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LOOPHOLES IN THE ADMINISTRATION OF DEATH PENALTY: AN ANALYSIS

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India is a retentionist country where capital punishment is awarded only in the 'rarest of rare' cases. The most recent death sentence execution took place in March, 2020 where 4 convicts in the gruesome Nirbhaya gangrape and murder case were hanged together. Recently, the Central Government has pleaded before the Supreme Court to frame "victim and society centric guidelines" in cases of death penalty. At the onset, this paper explains the judicial structure for the administration of death penalty. Further, this paper highlights the various loopholes in the administration of death penalty including judicial, constitutional, statutory and procedural loopholes. The objective of this paper is to engage in a meaningful discourse to frame appropriate guidelines and make legislative amendments for the effective execution of death sentences. A reasonable limitation period should be defined for filing a curative petition. Mercy petitions should be accepted or rejected timely lest the delay caused is pleaded as a ground for commutation of death sentences. To avoid political bias, the advice of the council of ministers should not be made binding on the President for deciding upon mercy petitions. The locus standi for filing a mercy petition should lie only with the convict. The statutory powers of suspension, remission and commutation under the Code of Criminal Procedure should be exercised judiciously. There is a need to re-examine the mandate of hanging all the co-convicts in a case together. There is a need to balance the rights and interests of the victims and the society vis-à-vis the rights and interests of the accused and the convicts in order to deliver justice.

INTRODUCTION

Globally, the outlook towards capital punishment is becoming increasingly critical.[1] India is a retentionist country where death penalty remains a legally valid punishment under the Indian Penal Code[2] and certain other legislations.[3] The law commission in its 262nd report had advocated the

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[1] 'Research Shows A Global Trend Towards Abolition of The Death Penalty, But More Work Remains' (2018) <https://www.amnestyusa.org/reports/research-shows-a-global-trend-towards-abolition-of-the-death-penalty-but-more-work-remains/> accessed 14 April 2020.

[2] The Indian Penal Code, 1860.

[3] The Commission of Sati (Prevention) Act 1987, The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act 1989.

abolition of death penalty for all offences except those related to terrorism.[4] However, the constitutional validity of capital punishment has been challenged unsuccessfully in several cases. The jurisprudential development over the course of time advocates for the award of death penalty only in the 'rarest of rare'[5] cases where heinous crimes are committed. This paper does not deal with the perplexing debate between abolitionists and retentionists. Death penalty maybe abolished altogether in future but, until that day, an effective execution of death row convicts is required. I attempt to analyse and draw attention towards various loopholes in the administration of death penalty and suggest potential solutions for the same.

Multiple safeguards are provided for convicts punished with death penalty keeping in mind the irreversible nature of this punishment. However, the misuse of these safeguards by the guilty to delay or escape death penalty highlights the loopholes in our justice delivery mechanism. The most recent death sentence execution took place on 20th March, 2020 where four convicts

in the heinous *Nirbhaya* gangrape and murder case[6] were hanged together. The Supreme Court agreed to assess the government's plea for laying down "victim and society-centric guidelines" in cases of death penalty in the light of this case where the convicts filed multiple review and curative petitions before the Supreme Court and mercy petitions before the President. The prevalent 'convict centric' guidelines were laid down by the Supreme Court in the case of *Shatrughan Chauhan* v. *Union of India*[7] in 2014.

Section II of the paper elucidates in brief the judicial structure for the administration of death penalty. Section III talks about the vanity of the concept of curative petition. Section IV deals with the conundrum of pardoning power of the head of the state. Section V discusses statutory and procedural loopholes. Section VI concludes the paper.

JUDICIAL STRUCTURE FOR THE ADMINISTRATION OF DEATH PENALTY

The lowest court in the hierarchy of courts which can award death penalty is the Court of Session. However, the administration of death penalty cannot take place without confirmation from the respective High Court as per Section 28 and Section 366 of the Code of Criminal Procedure (hereinafter CrPC).

