



Legislative Expansion and Judicial Confusion: Uncertain Trajectories of the Death Penalty in India

Anup Surendranath

Professor of Law, National Law University, India

Maulshree Pathak

Advocate, High Court of Delhi, India

Abstract

The numbers and the politics of the death penalty in India tell very different stories, presenting complicated narratives for its future. The public reaction to instances of sexual violence and other offences over the last decade and the consequent political response has significantly strengthened the retention and expansion of the death penalty. This is reflected from the fact that that of all the death sentences that district courts impose, only about 5 per cent get confirmed in India's appellate system. However, does this mean there is growing scepticism about the death penalty in the Supreme Court of India? Unfortunately, the answer is far from simple. An assessment of the death penalty in India's appellate courts during the last decade will demonstrate that a crime-centric approach has hindered any principled discomfort with the death penalty or the manner of its administration. In particular, the Supreme Court has faltered in high-profile death sentence cases (i.e., offences against the state and sexual violence cases), and its track record of commutations has very little to do with principled considerations on sentencing. This paper argues that the political and judicial imagination of the death penalty, as a necessary part of the response to crime, creates significant and unique challenges for the path towards abolition.

Keywords: Death penalty; judicial response; legislative expansion; sentencing.

Introduction

The death penalty in India evokes a strong emotional response but little principled discourse. In 2021, three key developments have accurately summarised the state of administration of the death penalty in India today. First, India voted against the resolution passed by the United Nations Human Rights Council on the 'question of the death penalty' (United Nations Human Rights Council 2021). Second, the number of death row prisoners in India was 488, the highest since 2004; however, the Supreme Court did not uphold a single death sentence, a first since at least 2016 (Project 39A 2022: 7). Further, if recent legislative developments are any indicator, current governmental policy appears skewed towards retention and expansion of the death penalty. This is also reflected in a rise in the number of death sentences awarded by trial courts. Conversely, however, the Supreme Court has seemingly expanded the scope and contours of the rights and procedural safeguards available to prisoners sentenced to death, resulting in fewer confirmations. However, despite the apparent emphasis on the reformation and rights of prisoners sentenced to death, death sentences in four cases were confirmed in the last decade, leading to the execution of seven prisoners.¹ This number is significant because the first decade of the 21st century saw one execution—that of Dhananjay Chatterjee in 2004.



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This paper outlines the legislative and judicial developments of the last decade to argue that despite a lack of concrete evidence to support its value, the death penalty is imagined increasingly as a solution to not only terror and sexual offences but also other offences. Operating within the broader context of public support for extrajudicial killings and retributive responses, the death penalty has served as a useful tool of political appeasement without any real engagement with the issues that plague the Indian criminal justice system. Over the last decade (2012–2022), the death penalty story in India follows different arcs in the legislative and judicial spheres. In response to widespread public reaction to certain incidents of sexual violence between 2012 and 2020, there has been significant legislative expansion of the death penalty, even to include non-homicide sexual violence against children. Such expansion has also been seen in statutes on alcohol prohibition, anti-hijacking of aeroplanes and human trafficking. The future of the death penalty in India must be appreciated in this context of legislative expansion and judicial confusion. Today, it is obvious that even within the different levels of the judiciary, divergent stories are being told. While trial courts demonstrate exaggerated use of the death penalty, the Supreme Court seems to be confirming death sentences in a far smaller proportion of cases.

This paper begins by analysing the legislative and judicial developments in the field of the death penalty in 1860–2010. Using the 2012 Delhi gang rape as a turning point, we analyse the trajectory of the death penalty to argue that legislative expansion has been met with judicial restriction and confusion.

Evolution of the Death Penalty in India: 1860–2010

India is a quasi-federal country, governed through a union government at the centre and respective state governments. The *Constitution of India 1950* delineates the legislative powers between the Parliament of India and the state legislative assemblies through the Union List, State List and the Concurrent List. Criminal law is a legislative field under the Concurrent List, where legislations by the Parliament of India² have precedence over the ones passed by the state legislative assemblies. The *Indian Penal Code 1860* (IPC) is a legislation by the Parliament of India (central legislation), as is the *Code of Criminal Procedure 1973*. State governments enforce the IPC along with other criminal law statutes passed by both the parliament and respective state legislative assemblies. The judiciary in the criminal justice system has a three-tiered structure with the Supreme Court of India, High Courts for each of the states and the trial courts. Trial courts are empowered to impose the death sentence; such sentences mandatorily require confirmation by the High Court. In certain types of death sentence cases, the Constitution assures the right to appeal in the Supreme Court.³ However, in all other matters, it is a matter of discretion whether an appeal against a death sentence is admitted for hearing before the Supreme Court.⁴

The death penalty as a punishment has existed on the statute books since 1860 when the IPC was enacted while India was still a British colony—post-independence, it was adopted by the Parliament of India. This section provides an overview of the use of the death penalty by the legislature between 1860 and 2020 and its simultaneous treatment by the judiciary. Then, these developments are placed alongside empirical data on death sentences and executions.

