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DEATH PENALTY SENTENCING IN INDIA - CONCERNS AND SOLUTIONS

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Abstract

Capital punishment, also known as the death penalty, is the state-sanctioned killing of a person as punishment for a crime. The sentence ordering that someone is punished with the death penalty is called a death sentence, and the act of carrying out such a sentence is known as an execution. In India, there are various provisions for criminal acts for which the punishment is set as capital punishment. Usually they are set so for the worst fenders or in some cases for certain offenses. Some of the statutes that do deal with the punishment of Death Penalty are the IPC, Army Act and so on.

In this research work, the primary goal is to give better context towards the death penalty, the sentencing statutes and system in general along with the possible issues faced today. First we go through the various sections and statutes that deal with the procedure followed under death penalty sentencing. We will also give a brief look into any possible concerns that might arise from the process of Death Penalty sentencing in India. Additionally, the research work will also assess the possible solutions towards the settling of the prior mentioned concerns.

Statement of Problem

The study conducted by the National Law University, Delhi known as Project 39 A brought into light the exorbitant imposition of death penalty on various crimes. This research work will try to showcase light on whether this indeed is a major cause of violation of the regular proceedings of death penalty set about in india or not

Objectives

- To understand the concept of death penalty
- To understand the procedure of death penalty in India under the CRPC
- To look into any possible concerns to the current situation of Death Penalty sentencing in India

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- To understand where the defects happen and to try to solve those defects in the criminal procedure in relation to the death penalty sentencing

Hypothesis

The hypothesis of the research work is as follows

Death penalty in India faces a variety of defects in the sentencing process, many of which stem from improper time management throughout the entire process.

Research Questions

- What do we mean by capital punishment and death penalty
- What is the procedure for capital punishment set about in the CRPC
- What is Project 39A
- What are some of the main concerns with regard to capital punishment sentencing in the CRPC in India

Research Methodology

The research methodology used for this project will be that of descriptive methodology. We will go through the history of capital punishment in general and in india. Following which we will seek to get clarity on the procedure set within the Indian legal system and in the CRPC. Following this we will discuss the major concerns raised in india regarding the current capital punishment procedure

Introduction

Capital punishment, also known as the death penalty, is the state-sanctioned killing of a person as punishment for a crime. The sentence ordering that someone is punished with the death penalty is

called a death sentence, and the act of carrying out such a sentence is known as an execution. In India, there are various provisions for criminal acts for which the punishment is set as capital punishment. Usually they are set so for the worst offenders or in some cases for certain offenses. Some of the statutes that do deal with the punishment of Death Penalty are the IPC, Army Act and so on. The CRPC, has under sections, 354 and 366 to 371, the way death penalty sentencing happens in India. The sections 413 to 416 also details a similar process. In this research work, we will be dealing with these sections. We will also give a brief look into any possible concerns that might arise from the process of Death Penalty sentencing in India

History of Capital Punishment

Capital punishment was one of the most profound methods of election and implementation of justice followed through in the entirety of human history. In many ways the ideal of capital punishment was always to inflict the maximum punishment on the offenders.

Some of the first instances of the death penalty date back to the dawn of civilization. In this case the first known and recorded instance of a law which calls for capital punishment of the accused can be found in the 18th century BC. This was during the rule of Emperor Hammurabi of Babylon. These laws were found in his legal code which later became known as the Code of Hammurabi. In this set of laws, there are around 25 crimes which could earn the criminal the death penalty.[1] The death penalty was also part of the Fourteenth Century B.C.'s Hittite Code. As we go forward in time we can understand that the concept of death penalty had permeated deep into the human psyche by then and almost entire civilizations began to implement these laws. We can see the presence of the death penalty even in the civilizational spectacles of ancient greece. Here the perfect example could be the case of the Draconian Code of Athens passed in the 6th century BC.[2] The code as with those of the Bobylonains under Hammurabi prescribed multiple offenses to

[1]L E Randa, "Early History of the Death Penalty", *Death Penalty Information Center*, *available at* https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty (last visited May 12th, 2021).
[2]Matthew A. McIntosh, "The Draconian Constitution: The First Written Legal Code in Ancient Athens", *Brewminate*, July 31, 2020, *available at* https://brewminate.com/the-draconian-constitution-the-first-written-legal-code-in-ancient-athens/ (last visited May 11th, 2021).

capital punishment. In most of these scenarios we can understand that the philosophy behind the act was retributive justice and to some extended deterrence.[3]

Even though these were the dominant traits in the western world at the time, the eastern world provided a radically different outlook. Here if we take the case of early Indian or Chinese laws, the ideal has a retributive role in them but rarely was capital punishment used. The main objective was compensatory.[4] However this was not to say that there was no lament of depth penalty present. As stated earlier even though contemporary was the main idea behind the laws, there were elements of retributive punishment in the,. The best example could be the proportional punishment imposed in ancient china.[5] As per this theory, the punishment is directly proportional to the crime committed. If the crime was arson, the culprit would be burnt to death and so on.

By the middle ages, things began to change for the worse in the west. This was the height of the retributive theory of punishment and the method was also intended for deterrence. The uniqueness was that the punishment was retributive to the upper classes as they used the empower of the law on capital punishment to inflict their fury on those who either wronged them or in any way insured the while at the same time the idea of death penalty was a form of deterrence to the lower classes to keep them in line under the thumb of the upper classes.[6] In simple terms the abusive nature of the law and the ideals of capital punishment were the reality of this system which was put into place only to further the oppression of the upper classes.

Since the age of enlightenment things have changed and the idea of capital punishment itself took a turn for the worse and was soon being rejected across the European states by the end of the 20th century.

