Gender Bias in Execution of Death Penalty in Post-Independence India: A Reason for Abolition

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ABSTRACT
In post-independence India conviction of women with capital punishment is considerable, however, the execution of death penalty on women is nil. This portrays the discrimination when it comes to actual execution of capital punishment, or in other words the fact that State has incidentally denied equality before law on the basis of sex. When the award of punishment is not uniform and a class of persons are consciously filtered out from its imposition, the continuance of such a flawed concept not only questions the very pillars of a legal system but ingrains ideas of discomfort and scepticism among general public. The paper, while evaluating facts and statistics supporting the notion, will analyse the extra-legal factors responsible for a predominantly patriarchal and paternalistic attitude of the judiciary and finally establish why gender bias should also be a ground for abolition of death penalty.

Keywords: Capital Punishment; Death Penalty; Discrimination; Gender Bias.

I. INTRODUCTION
The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill?

— Bryan Stevenson, Just Mercy: A Story of Justice and Redemption

Over years of evolving social dynamics, the individuation process brought about changes in the legitimate use of violence, which in modern legal systems vests in the State. Ever growing power of the State has ensured that the State maintains a huge number of armed forces and police, for the purpose of using its coercive machinery to snuff out human lives where it deems fit, mostly in the name of national defence or maintaining law and order. The debate surrounding death penalty in India and whether it should be abolished is ever evolving, however none takes into account the above fact of ending lives of alleged criminals in an

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encounter by the use of brute and “legitimate” force of the State, which is itself a form of homicide (inculpable). The authors, in this article, however are not questioning the means, methods, legitimacy of use of force by the brave soldiers and police of any country, but are wary of the superfluous use of excessive force in garb of upholding the legality of death penalty. The existing literature, supporting the need of capital punishment in a liberal democratic structure, is strongly (expressly or impliedly) based on the deterrent theory of punishment. The argument of continuing with death penalty on the basis of its deterrent effect is a weak one. In fact, the execution of convicts by the State using legitimate violence stands as much smaller a chance of being a consideration in mind of a potential perpetrator of capital offence, as are him/her being killed by his intended victim, or by police, or by a bystander private citizen.3 This hazard in itself is a much bigger deterrent to any potential offender of grave crimes and thus arguments of deterrence theory of punishment in favour of death penalty becomes timid.

In post-independence India, when it comes to conviction of women with capital punishment the number is considerable, however, the actual execution of death penalty on women is nil. One of the fundamental rights provided to every individual in India is, that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India4. This portrays the discrimination in actual execution of capital punishment, or in other words the fact that State has incidentally denied equality before law on the basis of sex.

When we talk about capital punishment we cannot ignore its irreparable and irreversible nature5 and the fact that any misjudgement results in injustice which is beyond redemption. Thence, being aware of the activist and humane approaches taken by several modern legal systems and non-State entities that advocate abolition of death penalty, we turn towards the democratic republic of India and find that, far from the question of abolition, the State has introduced inequality in execution of this medieval practice of cruel punishment. When we observe closely and find that India has not executed a single death penalty on a woman delinquent since Independence and adoption of its constitution, the apparent unfair predisposition of a legal

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3 Thorsten Sellin, ‘Capital Punishment’, 25 FEDERAL PROBATION 3–11 (1961). This report thoroughly brings out the data of United States of America where much more potential perpetrators of crime were killed while attempting the crime, on the spot of offence, either by the police or private citizen in private defence. The said data demonstrates that the chances of the potential perpetrator dying in action on the crime spot is greater than him/her being executed by capital punishment after trial.

4 Constitution of India 1950, Article 14.

system stares at the inhuman yet prevalent practice of capital punishment in the country. Based on this legal fact of an evident bias the authors will build their argument in favour of abolition of death penalty in India.

The second part of this paper tries to bring out the legal position of actual execution of death penalty in India on the basis of available doctrinal researches; the third part of the paper analyses the standards of womanhood set by the predominantly patriarchal judiciary where no relaxation of standards is allowable; she is either an absolute woman or nothing at all and the extra-legal factors which promote such an attitude. Finally the conclusion argues the basis and reasoning for abolition of death penalty in India because of its apparent gender bias.

