

Submission to the United Nations Secretary General's Report on a Moratorium on the Use of the Death Penalty

- **Project 39A, National Law University, Delhi**

1. Overview

While there does not appear to be any indication of a move towards abolition of the death penalty from the Indian government, the apex court in India is increasingly restricting the scope of the sentence by refusing to confirm death sentences and instituting a range of sentencing reform measures. Significantly, in 2022, the SC initiated suo moto proceedings to explore the possibility of ensuring that the state provides a mitigation investigator to those accused of death-eligible offences, in order to gather and present mitigation evidence on their behalf at the stage of sentencing, before the death penalty can be imposed.

In 2021, India introduced the death penalty for certain crimes against women and children and for crimes involving the sale or manufacture of spurious liquor. In line with these retentionist inclinations, India opposed a draft resolution on the question of the death penalty at the United Nations Human Rights Council in October 2021. 488 prisoners in India were on death row by the end of 2021, which is the highest number of death row convicts in India since 2004.¹ While trial courts in India sentenced 144 convicts to death in 2021, High Courts confirmed the death sentence in only 5 out of the 39 cases it decided in the same year. The Supreme Court did not confirm a single death sentence in 2021. No prisoner on death row has been executed in India since March 2020.

2. Information about the Death Penalty in 2021

Number of persons sentenced to death

2021 saw a sharp increase in the number of death sentences imposed compared to 2020. Trial courts across India pronounced 144 death sentences in 2021, 136 of which were imposed upon men and 8 on women. 62 people were sentenced to death for murder simpliciter. Courts gave the death penalty for cases involving sexual offences in 48 cases, out of which 43 cases involved a minor victim. 9 people were sentenced to death in March 2021 for dealing in

¹ See [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 7, 60; National Crime Records Bureau (Ministry of Home Affairs), Prison Statistics of India 2020.

spurious liquor in the state of Bihar under the Bihar Prohibition and Excise Act, 2016.² This was the first death sentence imposed in India for this offence as per available data.

Appellate courts decided far fewer matters in this period, likely because of their limited functioning in 2020-2021 due to Covid-19. In 2021, High Courts decided 39 matters as compared to 76 in 2019, while the Supreme Court only decided 6 matters as compared to 28 in 2019. High Courts confirmed death sentences of 5 prisoners in 2021. All 5 prisoners were men. 3 were convicted for murder and the other 2 were convicted for child rape without murder.³ The Supreme Court did not confirm any death sentences in 2021.

Number of sentences reversed or commuted on appeal

Of the 39 cases considered by the High Courts, 15 resulted in acquittals. Only 2 women were on death row before the High Court in 2021 and both were acquitted. In 18 cases, death sentences of 21 prisoners were commuted to life imprisonment,⁴ and 2 cases were remitted to the trial court to be considered afresh. Out of the 21 prisoners whose death sentences were commuted to life imprisonment, 9 were sentenced to a fixed term without the possibility of remission and 8 others were sentenced to full life without remission.

The Supreme Court decided 6 death penalty cases in 2021. 4 prisoners in 2 cases were acquitted of all charges and 5 prisoners in the other 4 cases saw their death sentences commuted to life imprisonment.⁵ One of these commutations was to life imprisonment for 30 years without remission.⁶ The other 4 commutations were to sentences of simple life imprisonment, which as per Indian law, entitles a prisoner to apply for early release after serving at least 14 years in prison.

The Supreme Court notified a list of 40 cases for priority hearing in September 2021 in order to decide capital cases more expeditiously, of which 14 were argued in court in the same year.⁷ Of these, 5 matters were decided, with judgements being pronounced by the end of the

² Rajesh Kumar Thakur, In a first in dry Bihar nine awarded death sentences over Gopalganj Hooch Tragedy, New Indian Express, (March 5 2021, 6:43 PM) available at <https://www.newindianexpress.com/nation/2021/mar/05/in-a-first-in-dry-bihar-nine-awarded-death-sentences-over-gopalganj-hooch-tragedy-2272716.html> (last accessed on April 20 2022).

³ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 26.

⁴ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 21.

⁵ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 42.

⁶ See Union of India v. Sriharan and Ors. (2014) 4 SCC 242.

⁷ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 7-8.

year.⁸ Arguments were concluded and judgments reserved in 8 other cases, 3 of which have been pronounced as of April 2022. While commuting death sentences in 2021, the Supreme Court showed an increasing repudiation of failures by courts below to comply with the sentencing procedures and guidelines developed by the Supreme Court over the years.

Number of persons on death row

By the end of 2021, 488 prisoners were on death row in India. This represents an increase of nearly 21% since 2020 and an increase of nearly 30% since 2019. The increase can be attributed to a combination of trial courts sentencing a high number of prisoners to death in 2021 and low disposal rates in appellate courts - most likely due to their limited functioning due to the impact of the Covid-19 pandemic.

3. Rights of Persons on Death Row

Safeguards available for prisoners on death row

Safeguards under Indian law for prisoners on death row include the right to adequate legal representation and a fair trial, bifurcated proceedings for a separate sentencing hearing, the right against torture and solitary confinement, and the right to appeal to a higher court.⁹ Through its jurisprudence, the Supreme Court has developed special safeguards to guarantee fair sentencing hearings for prisoners convicted of death-eligible offences. Key among these safeguards is the requirement that the state lead evidence and prove that the accused is beyond reformation.¹⁰ Even where no such material is produced by the accused, the law places an obligation on courts to elicit relevant material and analyse the probability of reformation and rehabilitation.¹¹ In several judgments passed in 2021, the Supreme Court, while overturning the death sentences imposed by lower courts, criticized lower courts for failing to comply with these sentencing safeguards.¹²

Sentencing process

⁸ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 60.

