The rarest of the rare

The Mohd. Arif judgment underscores the importance of review in cases of death penalty, says Aishwarya Chaturvedi

The Supreme Court of India in Bachan Singh v State of Punjab, held that the death penalty should be awarded only in 'the rarest of rare cases when the alternative option is unquestionably foreclosed'. This judicial interpretation ably implies the impact and gravity of a death sentence.

In 2014, the Supreme Court in Mohd. Arif alias Ashfaq v Registrar, emphasised on the importance of review and held that review petitions in cases of death sentence must be heard in open court and cannot be decided by circulation. Article 137 of the Constitution of India grants the Supreme Court the power to review any of its judgments or orders. This power is however subject to certain rules made by the Supreme Court under Article 145. The Apex Court pertinently observed that the fundamental right to life and the irreversibility of a death sentence mandate that oral hearing be given at the review stage in death sentence cases, as a just, fair and reasonable procedure under Article 21 mandates such hearing.

The infamous trial of Raja Nand Kumar during the British Rule, also known as "judicial murder", demonstrates the repercussions of lack of due consideration and review in cases of death penalty.

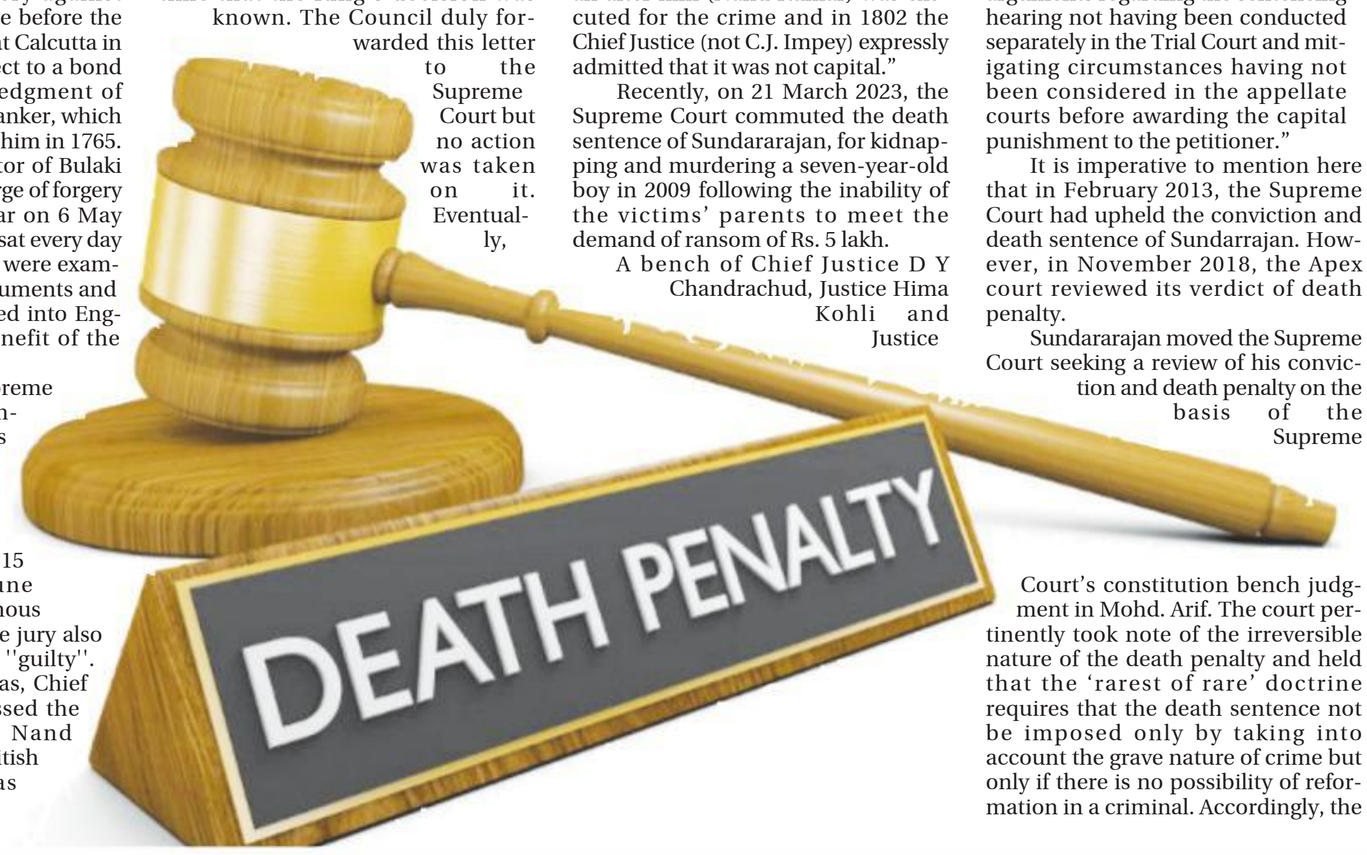
Raja Nand Kumar, who was once Governor of Hugli under Nawab Siraj-ud-Daulah in 1756, brought several charges of bribery and corruption against Governor-General Warren Hastings in 1775. A few months later, Raja Nand Kumar was arrested with Fawkes and Radhacharan for conspiracy at the instance of the Governor-General and his council member Richard Barwell. The trial of Nand Kumar for conspiracy continued together with another trial of his for forgery.

