# *BOOK REVIEWS*

PRESIDENTIAL POWERS OF PARDON ON DEATH PENALTY (2006). By Janak Raj Jai.Regency Publication, 20/36-G, Old Market, West Patel Nagar, New Delhi. Pp.xii + 61.

DEATH PENALTY is one of the subjects of human concern which gives rise to unceasing debate leading to no definite solutions that can be scientifically tested and empirically proved. To abolish or not to abolish is the problem which has been faced in many countries and which our legal system is facing even now. The execution of Dhananjoy Chatterjee after fourteen years in prison has given new impetus to the debate.

The movement against capital punishment started in England and other parts of Europe as a result of writings of utilitarians like Bentham and Mill who insisted that punishment in itself is an evil and, therefore, should be just adequate to curb the menace of crime and no excessive punishment including capital punishment should be inflicted where some milder penalty would achieve the goal. In England, capital punishment was abolished under the Murder (Abolition of Death Penalty) Act, 1965. The present position in England is in stark contrast to the situation prevalent at the end of the 18th century when about two hundred offences were punishable with death.

In India, the problem has been attracting the attention of government and the public alike over the years but death penalty still remains on the statute book although it has been sparingly used in the *rarest of rare cases* and there is a tendency to restrict its use to grave offences committed under aggravating circumstances.[1]

Article 72 of the Constitution of India confers on the President power to grant pardons *etc*. and to suspend, remit or commute sentences in certain cases. Article 72(1) states that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment

1. Capital punishment is awardable under the Indian Penal Code only in the following cases:
   (i) Treason, e.g., waging war against the government of India (S. 121) abetment of munity (S. 132).
   (ii) Perjury resulting in conviction and death of an innocent person (S. 194)
   (iii) Murder (Ss 302 and 303)
   (iv) Abetment of suicide of a minor or insane (S. 305)
   (v) Dacoity with murder (S. 396)
   (vi) Kidnapping for ransom, (S. 364-A).

or suspend remit or commute the sentence of any person convicted of any offence:

(a) In all cases where the punishment or sentence is by a court martial,

(b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the union extends,

(c) In all cases where the sentence is a sentence of death.

It is settled law that the exercise of presidential powers under article 72 is basically a matter for the discretion of the President and the courts would not interfere with his decision on merits. However, the courts do exercise a very limited power of judicial review in order to ensure that all relevant materials are placed before the President for coming to a conclusion and reaching a decision. In the exercise of his power, the President can examine and evaluate the evidence afresh. In doing so, he is not sitting as a court of appeal. His power is derived from the Constitution and is independent of the judiciary. Therefore, he can afford relief not only from a sentence, which he regards as unduly harsh but also from an error in evidence, or discovery of new facts.

The book under review[2] is divided into eight parts and contains a prologue in the form of a letter which the author wrote to the President of India Dr. A.P.J. Abdul Kalam who having read a book titled Death Penalty written by the author, had called him and raised some queries. In his letter to the President, the author has tried to throw light on some important problems and has attempted to unravel some elusive riddles which have perplexed and plagued the minds of judges, jurists and penologist alike. He points out that the judges are inconsistent while applying the principle of *rarest of rare cases*. In the words of P.N. Bhagwati, J "The judges have been awarding death penalty according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions."[3]

So death penalty depends, to a large extent, upon the benches that are constituted from time to time. Is that not arbitrary and discriminatory and violative of fundamental rights guaranteed in articles 14 and 21?

The author points out[4] that progressive criminologists across the world do agree that Gandhian diagnosis of offenders as patients and conception of prisons as hospitals – mental and moral – is the key to the

2. Janak Raj Jai, *Presidential Powers of Pardon on Death Penalty* (2006).
3. *Bachhan Singh* v. *State of Punjab*, AIR 1982 SC 1325.
4. *Supra* note 2 at ix.

pathology of delinquency and the therapeutic role of punishment.

The author laments[5] that although article 72 of the Constitution gives unfettered powers of pardon to the President to deal with mercy petitions, the petitions are routed through the home ministry where an officer of the rank of deputy secretary or joint secretary examines the Supreme Court judgment and puts up a note for the approval of the home minister and then the recommendation of the home ministry is sent to the President of India practically for his autograph. The purpose of the provision was that if by any chance, the Supreme Court has committed any mistake or error inadvertently, it may be rectified by the President of India. If the presidential power envisaged under article 72 is to meaningfully serve its purpose, the President should exercise it independently. Not only that it does not make sense that the state gets death sentence for a convict from the highest court of the land and commutes it to life imprisonment only to be autographed by the President, but it is also a mockery of the law, undermining the authority of the judiciary and an assault on the dignity of the Supreme Court of India, the *sanctum sanctorum* of justice.

