

Is The Death Row Phenomenon Antithetical To A Convict's Right To Life?

Saloni Dhadwal¹

Riya Kothari²

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¹ Student, Army Institute of Law, Mohali

² Student, Army Institute of Law, Mohali

Introduction

They always came for one at dawn; that much I knew. So, really, all my nights were spent in waiting for that dawn. I have never liked being taken by surprise. When something happens to me I want to be ready for it. That's why I got into the habit of sleeping off and on in the daytime and watching through the night for the first hint of daybreak in the dark dome above. The worst period of the night was that vague hour when, I knew, they usually come; once it was after midnight I waited, listening intently. Never before had my ears perceived so many noises, such tiny sounds. Still, I must say I was lucky in one respect; never during any of those periods did I hear footsteps. Mother used to say that however miserable one is, there's always something to be thankful for. And each morning, when the sky brightened and light began to flood my cell, I agreed with her. Because I might just as well have heard footsteps, and felt my heart shattered into bits. Even though the faintest rustle sent me hurrying to the door and, pressing an ear to the rough, cold wood, I listened so intently that I could hear my breathing, quick and hoarse like a dog's panting – even so there was an end; my heart hadn't split, and I knew I had another twenty-four hours' respite.³

On an impulse Meursault - the central character of Albert Camus's book 'The Stranger'-commits a murder and is sentenced to death. The passage above is the mental agony he suffers, oscillating between life and death, not knowing when he will be ordered to march towards the guillotine. The state of mind that Meursault is in is referred to as the 'death row phenomenon'. It arises when a convict is awarded the death penalty but is not executed. Reasons behind this can be many, appeals made by the convict to higher courts, arduously long trials and final mercy petitions etc. Whatever be the cause, one thing is certain - it not the execution but the wait for the execution that kills the convict.

India has retained the right to award death penalty for several criminal offences, despite strong voices of dissent nationally as well as internationally that call for its abolishment. The authors do not aim to challenge the validity of the death penalty, which is a much wider debate beyond the scope of this paper.

³ALBERT CAMUS, THE STRANGER 112-113 (Vintage International ed., Random House 1989) (1942).

Instead, the authors have chosen to focus on oft overlooked aspect of the death penalty- the plight of convicts stuck in web of judicial processes, lying in wait to meet their end. The first part of the paper discusses all aspects and contents of the death row phenomenon and will try and highlight the anguish of convicts living on death row. The second part of the paper will illustrate how the death row phenomenon is cruel, tortuous, degrading to the human spirit and is in contravention of Article 21 of the Indian Constitution i.e. the right to life. The third part of the paper will note the judicial response to the current state of affairs through precedents and case laws. This part also studies the judicial remedies and legal provisions available to convicts living on death row. The fourth part studies the role of prison administration in upholding rights of convicts. The final part offers probable solutions to ameliorate the current situation.

Death Row Phenomenon

'Death row' refers to a situation where a convict is in prison and waiting to be executed as punishment for a crime.⁴ Although the death penalty as a punishment is lawful in India, the delays and harsh conditions attached to it - which cause the death row phenomenon - cannot be considered lawful. In fact, they are nothing short of a human rights violation.

The concept of death row phenomenon found recognition in jurisprudence only recently. A universal definition has not been developed as yet, however several scholars consider the death row phenomenon as comprising of at least two separate components, i.e. the length of time spent on death row, and the harsh conditions such prisoners are typically exposed to.⁵ Hudson, for instance, defines the concept as

⁴www.dictionary.cambridge.org/dictionary/english/death-row (last visited on Nov. 5, 2017).

⁵ Amy Smith, *Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, PUBLIC INTEREST LAW JOURNAL 237-254 (2008).

"prolonged delay under the harsh conditions of death row".⁶ These two components have been separately discussed below:

Delay

Nathuram Godse was executed on 15th November 1949, less than two years after he assassinated Mahatma Gandhi in January 1948. Yakub Memon, the man behind the 1993 Mumbai Blasts was hanged on 30th July 2015, close to twenty-two years after he committed the crime. Agreed, these are two separate incidents - nonetheless they point to the fact that the time span between the sentence and its actual execution has been steadily increasing. Once a sentence of death is awarded to a convict, what follows is an endless cycle of appeals and petitions by virtue of Section 96 of the Civil Code of Procedure, 1908 which provides for the right to appeal a court's decree to all citizens of India. All human beings are born with an instinct to survive and fight for their lives. It is only natural to expect that as long as they are provided with a chance to live, they will continue to exploit it. Hence, convicts continue to appeal to higher courts and cases drag on for years, prolonging the execution of the sentence. In the interim, the convict spends a considerable amount of time, sometimes years on end awaiting his execution. The uncertainty regarding the execution of a decidedly certain death sentence creates a paradoxical situation for the convict - prolonging his suffering and agony.