Legislative Evolution

The death penalty as a punishment has come a long way since the passing of the *Code of Criminal Procedure 1898* (old Code). The old Code provided that in cases of offences punishable by death under the IPC and other legislations, the judge had limited discretion not to award the sentence of death and was required to record special reasons for imposing life imprisonment instead of death (s 367(5)). A 1955 amendment left the decision entirely at the discretion of the sentencing judges, without any legislative preference for either punishment (*Code of Criminal Procedure (Amendment) Act 1955*: s 66). The next major legislative shift came with the passing of the *Code of Criminal Procedure 1973* (new Code), which provided three significant safeguards for offences punishable with death. First, death sentences require special reasons if chosen over life imprisonment (s 354(3)). Second, all sentences of death passed by trial courts are subject to confirmation by the High Court (s 366(1)).⁵ Third, judges are required to hear offenders on sentencing in a separate hearing after they have been convicted (s 235(2)). Over the years, some unsuccessful attempts have also been made by private member Bills moved in parliament to abolish the death penalty (Law Commission of India 2015: 36).

On the legislative front, the death penalty as a punishment was found in at least 17 statutes and in the IPC (National Law University Delhi 2016: 33). Within the IPC, the majority of capital offences involve the killing (or attempted killing) of the victim⁶ and certain offences against the state.⁷ Notably, kidnapping for ransom (s 364A) is a non-homicide capital offence introduced in the IPC in 1993. The capital offences in other legislations included both homicide and non-homicide offences, the latter of which related to, inter alia, the conduct of members of armed forces during war,⁸ the conduct of members of paramilitary forces,⁹ and using explosive substances (*Explosive Substances Act 1908*: s 3(b)) and terror offences (*Unlawful Activities Prevention Act 1967*: ss 10(b)(i), 16(1)(a); *Terrorist and Disruptive Activities (Prevention) Act 1987*: s 3; *Prevention*

of *Terrorism Act 2002*: s 3). Notably, some social welfare statutes also contained capital offences (*Commission of Sati (Prevention) Act 1987*: s 4; *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*: s 3(2)(i)). Crucially, sexual offences against women were not punishable with death,¹⁰ and offenders could only be sentenced to death if a capital offence was also committed (e.g., rape and murder). The scope of sexual offences against children was defined properly through a criminal law statute in 2012. At the time of its introduction, the *Protection of Children from Sexual Offences Act 2012* (POCSO) did not contain any capital offences but was amended subsequently to provide for the death penalty for certain offences under this statute.

Judicial Response (1950–2010)

The judicial response to the death penalty can be categorised broadly into three categories: cases involving questions of constitutionality of the death penalty, cases discussing sentencing guidance available to judges for capital offences and cases involving post-mercy adjudication. While this section looks at the primary developments in the death penalty in the first six decades of the Supreme Court of India, a later section of the paper examines the shift in the judicial response between 2010–2022.

Constitutionality of the Death Penalty

To date, the judiciary has demonstrated deference to the legislature: the constitutional validity of the death penalty was upheld by the Supreme Court for the first time in 1973 (*Jagmohan Singh v State of Uttar Pradesh* [1973] 1 SCC 20 (India)). The Court relied on the 35th Law Commission Report¹¹ to conclude that the death penalty was not unreasonable and was in the public interest (*Jagmohan Singh v State of Uttar Pradesh* [1973] 1 SCC 20 (India): 14–15). Another factor that made the Court hesitant to interfere in this issue was the failure of the private member Bills in the houses of parliament (Lok Sabha and Rajya Sabha) over the years (*Jagmohan Singh v State of Uttar Pradesh* [1973] 1 SCC 20 (India): 17). The Court further held that the broad discretion vested in judges to choose the death penalty or life imprisonment in the absence of a legislative preference for either was not problematic because laying down standards was impossible and the discretion was exercised by judges on the basis of well-recognised principles (*Jagmohan Singh v State of Uttar Pradesh* [1973] 1 SCC 20 (India): 26). Following the enactment of the new Code, the constitutionality of the death penalty was reaffirmed by a constitution bench of the Supreme Court (by a 4:1 majority) in *Bachan Singh v State of Punjab* [1980] 2 SCC 684 (India) (*Bachan*). Soon thereafter, the Court was called upon to adjudicate the constitutional validity of Section 303 of the IPC, a provision that imposed the mandatory death penalty to persons convicted of committing murder while already under sentence of life imprisonment. In 1983, the Court struck it down as unconstitutional (*Mithu v State of Punjab* [1983] 2 SCC 277 (India)). The Court was of the view that a ‘standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case’ (*Mithu v State of Punjab* [1983] 2 SCC 277 (India): 16). This reasoning has been followed consistently by courts in striking down other provisions that prescribed the mandatory death penalty.¹²