II. SENTENCING OF DEATH PENALTY IN INDIA: AN OVERVIEW

There have been very few researches in independent India on death penalty and its execution. As the paper has not undertaken an empirical research in collecting a quantitative data for analysis, the extent of research in this paper is limited to the available doctrinal research.

One of the most prominent and recent research on death penalty is one undertaken by the National Law University of Delhi, but that research, though relied upon by this paper, is limited in its scope as it only analyses the available data between July 2013 and January 2015 of the convicts in prison on death row. The said research brings about the number of female prisoners on death row during the period of determination at 3.2 per cent. The number of women death row convicts awaiting execution demonstrates a low percentage, but with the limitation that it only reflects the number during the period of research and not how many women delinquents were actually convicted or executed since independence. Notwithstanding the logistics, the unofficial fact remains that no woman has ever been executed by death penalty in independent India.

According to the aforementioned study, there is no official record maintained by any ministry/agency of the total number of prisoners independent India has executed. However, some un-academic reports suggest that since Independence 755 executions were carried out in the country. The most recent executions of the Nirbhaya Rape case convicts take this unofficial

7 Ibid 114. (This number does not include the death row convicts in prison in state of Tamil Nadu, as access was not granted by the State authorities.)  
number to 759. The report also states that at the time of their study there were 373 prisoners on death row (excluding State of Tamil Nadu), out of which 12 were women and death warrants were awaited for all of them.

In our legal system, courts can declare the ultimate punishment for only grave offences including murder, instigating war against the government, acts of terrorism, instigating a child’s suicide etc. Section 354(3) of the Code of Criminal Procedure, 1973 (‘Cr.P.C’) particularly states that in case of offences punishable with death or life imprisonment in alternative, awarding sentence of imprisonment for life must be the rule and death penalty should only be awarded as an exception with the judgment recording special reasons for it. In addition to the permissive tone of the said provision the Supreme Court in its landmark judgment of Bachan Singh v State of Punjab laid down strict parameters and stated that death penalty must only be awarded in rarest of rare cases. The Law Commission of India in its 262nd report have recommended the speedy eradication of death penalty except for offences of terrorism and waging war against the nation. This information clearly depicts that conscious steps have been taken to reduce discretion in granting death penalty. However, it still finds place in statute books of the country. Except Section 416 of Cr.P.C which directs but not mandates the High Court to commute the death sentence passed on a woman who is found pregnant to life imprisonment, no other provision lends such a relaxation in favour of women death row convicts for any reason whatsoever.

The reasoning used by courts to justify such a lenient approach towards women reveal the rationale behind such a strong bias and the fact that the entire death penalty system in the country suffers from a very fundamental flaw. One of the most controversial case is that of Nalini Sriharan who was initially sentenced to death for her involvement in the assassination of the then Prime Minister of the country Mr Rajiv Gandhi. The Supreme Court in 1999 had upheld her death penalty, but the 3-Judge bench was divided in its opinion. The minority opinion given by Justice K.T. Thomas considered multiple mitigating factors that were in favour of Nalini. While deliberating that in a normal scenario death penalty was the ideal punishment for her, light was thrown on her statement. The learned judge said that one gets an

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13 State through Superintendent of Police, CBI/SIT v Nalini and Ors., AIR 1999 SC 2640, (Para. 353-55).
impression that ‘she was led into the conspiracy by playing on her feminine sentiments’. Further, stressing on the facts that she belonged to the weaker sex and was helpless, the Judge concluded that it was not possible for her to retract once the conspiracy had set in motion. One more important factor considered was her being a mother. The father to the child was already awarded death sentence and hence commutation of her sentence would spare the child from orphan hood. These factors among others in his opinion excluded Nalini’s case from the category of rarest of rare. Moreover, what is interesting to note here is that in the first line of the paragraph where he discusses Nalini’s sentence, it is mentioned that she was an elderly and educated woman. In our opinion, educational qualification should have been considered as an aggravating factor rather than a mitigating one because she was fully aware of her actions. It is hard to understand that she wasn’t able to foresee any implications of this conspiracy. Also, similar exercise of evaluating mitigating factors was not undertaken for any of the other male co-accused awarded death penalty. The other two judges decided against this line of reasoning of their brother judge and confirmed her death sentence. Although, later in 2000, Sonia Gandhi’s intervention pushed the Tamil Nadu Government to commute her sentence to that of life imprisonment.