In the 19th century, there has been a growing impetus for the removal of the practice by law and this soon became known as the abolitionist movement. Soon the movement grew with eminent

[3]Julian P Alexander, "The Philosophy of Punishment" 13 *Journal of the American Institute of Criminal Law and Criminology* 235 (1922).
[4]*Id.*
[5]*Id.*
[6]Niccolo Caldararo, "Human Sacrifice, Capital Punishment, Prisons & Justice: The Function and Failure of Punishment and Search for Alternatives" 41 *Historical Social Research/Historische Sozialforschung* 322 (2016).

jurists like Bentham and Romilly supporting such ideas. It is important to note that the first territory to abolish the death penalty as a punishment by law was the state of Michigan did so in the year 1846. Michigan was followed by nations of Venezuela and Portugal in 1867. As a goal for civilized nations, abolition of the death penalty was promoted during the drafting of the Universal Declaration of Human Rights in 1948. By the end of the 1990s, only one nation in europe, Belarus, still implemented death penalty as a punishment

Capital Punishment in India

India is one of the few nations that still upholds the punishment of death penalty. As per the article 21 of the constitution of the nation,

No person shall be deprived of his life or personal liberty except as according to procedure established by law.[7]

As such the Indian law does indeed have laws which call for the same. In the Indian Penal Code, as per section 302, the punishment for murder is either life imprisonment and it could even be death penalty.[8] The punishment is also held to be the death penalty for a variety of offenses under this Indian Penal Code. This can range from the punishment for Criminal Conspiracy under section 120B, dacoity with murder under the section 396 of the IPC and abetment of mutiny under section 132 to name a few.

It is also important to understand that as per the criminal law system in India, there are provisions in the constitution which call for the presence of clemency. Under the powers of the President of the nation, he has the power to grant the convicted relief from his punishment. If at all he is to be sentenced to death, the convicted can file a mercy petition of the president and the president can act on this. This has been stated in the article 72 of the Constitution of India which states that

[7]The Constitution of India, art. 21.
[8]The Indian Penal Code, 1860 (Act 45 of 1860), s. 302.

"Power of President to grant pardons, etc, and to suspend, remit or commute sentences in certain cases-

(1) 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 offense;

(c) in all cases where the sentence is a sentence of death."[9]

It is not just the president who has the power to pardon but also fulfills the role similar to his in the states. The Governor also has pardoning powers. These are specified under article 161 of the constitution of India and as per the article, he can suspend or remit or commute the sentence but he cannot pardon a death sentence once it has been issued by a court.[10]

The first case in India which dealt with the legality of the death penalty was the case of **Jagmohan Singh v. State of U.P.** The appellant in this case argued for the revocation of section 302 of the IPC. He argued that the granting of power to the courts and especially the judges to deliver death penalty upon the citizenry is violative of article 14 and furthermore argued that the practise of death penalty was unconstitutional and should be ended. They contended that since the practice takes away the rights guaranteed under article 19. The court ultimately ruled against such a frivolous case and upheld the section 302 of the IPC and by extension the practise of death penalty.[11]

With the passing of the amendment to section 354, section 354 (3) was added which set forward a proper procedure for the death penalty. As such the section held that in conviction for cases which are punishable either with death or life imprisonment, the judgment shall state the reasons for award of the punishment and in the event that it is a death sentence mention the special reasons for that decision.[12] With this in mind, the tables were turned and soon the death penalty or conviction which carried a sentence of death penalty went from being the rule to being the exception in india. Adding on to this was the fact that in the year 1979, it also ratified the International Covenant on

[9]The Constitution of India, art. 72.
[10]The Constitution of India, art 161.
[11]A.I.R. 1973 S.C. 947.
[12]Aditi Agarwal, "Death Penalty : An Overview of Indian Cases", *Academike*, September 2, 2014, *available at* https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/. (last visited May 12th, 2021).

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Civil and Political Rights (ICCPR) which severely restricted the scope and applicability of the practise of Death Penalty in the nation. This can be illustrated through article 6 (2) of the ICCPR which states that

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide."[13]

The case of **Bachan Singh v. State of Punjab (1982)** was one of the most important cases in the matter of death penalty in the nation. This was once more a case which challenged the constitutional validity of the practice in the nation. The case also questioned the validity of section 354 (3) of the IPC as well. Ultimately the court held that the practice was once again not in violation of fundamental rights under article 19 and 21.[14] One of the most important outcomes of this case was the fact that this case laid a de facto set of criterias on which the court can pass a sentence of death sentence and terming it as the *"rarest of rare cases"* after it ascertains the existence of these conditions. This case was the birth of the *"rarest of the rare"* rule in Indian Criminal Jurisprudence. The court must look into the "aggravating" and "mitigating" factors in this case. This was the first set of criterias set up for the imposition of the death penalty. The usage of these "mitigating" and "aggravating factors" are important. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating factors have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.[15] These conditions which one must look at before giving a verdict of death sentence can include the age of the convicted, mental condition, severity of the crime, the surrounding factors which led to the crime and so on.[16]

[13]The International Covenant on Civil and Political Rights, 1966, art. 6.
[14]A.I.R. 1982 S.C. 1325.
[15]G Kameswari and V Nageswara Rao, "The Sentencing Process - Problems and Perspectives" 41 *Journal of the Indian Law Institute* 452-459 (1999).
[16]*Supra* 14.

