

## **The Death Penalty in India: An Overview**

**Khushi Malik**

University of Waterloo

### **Introduction**

On 15<sup>th</sup> November 1949, the country was in an uproar. Many all over India rejoiced as their sense of justice was appeased, while a few mourned the life of a fellow compatriot gone awry. It was the date of the hanging of India's first-ever death row convict, the murderer of the nation's beloved father figure, the criminal named Nathuram Godse. He was quoted to be shouting "Akhand Bharat"<sup>1</sup> when he was led out of his cell with hands cuffed behind him, steps faltering as he approached the dawn of his life. Judge Khosla, who had heard the criminal's appeal at the Punjab High Court, observed that "the vigor with which he had argued his case at the trial and in the High Court seemed to have been all but expended"<sup>2</sup>.

In his last moments, he is said to have repented his course of action, seeking another chance to serve his country. Some say the rash decision of his execution would set a precedent that took the lives of 750+ convicts in India, while others argue that he simply got what he deserved as the perpetrator of a crime so appalling. The public's view may differ, but nobody can ever tell how Nathuram Godse would have gone on to live his life if he was awarded a life imprisonment sentence instead of the death penalty. And it is this finality of the death sentence that is often so heavily criticized.

### **Legal History of Death Penalty In India**

Article 21 of the Constitution says, "No person shall be deprived of his life or personal liberty except as according to the procedure established by law"<sup>3</sup>, guaranteeing the constitutional validity of any legal procedure in independent India to take someone's life.

The Indian Penal Code of 1860<sup>4</sup> was the first-ever recorded procedure laid down for awarding a death sentence. When India attained independence, many laws set down by the British were

---

<sup>1</sup> Prabhash Dutta, *Nathuram Godse was Nervous, fearful of going to gallows, said the judge who heard his appeal*, INDIA TODAY, (May 17, 2019). <https://www.indiatoday.in/india/story/nathuram-godse-was-nervous-fearful-going-to-gallows-said-judge-who-heard-his-appeal-1527184-2019-05-17>.

<sup>2</sup> *Id.*

<sup>3</sup> INDIA CONST. art 21.

<sup>4</sup> Indian Penal Code, No. 45 of 1860, INDIA CODE (2019).

retained including the Criminal Code of Procedures (CrPC)<sup>5</sup> and the IPC. These enlist the punishments that can be prescribed by the court, and the conditions under which certain punishments can be prescribed, including the death penalty.

Crimes punishable by death in India include aggravated murder, aggravated rape, terrorism, terrorism-related crimes, kidnapping, treason, espionage, military offenses<sup>6</sup>, etc. According to the Criminal Procedure Code (CrPC), the method of execution prescribed in India (in cases other than military offenses) is hanging<sup>7</sup>.

### **Can convicts challenge their sentence and seek respite?**

The sentence of the death penalty can be challenged at various levels of the court system through appeals and petitions. A convict who has been given capital punishment in sessions court may challenge the sentence at High Court, and if not satisfied, may appeal to the Supreme Court. If the Supreme Court refuses to hear an appeal or awards the same sentence, the death row convict may file a Mercy Petition with the President of India within seven days of conviction as a last resort.

Under Article 72 of the Constitution, this special provision of a Mercy Petition to the President has been outlined for convicts<sup>8</sup>. A Mercy Petition can be filed by the convict themselves or a relative, asking for their sentence to be commuted on grounds such as the convict is the sole breadwinner of the family, some error in the court's proceedings or judgment, mental illness, old age<sup>9</sup>, etc. These grounds may not hold enough weight in the eyes of the law but may be enough to warrant mercy from the President.

The President can choose to pardon the convict (complete acquittal), to reduce their sentence to one less harsh, to allow for some sort of reprieve (like a delay in the execution of punishment), or to give respite based on factors like pregnancy and old age<sup>10</sup>. The idea behind this provision is that the President would (on the advice of the ruling government) make a

---

<sup>5</sup> Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (2018).

<sup>6</sup> TaranDeol, *Rarest of rare' - history of death penalty in India and crimes that call for hanging*, THE PRINT (Mar. 19, 2020), <https://theprint.in/theprint-essential/rarest-of-rare-history-of-death-penalty-in-india-and-crimes-that-call-for-hanging/383658/>

<sup>7</sup> *Id.*

<sup>8</sup> INDIA CONST. art 72.

<sup>9</sup> *Mercy Petition*, DRISHTI IAS (Nov. 01, 2019), <https://www.drishtias.com/daily-updates/daily-news-analysis/mercy-petition>.

<sup>10</sup> *Id.*

decision keeping public good and welfare in mind, which is the main objective of all punishments anyway.

However, even the president's pardon is subject to judicial review<sup>11</sup> and if the judiciary feels that the pardon was not offered on reasonable grounds, it can also be struck down.