Sentencing Framework for Capital Offences

While upholding the constitutional validity of the death penalty, in *Bachan*, the Supreme Court refused to lay down any concrete guidelines for sentencing judges. Instead, it indicated broadly the possible aggravating and mitigating factors that were to be weighed when deciding whether an offender should be sentenced to death (*Bachan*: 206, 209). However, the Court did expressly indicate that circumstances pertaining to both the crime and the offender must be taken into consideration (*Bachan*: 201). The *Bachan* framework has subsequently been criticised as being inadequate (Surendranath, Vishwanath and Dash 2020). These inadequacies of the judgement notwithstanding, subsequent decisions of the Court have diluted its scope significantly. In *Machhi Singh v State of Punjab* [1983] 2 SCC 470 (India) (*Machhi Singh*), the Court sought to categorise five kinds of cases (based on the nature of the crime) where the death penalty could be awarded (33–37). It is crucial to note that the judgment in *Machhi Singh* essentially envisaged that there could be situations where the death penalty could be imposed by only assessing the gravity of the offence. Subsequently, at least two judgements of the Supreme Court upheld the death penalty awarded on consideration of the gravity of the offence rather than the circumstances relating to the offender (*Ravji v State of Rajasthan* [1996] 2 SCC 175 (India): 24; *Surja Ram v State of Rajasthan* [1996] 6 SCC 271 (India): 22).¹³ Although the inconsistent application of the *Bachan* framework and resultant arbitrariness has been examined and decried by the Supreme Court in several decisions (*Aloke Nath Datta v State of West Bengal* [2007] 12 SCC 230 (India); *Santosh Kumar Bariyar v State of Maharashtra* [2009] 6 SCC 498 (India); *Swamy Shraddhananda v State of Karnataka* [2008] 13 SCC 767 (India); *Sangeet v State of Haryana* [2013] 2 SCC 452 (India); *Shankar Kisanrao Khade v State of Maharashtra* [2013] 5 SCC 546 (India)), the Court recently refused to revisit the question of the constitutional validity of the death penalty (*Chhannu Lal Verma v State of Chhatisgarh* [2019] 12 SCC 438 (India)).

Scope of Judicial Review in Post-Mercy Adjudication

Another key area of judicial scrutiny in the 1980s was the limited power of judicial review exercised by constitutional courts over the exercise of powers of pardon and commutation conferred on the president and governor by Articles 72 and 161 of the Constitution, respectively. The Supreme Court has consistently held that it has limited scope of judicial review over such commutation decisions. For instance, a delay in deciding a mercy petition would be a ground for commutation of the sentence by the Supreme Court because delay in execution causes undue anguish to the prisoner and violates Article 21 (*Sher Singh v State of Punjab* [1983] 2 SCC 244 (India); *T. V. Vatheeswaran v State of Tamil Nadu* [1983] 2 SCC 68 (India); *Triveniben v State of Gujarat* [1988] 4 SCC 574 (India); *Kehar Singh v Union of India* [1989] 1 SCC 204 (India)). This position would be clarified further and strengthened by the Supreme Court's decision in *Shatrughan Chauhan v Union of India* [2014] 3 SCC 1 (India) (*Shatrughan Chauhan*), discussed in a subsequent section of this paper.

The Story as Told by Numbers

The problem with analysing the impact of legislative policy and judicial decisions on the death penalty until the end of the 20th century is the non-availability of official data on the subject. No official data exists on how many prisoners have been executed in India since Independence. In response to a private member Bill introduced in the Lok Sabha in 1973 to abolish the death penalty, the government stated that 517 individuals had been executed between 1951 and 1966 (Lok Sabha Debates 1973). This contradicts the data compiled by the Law Commission of India (1967: 249) as well as independent researchers, which indicate that 1,482 mercy petitions were rejected between 1955 and 1964 (Batra 2009: 89), implying that the number of executions was significantly higher than the figure quoted on the floor of the parliament. The Prison Statistics maintained by the National Crime Records Bureau since 1995 reveal that 15 individuals were executed between 1995 and 2000, and one individual (Dhananjay Chatterjee) executed between 2000 and 2010 (National Crimes Records Bureau 1995–2010). By and large, executions have been steadily declining, with just one execution in the first decade of this century.

However, this trajectory has not continued since 2010. Rather, the decade between 2010 and 2020 saw seven executions across four cases, and a legislative expansion of the death penalty at both central and state levels. This expansion occurred despite the express recommendation of the Law Commission of India to the contrary (2015: 217) that the death penalty must be abolished for all offences except those relating to terror. The rest of this paper examines the reasons for this change in trajectory and what the future holds for the death penalty in India.

A Decade of Legislative Expansion (2012–2022)

The Death Penalty as a Solution for Sexual Offences

As seen in the previous section, legislative policy on the death penalty has evolved from the death penalty being the norm in capital offences to becoming the exception. However, the last decade has witnessed major legislative expansion of the death penalty with the introduction of new capital offences, the majority of which were direct responses to specific sexual offences that were widely reported in the media and sparked outrage and protests.

The first of these expansions was precipitated by the 2012 gang rape of a young woman in Delhi, which sparked unprecedented protests in the country. In response to the incident, the government constituted the Justice Verma Committee to suggest amendments to the law. The Committee consulted with scholars, women's rights organisations and international organisations and took the view that it would not be appropriate to enhance the punishment for sexual offences by adding the death penalty, particularly in view of the fact that it could not be conclusively proved that the death penalty for sexual offences serves as a deterrent (Justice J. S. Verma Committee 2013: 249–250). The *Criminal Law (Amendment) Bill 2013* was introduced, debated and passed by both houses of parliament within three days. Notably, despite the Justice Verma Committee's express opposition to the death penalty for sexual offences, the Bill contained two new capital offences—rape causing death or resulting in a permanent vegetative state of the victim (s 376A) and the repeat offence of rape (s 376E).