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While the case of **Bachan Singh v. State of Punjab (1982)** did in fact attempt to give a set criteria to look into, the entire procedure was further explored by the case of **Macchi Singh v. State of Punjab (1983).** This case took the verdict of Bachan Singh further and expanded on it. The case of **Macchi Singh v. State of Punjab (1983)** finally made a power attempt to crystallize the procedure and create a set of proper guidelines. As per the verdict of the case, it further brought a great deal of emphasis to the *"rarest of the rare " rule* as held by Bachan Singh and laid down some guidelines. Some of them include

- The manner of commission of the crime in question
- The motive for this commission of the crime
- The extent and magnitude of the crime in question[17]
- The nature of the crime in question
- The nature and personality of the victim of this crime[18]

Another major case that once more brought forward the matter of the constitutionality of the practise of death penalty was the case of **Mithu v. State of Punjab (1983)**. In this case, in its judgment, once more the courts ruled that the practise of death penalty did not violate the fundamental rights per se however they did hold that the section 303 of the IPC was unconstitutional.[19] The court ruled this section to be in violation of article 14 and 21 of the Constitution because of the logic the section holds with it that any criminal who has been convicted for life and still can kill someone is too cold-blooded and beyond reformation, to be allowed to live.[20] As a whole however, the death penalty was still held legal in India.

The 262nd law commission finally gave its report and stated that the practise of death penalty should be abolished in the country. As per the law commission report, the practice does not serve any purpose of deterrence as the crime statistics have not fallen. The Law Commission also stated in its report that because the Indian judiciary was concentrating more on the death penalty and placing it as a retributive means to control the society, the restorative and rehabilitative aspects of

[17](1983) 3 S.C.C. 470.
[18]*Supra*, 15.
[19]A.I.R. 1983 S.C. 473.
[20]*Id.*

justice are lost and forgotten.[21] The law commission also stated that there has been a disproportionate application of the verdict of Bachan Singh in India and that has made the process of Indian criminal jurisprudence especially on the matter of death penalty, very complicated and unpredictable.[22] There is still arbitrary imposition of the death penalty and as such the practice must be abolished. The commission also took the stand that from now onwards the court must look towards victim compensation and not just retributive justice. There must not be a specialized system for reimbursement and compensation. However there still does exist the question of how to quantify cases such as murder, torture leading to murder and rape.

Sections of the CRPC dealt with Death Penalty Sentencing

Once the death penalty has been confirmed by the court the sentencing procedure begins. In this case what happens has been covered by the following sections.

Section 354

This section is from where the process of sentencing begins after the judgment has been rendered. As per this section in relation to the sentencing of the death penalty, 2 specific sections are to be noted. These are section 354 (3) and 354 (5). As per these sections, 354 (3) speaks about the when a judgment of death penalty had been rendered by the court in this way, the court must also specify the reasoning behind such a verdict. This is especially true in the case of the death penalty. Here as held in the case of **Ediga Anamma v State of Andhra Pradesh, (1974)** the lower court must furnish the relevant materials that have allowed the court to come to this verdict to the upper court when requesting the confirmation of the sentencing.[23] The verdict in the case of **Lehna v State of Haryana, (2002)** further reaffirmed the guidelines set up in both Bhachan Singh and Mithu Singh.[24] The court will have to here also look into the age of the convict, the situation surrounding

[21]Sucheta, "Law Commission Report on Death Penalty", *SCC Online*, September 1, 2015, *available at* https://www.scconline.com/blog/post/2015/09/01/262-law-commission-report-on-death-penalty/ (last visited May 12th, 2021).
[22]Law Commission of India, "262nd Report of the Law Commission of India on Death Penalty" (August, 2015).
[23]A.I.R. 1974 S.C. 799.
[24](2002) 3 S.C.C. 76.

the crime, the motive and the way the crime was committed and so on. As per the case of **Ram Naresh v State of Chhattisgarh,(2012)**, it was further expanded. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions to the offense and also the matters such as the possibility of the convict reforming and the chance for him or her to reenter society as well as the possibility of life imprisonment in light of the circumstances surrounding the case before choosing the appropriate sentence to be imposed.[25] The need to strike a balance between the circumstances of a case and the verdict when deciding the punishment became one of the primary factors influencing the continuity of the death penalty in a particular case.

The validity of clause (5) of this section was challenged on the ground that it was violative of Article 21 of the Constitution as being prescriptive of a cruel punishment. The Supreme Court, however, held that the section was valid in the case of **Govt of India v Lachma Devi, (1986).**[26] In the case of **Deena v UOI, (1983)** it was held that execution of the death sentence by hanging by the neck as provided in clause (5) of section 354 was not violative of Article 21 of the Constitution.[27]

Section 366

In this section, we deal with the confirmation of the death penalty by a competent court once the order has been passed. This section talks about the power to submit the case for confirmation for the carrying out of the death sentence. In actuality, it can be assumed that this section has basically explained which all courts have the authority to pass a decree of death penalty. As per the section, the verdict of the death penalty once issued by the Court of Sessions has to be approved by the High Court. This is mentioned in section 366 (1) which states that

"When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court."[28]

[25]A.I.R. 2012 S.C. 1357.
[26]A.I.R. 1986 S.C. 467.
[27]A.I.R. 1983 S.C. 1155.
[28]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 366.

One of the main things that must also happen is that regardless of the verdict of the court of sessions, the High Court must conduct its own investigation into the case. The High Court can use the proceedings, the facts and law and its implementation in the verdict of the session court as a note of reference but the main fact is that the High Court must be satisfied by the interpretation and that justice had been done before they confirmed the death penalty.[29] This had been held in the case of **Masalti v State of Uttar Pradesh (1965)**. Furthermore, if at all the High Court is not satisfied with the interpretation of the sessions court and finds that the verdict of death penalty is wrong, they have the power to reject it. However as they do so, they must provide the adequate reasoning for such a rejection and not just directly reject it without explanation.[30] This had been held in the case of **Ramji Rai v State of Bihar, (1999)**.

The courts of India have also held in the case of **State of Punjab vs Kala Ram @ Kala Singh (2018)** that the accused once convicted and once the decree of death penalty has been submitted to the High Court and confirmed shall be kept in custody.[31] This was in line with section 366 (2) of the Code of Criminal Procedure.