⁹ *Bachan Singh v. State of Punjab* (1980) 2 SCC 684.

¹⁰ *Rajendra Prahladrao Wasnik v. State of Maharashtra* (2019) 12 SCC 460.

¹¹ *Bhagchandra v. State of Madhya Pradesh*, Criminal Appeal Nos. 255-256 of 2018; *Lochan Shrivastava v. State of Chhattisgarh* Criminal Appeal Nos. 499-500 of 2018.

¹² See *Mofil Khan and Anr. v. State of Jharkhand* Review Petition (Crl.) No. 641 of 2015.

To guarantee that all relevant circumstances are considered at the stage of sentencing, the Supreme Court passed multiple orders in 2021 asking for additional material relating to the mitigating circumstances of the accused, including probation officer reports, jail conduct certificates, and psychological evaluations of prisoners on death row.¹³ In some cases, the Supreme Court even allowed a Project 39A mitigation investigator to interact with prisoners on death row, prepare an independent evaluation of their life history including psychological evaluations and affidavits sworn by the prisoners' family and community members. These affidavits were eventually cited by the Supreme Court to commute death sentences in 3 cases.¹⁴

Suo moto writ proceedings

In March 2022, a 3-judge bench of the Supreme Court initiated suo moto proceedings to consider the possibility of appointing mitigation investigators during trials for death-eligible crimes.¹⁵ The step is intended to help judges make an informed decision in imposing the death penalty and ensure that the spirit of the sentencing framework established in *Bachan Singh v. State of Punjab* is complied with. This represents an important shift in the Supreme Court's approach to sentencing in capital cases, and is indicative of a broader trend to reform the death penalty process and restrict its unfettered imposition by trial courts of India.

4. Legislative Changes – Increase in Death-Eligible Offences

India did not reduce the number of offences punishable by death in 2021.¹⁶ Two Indian states, Punjab¹⁷ and Madhya Pradesh¹⁸, introduced the death penalty for the offence of causing death by the sale or manufacture of spurious liquor in March and August 2021 respectively.¹⁹ 3 other jurisdictions, namely Bihar, Delhi, and Uttar Pradesh, already prescribe the death

¹³ Rahul and Ors. v. State of Delhi Ministry of Home Affairs and Ors. SLP (Crl.) No. 2264 of 2015 order dt. 25.11.2021; Mohd. Firoz v. State of Madhya Pradesh Crl. Appeal No. 612 of 2019 order dt. 25.11.2021; Manoj and Ors. v. State of Madhya Pradesh Crl. Appeal No. 248-250 of 2015 order dt. 29.09.2021.

¹⁴ Mofil Khan and Anr. v. State of Jharkhand Review Petition (Crl.) No. 641 of 2015, para 10; Bhagchandra v. State of Madhya Pradesh, Criminal Appeal Nos. 255-256 of 2018, para 44; Lochan Shrivastava v. State of Chhattisgarh Criminal Appeal Nos. 499-500 of 2018, para 52.

¹⁵ Irfan @ Bhayu Mevati v. State of Madhya Pradesh SLP (Crl.) No(s). 9692-9693 of 2021, order dt. 29.03.2022.

¹⁶ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 8.

¹⁷ Punjab Excise (Amendment) Act, 2021; See §61A, Punjab Excise Act, 1914.

¹⁸ Madhya Pradesh Excise (Amendment) Act, 2021; See §49A, Madhya Pradesh Excise Act, 1915.

¹⁹ [Death Penalty in India: Annual Statistics Report, 2021](#), Project 39A, National Law University Delhi, pg. 56.

penalty for similar offences of adulterating liquor. In Maharashtra, the state legislature unanimously approved a bill introducing the death penalty for the offences of rape and gang rape in 2021.²⁰ At the central level, a bill was also introduced prescribing the death sentence for repeat aggravated trafficking crimes involving women and children.²¹

5. Moratorium on Executions

India opposed a draft resolution on the question of the death penalty at the 48th session of the United Nations Human Rights Council in October, 2021. As a matter of practice, the Supreme Court stays the execution whenever presented with an appeal against the High Court's confirmation of a death sentence. In 2021, the Supreme Court admitted such appeals and passed orders staying execution proceedings in 2 cases.²² No person on death row was executed in 2021.

Conclusion

India is unlikely to abandon its retentionist tendencies and impose a moratorium on capital punishments. This is borne out by the introduction of the death penalty for new offences in 2021, positions taken by Indian representatives at international fora, and the trend of trial courts imposing the death sentence in a multitude of cases - perhaps too comfortable in the knowledge that multiple levels of appellate scrutiny can rectify any errors they make. That said, no death sentences were confirmed by the apex court in 2021 and no prisoners on death row were executed. The increasingly reformist approach of the Supreme Court of India is indicative of trends towards restricting the scope and enforcement of the death penalty in India, which ought to permeate to the lower courts to have widespread impact.

²⁰ Shakti Criminal Laws (Maharashtra Amendment) Act, 2021.

²¹ Draft Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.

²² Sohini Chowdhury, Supreme Court Death Penalty Digest 2021, LiveLaw (December 28 2021, 10 AM), available at

<https://www.livelaw.in/top-stories/supreme-court-death-penalty-capital-punishment-life-sentence-acquittal-2021-188461> (last accessed on April 20 2022).

From Project 39A, National Law University Delhi

Project 39A is a litigation and research centre that is formally a part of National Law University, Delhi. Project 39A represents prisoners sentenced to death before appellate courts in India and undertakes empirical research on various issues concerning the criminal justice system including legal aid, torture, forensics, mental health and criminal justice, and the death penalty.

p39a@nludelhi.ac.in, anup.surendranath@nludelhi.ac.in