Another example where unwarranted mercy was shown by the Supreme Court on a woman perpetrator is the case of Ediga Anamma v State of Andhra Pradesh14. The judgment in which the Supreme Court commuted death sentence of the young woman to life imprisonment was delivered by learned Justice V.R. Krishna Iyer. The victim and her child were stabbed to death by the accused with help of a chisel. While discussing the dilemma which courts face when deciding the question death penalty, the Judge highlighted the lack of ‘comprehensive provisions’ and ‘adequate machinery for collection and presentation of the social and personal data of the culprit to the extent required in the verdict of the sentence’.15 In the instant case mitigating factors which the court considered included facts that the woman was of a young age i.e. twenty-four, was sex starved and lived with her only child of ten. In humble opinion of the authors, the court did miss a vital point. It was an open and shut case of cold-blooded double murder done in envy. The fact that victims included a two year old child and its mother should have been enough aggravating factor for the court to award the death sentence. The judgment illuminates the deep rooted feeling of protectionism and paternalism which prejudices the mind of the courts, which in almost all such cases result in women delinquents being spared of the capital punishment.

15 Code of Criminal Procedure, 1973 had not come into effect at the time of writing of this judgment.
It has been a usual practice in India that mercy petitions of women are accepted by the executive and the sentences are commuted to life imprisonment. However, one recent and rare deviation from this trend was when mercy petition of Renuka Shinde and Seema Gavit was rejected by the President in 2014. The Supreme Court in 2006 had upheld the decision of the High Court, granting death penalty to the two women for murder and kidnapping. They were charged with thirteen cases of kidnapping and 9 cases of murder. The Supreme Court in its judgment particularly stated that there were no mitigating factors except of the fact that the accused were women:

The appellants have been awarded death penalty for committing these murders and their sentence was confirmed by the High Court. Going by the details of the case, we find no mitigating circumstances in favour of the appellant, except for the fact that they are women. Further, the nature of the crime and the systematic way in which each child was kidnapped and killed amply demonstrates the depravity of the mind of the appellants.

We have carefully considered the whole aspects of the case and are also alive to the new trends in the sentencing system in criminology. We do not think that these appellants are likely to be reformed. We confirm the conviction and also the death penalty imposed on them.

It is pertinent to note here that their execution has still not been carried out and no death warrants issued. The two sisters have approached the Bombay High Court and cited inordinate delay as one of the supervening circumstances in their case which warrants commutation. It has been almost six years since their mercy petitions were rejected by the President and it is unlikely keeping in mind the track record that their sentences will be carried out. This showcases the cloak of sympathy with which the legal machinery tend to garb itself while dealing with woman death row convicts.

One more case which falls within ambit of our discussion is the Amroha murder case. In this infamous case the accused Shabnam and her lover mercilessly killed seven members of her own family with an axe because they opposed her relationship. Supreme Court upheld the death penalty imposed on them.

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17 Renuka Bai and Ors. v State of Maharashtra, AIR 2006 SC 3056, (Para. 23-25).

penalty and stated in its judgment\(^\text{19}\) that aggravating factors such as diabolical and calculated nature of crime clearly outweigh mitigating factors such as youth of the accused and the fact that she was pregnant at the time of commission of the offence. However, death warrants issued by the trial courts were later stayed by the apex court. They are yet to be executed.

These cases point out the mindset with which the justice system functions when it comes to sentencing of women delinquents as well as issuance of death warrants or execution of women. The discussions point out our assertions of gender bias in the judicial and executive decisions in Indian legal system.