Section 367

This section is the power of the High Court to take necessary action in a court verdict for death penalty confirmation if the High Court has received knowledge of additional facts or evidence. Section 367 comes into effect if at all the High Court is of the opinion that the investigation was not properly done or more importantly if any additional evidence or facts have come to be revealed. Section 367 (1) states that

"If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the

[29]A.I.R. 1965 S.C. 202.
[30](1999) 8 S.C.C. 389.
[31](2018) 2 S.C.C. (Cri) 659.

convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session." [32]

As per this section of the Code of Criminal Procedure, if the High Court thinks that there is a question which might suspect the innocence of the convicted, the court might direct the sessions court or might itself take up the enquiry into the matter. Only after such enquiry is done, may the High Court allow the confirmation of the death penalty. As per the case of **Balak Ram Etc vs The State of U.P. (1974),** the Supreme Court gave the verdict that if at all there ever comes into question the innocence of the convicted in light of any new facts or evidences, the High Court is duty bound to order an investigation or enquiry into this and come to a conclusion.[33]

Section 367 (2) of the Code states that in these situations when there is indeed an enquiry underway, the convicted need not be present at the time unless he or she has been ordered to present themselves by the High Court[34]. Section 367 (3) states that in the event of such an enquiry not being undertaken by the High Court, in the matter of the final result of this same enquiry, the Code has given the power to the Sessions Court to certify it.[35]

Section 368

Section 368 finally deals with the power to finally confirm the death penalty and the verdict passed by the sessions court and submitted before the High Court under section 366. As per this section the court has been given a variety of powers in regard with the final sentencing process of the verdict of death penalty. As per the section 368 (a) the court may confirm the verdict and the decision for the imposition of the death penalty.[36] As per the section 368 (b) the accused in the verdict might not be facing the death penalty as the High Court would not grant permission for them and instead would choose to either convict and punish him on another punishment mentioned under the charges he had been convicted in or order a retrial on the same charge or on an amended

[32]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 367 (1).
[33]A.I.R. 1974 S.C. 2165.
[34]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 367 (2).
[35]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 367 (3).
[36]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 368 (a).

charge as set by the High Court.[37] Section 368 (c) on the other hand also bestows on the High Court to completely stop the sentencing of death penalty and instead order the acquittal of the convict.[38]

Section 369

The section 369 is another important section in the procedure of death penalty sentencing in india. This section lays about the criteria that must be met for the sentencing and its approval to be sanctioned properly and legal. In this case, as per the Code of Criminal Procedure, section 369 states that at least 2 judges are needed to finally confirm a submission made to the High Court under section 366.[39] This is an essential feature and is one that cannot be ignored.

Section 370

In relation with the manner of death penalty confirmation and sentencing, we have seen in section 369 that the approval of the division bench of the High Court is needed to be considered approved. In this case the question does arise is what if the 2 judges are in opposition to each other. This is what had been answered in the section here. In such a situation, the section states that the procedures then set about in section 392 of the Code of Criminal Procedure will then take into effect. The Section 392 of states that when a High Court bench hears a case and ends up having divided opinions, in such case the appeal along with the diverging opinions shall be laid before a judge of the same Court.[40] That judge shall deliver their own opinion only after hearing the judges, and that opinion shall be followed by the judgment. As such in this case of death penalty sentencing, the decision will be by that judge on the matter of the possible confirmation and the continuance of the sentencing of death penalty. An example of such a decision would be the verdict of the case of **Sri D N Srinivash Reddy vs State of Karnataka (2018)**. Here the High Court was not able to come to a consensus on its division bench confirmation of the death penalty sentencing. Here as a result the 3rd judge was consulted as per the procedure set forward in section 392 and as

[37]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 368 (b).
[38]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 368 (c).
[39]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 369.
[40]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 392.

per the verdict given by that judge, the sentencing of death penalty was halted and finally overturned.[41]

Section 371

Section 371 finally details the finishing role of the High Court in the confirmation process. Once the High Court has approved and confirmed the death penalty of the individual, the copy of such order of confirmation along with the seal of the High Court is sent to the sessions court by the proper official appointed. The appointed official must also attest the confirmation copy sent to the sessions court with his signature. Once received the sessions court will move forward with the implementation of the death penalty where the sentence of death penalty will be carried out

Section 413

Section 413 speaks of the events that happened after the High Court had confirmed and approved the death penalty sentence and had sent a copy of theri approval to the sessions court. As per the section,

"When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary."[42]

As such after the confirmation, a warrant is sent to the warden or the officer whois in charge of the jails and is instructed to carry out the death sentence. This is called the Black Warrant and this order is usually issued to him from the Sessions Court. There does arise the issue of what if the execution was not able to be carried out in the appropriate time due to some reason. This could be any last minute inability on the part of the executioner. The court held in the case of **Shiromani Akali Dal (Mann) v State of J&K, (1993)** that this is not sufficient ground for postponement and

[41]C.C.No.54125/2015, decided on Mar. 5, 2018 (Kar.).
[42]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 413.

in such a case of postponement, the court held that a session court could once again issue a second Black Warrant detailing the next date and time for the execution of the death sentence.[43]

Section 414

While the former section dealt with the matter of death penalty sentences which received the approval from the High Court, this section deals with the execution of sentences of death penalty passed by the High Court. Once the High Court has passed this sentence of death warrant, the warrant is issued to the jail. As per the case of **Peoples' Union for Democratic Rights (PUDR) v UOI, (2015)** the convict who is to be executed still has some rights. He has the right to consult his lawyers about any legal recourse, the time and date of the execution must be set properly and should be identifiable, the copy of the black warrant must be given to the convict and he has the right to meet with his family if the time bar permits.[44] As per the judgment of the case of **Shabnam v UOI, (2015),** the Supreme Court of india declared that if at all the convict is not given the time to conduct these matters or if the proper procedures are not followed, eg, the convict unable to take up the full legal recourse available to him through appeals and pardons, the copy not given to him and so on, the death warrant will be quashed.[45]