Conditions Of Prison Life

The conditions for death row convicts in prison are very different from other convicts. Research has revealed that their incarceration is characterised by isolation, deprivation and lack of human contact. Such measures are undertaken as there is a belief that these convicts have committed heinous crimes and are more dangerous than others. So along with the excruciating wait before their execution, convicts live in harsh physical conditions in prison.

⁶Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?* EUROPEAN JOURNAL OF INTERNATIONAL LAW 833 - 856 (2000).

Sunil Batra vs. Delhi Administration⁷ The apex court declared that a convict can only be kept in solitary confinement when his death sentence becomes executable and he has exhausted all of his judicial remedies. However, a study related to death penalty in India revealed that prisons continue to confine convicts sentenced to death in solitary confinement for considerable durations, violative of the rule laid down in the Sunil Batra case. Such punishment was seen to have caused severe physical and psychological pain and suffering amounting to torture, the combination of solitary confinement with the sentence of death is particularly inhumane.⁸The study also found that the conditions of the prisons were in flagrant violation of prison manuals - extremely cramped spaces, cells with very little light and air, unacceptable standards of hygiene, abysmal quality of food, poor standards of medical services and almost non-existent mental health services along with instances of prisoners being denied basic medical attention and failure to diagnose terminal illnesses until it was very late.⁹Various scholars have documented the severe mental trauma caused as a result of delay before execution coupled with harsh conditions of prison life. One study found, “the observable result of mental suffering inflicted on the condemned prisoner is destruction of spirit, undermining of sanity, and mental trauma¹⁰Specific manifestations include: an overwhelming sense of fear and helplessness, mental incompetence, recurrent depression, mental slowness, confusion, forgetfulness, symptoms of senility (rambling and expressing disconnected thoughts), self-mutilation, and insanity¹¹ Therefore, it can be surmised that the period of delay compounded by harsh prison life is cruel and tortuous, violating a convict’s right to a dignified life. The next part discusses this in detail.

⁷(1978) 4 SCC 494.

⁸DEATH PENALTY INDIA REPORT: SUMMARY 36-37 (National Law University, Delhi) (2016).

⁹*Id.*

¹⁰*Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, IOWA LAW REVIEW 814 - 829 (1972).

¹¹ Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, LAW AND PSYCHOLOGY REVIEW 141 (1979).

Death Row Phenomenon – A Violation Of Article 21

In the case of **Rajendra Prasad vs. State of State of Uttar Pradesh**¹² the learned judge remarked upon the agonizing delayed execution of a convict, “He [the convict] must, by now, be more a vegetable than a person and hanging a vegetable is not death penalty.” While on death row, a convict’s mind has little to contemplate except the crimes which have been committed, the impending execution and chances of successful appeal – many times convicts will face the moment of their execution, only to have a last-minute stay granted, forcing them to relive their suffering until the next execution date.¹³ These circumstances lead to considerable physical and psychological deterioration and it reduces them to nothing more than the living dead. The torturous, cruel and inhumane conditions that a convict is subjected to under death row are a clear violation of the right to life guaranteed under Article 21. This particular article has received the widest possible interpretation by the judiciary and it extends its protection to under trials, prisoners and even convicts. Here is a look at some landmark judgements that are relevant for death row convicts:

In the case of **Kharak Singh v. State of Uttar Pradesh** the court held that the term “life” meant something more than mere animal existence.¹⁴

In **Sunil Batra v. Delhi Administration** the apex court held that the “right to life” included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions.¹⁵ This case also laid down the rule that no convict could be kept in solitary confinement unless his death sentence had become executable.

¹²AIR 1979 916.

¹³HUDSON, *supra* note 4.

¹⁴AIR 1963 SC 1295.

¹⁵(1978) 4 SCC 494.

In **Maneka Gandhi v. Union of India** the Supreme Court gave a new dimension to Art. 21 and held that the right to live is not merely a physical right but includes within its ambit the right to live with human dignity.¹⁶

Convicts are denuded of all these rights while they face the death row phenomenon. They are robbed of their health, peace of mind, dignity and are nothing short of the living dead.

