

EQUALITY BEFORE THE LAW: ARTICLE 14

A fundamental problem in India is 'Caste'. Another is 'access to information'. With the death penalty as an issue being one to provoke such emotiveness, that minority of 'Indian society' in favour of its abolition has to find solid ground on which to stand (in an Indian cultural, *not any other*, context). That ground arises through the blatant discrimination involved in the award of the death penalty, almost exclusively the preserve of the low/no caste, impoverished and less educated. A system of administration of justice has existed, and continues to, that has propagated this discrimination. However, accumulating the hard evidence to prove this is far from easy, the access to information being such a problem in India. Even with the provisions as laid out in the 'Freedom of Information' Acts, the Home Office and the Central Bureau of Investigation (CBI) are not at all disposed to respond to inquiries as pertaining to the death penalty, which are, after all, all *public* prosecutions. Evidence on the discriminatory application of the death sentence must therefore be accumulated from alternative (and potentially less credible) sources, such as from journalists, but also from the cases as they present themselves.

Challenges to the death sentence under 'Article 14', however, may be seen to be qualitatively different from other challenges to the death penalty under Articles 19, 20 or 21. As Chandrachud C.J. stated in *Deena alias Deen Dayal and Ors* (see also pages **240, 645**):

"There is fundamental distinction between challenges arising from Article 14 and those that arise from Articles 19 and 21 of the Constitution. The position is somewhat stronger for petitioners in cases arising under Article 21, because the very fact that, in defence, a law is relied upon as prescribing a procedure for depriving a person of his life or personal liberty means clearly that the law purports to deprive him of these rights. When, in matter arising under article 21, the person aggrieved is found to have been totally deprived of his personal liberty or is being deprived of his right to life, the burden of proving that the procedure established by law for such deprivation is just, fair and reasonable lies heavily upon the state. To apply mechanically the decisions under article 14 to cases arising under article 19 is to ignore the significant distinction between the nature of the rights conferred by the two articles and their purport and content."

However, there is a profound content and weight behind the challenges arising under Article 14 that increasingly cannot be ignored. As the United Nation's have recognised categorically with respect to the administration of the death penalty in that *other* great democratic state executioner, the United States:

"The imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a death sentence."

(Bacre Waly N'Diaye, U.N. 'Special Rapporteur for arbitrary, summary and extra-judicial executions', April 1998).

From the 'supra-national' authority and counsel of the U.N., one can see the same sentiments arising from the criminologists, jurists and judiciary of the U.S. As Leigh Bienen, Professor of Law at Northwestern University School of Law (in the American Bar Association (ABA) 'Focus on Law Studies', Vol. XII, Number 2, Spring 1997):

"Since whether you are sentenced to death is hugely affected by the economic resources available to the defendant, that raises fundamental questions about justice. I don't think the death penalty can ever be administered justly, although it can certainly be administered more justly than it is at present."

Another type of specific and inherent 'inequality before the law' with respect to the application of the death penalty is similarly illustrated by Austin D. Sarat, the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College, (in the ABA 'Focus on Law Studies', Vol. XII, Number 2, Spring 1997):

"The race of the victim and defendant influences invisible decisions about whom to charge and prosecute for capital murder. And class can't be left out – research suggests that the quality of defense counsel makes a huge difference. If you can afford quality counsel, then your chances of "surviving" a capital charge improve immeasurably."

Almost in an appropriate summary of the generic 'Article 14' or 'discriminatory application' of the death sentence that surely arises due to each differing societies deficiencies, prejudices and establishments, Jack Greenberg, Professor of Law at Columbia University states, (in "Against the American System of Capital Punishment", Harvard Law Review Association, 1986):

"We have a system of capital punishment that results in infrequent, random, and erratic executions, one that is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character. This is the "system" – if that is the right descriptive term – of capital punishment that must be defended by death penalty proponents."

So, one can see that India is not alone in facing clear problems in the administration of the death penalty in a fashion that maintains 'equality for all before the law'. Here in India it gives rise to a powerful ground of challenge to the application of the death penalty which arises from 'Article 14' of the Constitution, and in the unique society that is India, that means principally discriminatory or arbitrary application of the law with respect to caste, ethnic and religious origins, social status and wealth.