The next major legislative expansion to the death penalty occurred in 2018 after widespread public protests in the aftermath of the rape and murder of a minor in Kathua (Jammu and Kashmir). The amendments to the IPC introduced two new capital offences: Sections 376AB (rape of a woman under 12) and Section 376DB (gang rape of a woman under 12). It is critical to note that a subsequent study concluded that the introduction of harsher punishments for sexual offences did not lead to an increase in the number of convictions (Dash 2020).

Soon after the 2018 amendment to criminal law, POCSO was amended (by the *Protection of Children from Sexual Offences (Amendment) Act 2019*) to make aggravated penetrative sexual assault a capital offence (POCSO: s 6). The Statement of Objects

and Reasons of the Bill invokes satisfaction of collective conscience and deterrence as arguments in favour of this amendment. Regrettably, this amendment disregards child rights activists and organisations working with survivors of sexual abuse and assault who have categorically emphasised the danger of introducing the death penalty for child sexual assault (Haq Centre for Child Rights 2019).

A dangerous expansion of the death penalty for sexual offences has been sparked by the aftermath of the December 2019 rape and murder of a young woman in Hyderabad. The protests in the aftermath of this incident have led to some state legislative assemblies passing Bills that drastically reduce the safeguards available to persons accused of sexual offences. For example, the Maharashtra state legislative assembly passed the *SHAKTI Criminal Laws (Maharashtra Amendment) Act 2021*, which sought to expand the number of sexual offences under the IPC punishable by death. At the time of writing, this state legislation is awaiting the President of India, as required by the Constitution.

The impact of these laws on the number of death row prisoners in India has been immediate and visible. At the end of 2021, 54 per cent of all death sentences passed concerned sexual offences (Project 39A 2021:7). However, larger concerns around patriarchal and biased attitudes towards investigations and prosecutions of such offences remain, with little being done to address these problems (Dash 2020).

Expanding the Scope of the Death Penalty for Other Offences

The central government has sought to create new capital offences in areas beyond sexual offences, such as human trafficking, hijacking of aeroplanes and maritime piracy. The last decade has also seen state legislatures expanding the scope of death penalty to other areas beyond sexual offences, such as spurious liquor, mob lynching and honour killing.¹⁴ As is the case with the amendments introduced by the central government, there is no ready data available in the public domain that explain the rationale for introducing the death penalty for these offences.

The legislative expansion of the death penalty over the last decade is a clear attempt to deflect the attention of the general public away from the issues plaguing India's criminal justice system. The death penalty is an emotive issue, and public support for the death penalty has also been used as a justification in the past for retaining capital punishment (Law Commission of India 1967: 265(22)). However, public opinion should not be a basis for deciding whether the death penalty can be retained on the statute books. The experiences of several countries that have abolished the death penalty reveal that abolition preceded change in public opinion or that the death penalty was abolished notwithstanding public opinion (Hood and Hoyle 2008: 381). However, in India, the relevant legislative outcomes are not the result of principled discussion of the value of the death penalty.

Legislative expansion of the death penalty also assumes significance because concerns have also been raised regarding the manner in which the death penalty is administered in India. Sentencing in death penalty matters is marred by inconsistency and a lack of uniformly applied principles—it has been termed a 'lethal lottery' (Amnesty International India 2008). A study of the socio-economic profiles of death row prisoners found that the death penalty was disparately awarded to religious minorities and economically vulnerable individuals (National Law University Delhi 2016: 109). Thus, expansion of the scope of the death penalty would effectively mean further victimisation and marginalisation of these communities—by placing more of their members on death row.

Judicial Response in an Era of Legislative Expansion

The legislative trend over the last decade clearly highlights an unprecedented expansion of the use of the death penalty. The judicial trend, on the other hand, is not as simple to explain. This section unpacks the jurisprudence that has emerged from the Supreme Court on the issue of the death penalty in the last decade and the impact thereof on the number of prisoners sentenced to death.

Constitutional Validity of Capital Offences

The constitutional validity of some capital offences has been adjudicated by the Supreme Court and the High Courts in the last decade. In 2015, a three-judge bench of the Supreme Court upheld the constitutionality of Section 364A (kidnapping for ransom) of the IPC on the ground that this was not a mandatory death penalty provision, meaning courts had discretion in sentencing (*Vikram Singh @ Vicky v Union of India* [2015] 9 SCC 502 (India) (*Vikram Singh*): 36). It was further held that the sentence cannot be said to be disproportionate to the offence and that the judiciary must defer to the wisdom of the legislature on issues of policy (*Vikram Singh*: 52.3–52.4, 53). The Court took the view that the punishment was not disproportionate as it reflected the concern of the lawmakers 'for the safety and security of the citizens and the unity, sovereignty and integrity of the

country' (*Vikram Singh*: 54). This reasoning is flawed because, as per the Court's own admission, the section applies as much to 'ordinary' offenders as it does to those involved in terror activities.