There are certain occasions when the Constitution itself expects the President not only to act independently but even contrary to the stand taken by the council of ministers. Article 78 of the Constitution gives specific powers to the President for obtaining information and referring matters to the cabinet. Article 111 of the Constitution embodies power in the nature of a veto exercisable by him to withhold his assent and to return the bill for reconsideration. The vetoes are not confined to non-official bills and thus highlight the President's discretionary power. If a bill submitted to him violates fundamental rights or the prescribed circumference of state powers, he is bound constitutionally by his oath to exercise one of the two vetoes, otherwise he would be guilty of failure to protect the Constitution.

The President is vested with the powers of supreme commander of the defence forces of the union. Such powers cannot be treated as illusory or their conferment on the President just a matter of form.

Some of the powers of the President are supra ministerial where ministry would not be relied upon to advise. Such powers include –

(a) Dismissal of the Prime Minister who does not enjoy the leadership of his party.

(b) Dismissal of a minister who has lost confidence of the Parliament.

(c) Dismissal of the House of the People which appears to the President to have lost the confidence of the people.

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5. *Id.* at xi.

(d) The exercise of powers as the supreme commander in an emergency where the Ministry has failed to defend the country.

Injustice to the accused has also resulted from the Supreme Court's inconsistent definitions of "long delay in execution of death penalty". Thus, in *Madhu Mehta* v. *Union of India and others*[6], the Supreme Court held, "It is well settled now that undue long delay in execution of the sentence of death would entitle the condemned person to approach the Supreme Court or to be approached under Article 32 of the Constitution. Under Article 21, speedy trial is part of one's fundamental right to life and liberty." In this case a delay of over eight years in disposal of the mercy petition was considered to be a delay long enough to entitle the accused to have his death sentence commuted to imprisonment for life while fourteen years in prison was not a delay long enough to entitle Dhananjoy Chatterjee to entitle him to have his death sentence commuted to life imprisonment.

Moreover there is no evidence to show that extreme measure of capital punishment cause a diminution in crime rates. From available statistics, it is clear that capital punishment, as applied today, fails as deterrent. The author has quoted authorities to show that many people have been wrongly executed and they were found to be innocent after they were sent to the gallows.

The author is of the opinion that except in rare instances, the serious offences are committed by those suffering from mental illness and impulsive nature and cannot be regarded as belonging to the criminal class. Also it is found that when death sentence is removed as a punishment, the rate of conviction increases and there is a concomitant reduction in delay. Unequal application of law takes place because those executed are actually the poor, the ignorant and the law fails to protect those who need its protection the most.

The author has quoted views of prison officials, penologists and criminologists to show that death, as a penalty is not a deterrent. Imprisonment for life is equally or rather more deterrent. Ten to twelve years in jail is a terrific punishment and is sufficient for mental and moral metamorphosis of a human being. The author has also suggested different ways and means of reforming an offender in a prison and has also highlighted healthy practices in prisons of England and the United States.

India's first Prime Minister was a prison bird for many years struggling for the independence of the country and as such was well conversant with stark reality of prison life. In his book, the author has highlighted his views on jail, plight of prisoners, the working of prison

6. (1989) 4 SCC 62.

and the approach of judges. He has also written on the utility and futility of capital punishment. Pandit Nehru had pointed out that judges are too impersonal, distant and too little aware of the consequences of the sentence they award.

An all India Committee on Jail Reform was appointed by the government under the chairmanship of Justice Anand Narian Mulla. The said Committee after visiting various prisons in the country, as also meeting the judges, the criminologists, the convicts, the jail officials, jurists and social activists, submitted its report in two volumes. some of the useful and valuable suggestions of the Mulla Committee relating to after-care, re-habilitation and follow-up action after their release from prison are succinctly discussed by the author.

The author has quoted various authorities and jurists without properly mentioning the sources. If proper citations were given, not only that the work would have become more authentic but also its utility to researchers and other readers who would be interested in further study and research in the subject, would be greatly enhanced.

The author is an ardent protagonist of abolition of capital punishment in India and the book is a passionate plea for it. But till it is abolished by suitable legislative measure, the author forcefully argues that the President should act independently under article 72 of the Constitution to make the provision meaningful, purposeful and benign. The President being head of the state is also the fountainhead of justice and the notion of justice is neither conterminous with nor can always be fathomed in terms of law and evidence.