### **Death penalty becomes the exception, not the norm**

The Law Commission of India's report in 1967 laid out some factors that should be considered by the court when deciding on a death penalty sentence, such as age, socio-economic background, and psychic compulsions<sup>12</sup>. Soon after, Section 354 (3) was added to the re-enacted CrPC 1973 that effectively made the sentence of life imprisonment the norm and death penalty the exception. This section required the court to list "special reasons"<sup>13</sup> when awarding death penalty to a convict which would justify why capital punishment was chosen over a sentence of life in prison.

This sentiment of death penalty as an exceptional sentence was made more concrete in the court case of Bachan Singh where a five-judge bench laid out the 'rarest of rare' doctrine. This doctrine says that only in a rarest of the rare case can a death penalty be awarded, where no alternative form of punishment would be similarly just. The verdict read, "death penalty should be imposed when collective conscience of the society is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion"<sup>14</sup>. The bench also emphasized on hearing both aggravating and mitigating factors of a case before coming to a decision of capital punishment. Mitigating factors can be described as facts other than the case which shed light on the defendant's character such as, the possibility of reform, age, frequency of crimes, the existence of conditions of coercion or duress, mental disability, or moral justification for acts committed<sup>15</sup>. These factors may help a bench decide between the two difficult choices of awarding death sentence or life imprisonment.

---

<sup>11</sup> *Id.*

<sup>12</sup> LAW COMMISSION OF INDIA, REPORT ON CAPITAL PUNISHMENT (1973).

<sup>13</sup> Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (2018), § 354 (3).

<sup>14</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684 (India)

<sup>15</sup> Soma Sarkar, *Rarest of Rare Doctrine*, LAW TIMES JOURNAL (Nov. 22, 2018), <https://lawtimesjournal.in/rarest-of-rare-doctrine/>.

The case conditions warranting the title of ‘rarest of rare’ case for the consideration of a death sentence were further defined in the *Macchi Singh* case<sup>16</sup>. The judge's bench said that the manner of committing murder, the motive for committing crime, the socially abhorrent nature of the crime and its societal impact, the magnitude of the crime, the personality of the victim/s, and a few others, were factors to be considered when considering the sentence of death penalty. In *Panchhi & Others Vs. State of Uttar Pradesh*, the court held that the brutality of the murder cannot be the sole criterion for awarding a death sentence<sup>17</sup> and appropriate consideration of mitigating factors is necessary before deeming any case to be a ‘rarest of rare’ case.

Furthermore, in *Mithu Vs. State of Punjab*, the court verdict declared the only case of mandatory death sentence provision to exist in India, Section 303 of the IPC, to be unconstitutional and had it removed from the IPC<sup>18</sup>. According to Section 303, if any convict serving a life sentence for murder is still able to commit another murder, then they are to be considered beyond reform and would have to be mandatorily awarded the death penalty<sup>19</sup>. By deleting this section, the judiciary made capital punishment even more of an exception.

### **Criticism of Death Penalty in India**

The death penalty has been a controversial punishment for long, with it being officially banned from about 100 countries as of date. When considering the four main purposes of legal punishment, namely retribution, deterrence, rehabilitation, and incapacitation, the death sentence fails in at least two. It leaves no scope for rehabilitation since by executing the criminal, we take away any hope of reforming them. The death sentence also has no proven effect on deterring society from undertaking similar crimes in the future, as can be demonstrated with the continuous rise in rape and murder cases in India. Many have claimed that the death penalty only leads to a loop of more crime, and therefore more punishment, citing police reform and education as the only viable solutions.

The National Law University undertook Project 39A and published the *Death Penalty India Report* in 2016 that studied all death row convicts executed since independence to assess the fairness with which this extreme punishment is meted out to criminals. However, their progress was hampered due to some records having been mysteriously reported as “lost or destroyed by

---

<sup>16</sup> *Macchi Singh v. State of Punjab*, (1983) 3 SCC 470 (India).

<sup>17</sup> *Panchhi v. State of Uttar Pradesh*, (1998) 37 ACC 528 (India).

<sup>18</sup> *Mithu v. State of Punjab*, (1988) 3 SCC 607 (India).

<sup>19</sup> Indian Penal Code, No. 45 of 1860, INDIA CODE (2019), §303.

termites”<sup>20</sup> by some prison authorities. Reportedly, even Mercy Pleas of four death row convicts were allegedly “lost” by the Home Ministry, as revealed by an RTI filed in 2003<sup>21</sup>. This careless attitude towards files dealing with a person’s life and death seems to hint towards an ignorant attitude towards death row convicts that has become the norm in India.