Section 415

Section 415 speaks about the postponement of the death sentence due to the case of appeal lying in the upper courts. This happens in 3 different forms. The main common factor here is that the order for postponement of the death sentence is issued from the High Court. As per the section 415 (1), the postponement of the sentence is issued when the appeal is against the death penalty passed by the High Court and the appeal is lying in the Supreme Court under 134 (1) (a) or 134 (1) (b) of the Constitution of India.[46] The second type happens under section 415 (2) where the appeal is in the High Court under article 132 or under 134 (1) (a) or 134 (1) (b) of the Constitution of India

[43]1993 Cr LJ 927 (J&K).
[44]2015 S.C.C. Online All 143.
[45](2015) 6 S.C.C. 632.
[46]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 415 (1).

on a death penalty confirmed by the High Court.[47] The third is under the section 415 (3) of the Code of Criminal Procedure where the order of postponement is issued from the High Court when there is a sentence of death penalty passed or confirmed by the High Court, and the High Court is satisfied that the convict who has been sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution.[48]

Concerns with Death Penalty Sentencing

In the time period after the case of Bachan Singh, and with the verdict of Mithu Singh case, many believed that the given set of guidelines and set criterias are enough to provide an adequate framework and to plug in any possible loopholes. However this was not the case. In reality in the aftermath of these cases there soon emerged various issues and problems with the criminal law proceedings in India. Some of which are discussed below.

Same Day Sentencing

One of the most important requirements of a proper criminal trial is the fact that the trial and the sentencing must not be on the same day. There must be different days allotted for these proceedings. Section 235 (2) of the Code of Criminal Procedure provides separate days for both the conviction and the sentencing. **Allauddin Mian and Ors. v. State of Bihar (1989)** explained the reasoning behind such a conscious decision of the court and stated that this was done so that the accused must be allowed to absorb and overcome the shock of conviction before being heard on sentence.[49] Since this was not done in that case, the Supreme Court went on to convert the death sentence into life imprisonment, finding insufficient material on sentencing to warrant awarding the death penalty. The case of **Malkiat Singh v. State of Punjab (1991)** added to this by saying that by giving the accused the time needed, there could be a chance for the defense to provide certain additional evidence to remand the case and stay the death penalty sentence issued.[50] In many cases, the idea is to protect the right to appeal guaranteed to the convict. With the chance to

[47]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 415 (2).
[48]The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 415 (3).
[49](1989) 3 S.C.C. 5.
[50](1991) 4 S.C.C. 34.

re appreciate the case and to make sure that no stone was left unturned, especially when it comes to a case of death penalty, justice would most certainly is being done and implemented.[51]

However Project 39 A , an initiative by the National Law University of Delhi found that in many cases, this was not followed and what happened was that same day sentencing was being the norm in most sessions courts in the country. In around 44 percent of the cases across the nation, the idea of same day sentencing was fast becoming the norm.[52] Madhya Pradesh recorded the highest with nearly 77 percent of its cases being those of same day sentencing.[53] Many see this trend in line with the verdict of **Manoj Suryavanshi v. State of Chhattisgarh (2020)** which gave a verdict that there is no absolute proposition of law that if the sentence is awarded on the very same day on which the conviction was recorded, the sentencing would be vitiated.[54] 2018 saw around 162 sentences which resulted in the death penalty for the convicted.[55] With around just 26 total confirmation from a total list of 160 cases, one can see a trend emerging. This could partially be in line with the fact that the entire process in the lower courts did not in reality follow the procedural courts of law set about by the Code of Criminal Procedure which is only highlighted with the statistics given above.

Lack of consideration procedural requirements

As per the case of Bachan Singh, and since that time onwards with the inclusion of Mithu Singh to the pantheon, there has always been the “mitigating circumstances" and the “aggravating circumstances" in the particular case that defined the necessity of death penalty imposition. However, in the reports from Project 39 A it was found that across the trial courts in India,the approach used was a crime-centric approach to impose the death penalty. The entire concept of mitigating circumstances was not even considered by the courts and was dismissed without any

[51]Sahana Manjesh and Yash S Vijay, "Hard cases and good law", *The Indian Express*, March 3, 2017, *available at* https://indianexpress.com/article/opinion/columns/death-penalty-in-india-supreme-court-cases-law-mitigating-evidence-4551607/ (last visited on May 10th, 2021)
[52]Project 39A, "Death Penalty Sentencing in Trial Courts" (May, 2020).
[53]*Id.*
[54]2020 S.C.C. OnLine S.C. 313.
[55]Varun Krishnan, "162 death penalties imposed by trial courts in 2018, highest in two decades", *The Hindu*, February 05, 2019, *available at* https://www.thehindu.com/news/national/162-death-penalties-imposed-by-trial-courts-in-2018/article26185734.ece (last visited on May 10th, 2021)

meaningful consideration.as a result, the trial courts in the nation only looked into the aggravating factors of the case which were based on to impose the death penalty, most of which centered around brutality of the crime.[56]

Statistics show that around 42 percent in Delhi. 47 percent in Maharathstraand around 62 percent of the cases in Madhya pradesh which ended with a conviction and sentence of death penalty went with this unconstitutional method which violated all procedural norms of criminal law jurisprudence set by the proceeds of **Bachan Singh v. State of Punjab** and many other such cases.[57] Many blame the lack of clarity in the guidelines set up under Bachan Singh to be the main cause for this issue. They state that the problems arise when there is a lack of clarity in finding out the mitigating circumstances properly and the normal trial court is forced to rely on the verdict of Michi Singh and its criterias which are predominantly used to confirm the sentence of death penalty.[58]