### III. ACTUAL EXECUTION OF DEATH PENALTY AND PATRIARCHAL PREDISPOSITION

We witness how women are subjected to unfair treatment and suffer from lack of freedom across all walks of life, and hence it becomes imperative that legislature, executive and judiciary of the nation collectively come forward for their empowerment. The authority lies in Article 15(1) of the Constitution which prohibits discrimination on basis of sex. Directive principles of state policy promoting women welfare serve as a major basis for courts to utilise the tool of purposive construction and ensuring a just environment for women in the country.\(^\text{20}\)

When it comes to discussing equality before law, if the social predisposition of considering women as the weaker sex continues to reflect in judicial and executive decisions, we shall never see the advocacy of gender equality fructify at least in form.

For the purposes of removal of existing prejudices, John Rawls advances the concept of ‘veil of ignorance’ in context of a legislator. He puts him in an ‘original position’ where he is ignorant of his hierarchy in a society. The foundation of his theory is that he blames social and biological conditioning and private interests of a group as being obstacles in reaching equality and fairness.\(^\text{21}\)

Putting this in context, members of the judiciary and executive are part of the society and subconsciously suffer from this curse of conditioning and reflect only abject prejudice. Even their decisions impart paternalistic views regarding women and stop them from employing objectivity. The Supreme Court has clearly demarcated that special provisions favouring women shall not attract the bar under Article 15(1) until and unless they discriminate solely on the basis of sex.

Although, howsoever positive the effect of such decisions maybe the reasoning adopted reeks

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of condescension towards women. It defeats the very spirit of eradicating discrimination from the community as it tends to reaffirm the orthodox notions by even acknowledging them legally.

In *Air India v Nergesh Meerza* the Supreme Court appreciably declared unconstitutional the regulations which mandated retirement for air hostesses on the instance of their first pregnancy or at attaining the age of 35 years. It is interesting to note that the apex court upheld the regulation allowing termination upon marriage within 4 years of service as constitutional on account of ensuring good family planning and success of marriage. This attitude even jeopardises court’s reasoning for striking down the other two regulations. The judgment views women as incapable beings in need of directions for leading a healthy personal life. It categorically mentions pregnancy as ‘the most sacrosanct and cherished institution’ of Indian womanhood thereby exposing their protective stance and stereotypical opinion. The court fails to carry an objective approach while evaluating blatant sexual discrimination which was per se in violation with the principles of equality enshrined under Article 14 rather it highlights the ancient prejudices filled in society with respect to a woman’s role in it.

Later in case of *Anuj Garg v Hotel Association of India* it has been stated that protective discrimination under Article 15(3) should be allowed only after heightened scrutiny and is not justified when it undermines personal autonomy of the female sex.

In *State of Himachal Pradesh v Nirmala Devi* the Supreme Court had to decide upon the quantum of punishment for a lady who was convicted for several offences including robbery and attempt to murder. The lady was 40 years of *young* age and mother to three minor children. The learned Justice Sikri observed that gender was not necessarily a mitigating factor globally and that for ensuring gender equality, women criminals must be treated at par with men. In the instant case considering the obligations of accused as a mother, the apex court upheld trial court’s merciful award of two years. The learned judge added that evaluation of gender woman as an extenuating factor must be on a case to case basis and not as a hard and fast rule. There is no scope for *compassion* when a woman is *part of a terrorist group*. This approach, even if acceptable for the purpose of argument, forgets that the non-execution of death penalty on women in post-independence India has blatantly exposed the apparent gender bias in not

22 1982 SCR (1) 438.  
treat male and women delinquents at par with each other.

The predicament which we want to highlight is overlapping of this protectionist mode of the courts and executive in serious and grave matters such as execution of death penalty. Death penalty is awarded by courts in cases involving heinous offences which symbolise inhumanity and in our humble opinion any pity shown towards women convicts is plainly in violation with Article 14 of the Constitution. It is logically inferable from such a stance that our judicial system is harsher with men when they face with charges attracting capital punishments.