[4] Law Commission of India, The Death Penalty (Report No. 262, August 2015).
[5] *Bachan Singh v. State of Punjab* AIR 1980 SC 898.
[6] *Mukesh and Anr. v. State for NCT of Delhi and Ors.* (2017) 6 SCC 1.
[7] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

According to Section 368 of CrPC the High Court "may confirm the sentence of the Sessions Court or annul the conviction". It "may also acquit the accused person". It is to be noted that "no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of".[8] Further, in an appeal against acquittal, the High Court "may reverse such order of the sessions court and impose capital punishment".[9] The High Court can also "withdraw a case pending before a sessions court and award death penalty after trial".[10]

An appeal can be made to the Supreme Court against the award of death penalty by High Court under the following instances. Firstly, a person convicted by the High Court under its extraordinary original criminal jurisdiction[11] can file an appeal to the Supreme Court. Secondly, where the High Court awards death penalty by reversing the order of acquittal by the sessions court.[12] Lastly, where the High Court withdraws a case from its subordinate court and sentences death penalty after trial.[13]

Other than these instances, the High Court "may grant a leave for appeal to the Supreme Court" under Article 134 (1) (c) of the constitution. The Supreme Court "may also grant a special leave to appeal" under Article 136 (1) of the constitution. Further, the Supreme Court "has the power to review its own judgment subject to the provisions of any law made by Parliament or any rules made under Article 145".[14]

THE VANITY OF CURATIVE PETITION

The novel concept of curative petition was invented by the Supreme Court in 2002 in the case of *Rupa Ashok Hurra* v. *Ashok Hurra and Another*.[15] The utility of this concept is under question as most of the curative petitions filed are dismissed for non-adherence to the specified grounds. Further, they are filed even after the issue of death warrants to delay the execution of death penalty in many cases.

[8] The Code of Criminal Procedure Act 1973, s 368.
[9] Ibid. s 386.
[10] Ibid. s 407.
[11] Ibid. s 374.
[12] Ibid. s 379.
[13] The Constitution of India, Art. 134(1)(b).
[14] The Constitution of India, Art. 137.
[15] *Rupa Ashok Hurra v. Ashok Hurra and Another* (2002) 4 SCC 388.

A review petition is filed to seek review of the final judgment of the Supreme Court under Article 137 of the constitution. It must be filed within 30 days of the pronouncement of such order or judgment.[16] The grounds for filing a review petition are as follows. Firstly, "discovery of new and important matter or evidence".[17] Secondly, "on account of some mistake or error apparent on the face of the record".[18] Thirdly, "any other sufficient reason".[19]

The constitution does not contain any provision for filing a curative petition as this concept is governed by Order XLVIII of the Supreme Court Rules, 2013.[20] It is opined that curative petition is nothing but a review of the review petition and has been carved out as a concept to prevent 'miscarriage of justice' which could have been prevented using existing constitutional framework also.

If the Supreme Court is to reconsider a case after the dismissal of review petition keeping aside the doctrine of stare decisis in the interest of justice, it can do so using its inherent and plenary jurisdiction under Article 136 and Article 142 of the constitution. The Supreme Court has discretionary power to grant "special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India"[21] which will also include the Supreme Court itself[22]. Moreover, the court has plenary power to do 'complete justice' in any matter by passing an order or decree necessary for the same.[23]

Capital punishment convicts try to delay the administration of death penalty by filing a review petition and on its dismissal, a curative petition. There are two grounds for filing a curative petition. Firstly, violation of principles of natural justice.[24] Secondly, apprehension of bias on the part of a judge.[25] Even though two grounds have been specified for filing a curative petition, still a large number of frivolous curative petitions are filed by the litigants, only to be dismissed. Had the concept of curative petitions not existed, review petition would have been considered as the final

[16] Supreme Court of India Handbook on Practice and Procedure and Office Procedure Chapter XII (2017).
[17] CPC Order XLVII, Rule 1.
[18] Ibid.
[19] Ibid.
[20] Supreme Court Rules Order XLVIII, Rule 1 (2013).
[21] The Constitution of India, Art. 136.
[22] Dhruv Tiwari and Anand Vardhan Narayan, 'Re-Colouring the Coloured Walls of the Constitution: A Futile Judicial Exercise of Creating the Curative Petition' (2016) 2 Indian Journal of Law & Public Policy 65.
[23] The Constitution of India, Art. 142.
[24] *Rupa Ashok Hurra v. Ashok Hurra and Another* (2002) 4 SCC 388.
[25] Ibid.

stage of litigation. No limitation period has been prescribed for filing a curative petition[26] and hence many convicts who are awarded death penalty file curative petitions even after the issue of death warrants to them. This causes inordinate delay in the administration of death penalty.