The book is a good contribution to the existing literature on administration of criminal justice in general and the debate on the abolition of capital punishment in particular. Students of law, teachers, judges, advocates and all those who are interested in criminal justice system *vis-à-vis* presidential prerogative of clemency will find the book interesting, thought-provoking and useful.

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CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS. (2005). By Jaya Sagade. Oxford University Press New Delhi. Pp. xlv +257. Price Rs. 545/-.

SELF-AVOWEDLY Jaya Sagade has undertaken a study on child marriage in India in order to especially find out the impact of child marriage on girls. This special concern of the work causes one to ask what is a child marriage? Child marriage could be defined to include marriage where both the parties are children as well as that where one of the parties to the marriage is a child. The first kind of marriage, where both bride and groom are children, happen on a mass scale and evidently have a impact on both boys and girls. The author accedes to the veracity of this belief.[1] But the special concern to a girl child in her work is because child marriages have a more detrimental impact on the educational opportunities and health of girls.[2] Sagade demonstrates these detrimental effects by relying upon the evidence generated by a range of social science studies. These studies show how early marriage results in early motherhood and how such motherhood results in frequent spontaneous abortions, premature low weight babies and chronic anaemia for the growing adolescent.[3] If the data on childbirth deaths is disaggregated it is found that a disproportionate segment consists of young girls. Child marriage also has a deleterious effect on the mental health of the young girls driving them to depression and suicides.[4] In the second kind of marriage where only one of the parties is a child that child inevitably has been a girl and hence the author does not need to mount a major justification of her preference.

Proponents of child marriage have often referred to the customary practice whereby a division is wrought between the marriage and its sexual consummation. How the marriage affords an opportunity to the young girl to settle down in her matrimonial home mentored and chaperoned by her mother-in-law. The young couple grow up together, make their sexual discoveries in accord with their biological needs in the legitimate bond of marriage. Sagade however finds that the time lag between marriage and cohabitation has been increasingly reducing.[5] She

1. Jaya Sagade, *Child Marriage in India* xxv (2005).
2. *Id*. at xxv –xvii.
3. *Id*. at 14-20.
4. *Id*. at 21.
5. *Id.* at 6.

also questions the adjustment reasoning as she holds inducting the young girl at a malleable age in the matrimonial home denies her choice, autonomy and the opportunity to build her own personal identity distinct from the roles of daughter, wife and mother.[6]

Sagade's work is a socio-legal study and the closeness with which the legal texts have been read is the strongest and most readable part of the work.[7] Sagade has been able to expose legislative half-heartedness by showing disconnect between various legislations impacting on child marriage. For example, even as the age of marriage has been raised, the age of consent remains unchanged.[8] Further, the option of puberty under the Hindu Marriage Act is available only if the girl is below 15 years at the time of marriage. Even as the age of marriage has been raised to 18 years for girls; this option has not been accorded to girls between the age of 15 and 18 years.[9] She questions the legislative policy whereby a child marriage has not been rendered void even as it has been made punishable.[10] It is here that Sagade makes one of the few concessions to pragmatism in the book.[11] She concedes that if all child marriages were to be held void the legal position could be more disadvantageous to women. Consequently she suggests, let the provision of marriages being void be brought onto the statute book but let there be an implementation amnesty of ten years to enable society to prepare for this altered legal scenario.[12]

Sagade raises issue on the legal provision of a lower age of marriage for girls. Her table in appendix 1 of the first chapter provides a table on the age of marriage in different countries. In all cultures women are not believed to mature faster than men. Sagade here had an opportunity to explore the gendered construction of human biology however she prefers to provide the information without analyzing it.[13]

Sagade has mounted her attack on child marriage with the aid of empirical data and the jurisprudence of human rights. She draws on each of the Human Rights Conventions to see how text or the jurisprudence emanating from the concerned committee strengthens her case for banning child marriage. However, in her passion and zeal to

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6. *Id*. at 10.
7. *Id*., Chaps 2 and 3 at 35-110.
8. *Id.* at 63.
9. *Id.* at 76-77.
10. *Id.* at 54.
11. Otherwise be it, an unequivocal ban of child marriage; or proactive prosecution of the offence or compulsory registration of marriage, she has adopted non-negotiable stances.
12. *Supra* note 1 at 55.
13. On the need to appreciated gendered construction of human biology see Martha Nussbaum, *Sex and Social Justice* 253-75 (1999).

ban the practice of child marriage, she forges connections with every kind of international instrument thus causing for an advocacial overkill. It would have helped both the reader and child rights activists if she had distinguished between the various civil-political and social-economic rights to highlight as to which one would be most helpful in advocating abolition of child marriage. This would have been especially useful because she concedes to the entrenched nature of the social belief. And yet she does not worry on how the law and advocacy could be designed to neutralize opposition and obtain support. Or which right may help to counter what kind of opposition. This nuance of advocacy is missing from the book.