Furthermore, it is also important to note that there is a rising trend in the cases of death penalty sentencing that the courts which are overseeing these cases are not looking into the possibility of the reformation of the criminal or on the matter of life imprisonment. This was something that was brought up in the 262nd Law Commission. In the commission As per Bachan Singh, courts while balancing the mitigating and aggravating circumstances must also look into the possibility of life imprisonment. Unfortunately this is no longer happening in the lower courts. In around 70 percent of the cases from Delhi and Madhya Pradesh and in around 60 percent of the cases from Maharashtra where the verdict was about death penalty, the courts did not even consider the possibility of life imprisonment. As per the law commission the evidence regarding the offender being 'beyond reform' is seldom adduced and considered.[59] This is a complete lack of procedure set up. This lack of procedural set up which can be seen in the earlier mentioned issue of same day sentencing would lead to general delegitimization of the judiciary. The judiciary derives its authority and legitimacy from the independence it sets itself and the procedural requirements that

[56]*Supra*, 52
[57]*Supra*, 52
[58]Anup Surendranath, Neetika Vishwanath and Preethu Praishruti, "The Enduring Gaps and Errors in Capital Sentencing in India*", Project 39 A, available at* https://www.project39a.com/op-eds/the-enduring-gaps-and-errors-in-capital-sentencing-in-india (last visited on May 11th 2021)
[59]*Supra* 22.

allow proper justice to reach the victims. The loss of these very same procedural requirements would allow for a more haphazard and problematic judicial system which might not consider the entire facts and circumstances in its pronouncement of death penalty.

Public Opinion and the Collective Conscience

One of the main aspects of criminal jurisprudence that we have to realize is that as per the guidelines set under the case of **Bachan Singh v. State of Punjab**, there was no importance given to the matter of public opinion in the decision making of the court when it comes to death penalty sentencing.[60] The case of Micchi Singh however added the criteria of public opinion and the idea of a collective consciousness into the death penalty sentencing.[61] This led to what was in many ways the beginning of mob rule in the court of law when deciding on the matter of death penalty sentencing. Public opinion became one of the deciding hallmarks for death penalty sentences by the courts. The courts essentially come to the consensus that the death penalty might be deserved in cases where the conscience of the society is so shocked as to warrant the imposition of the death penalty. Subsequently, satisfying the collective conscience of the public and the society's cry for justice have been used frequently by the Supreme Court to impose the death penalty.

Although the court stated in the case of **Santosh Bariyar v. State of Maharashtra (2009)** that public opinion was indeed incompatible with the institution of Criminal Proceedings under the Code of Criminal Procedure and in the final sentencing of death penalty.[62] The case of **Om Prakash v. State of Haryana (1994)** was another attempt by the judiciary to do away with the matter of public opinion by providing the much needed proper demarcation between public opinion and the collective conscience and the entire judicial system setup in India. Here the Court observed that there was a significant tension between responding to society's cry for justice and Bachan Singh's sentencing framework, and held that courts are bound by precedent and not by the fluid responses of society.[63] However despite these judicial attempts to control this, the trend still continues. In many ways this majoritarianism became the norm in many trial courts. In 2/3rd of

[60] *Supra* 14.
[61] *Supra* 17.
[62] (2009) 6 S.C.C. 498.
[63] (1994) RD-SC 24

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the cse in Delhi, and in over half the cases in Maharashtra and Madhya Pradesh the institution of the collective conscience of the public became a deciding factor in the imposition of death penalty.[64]

While public opinion is not in itself a crime, the growing role they play might hamper the integrity of the judiciary. The overloading influence they may have might lead to a reduced role of procedural requirement. The demand of quick justice might as well lead to more same day sentencing. In the long term, this would become the basis for the loss of independence in the judiciary. While yes the courts should listen to public opinion and the voice of the people, they must not let that be the sole driving criteria towards the conduct of a trial. All facets of the case need to be carefully analyzed and investigated and cross examined only after which should there be a verdict of guilt or exoneration.

Delayed Pardoning power under Article 72

Article 72 of the Constitution of India deals with the issue of pardoning powers in the hands of the president.[65] The president can use this article to grant pardon if there is a case of a person being convicted by a court martial or when the penalty is a death sentence or when the punishment is for the conviction of an offense which is a matter that can be decided by the executive power of the Union. However the president cannot utilize this power independent of the government. Article 74 holds that the president will be aided by the Council of Ministers when he is undertaking his functions. Following the verdicts in the cases of **Maru Ram v. Union of India (1980)** and **Dhananjoy Chatterjee v. State of West Bengal (1994**) it is generally understood that the president can only use this power to act upon the advice given to him by the Council of Ministers while deciding mercy pleas.

The article Exercise of Pardoning Power in India: Emerging Challenges J.P. RAI argues that currently there is a great deal of delay in the act of pardoning from the highest constitutional offices. The article states that while in the time before the 1980s the issue of pardoning was dealt

[64]*Supra*, 52
[65]The Constitution of India, art. 72.

with within 2 weeks, currently it is at an astounding 12 years.[66] This is true not only for pardoning petitions under article 72 but for those towards the governors under article 161. The issue is twofold here. On one hand the delay in pardoning means that there is a chance that many individuals might languish in prisons without any proper conclusion reached for their case.

On the other hand at the other side of the equation it also means that those individuals such as terrorists and anti national activists who do commit acts against the integrity of the republic are given more time to plan any future role. These people can utilize this time to further their messaging, portray themselves as victims or generally function from the jails and threw their intermediaries against the integrity of the Republic. The removal of the delay in the decisions over pardoning would allow the state to take quick action on both the counts. On one hand allow for the immediate release of certain individuals based on the advice of the state or conversely allow for the quick execution of those threats to the Republic.