The constitutional validity of Section 376E of the IPC was upheld by the Bombay High Court in 2019 (*Mohd, Salim Mohd, Kudus Ansari v State of Maharashtra* [2019] SCCOnlineBom 894 (India)). The section provides that repeat offenders in cases of certain sexual offences of the IPC be punished with 'imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death' (*Indian Penal Code, 1860: s 376E*). Specifically on the validity of the death penalty, the Court adopted reasoning similar to that espoused in the 2015 decision of the Supreme Court outlined above, holding that the judiciary must defer to the wisdom of the legislature and that the sentence in the present case cannot be said to be so disproportionate as to be termed inhuman or barbaric (*Mohd. Salim Mohd. Kudus Ansari v State of Maharashtra* [2019] SCCOnlineBom 894 (India): 103–104). It is important to note that except Section 376A, all other offences within the ambit of Section 376E are non-homicide offences.

This deference of courts to the wisdom of the legislature is partly responsible for the expanding contours of the death penalty in India today. The threshold set by the courts—that of the punishment being disproportionate to the extent of being 'per se inhuman or barbaric' (*Vikram Singh*: 54)—is almost insurmountably high, especially while adjudicating the proportionality of the death penalty in cases of non-homicide offences.

The Court has not developed a robust jurisprudence on proportionality to assess the relationship between offences and punishment; consequently, the legislative expansion of the death penalty is unlikely to meet any significant judicial resistance.

Expanding Rights of Death Row Prisoners

Procedural Safeguards in the Supreme Court

In a significant expansion of the safeguards available to death row prisoners, a constitution bench of the Supreme Court in 2014 expanded the procedural contours of its review jurisdiction under Article 137 of the Constitution. Generally, review petitions are first considered *in chamber* by the judges, and an opportunity for oral hearing is afforded to the petitioner only if the judges conclude upon a reading of the case documents that the impugned order suffers from grave error or results in miscarriage of justice. However, in *Mohd Arif v Registrar General, Supreme Court of India* [2014] 9 SCC 747 (India) (*Mohd Arif*), the Court held that since death row prisoners are a special category owing to the irreversibility of the punishment, they must be afforded the opportunity to advance arguments in open court at the time of admission of the review petition (*Mohd Arif*: 32, 36). The Court further mandated that all appeals in matters relating to the death penalty be heard by a bench of at least three judges (*Mohd Arif*: 39). Significantly, the Court extended the benefit of this judgement to not only pending and future petitions but also cases where review petitions had already been dismissed. Pursuant to this judgment, the Supreme Court revisited the death sentence it had confirmed in 12 cases (20 prisoners). It is striking to note that on such reconsideration, the death sentence was commuted for nine prisoners (seven cases), and a further six prisoners were acquitted (Project 39A forthcoming).

The judgement in *Mohd Arif* also paved the way for remedying one major problem plaguing the death penalty jurisprudence of the Supreme Court: *in limine* dismissals. In the Indian criminal justice system, while the death sentence awarded by trial court must be confirmed by the High Court, there is no automatic right of appeal to the Supreme Court thereafter. A special leave petition can be filed under Article 136 of the Constitution, whereby the Supreme Court first decides whether a case should be heard on merits. In cases where the Court decides not to interfere and admit the appeal, it can dismiss the petition without a speaking order, or *in limine*. Between 2000 and 2015, at least nine special leave petitions in matters relating to the death penalty were dismissed *in limine* by the Supreme Court (Law Commission of India 2015: 167). This means that the Court did not consider it appropriate to examine the correctness of the conviction or the sentence of death awarded in these nine cases. Pursuant to *Mohd Arif*, the Court held that special leave petitions filed before it in death penalty matters could not be dismissed without assigning reasons, at least on the aspect of the correctness of the sentence imposed on the offender (*Babasaheb Maruti Kamble v State of Maharashtra* [2019] 13 SCC 640 (India)).

A study of sentencing orders passed in capital cases by trial courts across Delhi, Maharashtra and Madhya Pradesh between 2000 and 2015 revealed the casual manner in which sentencing hearings are conducted in such cases (Project 39A 2017). This includes ineffective legal representation for the accused at the sentencing stage, mitigating factors not being brought on record and a singular focus on the gravity of the offence. The Supreme Court has recently sought to view errors committed by trial courts seriously, particularly in cases where the death sentence has been imposed only on the basis of the gravity of the crime and not the circumstances of the criminal (*Lochan Shrivastava v State of Chhattisgarh* [2021] SCCOnline SC 1249 (India); *Bhagchandra v State of Madhya Pradesh* [2021] SCCOnline SC 1209 (India)). It has also reiterated the requirement laid down

in *Bachan* that the onus was on the state to lead evidence to the effect that the offender was beyond reformation (*Lochan Shrivastava v State of Chhattisgarh* [2021] SCCOnline SC 1249 (India); *Bhagchandra v State of Madhya Pradesh* [2021] SCCOnline SC 1209 (India)). The Court has also attempted to concretise the process of collection of mitigation evidence at the time of sentencing. In two cases where materials relating to mitigating circumstances were not placed on record before the trial court, the Court called for reports from the probation officer, psychological evaluation reports and jail reports regarding conduct (*Manoj v State of Madhya Pradesh* [2021] SCCOnline SC 3219 (India); *Mohd Firoz v State of Madhya Pradesh* [2021] SCCOnline SC 3221 (India)). Taking this step forward, in one case, the Court also granted permission to mitigation experts to interview the prisoner and submit a mitigation report (*Irfan @ Bhayu Mevati v State of Madhya Pradesh*, Criminal Appeal No. 1667–1668 of 2021, order dated 29 March 2022 (Supreme Court) (India)). The same matter has now been converted into a *suo moto* writ petition, wherein the Court will attempt to streamline the process of data collection for a meaningful sentencing hearing in capital cases (*In Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences* (Suo Moto Writ (Criminal) No. 1 of 2022 (India)).