Indian judiciary has been silent on the topic of the death row phenomenon. There has been no mention of the violation of Article 21 by delay in execution of convicts living under harsh conditions of prisons. However, courts have opined that prolonged detention to await the execution of a death sentence is in contravention to the right to life:

In **T.V. Vatheeswaram v. State of Tamil Nadu** the Supreme Court held that delay in execution of death sentence exceeding 2 years would be sufficient ground to invoke protection under Article 21 and the death sentence would be commuted to life imprisonment. The cause of the delay is immaterial; the accused himself may be the cause of the delay.¹⁷

In **Sher Singh v. State of Punjab**, the Supreme Court said that prolonged wait for execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo that is through quashing the death sentence and commuting it to life imprisonment. But the Court held that this cannot be taken as the rule of law and applied to each case.¹⁸

These judgements have been welcome attempts at improving the condition of death row convicts in India. However, recognition needs to be extended to the death row phenomenon and its ramifications for convicts.

¹⁶1978 AIR 597.

¹⁷AIR 1981 SC 643.

¹⁸AIR 1983 SC 465.

Legal Provisions And Judicial Precedents

The constitution of India does not expressly provide any legal rights to the prisoners on death row, but through certain judicial precedents and Articles provided in the Constitution we can constitute evidence of various rights given to the death row convicts.

In the case of **Shatrugan Chauhan v. Union of India**¹⁹ the Supreme Court issued guidelines on various procedures to be followed before the execution of the death convict. They are mentioned as follows-

No Solitary Confinement

In the case of **Sunil Batra v. Delhi Administration**²⁰ it was held by the Supreme Court that keeping prisoners sentenced to death under solitary confinement as impermissible since it is a different form of punishment under S.73 of the Penal Code, 1860 and not a part of the death sentence under S.53. This was followed in the case of Shatrugan Chauhan where it was said that solitary confinement of a death row convict before the rejection of his mercy petition is unconstitutional since it violates the convict's right to life under Article 21. Under Article 30(20) of the Prisoner's Act, 1894 a prisoner "under the sentence of death" has to be placed in a separate cell. A prisoner is only "under the sentence of death" when all his remedies have been exhausted and there is no stay on the execution by any authority.

Legal Aid

Legal aid is a fundamental right provided to all citizens under the ambit of Article 21. In no prison manual is there a provision for providing legal aid for preparing appeals, mercy petition or assessing judicial remedies if the mercy petition has been declined. Since the Supreme Court has also held that Article 21 is inherent in a convict till his last breath, even after the rejection of the mercy petition by the President, the convict can approach a writ court for commutation of the death

¹⁹ (2014) 3 SCC 1.

²⁰ (1978) 4 SCC 494.

sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid should be provided to the convict at all stages.²¹

Notice Of Execution

It is necessary that a minimum period of 14 days be stipulated between the receipt of communication of rejection of mercy petition and the scheduled date of execution for the following reasons:

- (a) It allows the prisoner to prepare himself mentally for execution, to make his peace with god, make his will and settle other earthly affairs.
- (b) It allows the prisoner to have a last and final meeting with his family members. It also allows the prisoners' family members to make arrangements to travel to the prison which might be located at a distant place and meet the prisoner for one last time.²²

In absence of a notice the prisoner's right to avail judicial remedies will be violated and their families would not be able to visit the prisoner one final time before his execution. It is a duty of the superintendent of the jail to ensure that the notice of execution reaches the family of the prisoner within sufficient time.

Copy Of The Rejection Of The Mercy Petition

This right is of utmost importance since without the knowledge or proof of rejection the death convicts will not be able to access other judicial remedies. It is a duty of the State to inform the convict and his family about the rejection of the mercy petition by the governor and the president. The Superintendents of jails are required to inform the nearest Legal Aid Centre of the rejection of mercy petition apart from the convict. It is also a duty of the prison authorities to furnish all documents related to the case to the convict within a week of the rejection of mercy petition so as to provide the convict time to assess other legal remedies.

²¹ (2014) 3 SCC 1.

²² (2014) 3 SCC 1.

Evaluation Of Health

Insanity/ mental illness/ schizophrenia is a crucial and relevant supervening circumstance, which should be considered by the Supreme Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment.