In the light of the welter of cases since the Dhananjay execution, material for a ground considering the discriminations in application of the law is being formulated for a Petition to challenge the death penalty.

A Writ Petition which prays to compel the Home Office and CBI to release the appropriate and necessary information, is also being formulated to fortify the ground (and to enable concerned organizations against the death penalty to be more pro-active in cases). The tentative fundamentals on which this ground could be based are illustrated by the following paragraphs.

A DRAFT GROUND

ARTICLE 14: EQUALITY BEFORE THE LAW

A. Because in the landmark judgment of the Supreme Court in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, and particularly paragraphs 206 and 207 thereof, clearly the Constitutional Bench held that the State was required to lead evidence to prove that the accused would commit criminal acts of violence as to constitute a continuing threat to society and that the accused could probably not be reformed and rehabilitated. In the very recent case of *Rahul @ Rao Saheb's v State of Maharashtra* (unreported as yet, from August 19th, 2004), and in keeping with numerous other cases concerning the consistent commuting of the sentence of Death to one of Life, the fact that the condemned man (convicted of raping, murdering and decapitating a 4 ½ year old girl) was in his mid-20s, and that it was his first

offence, was reason enough to commute the sentence, since these factors were seen as sufficiently mitigating. These mitigating factors were held as sufficiently important by the Supreme Court, serving to show that the condemned man was considered capable of rehabilitation and/or reform. In the (anon) case, whether it is held or not that the condemned dalit man was of minor age on the date of commission of the offence, nobody denies that he was still a teenager, and that this crime was his first offence, yet still his sentence of death has been confirmed, not commuted. This reflects at best an arbitrary imposition of the death sentence, and at worst, an endemic bias towards the wealthy and/or high caste.

B. Because Article 14 of the Constitution says:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

The authorities must ask themselves what it is that distinguishes the cases such as that cited in the paragraph above, from the instant case. It is the contention of the petition that the backgrounds of the criminals is a significant factor which is taken into account, such that the system of administration sees fit to set the punishment to fit the criminal, not the crime. As stated by Justice A.S. Anand in *Rajiv v State of Rajasthan*:

“It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.”

Any deviation from this dictum cannot be supported under Article 14 of the Constitution, nor can it be seen to bolster Society’s confidence in its criminal justice system. Hence and otherwise it does not serve in the interests of justice itself.

C. Because there remains not just an apparent imbalance, but an overwhelming chasm between the backgrounds of those who have had death sentences conferred and confirmed on them, and those who have not. Evidence on the backgrounds of virtually all death sentence recipients, and of those currently on death row around the country, suggests that virtually all are of low caste/no caste/low class backgrounds. The evidence is, however, largely qualitative, since information and statistics on what are clearly public prosecutions and prisons, is not available to the public or concerned organisations from the relevant government offices. Notable for their lack of provision of such public information are the Home Office, the National Human Rights Commission, and the Criminal Bureau of Investigation, either intentionally or because they are not in possession of such information. This potentially violates the laws concerning the Right to Information, which aims to empower every citizen with the right to obtain information from the Government. It is submitted that the records and a study of them should be made available to the public. This must be done in order to refute the persistent claims of Articles 14 of the Constitution being consistently violated due to an unequal application of the death sentence, due to the death sentence being, effectively, the privilege of the poor and lowly. In the words of former Supreme Court Chief Justice P.N. Bhagwati in *Bachan Singh v State of Punjab*, 1982 SCC 24 (3), paragraph 81 *et sequiter*:

“There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death sentence has a certain class complexion or class bias inasmuch as it is largely the poor and the down-trodden who are victims of this extreme penalty ... We would hardly find a rich or affluent person going to the gallows.”

Whilst such a situation exists within the system of criminal justice in India, it is submitted that there is glaring inequality before the law, that this utterly

undermines the majority of the public's confidence in the criminal justice system (since the majority are not just the most vocal and visible middle and upper classes) and so the interests of justice are not being served, but rather the interests of justice are being undermined...

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