However, one area of concern that persists is the issue of same day sentencing. The Court has interpreted section 235(2) of the new Code to mean that as long as the offender was afforded the opportunity to address arguments on sentencing, it does not matter if the sentencing hearing occurred on the same day as the conviction (*Accused X v State of Maharashtra* [2019] 7 SCC 1 (India)). Worryingly, the Court has taken the view that any defects or lack of opportunity at sentencing by the trial court can be cured at the appellate level (*Accused X v State of Maharashtra* [2019] 7 SCC 1 (India): 40.4). This not only signals to the trial courts that sentencing as an exercise can be ignored but also removes the precious right of the offender to appellate review of the sentence.

Post-Mercy Adjudication

In the last decade, the Court has also significantly expanded the scope of safeguards available to a death row prisoner after the president or governor's decision regarding their mercy plea. In 2014, the Supreme Court commuted the death sentence of 15 death row prisoners whose mercy petitions had been rejected by the president or governor (*Shatrughan Chauhan*). The Court held that undue and unexplained delay in deciding the mercy petition, solitary confinement prior to decision regarding mercy petition and insanity were grounds for commutation of the death sentence of an offender, even after the rejection of the mercy petition.

In *Shatrughan Chauhan*, the Supreme Court also expanded the scope of other rights available to a prisoner, including the provision of legal aid even at the mercy disposal stage (241.2), communication of rejection of mercy petition by the president or governor (241.4–241.5), and held that there must be a minimum period of 14 days between the rejection of the mercy petition and the execution to enable the prisoner to meet his family and 'settle worldly affairs' (241.7, 241.12). This decision was affirmed in 2015 when the Court deprecated the practice of trial courts issuing a black warrant—fixing the date of execution of a death row prisoner—without ascertaining if all legal remedies have been exhausted (*Shabnam v Union of India* [2015] 6 SCC 702 (India) (*Shabnam*): 12.1–12.2, 20).

Lack of Consistency in Sentencing

While, on the one hand, the judiciary has predominantly deferred to the wisdom of the legislature on matters relating to the constitutionality of capital offences, the last decade has witnessed massive strides in the expansion of the safeguards available to prisoners sentenced to death as well as attempts to recognise and address the arbitrariness in capital sentencing. In 2013, the Supreme Court examined its own jurisprudence regarding sentencing in death penalty matters and identified that the problem lay essentially in the non-uniform application of the standards laid down in *Bachan* and its dilution over the years by subsequent benches (*Sangeet v State of Haryana* [2013] 2 SCC 452 (India); *Shankar Kisanrao Khade v State of Maharashtra* [2013] 5 SCC 546 (India): [81]). The Court also felt that there was a need to examine 'whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal' (*Shankar Kisanrao Khade v State of Maharashtra* [2013] 5 SCC 546 (India): 148). These judgements are built on the trend that began the decade before, where at least three different judgements of the Supreme Court expressed concern over the lack of uniformity or consistency in sentencing principles for capital offences (*Aloke Nath Datta v State of West Bengal* [2007] 12 SCC 230 (India); *Santosh Kumar Bariyar v State of Maharashtra* [2009] 6 SCC 498 (India); *Swamy Shraddhananda v State of Karnataka* [2008] 13 SCC 767 (India)). While the candour of the admission that the death penalty is being imposed arbitrarily is admirable, it is unclear what the impact of this admission is on the future of the death penalty in India. In 2019, one member of a three-judge bench expressed the view that in light of the 2015 Law Commission Report, as well as the arbitrary manner in which the death penalty is imposed, it is perhaps time to revisit the constitutionality of the punishment itself (*Chhannu Lal Verma v State of Chhattisgarh* [2019] 12 SCC 438 (India): 23). However, the other two judges took the view that because a constitution bench of the Supreme Court in *Bachan* has upheld the constitutionality of the death penalty, the issue does not require reconsideration (*Chhannu Lal Verma*: 29). This grave issue

certainly deserves more than this simplistic dismissal—by a Court that has itself accepted that sentencing in capital offences has become arbitrary and judge-centric. Further, much water has flowed under the bridge since the constitutionality of the death penalty as a punishment was upheld more than 40 years ago in *Bachan*. As a retentionist state, India is now in the global minority. Even within India, there is now clear evidence highlighting that the punishment is administered disparately and a disproportionate majority of those on death row belong to minority communities and are socio-economically vulnerable (National Law University Delhi 2016: 109).