The charge of forgery against Nand Kumar, which came before the first ever Supreme Court at Calcutta in May 1775, was with respect to a bond claimed as an acknowledgment of debt from Bulaki Das, a banker, which it is said, was executed by him in 1765. Mohan Prasad, an executor of Bulaki Das' will, brought the charge of forgery against Raja Nand Kumar on 6 May 1775. The Supreme Court sat every day from 8 AM and witnesses were examined till late at night. Documents and statements were translated into English language for the benefit of the judges.

Interestingly, the Supreme Court judges cross-examined the defence witnesses themselves on the ground that the King's Counsel was incapable of doing it efficiently. The trial continued till the midnight of 15 June 1775. On 16th June judges gave their unanimous verdict of ''guilty'' and the jury also declared their verdict of ''guilty''. Rejecting all defence pleas, Chief Justice Elijah Impey passed the sentence of death on Nand Kumar under an Act of British Parliament which was passed in 1729 - The Statute of 1729.

Susequently, several efforts were made to save the life of Nand Kumar. His lawyer decided to appeal against the Supreme Court's judgement before the Privy Council in England and petitioned the Supreme Court to stay the execution of the sentence till such time that the Privy Council's decision was known. However, the court rejected the petition without giving it due consideration.

Later, the Nawab of Bengal wrote a letter to the Council recommending suspension of the sentence till such time that the King's decision was known. The Council duly forwarded this letter to the Supreme Court but no action was taken on it. Eventually, Raja Nand Kumar was hanged at 8 a.m. on 5 August 1775 at Cooly Bazar near Fort William. All efforts to review his death sentence were rejected by the Supreme Court at Calcutta.



A.B. Keith, a Scottish Constitutional lawyer states, "English law was introduced by the Charter of 1726. The subsequent Charter of 1753 and the Act of 1773 could not possibly be regarded, as they were by Impey, as substantive reintroductions of English Law up to that date and in any case, to apply literally an English law as a mere miscarriage of justice. No Indian after him (Nand Kumar) was executed for the crime and in 1802 the Chief Justice (not C.J. Impey) expressly admitted that it was not capital."

Recently, on 21 March 2023, the Supreme Court commuted the death sentence of Sundararajan, for kidnapping and murdering a seven-year-old boy in 2009 following the inability of the victims' parents to meet the demand of ransom of Rs. 5 lakh.

A bench of Chief Justice D Y Chandrachud, Justice Hima Kohli and Justice P S Narasimha upheld the conviction but set aside the death penalty and commuted it to 20 years' imprisonment.

The court said, "We commute the death sentence imposed upon the petitioner (Sundar alias Sundararajan) to life imprisonment for not less than twenty years without reprieve or remission." The court further observed that, "We see no reason to doubt the guilt of the petitioner (Sundar alias Sundararajan) in kidnapping and murdering the victim… However, we do take note of the arguments regarding the sentencing hearing not having been conducted separately in the Trial Court and mitigating circumstances having not been considered in the appellate courts before awarding the capital punishment to the petitioner."