More recently the death penalty has come under criticism for various reasons. It has been noticed that the trial courts or sessions courts are too liberal in sentencing criminals to death, with NLU’s Project 39A claiming that in 2018 lower courts in India awarded capital punishment to 162 convicts<sup>22</sup>, making India a part of the top seven countries to award death penalty. In response, Asian Centre for Human Rights (ACHR) director Suhas Chakma has said, “the sanctity of the rarest of rare doctrine has been eroded considerably and awarding death penalty has become routine for courts in India”<sup>23</sup>.

This is especially problematic considering that there is a huge gap between death sentences awarded and criminals actually executed. According to a 2013 ACHR report, 4321 convicts were commuted from death sentence to a life imprisonment sentence<sup>24</sup>. Some of these convicts had been on death row since 2001. In the last 15 years, only 4 people have been executed (excluding executions commissioned in 2020) while 350+ people remain on death row, some of them have been awaiting execution since before 2000<sup>25</sup>. The mental anguish and the dehumanization of a person who has been given a death sentence but is kept waiting years for their execution is unimaginable. Such extraordinary delays impact the convict’s mental health, in some cases even resulting in the development of suicidal tendencies and mental disorders<sup>26</sup>. They also have a ripple effect on the convict’s family and friends who are kept fluctuating between hope and despair as they await the ultimate death of their loved one.

---

<sup>20</sup> Pradeep Thakur & Himanshi Dhawan, *death penalty files ‘lost, eaten by termites’*, TIMES OF INDIA (Aug. 03, 2015), <https://timesofindia.indiatimes.com/india/Death-penalty-files-lost-eaten-by-termites/articleshow/48322218.cms>.

<sup>21</sup> *Id.*

<sup>22</sup> Project 39A, National Law University, Delhi at 4-5 (2018).

<sup>23</sup> Satya Prakash, *Death penalty: ‘Rarest of rare’ cases are not so rare in India now*, HINDUSTAN TIMES (Feb. 05, 2016), <https://www.hindustantimes.com/india/rarest-of-rare-cases-are-not-so-rare-in-india-now/story-JxnTLyJ4tPIDBnHhatCcIL.html>.

<sup>24</sup> *Id.*

<sup>25</sup> Chaitanya Mallapur, *371 Indians are on death row; only 4 have been executed in 13 years*, BUSINESS STANDARD (May 28, 2018), [https://www.business-standard.com/article/current-affairs/371-indians-are-on-death-row-only-4-have-been-executed-in-13-years-118052800123\\_1.html](https://www.business-standard.com/article/current-affairs/371-indians-are-on-death-row-only-4-have-been-executed-in-13-years-118052800123_1.html).

<sup>26</sup> Prakash, *supra* note 23.

In light of such cases, the Supreme Court laid down guidelines on commuting a death sentence to a life imprisonment sentence on account of extraordinary delay in *Shatrughan Chauhan Vs. Union of India*<sup>27</sup>. This was famously implemented in *Union of India vs. Sriharan*<sup>28</sup> where the death sentence of the assassins of Rajiv Gandhi was reduced to a life imprisonment sentence after having waited decades for their execution and resultantly developing suicidal tendencies.

The irreversibility of the sentence has been criticized as well since it leaves no room for rectification of any errors in judgement. Errors can happen and have happened, as exemplified in 2012 when 14 retired judges asked for 13 death row sentences to be commuted to life imprisonment sentences due to the previous judgements being erroneous<sup>29</sup>. After all, we cannot forget that judges are humans too. A judge's subjectivity to the case can come into play at times and even though our legal system has many safeguards, there is still some room for arbitrariness and confirmation bias when passing judgement. Due to this, many have asked for re-definition of the 'rarest of rare' doctrine, claiming it has become too judge centric. As of now, no statutory definition of this doctrine exists.

## **Conclusion**

While it is true that a death sentence for a particularly gruesome crime serves as justice for the victims and their families, the death penalty's effectiveness as a deterrent for society is questionable and thus the whole purpose of a clause of capital punishment itself becomes problematic. The retributive spirit of the people needs to be checked as well, an eye for an eye is not how justice should work.

However, many in India have claimed that while it is easy to count numbers and criticize the system for awarding death penalties too often, the real-life impact on victims is not considered when looking at these facts. After all, how can we account for the hurt and trauma inflicted on victims, their families, and their communities due to such heinous crimes? And is it fair to view death penalty through the lens of its effects of deterrence in society when we cannot even

---

<sup>27</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1 (India).

<sup>28</sup> *Union of India v. Sriharan*, (2014) 4 SCC 242 (India).

<sup>29</sup> Soutik Biswas, *Should India abolish the death penalty?*, BBC NEWS (Aug. 29, 2012), <https://www.bbc.com/news/world-asia-india-19410108>.

account for the ripple effect set in motion when society sees that such publicly discussed, inhuman acts go virtually unpunished?

It is a difficult question, no doubt. What we can ask right now is for reform, for more objective guidelines and statutory clarity. Whether the death penalty is completely abolished or just reformed, the country would benefit either way.