On similar lines, Sagade asks for a public interest litigation seeking a ban on child marriage to be filed in the Supreme Court holding that a positive holding from the court would greatly strengthen the movement to legally outcaste such marriages.[14] In the very next paragraph she asks for a test case to be filed seeking exemplary damages from the state by any young girl whose life, liberty, health and education has been severely compromised by child marriage.[15] As the author does not dwell on the strength and weaknesses of each of the strategies it is not clear whether one should employ both or one of the strategies and should it be simultaneous or one after the other. The author in inviting the use of the courts has also not warned of the danger of an adverse verdict - a danger that has to be taken on board if the courts are being approached to seek authoritative legal support for the movement.

Sagade has employed the feminist method in making her analysis. And the feminist method she informs accords voice to the neglected and marginalized. From that stand point it may be worthwhile to ask how an early marriage impacts upon boys. Does the early assumption of emotional and familial responsibilities have some special consequences on boys? Does it make for skewed personalities who are then unable to face the trials and tribulations of life? Or is it that the young boys escape from the experience without any significant personality costs. In so far as the author has concentrated the scope of her study to the girl child it would not be appropriate to raise this issue in the context of her work. However, Sagade wishes to break through the current administrative apathy on child marriage to make a case for its rigorous restraint. In this circumstance it may have been worthwhile for her to expand her alliances beyond women and to show how in different ways both girls and boys are disadvantaged by child marriage. There is a stronger case for abolishing the practice if it is harming both partners to the marriage.

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14. *Supra* note 1 at 212.
15. *Id*. at 212-213.

Analysis cannot precede the collation of data and it degenerates into sheer opinion mouthing if not supported by evidence. It is here that Sagade's work scores unequivocally. Her analysis has been strongly supported by both empirical and legal data. Thus be it be field studies[16] or government schemes[17] or a journalistic exposes or a cinematic representation[18] she has combed through a range of materials to put together her case against child marriage. Similarly she has backed her close reading of the laws relating to child marriage with the relevant legal document be it be a legislative provision, a judicial decision or a juristic analysis. Her reliance on international instruments is again not confined to convention texts. She has gone further and examined the general comments issued by concerned monitoring committees, the reports of state parties and the responses of the United Nations Committees to the state reports[19]. The work has undeniably made an evidence based case for the ban of child marriage by examining this practice from the standpoint of the girl child. By her work the author has alerted state and civil society on the baneful effects of this much tolerated social practice.

*Amita Dhanda**

16. See for example *id.* at 16-19.

17. *Id.* at 197 where she discusses ICDS, Balika Samridhi and schemes of some state governments for the girl child.

18. See for example *id.*, endnote 31 to chapter 2 where she discusses the Bandit Queen Phoolan Devi's experience with child marriage.

19. Here especially see *id.* at 145-46 the response of the Women's Committee to the Report of the Indian Government on CEDAW.

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NEW LAW ON HINDU SUCCESSION (2005). By P.K. Das. Universal Law Publishing Company Private Limited, Delhi. Pp. XIII + 259. Price Rs.250/-.

THE BOOK under review[1] presents an excellent exposition of the laws relating to Hindu succession in the context of international conventions, state laws and precedents of high courts and the Supreme Court. It is indeed a great relief to the practitioners in as much as it provides and purveys a lot of information on Hindu succession. The latest developments in the law are captured and dealt with in the light of the constitutional imperatives.

In fact, the constitutional directives under article 44 is sought to be achieved in matters of succession among Hindus by the Hindu Succession (Amendment) Act, 2005. It is a product of the 174th report of the Law Commission of India. The Commission found that discrimination against women is writ large in relation to property rights and that social justice demands that a woman should be treated equally both in the economic and social spheres. By the amendment of section 6 of the Hindu Succession Act 1956, it is proposed to give full fledged right to women in their ancestral property by making daughter as a coparcener on the same footing as a son in a *Mitakshara* coparcenary. The cumulative effect of the amendments made in sections 6, 23, 24, 30 and the schedule of the Hindu Succession Act, 1956 is that a daughter is allotted the same share as that of a son and marriage is not a factor to be reckoned with in matters of succession.