After it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 of the Constitution protects him and such person cannot be executed without further clarification from the competent authority about his mental problems.²³

Due to the uncertainty of death the death convicts often lose their minds waiting for long periods of time, wondering if death will ever come, this being a traumatic experience mental illness among death row prisoners isn't a surprise. Under the Section 24(2) of the Prisons Act 1894 there should be regular examination of prisoners by qualified Medical Officer. The prisoner also needs to be physically fit for execution. In case a death convict isn't physically or mentally fit and the same has been verified by a qualified doctor it is a ground for commutation of the prisoner's death sentence to life imprisonment.

Post Mortem Reports

The Supreme Court made conducting a post mortem obligatory despite the fact that no prison manual or the Prison Act has asked to carry it out, this was done by the Supreme Court because of the dearth of experienced hangmen in our country. This will ensure that the correct way is used to execute the death sentence and it's not in violation of the Constitution. The method of hanging prescribed by Section 354(5) CrPC is not violative of the guaranteed right under Article 21 of the Constitution.²⁴ However, owing to the dearth of experienced hangmen, the accused are being hanged in violation of the due procedure. Our Constitution permits the execution of

²³*Id.*

²⁴(2014) 3 SCC 1.

the death sentence only through procedure established by law and this procedure must be just, fair and reasonable.

Commutation Of Sentence

Commutation is a change of legal penalty or punishment to a lesser one.²⁵ The sentence of death can be commuted to life imprisonment in certain cases. The following was said by the Supreme Court in the judgement of the case of **V. Sriharan v. Union of India**:

*The basis of relief granted in cases of delayed disposal of the mercy petition is that, such delay violates the requirement of a just, fair and reasonable procedure, regardless and independent of the suffering it causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates procedural due process guaranteed under Article 21 of the Constitution and the dehumanising effect is presumed in such cases.*²⁶

²⁵www.merriam-webster.com/dictionary/commutation (last visited on Nov. 5, 2017)

²⁶ (2014) 4 SCC 242.

There is no obligation on the convict to demonstrate specific ill effects of suffering and agony on his mind and body as a prerequisite for commutation of sentence of death on the ground of undue delay in disposal of his mercy petition.²⁷

The court's ground for commutation of the death sentence to life imprisonment is when there is an unreasonable and unexplainable delay in the disposition of a death convict's mercy petition. The death convict does not need to prove his suffering but the fact that there was a considerable delay is enough to violate his right under Article 21 for a fair trial.

Role Played By Prison Administration

Ramrang never got a chance to speak with his lawyer. And so he was not asked a single question by the judge and was sentenced to death without getting any opportunity to defend himself. As he worries about his family, he remarked: "Be it the government, the police or the judge – no one heard our pleas."²⁸

A major part of the welfare of an accused or a convict falls on the shoulders of the prison administration. It is them who have to see if the convict gets to meet his lawyer timely, have his family visiting him, attend all his court hearings and proceedings, gets a sanitary and hygienic environment to live in and have regular mental and physical check-ups by a qualified practitioner. They are also obligated to keep the prisoner safe and away from harm's way, both conducted at their hands or the hand of other inmates.

"I was stripped and tied on a table when a snake was let loose in the room."²⁹

Under the Section 55A of the CrPC, the prison administration has to take reasonable care of health and safety of an accused. This duty of the prison officials is being grossly violated by them. Under the death penalty project conducted by National Law University, Delhi the graveness of the situation came into light. The prison

²⁷ (2014) 4 SCC 242.

²⁸ Samarth Bansal, *On death row, dying many deaths*, THE HINDU, May 8, 2016.

²⁹ 2 DEATH PENALTY INDIA REPORT25 (National Law University, Delhi) (2016).

officials follow through with unspeakable acts on these prisoners which results in damage of mental and physical health. Some of the forms of torture described by the prisoners are intense electric shocks, tying with wires, making them drink urine, etc. This not only violates Section 55A but also their fundamental right of Right to Life.

One of the disturbing observations during our interviews with family members of the prisoners were the narratives of harassment by the police. While stories of physical, verbal and psychological violence faced by the prisoners' families at the hands of the police are less explored, it is often used as effectively as custodial violence to subvert a fair investigative process. Out of the families of 204 prisoners that discussed their experience with police officials, 120 admitted to have been ill-treated, harassed or threatened by the police.

