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Death Penalty in Rape: A necessary evil?

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Abstract

“Feminism is neither about making women strong nor empowering them, as women are strong and powerful enough; the real challenge is to change the perception of the world towards them.”

- By G D Anderson

(Feminist, author and founder of COVA Project)

The incessant global debate around the necessity and legality of capital punishment takes a tangential turn in India. A major chunk of population blindly supports the principle of “eye for eye and tooth for tooth” and find the solution of rape as death penalty. However, with the passage of time and increased discourse around the matter, a dichotomy has been witnessed within the close group of countries. One of the admonitions against the capital punishment furnished by some feminist scholars is that the original issue remains untouched, and the root cause or disease remains uncured. They often propose that capital punishment has a tendency to cause the opposite effect instead of creating a deterrent effect in the society. The other impediment in its way is the arbitrary nature of the judgments around the country and enormous discretionary power vesting with the judiciary on the grounds of “rarest of the rare case” principle. Death penalty stands as an exception of Article 21 of the constitution and Article 6 of ICCPR, therefore it becomes matter of utmost importance for discussion. The research paper intends to analyse the legal stance in India regarding the penalty for rape and other types of sexual abuse against women in light of Criminal Law Amendment Acts of 2013 and 2018 and Maharashtra’s Shakti Act. It will investigate whether capital penalty is a desirable form of retribution in situations of rape and if it may serve as a solution to the social problem. It will try to highlight alternatives to the death penalty in order to properly address the issue of sexual violence against women. It intends to thoroughly discuss the debates around capital punishment based on political convenience, notion of deterrence, retributive and restorative form of justice and patriarchal mind-set.

Introduction

“Until an accused is proved that he is guilty, he is presumed to be innocent. But till the time, the case is established beyond reasonable doubt and the victim is proven to be truthful, she is presumed to be liar”

— Louise O'Neill, Irish Author

Death penalty is the legal tender given by the state to abolish someone's right to life by following the due process. However, it has been a matter of contention throughout the globe. Several countries have abolished it but a few countries like India still sees it as a viable option to cater the problem of heinous crimes like rape and gang-rape.¹ India is a staunch believer of the deterrent effect, death penalty has in the society. But many feminist scholars argue against this admonition that the capital punishment further advances the patriarchal notion of women's honour related to her sexuality.

The paper intends to delve into the discussion of the necessity of death penalty in rape cases and shall also try to decipher on the unceasing debate on the issue that death penalty is often administered in states for political convenience rather than looking into the quint-essentiality of the punishment. It shall also discuss various theories of punishment in the context of rape and shall unfold the efficacy of deterrent theory of punishment. It shall highlight the feminist view on the matter regarding promotion of patriarchal notion and the issue of digression from the root cause of rape. In the latter part, the paper shall move from philosophical and principle based discussion to the practical laws and statutes in India. It shall finally delve into the substitutive solutions possible to the capital punishment and the need to change the current criminal justice framework.

Analysis

Chapter 1 – Conundrum of judicial discretion

A drastic change in the legal system came post-independence when the criminal law went through a re-arrangement and the courts were freed from the burden and statutory mandate of recording the reasons behind the punishments that they delivered and what made them not administer death penalty when they had the option to choose it.² But was it really a positive change? Certainly, the provision in the 1898 Act had a negative connotation attached to it. In a

¹ ALIINA VEGAR, *State Complicity in Death Penalty: Mutual Legal Assistance*, (2020).

² Code of Criminal Procedure, 1898, Section 367(5).

way, it seemed that it was necessary to avail the option of the death penalty and reason had to be provided if not availed. However, the legislation currently in place has a positive tone and demands the reason of administering the death penalty.³ The landmark judicial pronouncement in this regard noted that imposition of capital punishment cannot be limitless and brought “*rarest of rare cases*” principle into force.⁴ It was clarified that the first option would be to avail life imprisonment and if the circumstances are of such exceptional nature that even life imprisonment would not suffice then death penalty has to be imposed. Nonetheless, in the famous dissenting opinion, *Justice Bhagwati* opined that death penalty cannot be the solution to a problem and he saw it as the violation of individual’s fundamental right to equality and life.⁵ He discarded the arguments that it qualified the retributive and deterrent theory of punishment, and upheld basic human right to be of utmost importance. The five judge bench also enlisted the mitigating and aggravating factors that have to be kept in mind while imposing penalty.

To note, the entire judgement vests enormous discretionary power in the hands of judges. Though, it cannot be denied that it highly depends on the heinousness of the crime and circumstances around it, and a certain amount of subjective approach is required but due to the absence of any stringent sentencing policy in our country, it has a tendency to backfire causing judgements to be enigmatic and indefinite. But what factors actually lead to the determination of “*rarest of the rare cases*”, considering each case is heinous in itself, traumatising the victim for life. As mentioned in the death penalty report that judges make their decision based on their own understanding, paving a way for arbitrariness.⁶ There have been instances of sheer vagueness where courts have ignored the mental condition and agony of women and have ordered her to tie *Rakhi* to the accused and receive money as gift for *Rakhi*. Even though, the judgement was scrapped by the apex court, but it highlights a complex issue of criminal justice system.⁷

Project 39A also analyses the drastic effect it has on the people of lower economic strata. Therefore, it has to be kept in mind that subjectivity has to be removed to an extent from legal parlance.⁸

³ Code of Criminal Procedure, 1973, Section 354(3).