A traditional Hindu family whether patriarchal or matriarchal has its own long cherished customs, which by passage of time have attained the status of law. The legislative intervention is to rectify the anomalies, if any, found in the customary practices. The Amendment Act of 2005 enables daughters (women) not only the right of residence in ancestral home but also confers on them the right to demand partition. She is also conferred with the right to get partition of agricultural land and is made a coparcener in the *Mitakshara* family. This confers a technically and a theoretically sound proposition of equality and thereby eradicates gender discrimination. But the ground realities of social practices deep rooted in customs have not been given due consideration as there are certain social factors which cannot be changed by legislation. For example, a

1. P.K. Das, *New Law on Hindu Succession* (2005).

daughter on marriage gets transplanted into another family and it becomes the responsibility or liability of the son to look after the aged parents. The best part of the life of a daughter is spent in the family of her husband and partition of the family house and family property, agricultural or otherwise, though sound in principle might work out great injustice to the son. In effect the amendment has enabled women to establish their rights in their parental property but the legislators have not put in a moment's thought as to how the rights of women can be protected in her matrimonial home by demanding or enabling half rights over her husbands property in token of their services either as housewives or as partners in life. Be that as it may, the 2005 amendment is a step forward in the march of law in obliterating gender discrimination and achieving the constitutional goal.

The book under review is an exposition of this new law on Hindu succession. It is a useful tool for the practitioners and students of law. Indeed, there is not much critical evaluation of the amendments and its impact on society. But it seems to be one of the best books on the subject not only for teaching but also for learning and reference.

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SUPREME COURT EDUCATIONAL INSTITUTIONS CASES (2005). By Surendra Malik. Eastern Book Company, Lucknow. Price. Rs.625/-

THE BOOK under review[1] is a compilation of certain recent cases on minority rights (religious, linguistic and denominational), reservation based on domicile, common entrance test; medium of instructions, syllabi and curricula that may be taught and service conditions for teachers and staff etc. All head notes and text of the cases being an exact reprint from *Supreme Court Cases*, even the original page numbering has been retained.

While laying down the criterion for entitlement of minority status, the Supreme Court in *St. Stephen's College* v. *University of Delhi*,[2] had held that pre-Constitution institutions must be shown to have been established by such minority group of persons residing in India while post-Constitution institutions must be shown to have been established by such a minority group of citizens of India. The Supreme Court had also held that administration of educational institution does not confer a right of misadministration on them. Many conceptual developments have taken place during the last two decades and this was reflected in the Supreme Court decisions of *TMA Pai Foundation* v. *State of Karnataka*,[3] wherein an 11 judge bench held education to be an occupation and that the right to establish and administer educational institutions is a fundamental right of non-minorities as well. In its endeavour to discuss the true scope and interpretation of article 30 (1), the apex court laid down certain prepositions relating to minority rights after defining the term minority itself. Those prepositions were further clarified in *Islamic Academy of Education* v. *State of Karnataka*[4] with regard to the power of minority (aided and unaided) as well as non-minority managements, in respect of quantum of fees to be charged and the intake of students in their educational institutions.

Applying the *TMA Pai Foundation* case,[5] the Supreme Court, in *Brahmo Samaj Education Society* v. *State of West Bengal*,[6] struck down the law creating higher education services commission, holding that the

1. Surendra Malik, *Supreme Court Educational Institutions Cases* (2005).
2. (1992) 1SCC 558.
3. (2002) 8 SCC 481.
4. (2003) 6 SCC661.
5. *Supra* note 3.
6. (2004) 6 SCC 224.

power of appointment of teachers is one of the incidents of power of administration and the state cannot impose persons of its choice on the management, and that too, when UGC has clearly laid down the qualification and eligibility conditions. In *Modern School* v. *Union of India*,[7] the apex court has reiterated that education is an occupation and that the fundamental right to establish and administer educational institutions is subject to reasonable restrictions under article 19(6) of the Constitution. In *Usha Mehta* v. *State of Maharastra*,[8] where the issue involved was choice of medium of instruction by linguistic minority, it has been made clear that the prescription of regional language as compulsory subject is within the regulatory power of the states.

These and other cases published in the book will prove to be useful to lawyers, academicians and researchers in their quest for knowledge and information in educational law.

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7. (2004) 5 SCC 583.
8. (2004) 6 SCC 264.
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