Families also shared detailed accounts of the various forms of abuse they encountered.³⁰

The inhuman manner in which the investigation of trials is done by the police may even lead to an innocent being given the sentence of death and eventually the wrongly convicted person may be hung from the gallows. The procedural safeguards are neglected by the police officials, in many cases evidence is extracted through custodial violence and harassment of families; this is a clear indication of violation of convicts right to a free and fair trial. During the research for the Death Penalty India project out of the 90 prisoners who said they had confessed to a crime in the police custody, 72 of them said they did so because of the torture inflicted on them. This evidence gathered is then used in the trial proceedings, in case the evidence has been coerced the validity comes into question since it may or may not be accurate.

Every visit to a prison is distressing; the conditions in which prisoners, particularly those on death row, are confined are nothing short of torturous. The meeting with relatives or lawyers (called mulakaat) take places over the phone in a confined space with glass partitions and iron bars separating the prisoner, eliminating even the slightest possibility of human contact. The mulakaat timings are also very limited, with each mulakaat lasting less than ten minutes. Given these constraints, meetings are stressful and emotionally charged. With more than ten

³⁰*supra* note 27.

*family meetings happening simultaneously, the jarring cacophony in the mulakaat room makes most attempts at a meaningful conversation futile.*³¹

Due to stringent meeting time the right to legal aid of a convict is compromised. The prison administration doesn't pay sufficient heed to this pressing problem, even though the convict has the right to meet his lawyer this right is taken away due to the poor administration on part of the prison officials. In the study by Death Penalty India project it was noticed that 60% of the death row prisoners chose to engage a private lawyer in the hope of better services as compared to the lawyers provided by the government since in most cases they do not even meet the prisoner but rely on paperwork. Seeing that the prison officials pose so many challenges in meeting a convict it is expected out of the government lawyers to refrain from meeting the convict. The lax behaviour of both the prison administration and the lawyers poses a threat to the convicts' life.

*A few families however said that the police were very helpful and even protected the prisoners' family members from local residents following the incident. According to the family of Dharmaketu, the police was extremely cooperative and even stored their belongings for safekeeping after the neighbours tried to destroy their household items.*³²

In not all cases have the police officials been the villain, there are officials who have been fulfilling their role and obligation as per what is required of them.

Suggestions

There is a wide gap between the legal provisions and their implementation on ground. To keep the implementation in check, what we need is not another law but increased access for civilians, think tanks and NGOs to prisons, this is so that they can create a dialogue between the prisoners and themselves, spread awareness about the violations of the rights of death row convicts and primarily help in making the system more transparent. Once this criminal system becomes more transparent the

³¹Himanshu Agarwal, CONDITIONS IN DEATH ROW ARE A RECIPE FOR MENTAL HEALTH DISASTERS, (Dec. 1, 2016), <https://thewire.in/83543/death-row-mental-health/>(last visited on Nov. 5, 2017).

³²*supra* note 27.

concerned parties will instinctively fall in line with regards to implementation of the given provisions.

Another pressing problem is the legal aid provided by the government to the convicts. The lawyers appointed by the government should be competent for the duty, the court and prison officials should keep a close check on this lawyer and make sure he's meeting his client as and when necessary, keeping the convict up to date with the proceedings of the court and not handling the case in negligently. Legal aid is also provided to economically weak convicts by NGOs working for prisoner rights; the government can promote, increase the funding/start funding these organisations so that the lawyers appointed are competent and the cases of the convicts are not compromised upon.

Evaluation of a prisoner's mental and physical health is an obligation on the prison officials which is more often than not followed. This could be due to lack of qualified medicine practitioners and psychologists, since the government and its workers cannot look fulfil this duty the task of evaluation should be outsourced to some other organisation that can organise regular medical camps for prisoners with special focus on mental health of death row convicts.

Lastly, the death row phenomenon arises due to the existence of the death penalty as a punishment. Rather than eliminating the criminal we should focus on eliminating the crime. This can happen through prisoner reformation and a better system of education which reaches all strata of people.

Conclusion

It is natural human instinct to cling to the slightest of support in times of adversity. Similarly convicts on death row make sure they have exhausted all judicial remedies before succumbing to the death sentence awarded to them, this though is not an invitation for the executive to delay giving decisions on his petitions, the prison administration to make his life a living hell or the government provided legal aid to take his case for granted. As has been established, a convict on death row deserves his right to life till his last breath and therefore should be given a dignified life free from unjustified exploitation and torture.