

Death Penalty

SUMMARY OF KEY ISSUES FROM PREVIOUS UPR CYCLES

During the second Universal Periodic Review in May 2012 at the UN Human Rights Council, India received 11 recommendations (made by Ireland, Slovakia, Spain, Chile, France, Belgium, Italy, Switzerland, Argentina, Norway and Portugal) regarding death penalty. The Council recommended that India establish an official moratorium on executions and move towards abolishing the death penalty. The Council also recommended that India commute all death sentences into life imprisonment terms and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights with a view to definitive abolishment of the death penalty. However, India did not accept any recommendations regarding the death penalty, or abide by any international moratorium or resolution that requires it to eradicate death penalty from its legal order.

India is party to the International Covenant on Civil and Political Rights (ICCPR) that require a progression towards abolition of Death Penalty. Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty. In 2014, India, along with 37 other countries, voted against a UN General Assembly resolution calling for moratorium on death penalty.

NATIONAL LEGAL FRAMEWORK

Capital Punishment has been part of Indian law since the colonial era, officially 1860. At independence, India retained several laws put in place by the British colonial government (the Code of Criminal Procedure, 1898 ('Cr.P.C.1898'), and the Indian Penal Code, 1860 ('IPC') prescribing death penalty as punishment for a number of crimes. Article 21 of the Constitution of India allows the state to deprive any person of the right to life. Section 53 of the Indian Penal Code (IPC) also lists "death" as one of the forms of punishment that may be imposed for an offense.

The 1973 Code of Criminal Procedure states that those sentenced to death should be hung until dead. (Previous methods have included being crushed by an elephant, impaling and being shot from a cannon.)" In 1982, the Supreme Court of India, in *Bachan Singh vs. State of Punjab* (AIR 1982 S.C 1325) upheld the constitutionality of the death penalty under Section 302 of Indian Penal Code (IPC) which prescribes the death penalty as punishment for murder. The court prescribed that the penalty be accorded only in the "rarest of rare cases." Notwithstanding the "rarest of rare" doctrine which was intended to restrict the use of the death penalty, a large number of convicts are routinely awarded death penalty in India. The Indian Law Commission argued against retaining death penalty even for rarest of rare crimes as it is a "regressive step" and in no way acts as deterrent on serious crimes like rape.

In the case of *Mithu v. State of Punjab*, the Court determined that the mandatory sentence of death enacted in Section 303 of the IPC is unconstitutional in India. While later legislation for drug and atrocity offenses prescribes the mandatory death penalty, and the Supreme Court has not expressly struck down the language in such legislation as unconstitutional. In fact the first expansion of death penalty also came by way of mandatory death penalty for terrorists offences under the Terrorist and Disruptive Activities (Prevention) Act, 1985. While TADA 1985 – dangerously – gave way to a national TADA 1987, the legislature

took away the mandatory death penalty, replacing it with death sentence as an alternative punishment.

The Arms Act amended in 1988 provided a mandatory death sentence for any person who used prohibited arms resulting in the death of other person. The Narcotic Drugs and Psychotropic Substances Act was amended in 1989 to include the death penalty for specific second convictions as per the recommendations made by Cabinet sub-committee. Even after TADA's eventual expiry in 1995, the subsequent The Prevention of Terrorism Act, (POTA) 2001 and the latest anti-terror legislation, the amended Unlawful Activities (Prevention) Act 2004 (UAPA) continued with an alternative death sentence. The Anti-Hijacking Bill, 2014 introduced in Indian Parliament expanded the scope of the definition of hijacking and prescribed capital punishment for all offences committed under the Act related to hijacking to all offenders including hijackers, conspirators and abductors and all persons involved directly or indirectly in hijacking get similar punishment.

The scope of the death penalty has been expanded and reinforced in enactments following the brutal gang rape and murder of a 23-year old woman in December 2012. For example, the Criminal Law (Amendment) Act passed in 2013, introduced several new provisions into the IPC, including Section 376A, which allowed for the death penalty to be imposed in cases where rape led to the death of the victim, or left her in a persistent vegetative state; and 376E which allowed for the imposition of the death penalty for certain repeat offenders. These amendments were passed in the wake of the recommendations of the Verma Committee formed by the government to study legislative reforms. However, the Verma Committee recommended enhancing the maximum sentence for rape to "the remainder of natural life," but rejected the death penalty as a possible punishment.