Application of Safeguards

The jurisprudence of the Supreme Court over the last decade has been encouraging. However, the question remains: what impact has it had on the numbers of prisoners sentenced to death across the country? In 2000–2014, of the 1,486 prisoners sentenced to death by trial courts across the country whose cases travelled upwards in the appellate hierarchy, only 73 (five per cent) remained on death row after the Supreme Court had decided their appeal (National Law University Delhi 2016: 190). Notably, this number is higher in the specific context of sexual offences (10 per cent) (National Law University Delhi 2016: 190).

Data collected from 2016 reveal that between 2016 and 2021, a total of 729 offenders have been sentenced to death by trial courts across the country (Project 39A 2017, 2018, 2019, 2020, 2021). This period has witnessed a steady rise in the proportion of sex offenders being awarded the death penalty, from 41 per cent (67 of 162) in 2018 to 53 per cent (54 of 102) in 2019 to 65 per cent (50 of 77) in 2020, then declining to 54 per cent in 2021 (48 of 144). Conversely, the data from the High Court and Supreme Court show that appellate courts have exercised far more restraint in confirming death sentences awarded by trial courts. Between 2016 and 2021, the death sentences of 82 prisoners were confirmed by the High Court, while the Supreme Court upheld the death sentences of 19 prisoners (Project 39A 2017, 2018, 2019, 2020, 2021).

Despite these seeming advances in death penalty jurisprudence, seven individuals were executed between 2010 and 2020. While Ajmal Kasab (accused in the Mumbai Terror Attack of 2008) and Afzal Guru (accused in the Parliament Attack case) were executed before the Supreme Court decisions in *Shatrughan Chauhan* and *Shabnam*, Yakub Memon (accused in the 1993 Mumbai serial bomb blasts) and the four accused in the 2012 Delhi gang rape were executed after these judgments.

In *Yakub Abdul Razak Memon v State of Maharashtra* [2015] 9 SCC 552 (India) (*Yakub Abdul Razak Memon*), the Court was confronted with a situation where a mercy petition filed by the brother of the petitioner had been rejected by the president. Pursuant to *Mohd Arif*, arguments were subsequently heard by the Supreme Court afresh on the review petition, which the Court ultimately rejected. The curative petition filed by the petitioner was also dismissed. However, the trial court fixed the execution date as 30 July 2015 before the curative petition had been filed (in violation of *Shabnam*). Further, the mercy petition filed by the petitioner was also pending adjudication. It was contended on behalf of the petitioner that the mercy petition filed by him stated additional grounds, including the fact that he was suffering from schizophrenia. The Supreme Court refused to stay the execution of the petitioner despite acknowledging that the said mercy petition filed by the petitioner was pending adjudication as at the date (*Yakub Abdul Razak Memon*: 63). The mercy petition filed by the petitioner was rejected by the president a few hours after the Supreme Court order on 29 July 2015 (it had been filed on 22 July 2015). Despite the clear mandate of *Shatrughan Chauhan*—that the Court can exercise limited judicial review over the decision to reject a mercy petition—the Supreme Court refused to stay the execution of Yakub Memon on the ground that he had not challenged the rejection of the first mercy petition (filed by his brother) (*Yakub Abdul Razak Memon*: 81). In the Court's view, staying the execution to afford Yakub the opportunity to challenge the rejection of his mercy petition would be a 'travesty of justice' (*Yakub Abdul Razak Memon*: 81).

In *Mukesh Kumar v Union of India* [2020] 16 SCC 424 (India) (*Mukesh*), the Court was confronted with a situation where the mercy petition had been rejected by the president within two days. In a grossly pedantic reading of *Shatrughan Chauhan*, the Supreme Court rejected the contention raised on behalf of Mukesh that the swift dismissal is indicative of bias and predetermined mind on part of the executive and held that while delay in deciding the mercy petition is a ground for review, swift rejection is not (*Mukesh*: 37). Further, the response of the Court to the contention that he had been sexually and physically assaulted while in jail was that 'alleged sufferings in the prison is not a ground for judicial review' of an order rejecting a mercy petition because it is not one of the grounds enumerated in the earlier judgements of the Court (*Mukesh*: 33).

These two cases and their treatment by the Court starkly reflect the abysmal track record of the Court in dealing with high-pressure situations. The tendency of the Court to expand the scope of safeguards has not resulted in the Court extending the basic benefit of those safeguards to death row prisoners accused in high-profile cases. A reading of the judgements of the Supreme Court in both *Yakub Abdul Razak Memon* and *Mukesh* reveals that the Court went out of its way to deny the benefit

of *Shatrughan Chauhan* to these prisoners by resorting to a strict reading and deliberate misinterpretation of the judgement, completely missing the underlying principle therein—that even a prisoner sentenced to death is entitled to constitutional and procedural safeguards.