It is imperative to mention here that in February 2013, the Supreme Court had upheld the conviction and death sentence of Sundarrajan. However, in November 2018, the Apex court reviewed its verdict of death penalty.

Sundararajan moved the Supreme Court seeking a review of his conviction and death penalty on the basis of the Supreme Court's constitution bench judgment in Mohd. Arif. The court pertinently took note of the irreversible nature of the death penalty and held that the 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation in a criminal. Accordingly, the Supreme Court commuted the death sentence to 20-year life imprisonment.

A recent study by Project 39A examined all judgments involving a sentence of death delivered by the Supreme Court between 2007 and 2021 as part of which it analysed the exercise of the review jurisdiction in capital cases. The report revealed that before the decision in Mohd. Arif, 14 review petitions were dismissed by circulation and capital punishment was confirmed in all of them. Out of these, 13 were reopened in view of the judgment which resulted in only four reconfirmations of the death penalty. On the other hand, seven judgments resulted in commutation of death sentences, one in acquittal and one case being abated due to the death of the prisoner. In view of the foregoing it would be safe to say that the impact of the oral hearing of review petitions has led to a change in the outcome of a death penalty confirmation.

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Top bosses in the dock

The maturity of a democracy is reflected in the manner in which it prosecutes its leaders, says Victor Menaldo, James D Long and Morgan Wack

A Manhattan grand jury on 30 March indicted former President Donald Trump on charges likely related to the cover-up of his relationship with a porn star. He's the first U.S. president or former president to be criminally charged.

Trump is also under investigation in other cases. These include the 8 August 2022, seizure of documents from his Florida home by the FBI, continued progress in a Georgia state investigation into Republican election tampering and the ongoing revelations of evidence presented by the congressional committee investigating the January 6 insurrection.

While charging a former president with a criminal offense is a first in the United States, in other countries ex-leaders are routinely investigated, prosecuted and even jailed.

In March 2021, former French President Nicolas Sarkozy was sentenced to a year in prison for corruption and influence peddling. Later that year, the trial of Israel's longtime Prime Minister Benjamin Netanyahu related to breaches of trust, bribery and fraud while in office commenced. And Jacob Zuma, the former president of South Africa who was charged with money laundering and racketeering, has yet to face trial after years of delays.

At first glance, prosecuting current or past top officials accused of illegal conduct seems like an obvious decision for a democracy: Everyone should be subject to the rule of law.

But presidents and prime ministers aren't just anyone. They are chosen by a nation's citizens or their parties to lead. They are often popular, sometimes revered. So judicial proceedings against them are inevitably perceived as political and become divisive.

This is partly why U.S. President Gerald Ford pardoned Richard Nixon, his predecessor, in 1974. Despite clear evidence of criminal wrongdoing in the Watergate scandal, Ford feared the country "would needlessly be diverted from meeting (our) challenges if we as a people were to remain sharply divided over" punishing the ex-president.

Public reaction at the time was divided along party lines. Today, some now see absolving Nixon as necessary to heal the nation, while others believe it was a historic mistake, even taking Nixon's deteriorating health into account — if for no other reason than it emboldens future impunity of the kind Trump is accused of.

Our research on prosecuting world leaders finds that both sweeping immunity and overzealous prosecutions can undermine democracy. But such prosecutions pose different risks for older democracies such as France and the U.S. than they do in younger democracies like South Africa.

Strong democracies are usually competent enough — and the judicial system independent enough — to prosecute politicians who misbehave, including top leaders.

Sarkozy is France's second modern president to be found guilty of corruption, after Jacques Chirac in 2011 for kickbacks and an attempt to bribe a magistrate. The country didn't fall apart after either conviction. Some observers, however, say that Sarkozy's three-year prison sentence was too harsh and politically motivated.

In mature democracies, prosecutions that hold leaders accountable can solidify the rule of law. South Korea investigated and convicted five former presidents starting in the 1990s, a wave of political prosecutions that culminated in the 2018 impeachment of President Park Geun-hye and, soon after, the conviction and imprisonment of her predecessor, Lee Myung-bak.

