not just the victim who suffers but his or her family as well. So, why should special regard be had about the family of the accused only? Fear of suffering shall loom upon the family of the accused just as well as haunts the family of the victim. It is because the onus to build responsible citizens should also fall upon one's family. It is through a collaborative effort of everyone that the society as a whole can become safer for all its stakeholders.

So, it can be said that, there are only two ways to approach an offender – reformation or punishment. When you punish someone, it is by its very nature vindictive or retributory. On the contrary, if you only aim to reform someone, punishment is not the only way, in fact, punishment is hardly a way. So, when the State decides to punish an offender, it is anyway following the retributory approach. To further classify punishments to the effect that one

punishment is acceptable, while the other is not is in itself a flawed perception. This is mainly because it is an incorrect belief that when someone is incarcerated, he necessarily comes out a reformed and rehabilitated person. He could rather come out as more scarred and hence, an even bigger threat to the society.

Finally, there is a segment of activists who consider capital punishment as the violation of the human rights of the accused. However, the criteria laid down by the Court which restricts the use of capital punishment to the rarest of the rare cases is appropriate especially where the guilt of the accused has indeed been proven beyond reasonable doubt. Death penalty would be an absolute violation of human right of the accused if he doesn't receive a fair trial or was banished to the gallows on preponderance of probabilities. Thus, the true debate should not really be about the capital punishment, if anything, it should actually be about the efficacy of punishment in itself as a measure of deterrence of crimes.

Execution of Death Sentence in India

Execution of death sentence is the second aspect of this article which deals with the issue and challenges in this regard. Apart from the legitimacy of death sentence itself, another important area of concern in this regard is the delay in its execution. To condemn someone to the gallows based on a thorough investigation and a fair trial is one thing, but unwarranted delays in execution is a torture of another level, not only, to the accused but to the victim or their legal representatives as well. At times, it is the accused himself who mocks the criminal legal system through shrewd delaying tactics and it is the system which mocks its stakeholders running from pillar to post for justice.

Various Law Commission reports have repeatedly addressed the question of death penalty. ^{xxvi}The 35th report of the Law Commission recommended in favour of death penalty while highlighting the importance of discretion of the Courts in such sentences. The report even recommended retaining section 303 of Indian Penal Code which mandated capital punishment in certain cases. Some of these views were endorsed by the 41st Law Commission Report. ^{xxvii}The 187th report of the Law Commission has dealt with the manner of execution of death sentence but did not come up with a firm conclusion. However, it is the 262nd report of the Law Commission which lamented the delays in execution of death sentence. ^{xxviii}Delays for a period beyond two years have been held to be in violation of Article 21 of the Constitution as well. ^{xxix}However, such delays do not afford a sure shot relief to the accused from the execution.

^{xxx}Also, it is only a lag on the part of executive, including rejection of mercy petitions by the President, that has been brought under the purview of the violation of Article 21 and not a delay on the part of the judiciary. ^{xxxi}This view was upheld in another case which dealt with the protecting the interest of a prisoner on death row. This view of the judiciary is one of the reasons why no major progress has not been made in this regard. The low rate of execution of death sentence in India is due to a number of reasons such as extended trials, multiplicity of petitions, abuse of law etc. This has dented the reputation of our country's legal justice system to a great extent. The fact that only 5 executions have taken place in the last 16 years is a testimony to this record. Those five executions are as follows:

- August 14, 2004: **Dhananjoy Chatterjee** hanged for the rape and murder of a teenage girl
- November 21, 2012: **Mohammad Ajmal Kasab** hanged for 2008 Mumbai terror attacks
- February 9, 2013: **Mohammad Afzal Guru**, convicted in the 2001 Parliament attack case hanged
- July 30, 2015: **Yakub Memon**, a convict in the 1993 Mumbai serial blast case hanged
- March 20, 2020: Four convicts of **Nirbhaya Gang rape and murder** case hanged

As stated earlier, the primary reasons for the delayed execution is not only the pendency of cases in India but also the misuse of provisions provided by the Constitution for safeguarding the interests of the convicts.

Legal remedies available to convicts on death row

Aforesaid discussion brings us to the second question which this document seeks to address – the misuse of legal remedies provided to the convicts serving death penalty. Let us first have a look at the remedies available for a death penalty convict in India.

Appellate Provisions

The High Court is the first appellate Court for a person sentenced to death from the Trial Court which is also required to confirm the said penalty as per section 28 of the Code Criminal Procedure, 1973. The Supreme Court is the second appellate body from an order of the High Court, though not as an automatic right. 'Special Leave' is to be given for appeal to

the Apex Court by the High Court in the form of a Certificate as per Article 134A of the Constitution of India. Alternatively, the Supreme Court itself can allow the appeal through the filing of a Special Leave Petition (SLP) under Article 136 of the Constitution.