No clear trends regarding the future of the death penalty in India emerge from the above discussion of the judicial journey over the past decade. Trial courts continue to award death sentences in a high number of cases, most of which result in acquittals or commutations as they travel up to the High Court and the Supreme Court. For its part, the Supreme Court has expanded the scope of safeguards available to death row prisoners, including those whose mercy petitions have been rejected by the president or governor. However, it has failed to check the legislative expansion of the death penalty by upholding the constitutional validity of non-homicide capital offences without engaging in appropriate appreciation of the proportionality of such provisions. Further, when faced with extremely high-profile cases, the Court has failed to extend the basic benefit of the safeguards it has developed on the basis of a deliberately narrow and pedantic reading of those judgements. The only conclusion that can be drawn from these diverse trends is that the emphasis on reformation and rights of death row prisoners does not stem from principled opposition to the death penalty or a desire to move progressively towards its abolition. The sharp decline in the number of death sentences upheld by the Supreme Court provides hope; however, it leaves a more concerning question unanswered. An analysis of recent appeals where death sentences have been upheld by the Supreme Court in criminal appeals over recent years reveals that there is nothing principled about the decline in commutations. It remains a mystery why the Court chooses to commute death sentences in the majority of cases but confirm such sentences in a handful of others.

Conclusion

At the beginning of the 2000s, India's legislative and judicial trends pointed towards the gradual and eventual abolition of the death penalty. However, legislative developments over the last decade indicate that India might be entering an era of renewed reliance on the death penalty. Non-homicide capital offences and the mandatory death penalty are two areas of concern that emerge from an analysis of new capital offences. The introduction of the death penalty for new subcategories within non-homicidal sexual offences is also on the rise. It is perhaps a result of this legislative expansion that the number of death sentences in India is on the rise despite the fact that most of these sentences are overturned on appeal. For its part, the judiciary has adopted a deferential attitude towards the legislature on the few occasions it has had to adjudicate the constitutionality of such provisions. The Supreme Court has been gradually restricting the scope of the death penalty over the last 10 years; however, it has failed to act as a counter-majoritarian institution when confronted with cases that evoke immense public interest and scrutiny. What seemed to weigh with the Court in these cases was the nature and gravity of the crime rather than the applicability of safeguards. As the death penalty continues to be envisaged as a solution to the problem of rising sexual violence and other offences in India, the death penalty will remain firmly entrenched in our statute books.

Correspondence: Dr. Anup Surendranath, Professor of Law & SK Malik Chair Professor on Access to Justice, National Law University, Delhi, India. anup.surendranath@nludelhi.ac.in

¹ Afzal Guru in 2012 (Parliament Attack case); Ajmal Kasab in 2013 (26 November terror attack); Yakub Memon (1993 Bombay Bomb Blasts); and Mukesh Singh, Vinay Sharma, Pawan Gupta and Akshay Thakur in 2020 (16 December gang rape) (Law Commission of India 2015; Project 39A 2021).

² The Parliament of India comprises the Lower House (Lok Sabha), Upper House (Rajya Sabha) and the Council of States.

³ See: Article 134 of the Constitution of India.

⁴ See: Article 136 of the Constitution of India.

⁵ Note that this is not applicable to certain special legislations that are not governed by the new Code, such as the now repealed *Terrorist and Disruptive Activities (Prevention) Act 1987* (India).

⁶ Such as murder (s 302), attempted murder (s 307), dacoity with murder (s 396) and 'giving or fabricating false evidence with intent to procure conviction or capital offence' (s 194).

⁷ Such as 'waging war against the Government of India' (s 121) and abetment or mutiny (s 132).

⁸ Such as mutiny and desertion (*Air Force Act 1950* (India): ss 37, 38(1); *The Army Act 1950* (India): ss 37, 38(1); *The Navy Act 1957* (India): ss 43, 49(2)).

⁹ Such as mutiny (*Border Security Force Act 1968* (India): s 17; *Coast Guard Act 1978* (India): s 17; *Indo-Tibetan Border Police Force Act 1962* (India): s 17; *Assam Rifles Act 2006* (India): s 17; *Sashastra Seema Bal Act 2007* (India): s 19).

¹⁰ Note that sexual offences against adults under the IPC are not gender-neutral and can only be perpetrated against women.

- ¹¹ The Law Commission of India is a body constituted by the Ministry of Law Justice to aid in law reforms. Twenty-two Law Commissions have been notified since independence, usually under the chairpersonship of a retired judge. Thus far, these Law Commissions have submitted 262 reports on various issues to the government, which aid in policy and legislative reforms.
- ¹² In *State of Punjab v Dalbir Singh* [2012] 3 SCC 346 (India), the Supreme Court struck down Section 27(3) of the *Arms Act 1959* (India) as unconstitutional. In *Indian Harm Reduction Network v Union of India* [2011] SCCOnline Bom715, the Bombay High Court similarly struck down Section 31A of the *Narcotic Drugs and Psychotropic Substances Act 1985* (India).
- ¹³ Both these judgements were declared per incuriam by the Supreme Court in *Santosh Kumar Bariyar v State of Maharashtra* [2009] 6 SCC 498 (63). This was of no help to the condemned prisoners themselves as Ravji was executed on 4 May 1996 and Surja Ram was executed on 7 April 1997.
- ¹⁴ The Bihar state legislature was the first to introduce the death penalty for death caused as a result of mixing noxious substance with liquor in 2016 (*Bihar Prohibition and Excise Act 2016* (India): s 34). This has been followed by the *Punjab Excise (Amendment) Act 2021* and the *Madhya Pradesh Excise (Amendment) Act 2021* (India). The West Bengal state legislature has introduced a Bill making the lynching to death of an individual a capital offence (*West Bengal (Prevention of Lynching) Bill 2019*: s 7(c)).

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