Delayed execution

While there is already a growing concern regarding how death penalties are issued in India, there is also another major crisis emanating from the judicial procedure. This is with regard to the carrying out of convicted death penalty convicts. In particular one could turn their attention towards terrorist groups as well as anti national elements. In many cases those who had been sentenced to death for legitimate crimes are not punished accordingly due to the delay in the entire process. The case of Afzal Guru is a perfect example of how a person who should have been executed as soon as possible was given a few more years of life delaying justice for the victims of his terrorist activities. To put things further into perspective, nearly 2500 people have been awarded the capital punishment since 2018 but hardly a few have been executed since then.[67]

[66]J.P. Rai, "Exercise of Pardoning Power in India: Emerging Challenges" 12 *NEHRU Journal* 1-24 (2014).
[67]Pavithra K M, *"*Explainer: What are the reasons for delay in the execution of a Death sentence?", *Faqtly*, March 25, 2020 *available at* https://factly.in/explainer-why-are-the-reasons-for-delay-in-the-execution-of-a-death-sentence%EF%BB%BF/ (last visited on May 11th 2021).

While yes there is a delay in the entire process and there is a growing concern of same day sentencing and public opinion influencing the courts, the delay in the execution as well is a major cause of concern. While the former leads to a breakdown of judicial procedure and convention allowing for a possible weakening of the entire judicial system, the latter leads to a disillusionment of the people towards the system entirely. This delay in justice might lead to loss of integrity and faith thus leading to a loss in trust.

Thus we can see the various issues faced by the judicial system when it comes to death penalty sentencing. While on one hand we risk unfortunate instances of those who might not deserve death penalty getting this punishment while on the opposite end we are also risking truly dangerous individuals and terrorists being allowed a chance to delay their punishment thus denying justice to the victims.

Possible Solutions

So we are facing issues on either side, it is imperative that we take action facilitating the betterment of individuals and the ideal of justice from either side.

One of the biggest issues brought forward by the reports and studies done by the various institutions is that there is a great deal of unaddressed mental health concerns for these individuals. In many ways that is something which can be expected since they are on death row. Regardless of any mental health issues or not, they are to be provided with the necessary mental health facilities in the last remaining time they have left.[68] Although the Supreme Court in its various orders try to deal with this matter, they have so far not resulted in any tangible betterment. This however must not be a benefit extended towards certain types of criminals who are wholly unrepented towards the crime they have committed. First, all such individuals must be given a mental assessment to analyze and understand who are unrepentant and who have been convicted due to circumstances. To put forward an adequate response, we could set up diagnostic clinics, which would be staffed by a group of persons skilled in the fields of human behavior like psychiatrists,

[68] National Law University Delhi, Death Penalty India Report Summary 36 (2016).

social workers and psychologists. These clinics, through tests and investigations, would distinguish those who suffer from emotional disorders from those who are facing issues and could provide adequate mental health facilities.

The judges in essence are basically having a large amount of discretion at their hands and the final verdict in whatever form lies on their choices. Add the above problems to the matter and we can see why there is a great deal of concern to the issue of death penalty sentencing in India. This is one of the fundamental issues some articles find in the case of death penalty sentencing.[69]

One probable solution could be to disseminate information. Better training had been proposed as a possible solution to the issue of preventing the current trends from remaining as the norm. With this supply of information there does stand a chance. How to come about with this, the article The "*Sentencing Process - Problems and Perspectives"* has a solution to offer. According to them, the creation of Sentencing Councils or Boards can be set up with experts with the adequate legal and non legal knowledge to advise and guide the judge in matters of a judicial verdict.[70] This could benefit not only the death penalty sentencing process but rather the entire criminal law procedure in the nation. The article did indeed call for a suggestion to drop the matter of pronouncing punishment from the judges entirely. This seems extremely idealist in nature.

I have a solution which might be a system which takes the best form these suggestion and try to make it into a possible workable solution

We could set up a system which does create the special councils that will be set up to assist in the process of criminal justice. These councils will advise the judges. They will not just be the advisors for the final pronouncement but rather they could be those who will provide the avenues for the punishment. They would provide the judge on what to punish the convict with. On the surface this might seem absurd and very similar to the earlier idealist notions placed in that article but I am arguing for is that the judge will dispense justice to an extent and would be more involved and be

[69]K I Vibhute, "Choice between 'Death' and 'Life' for Convicts" 59 *Journal of the Indian Law Institute* 221-264, (2017).
[70]*Supra* 15.

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present to deliver the final verdict of who is right and wrong. While at the same time this council of experts will determine the adequate punishment the person needs. Ther does not need to be any devolution of power in anyways either. From the Judge. he will still hear the arguments from the side for the prosecution and the defendant and act on them the same as always. The council would present to the judge a set of possible punishments that they would deem to be the best suited for the particular case at hand and the judge can choose from among them.

Some would argue that this in essence leads to a position where these "experts" will be the sole decision maker in the process and give them unvalued power and in many ways be unconstitutional. This is where i would like to clarify that in this system, the experts will advise the judge and they could provide the necessary medical expertise to better help understand who retarded mentally or who, through obvious circumstances were accidentally precipitated into the crime[71]. Furthermore, as per the system I envision, the judge would be advised by these experts but he is under no obligation to follow them to the letter. Both must provide their output in a reasonable manner keeping in mind the facts of the case. No ideological idealism however must be permitted.

The judge after delivering the verdict will send to the experts the list of sections he has found the convict guilty under and the experts will set up the best possible punishment for the person keeping in mind the legal implications of their decision and send back to the judge what they consider to be the possible punishments that could be inflicted on them. In many ways this process by itself could take some time and that would negate the issue of the same day sentencing and thus provide the convict the possible time frame as ordained by the law. The judge is free to choose from the possible solutions offered to him. Furthermore, to not make the system in a way that no party dominates, either the judges or the council will be transferred on a 6 month basis so as to prevent any disruption of the delicate balance.