In the gruesome *Nirbhaya* case decided by the Supreme Court in May 2017[27], one of the four co-convicts filed a review petition after around 6 months of the passing of the final verdict. The petition was rejected.[28] Later, two other co-convicts also filed a review petition which was dismissed.[29] The fourth co-convict filed a review petition in December, 2019 after around two and a half years of the judgment. It was also dismissed by the court.[30] The delay in filing review petitions was condoned[31] but all three review petitions were either rejected or dismissed due to lack of merit. A curative petition filed by two of the co-convicts was dismissed in January, 2020. Another curative petition filed by a co-convict was also dismissed later that month.[32] These petitions did not adhere to the two grounds specified for filing a curative petition and were filed with the intent to delay the administration of death penalty as death warrants had already been issued against the convicts.

A reasonable limitation period must be defined for filing a curative petition, similar to that of a review petition. Guidelines for the same should be laid down by the Supreme Court. Delay in the filing of petitions should not be condoned unless very convincing reasons exist for the same.

THE CONUNDRUM OF PARDONING POWER

The power to pardon in all cases of death sentence is vested with the President[33] under Article 72 of the constitution. The term pardon is being used here as an inclusive term to include all sorts of respites that can be granted by the head of the state.

The Governor of a state has a similar power in cases where the executive power of the state extends.[34] However, the Governor cannot exercise this power in cases where the death sentence has been awarded. The power to pardon can be exercised "at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either or after

[26] Supreme Court Rules Order XLVIII, Rule 3 (2013).
[27] *Mukesh and Anr. v. State for NCT of Delhi and Ors.* (2017) 6 SCC 1.
[28] *Mukesh v State of NCT Delhi* (2018) 8 SCC 149.
[29] *Vinay Sharma and Anr. v. State (NCT of Delhi) and Ors.* (2018) 8 SCC 186.
[30] *Akshay Kumar Singh v. State (NCT of Delhi) and Ors.* 2019 SCC OnLine SC 1653.
[31] The Limitation Act 1963, s 5.
[32] *Akshay Kumar Singh v. State (NCT of Delhi) and Ors.* (2020) 2 SCC 454.
[33] The Constitution of India, Art. 72.
[34] Ibid. Art. 161.

conviction."[35] The pardoning power does not interfere with the judicial order, but it affects the implementation of the sentence passed by the court. The judicial power and the executive power over sentences are readily discernible.[36] However, the power of pardon extends only to punishments and sentences[37], and hence can be logically exercised only after trial and conviction.

There are certain loopholes in the existing theoretical and practical framework of a mercy petition which aid the probable escape of a death row convict. One of these loopholes is that the constitution has not prescribed any specific time period to the President to decide upon the mercy petitions. In many cases, convicts plead the delay in deciding of their mercy petitions as a ground for commutation of their death sentences by way of a writ petition[38].

If the court commutes a death sentence only on the sole ground of delay in deciding a mercy petition by the executive, it is problematic for three reasons. Firstly, the case has already gone through the judicial structure for the administration of death penalty as explained in Section A of this paper and the convict remains as guilty as ever. Secondly, the convict would have already exhausted all legal remedies including review petition and curative petition to escape death penalty unsuccessfully which means that the judiciary is of the view that the convict ought to be given death penalty in the best interest of justice. Thirdly, even the President has answered in negative to the convict's mercy petition. Even then if the court decides to commute the convict's death sentence in such a case, it would mean stepping into the shoes of the President and assuming pardoning powers which is clearly a judicial overreach. 'The court will have no jurisdiction to reopen the conclusions it reached while finally maintaining the sentence of death.'[39]

There is no specific delay period that could render a death sentence inexecutable.[40] Even where undue delay in deciding mercy petition is considered as a supervening circumstance[41], the guidelines fall short of stating how much delay is to be considered as a supervening circumstance. To prevent this loophole in the administration of death penalty, mercy petitions should be decided within a reasonable time period or an amendment[42] should be brought to Article 72 of the

[35] *In re Maddela Yerra Channugadu* AIR 1954 Mad. 911.
[36] *Sarat Chandra Rabha v. Khagendranath Nath* AIR 1961 SC 334.
[37] The Constitution of India, Art. 72.
[38] Ibid. Art. 32.
[39] *Triveniben v. State of Gujarat* (1989) 1 SCC 678.
[40] Ibid.
[41] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.it
[42] Indian Constitution, Art. 368.

constitution specifying a fixed time period within which such petitions should be accepted or rejected.