Review Petition and Curative Petition

As per the Constitution of India, a review petition can be filed by the parties aggrieved by the decisions of Supreme Court as per the provisions of Article 137. Such a petition is to be filed within 30 days of the pronouncement of judgment or order and that petition should be circulated without oral arguments to the same bench that delivered the judgment.

Furthermore, if a review petition is dismissed by the Supreme Court, it may consider a curative petition filed by the petitioner so as to prevent abuse of process, even if there is no mention of a the concept of a 'Curative Petition' in the Constitution of India. The Supreme Court evolved the idea of Curative Petition in the landmark case of Rupa Ashok Hurra vs. Ashok Hurra and Anr (2002 SC) where a question was raised regarding the relief available to an aggrieved person against the final order/judgment of the Supreme Court after dismissal of review petition. The primary essentials for a curative petition are that the petitioner shall establish abuse of process of law or miscarriage of justice or violation of Principles of Natural Justice.

Mercy Petition

In the context of Indian judicial system, Mercy Petition is the last resort. When a person has lost all the remedies available to him/her under all the prevailing laws as well as under the Constitutional remedies, he may file a mercy petition before the President of India under Article 72 of the Indian Constitution or the Governor of the state under Article 161 of the Indian Constitution.

In accordance with Article 72 of the Indian Constitution, President is empowered to pardon, give reprieve or respite or to remit punishment or to suspend, remit or commute the sentence pronounced by the Apex Court i.e. the Supreme Court of India. However, the power to grant pardon is not discretionary as any decision is reached by consulting with the council of masters. In accordance with Article 161 of the Indian Constitution, Governor of the State shall have the power to grant pardon, reprieve, respites or remission of punishment or to

suspend, remit or commute the sentence of any person convicted of any offence. Section 433 of the Criminal Procedure Code and Section 54 of the Indian Penal Code also entail commutation of death sentence by the appropriate Government.

An analysis of the Nirbhaya Case in view of the delay in execution of death sentence

There is no doubt that the law of our land is more inclined towards protecting the interests of an accused, until proven guilty, than the victim. The ideology that “let 100 criminals be set free but no innocent shall be punished” has always driven the justice dispensation mechanism of our country. Not only does it make it mandatory for every accused to be given ample opportunities to defend himself in the first place but for him to be so facilitated that he is able to exhaust all his legal remedies after conviction as well. However, the problem arises when convicts try to misuse the provisions of the law for in their own interest. Therefore, it can be said that one of the reasons for the delayed executions in our country is not only an over-burdened judicial system but also the misuse of provisions provided for safeguarding the interests of the convicts.

The Nirbhaya gang rape and murder took more than 7 years to reach its culmination after investigation, trial, conviction, sentencing and execution. But 7 years still seems like a short span of time in a country saddled with a limping justice dispensation system, where in a plethora of cases, litigants die before their case is even enlisted for hearing. ^{xxxii}As of August 2020, there are almost 4 crore cases pending in Supreme Court, High Courts and all subordinate Courts put together in India.

In case of Nirbhaya, it was obviously because of the nature of the offence and the extent to which it was pursued by the media and the public that it was disposed of within a decade. But still, despite the accused having being convicted to a death sentence in 2013 itself, there was a delay in the execution of sentencing lasting 7 years. ^{xxxiii}The lawyer who represented the four convicts astutely played around with the legal provisions for stalling the sentence execution and was successful to a great extent.

This discussion mandates that a glance be made at the timeline of the entire case to consider the extent to which the law was bent in this case.

- December 16, 2012 – Brutal gang rape and assault of 23 year old paramedical student in a private bus
- December 18-21, 2012 – Search operations carried out by the Police and arrest of accused men – Akshay Thakur, Vinay Sharma, Ram Singh, Mukesh Singh, Pawan Gupta and a minor.
- December 29, 2012 – The victim succumbs to her injuries and Police add murder charge in the FIR.
- January 02, 2013 – Then Chief Justice of India Altamas Kabir inaugurates Fast Track Courts (FTC) for the trial of sexual offences
- January 17, 2013 - FTC starts proceedings against the accused.
- January 28, 2013 – Juvenile Justice Board (JJB) says minority of juvenile proved
- February 02, 2013 – Charges framed against the five accused by FTC and against the minor by the JJB.
- March 11, 2013 – Ram Singh commits suicide in the Tihar Jail.
- August 31, 2013 – JJB convicts minor for gang rape and murder and awards three year term at probation home.
- September 03, 2013 – FTC convicts all four accused.
- September 13, 2013 – Death Penalty awarded to the four convicts by the Court
- March 13, 2014 – High Court upholds death penalty
- March 15, 2014 – Execution of sentencing of two convicts stayed and later for the remaining two as well
- May 05, 2014 – Supreme Court upholds death penalty
- November 08, 2014 and December 15, 2014 – Review petition filed against capital punishment by Mukesh Singh and Vinay along with Pawan respectively
- July 09, 2018 – Review petition dismissed
- December 10, 2019 - Review petition for death penalty filed by Akshay Thakur
- December 18, 2019 – Review petition of Akshay dismissed, Delhi Government seeks issuance of death warrants for execution of death penalty, Delhi Court directs Tihar authorities to issue notice to convicts to avail legal remedies
- January 07, 2020 - Death warrant issued for January 22, 2020 by Delhi Court
- January 09, 2020 – Curative petition filed by Mukesh Singh before Supreme Court
- January 09, 2020 – Curative petition filed by Vinay Sharma before Supreme Court
- January 14, 2020 – Mercy petition filed by Mukesh Singh before the President