This would allow for a quick dissemination of cases in the Indian judicial system allowing for a much more fast paced judicial system. Additionally, it would also assure that hard-core criminals and rapists along with terrorists are convicted faster and that the families are given justices much

[71]*Supra* 15.

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quicker. This would allow for more trust to be built from the people towards the judiciary. Instead of an ivory tower perception, the judiciary will now be one working in tandem with this council of experts and such to provide for better optics. There will now emerge a sense of participation from the public. This would go a long way in bridging any gap between the people and the judiciary.

Conclusion

The solutions put forward are just a few of the possible avenues to prevent the Code of Criminal Procedure from losing its meaning. It is important to realize that in most cases, death penalty is a measure of societal control. Even so, it must be a tool used sparsely to ensure that order is maintained. This is not just a legal issue but rather a socio economic one as well. We must delve deeper to understand these matters and find out why these problems occur. The very future of our legal system depends on this.

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 UGC CARE Listed (Group -I) Journal Volume 11, Iss 10, 2022

Bibliography

Statutes and Regulations

- The Constitution of India
- The Indian Penal Code, 1860 (Act 45 of 1860)
- The Code of Criminal Procedure, 1973, (Act 2 of 1974)
- The International Covenant on Civil and Political Rights, 1966

Reports

- Law Commission of India, "262nd Report of the Law Commission of India on Death Penalty" (August, 2015)
- Project 39A, "Death Penalty Sentencing in Trial Courts" (May, 2020).

Case Laws

- Jagmohan Singh v. State of U.P., A.I.R. 1973 S.C. 947.
- Bachan Singh v. State of Punjab, AIR 1982 SC 1325.
- Machhi Singh v. State of Punjab, (1983) 3 S.C.C. 470.
- Mithu v. State of Punjab, AIR 1983 SC 473.
- Ediga Anamma v. State of Andhra Pradesh, AIR 1974 SC 799.
- Lehna v. State of Haryana, (2002) 3 SCC 76.
- Ramnaresh v. State of Chhattisgarh, AIR 2012 SC 1357.
- Govt of India v. Lachma Devi, AIR 1986 SC 467.
- Deena v UOI, AIR 1983 SC 1155.
- Masalti v. State of Uttar Pradesh, AIR 1965 SC 202.
- Ramji Rai v. State of Bihar, (1999) 8 SCC 389.
- State of Punjab vs Kala Ram @ Kala Singh, (2018) 2 SCC (Cri) 659.
- Balak Ram v. State of U.P., AIR 1974 SC 2165.
- Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498.
- Sri D N Srinivash Reddy v. State of Karnataka, C.C.No.54125/2015, decided on Mar. 5, 2018 (Kar.).
- Shiromani Akali Dal (Mann) v. State of J&K, 1993 Cr LJ 927 (J&K).
- Peoples' Union for Democratic Rights (PUDR) v UOI, 2015 SCC Online All 143.
- Shabnam v UOI, (2015) 6 SCC 632.

ISSN PRINT 2319 1775 Online 2320 7876
 UGC CARE Listed (Group -I) Journal Volume 11, Iss 10, 2022

- Allauddin Mian v. State of Bihar, (1989) 3 SCC 5.
- Malkiat Singh v. State of Punjab, (1991) 4 SCC 34.
- Manoj Suryavanshi v. State of Chhattisgarh 2020 SCC OnLine SC 313.
- Om Prakash v. State of Haryana, (1994) RD-SC 24

Journal Articles

- The Philosophy of Punishment by Julian P Alexander
- Human Sacrifice, Capital Punishment, Prisons & Justice: The Function and Failure of Punishment and Search for Alternatives by Niccolo Caldararo
- The Sentencing Process - Problems and Perspectives by G Kameswari and V Nageswara Rao
- Exercise of Pardoning Power in India: Emerging Challenges by J.P. Rai
- Choice between 'Death' and 'Life' for Convicts by K I Vibhute

Online Sources

- The Draconian Constitution: The First Written Legal Code in Ancient Athens by Matthew A. McIntosh, available at https://brewminate.com/the-draconian-constitution-the-first-written-legal-code-in-ancient-athens/
- Death Penalty : An Overview of Indian Cases by Aditi Agarwal available at https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/
- Early History of the Death Penalty by L E Randa available at https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty
- Law Commission Report on Death Penalty by Sucheta available at https://www.scconline.com/blog/post/2015/09/01/262-law-commission-report-on-death-penalty/
- Hard cases and good law by Sahana Manjesh and Yash S Vijay available at https://indianexpress.com/article/opinion/columns/death-penalty-in-india-supreme-court-cases-law-mitigating-evidence-4551607/
- 162 death penalties imposed by trial courts in 2018, highest in two decades by Varun Krishnan available at https://www.thehindu.com/news/national/162-death-penalties-imposed-by-trial-courts-in-2018/article26185734.ece

ISSN PRINT 2319 1775 Online 2320 7876
 UGC CARE Listed (Group -I) Journal Volume 11, Iss 10, 2022

- The Enduring Gaps and Errors in Capital Sentencing in India by Anup Surendranath, Neetika Vishwanath and Preethu Praishruti available at https://www.project39a.com/op-eds/the-enduring-gaps-and-errors-in-capital-sentencing-in-india
- Explainer: What are the reasons for delay in the execution of a Death sentence? by Pavithra K M available at https://factly.in/explainer-why-are-the-reasons-for-delay-in-the-execution-of-a-death-sentence%EF%BB%BF/

Index of Abbreviations

Art.	-	Article
S.	-	Section
A.I.R.	-	All India Reporter
S.C.C.	-	Supreme Court Cases
Cri.	-	Code of Criminal Procedure Act, 1973
C.C. No.	-	Criminal Complaint Number
Kar.	-	Karnataka
IPC	-	Indian Penal Code
CRPC	-	Criminal Procedure Code
Cr. LJ	-	Criminal Law Journal