Another pertinent issue with regards to the pardoning power of the President is the possibility of favouritism or bias owing to political pressure. "A Council of Ministers headed by the Prime Minister shall advise the President who shall act in accordance with such advice in the exercise of his functions."[43] If the convict has an affinity with the political party in power, there are chances that the President would be advised to grant pardon to the convict.

This loophole to escape death penalty calls for an independent exercise of the pardoning power by the President, brushing aside the political pressure. Even though the advice of the Council of Ministers binds the head of the state, political vendetta or party favouritism[44] should not be allowed to interfere with the pardoning powers of the President. This is one of the reasons why pardoning power is not given to the ministers. It is opined that the advice of the Council of Ministers should not be made binding upon the President with respect to the application of his pardoning powers.

Another concern is the possibility of arbitrariness in deciding mercy petitions by the President. It is to be noted that the power to pardon is a constitutional responsibility[45] and cannot be exercised in a capricious manner. "Exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review."[46] Following are the grounds for judicial review of pardoning powers laid down in the case of *Epuru Sudhakar & Anr.* v. *Govt. of A.P. & Ors.* Firstly, if there is "non-application of mind while passing the order." Secondly, if "the order is mala fide". Thirdly, if "the order has been passed on extraneous or wholly irrelevant considerations".[47] Fourthly, if "relevant materials have been kept out of consideration."[48] Lastly, if "the order passed is arbitrary". However, the power under Article 72 is of the widest amplitude[49] and therefore if the order of the President is not in contradiction with any of the abovementioned grounds, the court cannot question the decision of the President or demand reasons for the acceptance or rejection of mercy petition.

[43] Ibid. Art. 74.
[44] *Maru Ram v. Union of India* (1981) 1 SCC 107.
[45] *Kehar Singh v. Union of India* (1989) 1 SCC 204.
[46] *Epuru Sudhakar v. Government of A.P* (2006) 8 SCC 161.
[47] Ibid.
[48] Ibid.
[49] *Kehar Singh v. Union of India* (1989) 1 SCC 204.

There is no locus standi for filing a mercy petition which means anyone can file a mercy petition on behalf of the convict. In a case it was contended by the government that sometimes, a person or at their instance some of their relatives, file mercy petitions repeatedly which cause undue delay.[50] This creates another loophole in the administration of death penalty as multiple mercy petitions can be filed in a single case and their consideration on different supervening grounds leads to delay in disposal of petitions. To prevent duplicity and delay, only the convict should have the right to file a mercy petition. Further, a mercy petition should be filed within a week of issuance of death warrant.[51]

STATUTORY AND PROCEDURAL LOOPHOLES

Other than the constitutional provisions for pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence under Article 72 and Article 161, Chapter XXXII of The Code of Criminal Procedure, 1973 deals with 'Execution, Suspension, Remission and Commutation of Sentences'. Section 432 of CrPC deals with "the power to suspend or remit sentences".[52] Section 433 of CrPC deals with "the power to commute sentence".[53] Section 433A of CrPC deals with "restriction on powers of remission or commutation in certain cases".[54] An application has to be made by the convict to the 'appropriate government' as these powers cannot be exercised Suo moto.[55]

The pardoning powers provided under the constitution are superior than those provided under the statute as can be ascertained from their different sources. "The two powers are far from being identical, and the constitutional power is 'untouchable' and 'unapproachable' and cannot suffer the vicissitudes of simple legislative processes."[56] This can be elucidated with an example. If in a certain case the court orders that a convict be sentenced to life imprisonment for a minimum period of at least say twenty-five years. This will restrict the statutory power of remission but the constitutional power of remission remains unfettered.