Otto Polak\textsuperscript{26} mentions in his book \textit{The Criminality of Women} that women criminals have always received preferential treatment. His theory of \textit{chivalry hypothesis} explains how representatives of the judicial system find it difficult to criminalise women and impose on them adequate sentences which they would have ideally imposed on their male counterparts for the exact offences.\textsuperscript{27} This further led to evolution of the thesis of paternalism or the \textit{evil woman hypothesis}. According to this, coupled with chivalry are expectations from the woman of filling the stereotypical roles prescribed for her by the society. The obeisance or transgression of such rules end up deciding the extent of compassion that such a woman perpetrator will end up receiving. This theory justifies that an ‘evil woman’ ought to be hanged not only because she falls outside the parameters describing woman but also because she possesses the same qualities as a male death row convict. \textsuperscript{28}

However, this does not seem to be the case with Indian legal system as unbridled mercy has always been shown towards women death row convicts irrespective of them violating the worshipped gendered paragons. These notions question the very foundation and intention of any decision taken in favour of women. Is it true sense of philanthropy or does it merely intends to envelop the generational subjugation which women suffer?

\textbf{IV. CONCLUSION}

The movement to end death penalty is being embraced around the globe and according to a report of Amnesty International\textsuperscript{29} in 2018 around 142 countries have abolished death penalty in law or in practice. The report also states that the most number of executions are carried out by countries like China, Saudi Arabia, Vietnam and Iraq. It is time for India to realise that it

\textsuperscript{26} Otto Pollak (30 April 1908 – 18 April 1998) was a writer and a professor of Sociology at the University of Pennsylvania.


\textsuperscript{28} Dr Samantha Jeffries and Dr Christine E.W. Bond, Gender, ‘Indigeneity and the Criminal Courts: A Narrative Exploration of Women’s Sentencing in Western Australia’, <https://core.ac.uk/download/pdf/143853142.pdf>.

shares its name with a handful of nations which still allow the use of this purported deterrence of a sheer draconian nature. It is here important for us to highlight the example of Canada. In Canada death penalty was abolished in 1976. The rate of murder has declined steadily and the country recorded its lowest rate in 2016 since 1966.\(^{30}\) This further stresses on to prove that there is no universality to the argument of deterrence in favour of capital punishment. It is time that we move on to more reformist and progressive ideology, thereby setting an example for other nations in Asia to follow.

When the award of punishment is not uniform and a class of persons are consciously filtered out from its imposition, the continuance of such a flawed concept not only questions the very pillars of our legal system but ingrates ideas of discomfort and scepticism among general public. An argument for establishing bias in United States would not hold water as there are still a considerable number of women executions that take place in several of its states. The argument came up for deliberation in \textit{State v White}\(^ {31} \) where the convict had appealed against his death sentence on the ground that one of his accomplice who was a female, received only life imprisonment and thus his rights under the equal protection clause were violated. He also mentioned that under the then Arizona sentencing guidelines not a single woman had been executed irrespective of the fact that almost 10 per cent. of homicides in Arizona were committed by women.\(^ {32}\) The Supreme Court dismissed the argument by stating that there were certain mitigating factors (these included that the female was a caring mother, had suffered from a difficult marriage and divorced) worked in favour of the woman convict and that it was constitutionally valid to impose different sentences on persons convicted of the same offence. The Supreme Court did not even indulge in the question of an inherent gender bias. However justified the argument of the Supreme Court may seem on basis of mitigating factors (which in themselves suffered from orthodox thinking) it cannot hide that in similar cases women convicts are prone of being given a relatively lighter punishment.

This raises a potential question that whether such a challenge can be made successful in India. The situation speaks of a stark contrast as in India there has not even been a single execution of a woman. Also, when there is no express discrimination in any statute imposing death penalty for a particular offence there shouldn’t be any bias when actual execution is to be carried out. It is futile enough to argue that there is any other reason responsible for such a state


of affairs in India rather than the condescending and paternalistic attitude of the two organs of state whose interplay decides whether someone ought to be hanged or not. There are myriad arguments which can make a strong case for abolishment in India including the inhuman nature of hanging, the delay, laches and uncertainties which traumatis the death row convicts and the fact that it is an ineffective deterrent. It is equally vital to substantiate the challenge by adding to it this aspect of socially instilled gendered discrimination which will further doom the loosely hanging ruins of a fallen and almost extinct practice.

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