Did these prosecutions deter future leaders from wrongdoing? For what it's worth, Korea's two most recent presidents have so far kept out of legal trouble.

Even in mature democracies, prosecutors or judges can abuse prosecutions. But overzealous political prosecution is more likely, and potentially more damaging, in emerging democracies where courts and other public institutions may be insufficiently independent from politics. The weaker and more beholden the judiciary, the easier it is for leaders to exploit the system, either to expand their own power or to take down an opponent.

Brazil embodies this dilemma.

Ex-President Luiz Inácio "Lula" da Silva, a former shoeshine boy turned popular leftist, was jailed in 2018 for accepting bribes. Many Brazilians thought his prosecution was a politicized effort to end his career, but Lula was re-elected in October, 2022.

A year later, the same prosecutorial team accused the conservative former President Michel Temer of accepting millions in bribes. After his term ended in 2019, Temer was arrested; his trial was later suspended.

Both Brazilian presidents' prosecutions were part of a years-long sweeping anti-corruption probe by the courts that has jailed dozens of politicians. Even the probe's lead prosecutor is accused of corruption.

Depending on one's perspective, Brazil's crisis reveals that nobody is above the law or that the government is incorrigibly corrupt — or both. With such confusion, it becomes easier for politicians and voters to view leaders' transgressions as a normal cost of doing business.

For Lula, a conviction didn't end his career. He was released from jail in 2019 and the Supreme Court later annulled his conviction.

Historically, Mexico has taken a different approach to prosecuting past presidents: It doesn't.

During the 20th century, Mexico's ruling Institutional Revolutionary Party, or PRI, established a system of patronage and corruption that kept its members in power and other parties in the minority. While making a show of going after smaller fish for petty indiscretions, the PRI-run legal system wouldn't touch top party officials, even the most openly corrupt.

Impunity kept Mexico stable during its transition to democracy in the 1990s by placating PRI members' fears of prosecution after leaving office. But government corruption flourished, and with it, organized crime.

That may be changing, though. In early August 2022, Mexican federal prosecutors confirmed that it has several open investigations into former PRI President Enrique Peña Nieto for alleged money laundering and election-related offenses, among other crimes.

Mexico is far from the only country to overlook the bad deeds of past leaders. Our research finds that only 23 per cent of countries that transitioned to democracy between 1885 and 2004 charged former leaders with crimes after democratization.

Protecting authoritarians — including those who oversaw human rights violations — may seem contrary to democratic values, but many transitional governments have decided it is necessary for democracy to take root.

That's the bargain South Africa struck as apartheid's decades of segregation and human rights abuses ended in the early 1990s. South Africa's white-dominated government negotiated with Nelson Mandela's Black-led African National Congress to ensure outgoing government members and supporters would avoid prosecution and largely retain their wealth.

This strategy helped the country transition to majority Black rule in 1994 and avoid a civil war. But it hurt efforts to create a more equal South Africa. As a result, the country has retained one of the world's highest racial wealth gaps.

Corruption is a problem, too, as former President Zuma's prosecution for lavish personal use of public funds shows. But South Africa has a famously independent judiciary. Despite pushback from some African National Congress stalwarts and several legal appeals, Zuma's prosecution continues. And it may yet deter future misdeeds.

Israel is partly a testament to the rule of law — and partly a cautionary tale about prosecuting leaders in democracies.

Israel didn't wait for Prime Minister Benjamin Netanyahu to leave office to investigate wrongdoing. But the court process was fraught with delays, in part because Netanyahu used state power to resist what he called a "witch hunt."

The trial triggered protests by his Likud party. Netanyahu tried unsuccessfully to secure immunity and stall. He was even re-elected while under indictment, and his trial is not over yet.

With the Trump indictment, the process will reveal something fundamental about American democracy. Whatever the outcome, they will be a matter of both law - and politics.

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Must judges be yanked by the hair?