CHALLENGES

Breaking self-imposed moratorium on executions

By hanging the sole-surviving gunman of 2008 Mumbai attacks Mohammad Ajmal Amir Qasab on November 21, 2012 India broke its eight-year unofficial moratorium on death penalty. Prior to this hanging, the last execution in India had taken place in 2004, when Mr. Dhananjay Chatterjee was executed by hanging in Kolkata in 1990. On February 8, 2013 Muhammad Afzal, convicted of plotting the 2001 attack on India's Parliament was hanged to death. The last execution to take place in India was the July 30, 2015 hanging of Yakub Memon, convicted of financing the 1993 Mumbai bombings.

Annual Rate of Conviction & Executions

Figures on death penalty provided by the Supreme Court of India to the Death Penalty Litigation Clinic, National Law University, Delhi, indicate that between 2000- 2015, trial courts imposed the death sentence on 1790 persons. Of these, 1512 cases were decided by the High Courts. The remaining are either still pending, or their judgments have not been located. In 62.8% of these 1512 cases, the appellate courts commuted the sentence. In all, the death sentence was confirmed only in 4.3% of the cases. The Supreme Court's data thus shows that trial courts erroneously impose the death penalty in 95.7% cases.

ISSUES AND IMPACTS

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Death Sentence and Miscarriage of Justice

There is increasing concern about the incorrect application of capital punishment law. In August 2012, the miscarriage of justice has prompted 14 retired judges of Supreme Court and High Courts across the country to appeal to the President of India, pointing out that the Supreme Court had wrongly awarded death sentence to 15 people. They described the execution of two prisoners in 1996 and 1997 following flawed judgments as “the gravest known miscarriage of justice in the history of crime and punishment in independent India”

Role of Supreme Court in Commuting Death Sentence into Life Imprisonment

In February 2014, the Supreme Court of India emphasized the importance of the clemency process for capital inmates and converted the death penalty to life sentence in the case of Bhullar, Perarivalan, Murugan and Santhan and 4 others involved in Veerappan case citing inordinate delay in executing the death sentence. The judgment said, "we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 (Right to life and liberty) and thereby entails as the ground for commutation of sentence.

Law Commission of India and Its Recommendations

The Law Commission of India in its 262nd report on the issue of 'Death Penalty' in India in 2015 felt that “time has come for India to move towards abolition of the death penalty,” and recommended that “the death penalty be abolished for all crimes other than terrorism related offences and waging war”.

RECOMMENDATIONS

India should accept the recommendation that it sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

Executions of capital punishment should be immediately suspended and drastic deliberation, review and public discussion on capital punishment should be carried out.

India should abolish all provisions in legislation which provide for mandatory death sentences.

India should immediately commute all death sentences to prison terms.

India should endorse the UN call for a worldwide official moratorium on the use of the death penalty and vote in favour of any subsequent UN General Assembly resolutions that call for a moratorium on executions.

India should “progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed” as called by UN General Assembly resolution (UNGA) in 2007.

India should ensure that anyone who faces the death penalty has an effective right to competent state appointed legal counsel of the defendant's choice during the entire legal process, including appeals and mercy petitions.

India should develop legal mechanism to ensure that mercy petitions are considered within a reasonable time period to avoid inordinate, undue, and unreasonable delay as proposed by the Indian Supreme Court.

India should strictly implement the guidelines issued by the Indian Supreme Court regarding prisoner's rights to legal aid to prepare legal challenges to the clemency process and to be informed of the result of their mercy petition in writing.

Ensure that after mercy petitions are rejected by the President, the prisoner and the petitioners are supposed to be informed of the decision. Such policies ensure that the prisoner and relatives are able to utilize judicial remedies to further stay or commute a pending execution.

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