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[50] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

[51] 'Supreme Court admits government plea seeking 'victim and society centric' guidelines' (2020) <https://rstv.nic.in/sc-agrees-examine-centres-plea-victim-society-centric-guidelines-death-penalty-cases.html> accessed 20 April 2020.

[52] The Code of Criminal Procedure Act 1973, s 432.

[53] Ibid. s 433.

[54] Ibid. s 433A.

[55] *Union of India v. V Sriharan* (2016) 7 SCC 1.

[56] *Maru Ram v. Union of India* AIR 1980 SC 2147.

The statutory powers of suspension, remission and commutation can also be exercised in cases where death penalty has been awarded to the convict. However, Section 433A puts a restriction on the same. In a case death sentence given to the appellant was replaced by life imprisonment and it was further directed that he shall not be released till the rest of his life.[57] This curtailed the statutory power of remission under Section 432 of CrPC. If in a case a person who is awarded death penalty applies to the appropriate government for the commutation and subsequent remission of his punishment and if such commutation and remission is granted in accordance with Section 433 and 432 of CrPC respectively, then such a convict can be released after serving fourteen years of imprisonment as per Section 433A. On the one hand, this loophole allows a person sentenced with death penalty to be released whereas on the other hand, a person sentenced with life imprisonment won't be released. This absurdity needs to be rectified.

In the case of *Harbans Singh* v. *State of U.P. and Others* the Supreme Court directed that "the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any of the co-accused of the prisoner who is due to be hanged, has been commuted".[58] If it has been commuted, the Superintendent should inform the superior authorities who must quickly bring the matter to the notice of the Court concerned.

This poses a procedural loophole in the administration of death penalty by mandating that all the co-convicts in a particular case should be hanged together. If one of the co-convicts has exhausted all the legal recourses available to escape death penalty unsuccessfully, he should be hanged after being provided with a window of seven days to settle his 'earthly affairs'. The procedure mandating hanging of all the co-convicts of a case together tends to be misused by them by approaching separate forums at different times with the intent of delaying the administration of their death sentences. This becomes more problematic in cases of heinous crimes such as gangrape involving multiple convicts. The Supreme Court has agreed to examine if death row convicts in the same case can be hanged separately in the light of the hanging of convicts of the *Nirbhaya* case on 20th March, 2020.[59]

[57] *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767.

[58] *Harbans Singh v. State of U.P. and Others* AIR 1982 SC 849.

[59] 'SC to examine if death-row convicts in same case can be hanged separately' (2020) <https://rstv.nic.in/nirbhaya-sc-hear-mar-23-centres-plea-hc-verdict-hanging-4-convicts-together.html> accessed 20 April 2020.

CONCLUSION

There are various loopholes in the administration of death penalty, which is a legally valid punishment in India. There is a need to balance the rights and interests of the victims and the society vis-à-vis the rights and interests of the accused and the convicts in order to deliver justice. The concept of curative petition is a judicial creation and many frivolous curative petitions are filed by litigants even after issue of death warrants to delay capital punishment. A reasonable limitation period must be defined for filing a curative petition, similar to that of a review petition.

Commutation of death penalty only on the sole ground of delay in deciding mercy petitions is judicial overreach as the penalty has already been upheld by the judiciary as well as the head of state. An amendment should be brought to Article 72 of the constitution specifying a time period within which mercy petitions should be accepted or rejected. The advice of the Council of Ministers should not be made binding upon the President with respect to the exercise of his pardoning powers to prevent possibility of political bias. To prevent duplicity and delay, only the convict should have the right to file a mercy petition within a week of issuance of a death warrant.

The statutory powers of suspension, remission and commutation under the Code of Criminal Procedure can be curtailed by imposing life imprisonment until death whereas death row convicts have a chance of release after serving fourteen years of imprisonment. The procedure mandating hanging of all the co-convicts of a case together is misused by them by approaching separate forums at different times. As and when a co-convict exhausts all the available legal remedies, such co-convict should be hanged after a period of seven days. There is a need to pay attention to the loopholes in the administration of death penalty and engage in a meaningful discourse to frame appropriate guidelines and make legislative changes on the subject.