It is for Pakistan's Supreme Court to regulate itself, argues Asad Rahim Khan

Around this time a year ago, Pakistan's Constitution was at risk. To frustrate the will of parliament, the deputy Speaker had thrown out its vote of no-confidence against a falling prime minister. But the Supreme Court stepped in: it took suo motu, undid the Speaker's ruling, and restored the Assembly.

And the bells tolled loud and long: 'We profusely thank the Supreme Court,' said Shehbaz Sharif. PTI partisans, meanwhile, screamed blue murder about biased judges.

Amid all the noise though, there was little debate – with a few exceptions – about whether the opposition was justified in going for the vote. Or whether the chief justice should form a full court of his own accord. Or the nature of suo motu itself.

And perhaps rightly so: as senior counsel Feisal H. Naqvi quoted recently: "The main thing is to keep the main thing the main thing."

The main thing last April was a prime minister trying to keep his enemies out of power by violating the Constitution. The Supreme Court stopped him. The main thing this April is a prime minister trying to keep his enemies out of power by violating the Constitution: delaying polls in two provinces set for 90 days. The Supreme Court stopped him again. But this time, the discussion is about everything but: from the regulation of suo motu to the formation of benches to the floods of 1988.

And yet what's triggering this national nosebleed is clear: a widely despised minority government trying to prevent a specific outcome – elections within 90 days. The same gents once delirious with joy over the chief justice's powers now weep tears of rage.

But none of the excuses trotted out so far pass muster. Consider a few: could the chief ministers dissolve their assemblies? (Yes, because they did it as provided for in the Constitution – one fresh from a vote of confidence in Punjab; the other with a thumping majority in KP.)

Then, could the chief justice take suo mo--tu at all? (Yes, because of democracy's destruction when the ECP broke the law, the governors shrugged, and all refused to obey the direction of the Lahore High Court's Justice Jawad Hassan mandating 90 days.)

Then, what about a full court? (While there's no harm, no law or precedent warrants one; nor is this a case of first impression, just the glaringly obvious: elections must be held in 90 days. The last full court we had was for whether the Constitution had a basic structure during the military courts case; it went on to deliver the silliest, most divided, and most incoherent plurality in history.)

As law students know, these are all Tamizuddin-esque sideshows. In 'Tamizud-din', Justice Munir never actually decided the main thing: whether the assembly was sovereign. He twiddled his thumbs over tech--nicalities instead, and wrecked democracy.

This time, however, it's a different story: the same Bandial court that restored the Assembly the PTI government aborted, again upheld the law on March 1 – polls within 90 days.

Hence also the unity regime's latest clownish attempt – à la Israel's Netanyahu – to declaw the judiciary: a bill that snatches away the chief justice's powers to take suo motu and form its benches, spreading it over a committee of three, with a fresh appeal that all our disqualified-for-lifers are rubbing their hands over.

But seeing as naughty thoughts shouldn't be pegged to the legislature, let's look at the law. Most legal eagles point to Article 191 in its favour, which reads: "Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Cou-rt". The 'law' in question, they argue, being the new bill.

Only, a five-member bench has already held the conferral, and exercise of suo motu isn't a matter of procedure at all: "The tripartite categorisation of the ju--dicial process," held Justice Munib Akhtar, "…is not a matter of mere procedure; it is part of the very essence of the judicial power."

The court has elsewhere reaffirmed the clause "subject to law" doesn't mean "a sta-t--ute can control or curtail the power confer-red on the superior Courts by this Article." It remains for the court to regulate itself.

Even otherwise, Item 55 of the Federal Legislative List excludes parliament from legislating on the court's powers or jurisdiction (like grafting new floors of appeal on top what's already in the supreme text). If PDM wants to interfere, it must amend the Constitution, not pass some bill at midnight under a banana tree.

Finally, a thought to actual practice: judges must themselves step away from samosa prices and policy. But the suo motu is the natural result of facing an all-out assault by Musharraf, and winning.

Diffusing that power by three, given these divides, renders it dysfunctional – the last hurdle protecting an independent judiciary. Then back we go to Quetta registries, to judges yanked by the hair.

There can be no more of that.

(The writer is a barrister.)
Dawn/ANN.