- January 14, 2020 – Curative petition of Mukesh and Vinay dismissed
- January 17, 2020 – Mercy petition of Mukesh Singh rejected, fresh death warrants issued for February 01, 2020
- January 28, 2020 - Curative petition filed by Akshay before Supreme Court
- January 29, 2020 – Mercy petition filed by Vinay before the President
- January 30, 2020 – Rejection of curative petition of Akshay
- January 31, 2020 – Execution postponed again
- February 01, 2020 – Mercy petition of Vinay rejected, mercy petition filed by Akshay
- February 05, 2020 – High Court rejects Centre’s plea, holds all four convicts have to be hanged together, directs all convicts to pursue all legal remedies within a week, Akshay’s mercy petition rejected
- February 17, 2020 – Fresh death warrant issued for March 03, 2020
- February 28, 2020 – Curative petition filed by Pawan Gupta seeking commutation of death penalty to Life Imprisonment
- March 02, 2020 – Curative petition of Pawan rejected, execution stayed by Delhi Court
- March 04, 2020 – Mercy petition of Pawan rejected
- March 05, 2020 – Fresh death warrant issued for March 20, 2020
- March 20, 2020 – Execution of all four convicts

Conclusion

Therefore, the 'Nirbhaya' case manifests the tragic journey of a crime saga which commenced in December 2012 and stretched till March 2020, until when the convicts were finally executed. What transpired in between was immense anguish and struggle for the family of the victim, blatant attempts to exploit the loopholes of the law, numerous judicial hearings one after the other and a sickening wait for justice.

However, to look at the situation differently, this entire episode has opened the doors for a review of the entire mechanism of execution of death sentence in India. The lawyer of the accused in this case, although faced a lot of flak from the emotional citizens of the country, but, in fact, did a service to the society by bringing forth the loopholes in our legal system. He did his best to ensure that every legal remedy is resorted to and every possible loophole is exploited in favour of his clients. In the process he unintentionally highlighted that attention be laid towards plugging the loopholes in our judicial system regarding execution of death sentence. Although it is very important that ample opportunities are granted to an accused to seek a respite from the death sentence, but it should be on grounds of merits of the case. Procedural aspects shall not be allowed to be exploited resulting in undue delay in justice delivery.

Finally, as far as the use of capital punishment in India is concerned, there is no denying that the societal, cultural, educational and economic make up of our country is very different from other developed or developing nations which have abolished the capital punishment. A substantial population of the country still faces challenges with respect to basic necessities such as education, health care and even food. There is still a major section of our society which refuses to adhere to the fundamental social standards such as respect and dignity for women. Hence, there is obviously no dearth of people who don't fear the law, let alone abide by it. Many times, they are the ones who end up committing the sort of crimes which a civilized person wouldn't even imagine. Many reports and studies have been conducted on this subject in India but no one could undoubtedly recommend a blanket ban on death penalty. Therefore, instead of focussing on abolition of death penalty, attention should rather be laid towards strengthening the law & order and criminal justice system of the country for ensuring that a fair trial is granted to every accused and no one is convicted falsely because incarcerating an innocent for life is not a lot better than hanging an innocent. State shall, in

fact, focus on improving literacy rates, standards of educations and employment levels so that people are themselves dissuaded from committing crimes befitting a death sentence.

Punishment is not an ideal way to reform people but only a way to deter crimes. Therefore, presence or absence of death penalty in the list of punishments which can be levied on a criminal is not likely to make a difference to the propensity of the people to commit a crime. Rather there are other areas need to be worked upon to directly hit at the root cause of the problem. Abolition of death penalty is not the direct path to protect human rights but a secondary stage which is in fact avoidable in the first place. Retention of death sentence in the statute is not the reason why people commit a crime but it may very well become a reason why people don't commit an offence. The need is to recognize the bigger challenges which in the first place may drive an individual to commit a crime and address the same. Rest for those who commit a crime out of choice or habit, abolition of death penalty for their human rights seems like a mockery of the human rights of those whose rights are violated by such offenders.

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