⁴ *Bachan Singh v State of Punjab*, 1980 CriLJ 636.

⁵ *Id.*, 4.

⁶ DEATH PENALTY REPORT, National Law University Delhi available at https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5b4ced7b1ae6cfe4db494040/1531768280079/Death+Penalty+India+Report_Summary.pdf.

⁷ A. PRIYADARSHI & ISHA TIWARI, *Rethinking of the Need of Capital Punishment in India*, 16 *Supremo Amicus* 5 (2020).

⁸ ANUP SURENDRANATH, *Project 39 A*, National Law University, Delhi.

Chapter 2 – Penalty IN CASES OF Rape IN India

- Existing Legal Framework

Since, the beginning of the criminal law, the punishment for rape laws varied from 7 years to imprisonment for life. However, a major change came post *Mathura Rape case*⁹, where the need for amending the definition of rape was felt and also some additions were made in the *evidence Act*¹⁰ to establish the fact that in rape cases it shall be presumed that consent of the victim was absent.¹¹ Subsequently, major changes were brought in 2013 and 2018. But the concerning factor in the philosophical arena is the ignition point of these amendments.¹² The changes were made post the mass backlash and protest in light of the two most heinous rape cases. Post the infamous *Nirbhaya case*¹³, the *Verma Committee*¹⁴ determined the “*lack of proper and adequate governance*” as one of the aggravating factors behind the commission of crime. The recommendations were adhered to and the definition of rape was broadened.¹⁵ It also, deciphered the punishment extending from imprisonment of life to death penalty.¹⁶ However, it had a major backdrop as it neither did look into the similar problems that occurs due to the laws like AFSPA nor did it deal with the issue of marital rape. The 2018 amendment came into force in the form of ordinance and increased the quantum of punishment¹⁷, but similar to the previous amendment it did not deal with any of the mentioned issues.

- Shakti Act: Planting powerful tool for Women

Eyeing specially on the most heinous crimes like gang-rape and rape, after Andhra Pradesh, Maharashtra passed the *Shakti Act*, which stands as a bulwark to the criminal justice system. It has incorporated capital punishment in the existing criminal justice jurisprudence. The only pre-requisite is the conclusive evidence furnished in the court which has the capacity to prove

⁹ *Tuka Ram and Anr vs State Of Maharashtra*, 1979 SCR (1) 810.

¹⁰ Indian Evidence Act, §114.

¹¹ The Criminal Law (Amendment) Act, 1983, § 6.

¹² A. GUPTA, *Decoding 'Deterrence': Critique of the Criminal Law*, ILI LAW REVIEW 136 (2018), available at <https://ili.ac.in/pdf/ag.pdf>.

¹³ *Mukesh & Anr vs State For Nct Of Delhi & Ors*, (2017) 6 SCC 1.

¹⁴ JUST. J VERMA COMMITTEE, *Report of the Committee on Amendments to Criminal Law* (2013).

¹⁵ The Criminal Law (Amendment) Act, 1983, § 3.

¹⁶ The Criminal Law (Amendment) Act, 2013, § 9.

¹⁷ **THE BUSINESS STANDARD**, *Was any research done before ordinance on POCSO Act amendment, April 23, 2018*, available at https://www.business-standard.com/article/news-ians/was-any-research-done-before-ordinance-on-pocso-act-amendment-asks-hc-118042300784_1.html.

the heinous nature of the case beyond reasonable doubt.¹⁸ Circumstances are also considered while determining the sentence under the Act. It has also increased the quantum of penalty in such cases. The Act has also brought significant changes in the application of POCSO Act, and has introduced death penalty for penetrative sexual abuse.¹⁹

Certain features of the Act are: -

- Avoidance in delay of trial and its completion within 30 days subject to extension of concerned authority.
- Till the passage of the Act, any harm to the modesty of women was considered a crime, but now in addition to this any threat to a women by any means shall also be an offence under IPC.²⁰ The offender here can be of any gender and the Act can be via any mode, physical or electronic.
- With the advent of technology, the mobile data companies can be made to furnish any data within 3 days, required for the cohesive investigation of POCSO case.
- The Act has also catered to the problem of false sexual harassment cases, and has mentioned appropriate penalty for the same.
- The option of anticipatory bail has been revoked, and only session and higher courts are authorised to grant bails in well-analysed situations.
- The Act states that bail in cases of acid attacks, rape and gang-rape can be decided only by Sessions court and higher courts. Grant of anticipatory bail in such cases has also been prohibited.²¹

However, like any other legislation, the Shakti Act has also faced severe criticism and has been called draconian²².

¹⁸ THE INDIAN EXPRESS, *Explained: Maharashtra's Shakti Act that approved death penalty for rape*, December 30, 2021, available at <https://indianexpress.com/article/explained/explained-maharashtras-shakti-act-that-approved-death-penalty-for-rape-7694231/>.

¹⁹ *Id.*, 18.

²⁰ The Indian Penal Code, §354.

²¹ *Supra* note, 18.

²² THE PRINT, *The Maharashtra Shakti Bill on crimes against women, & why it's called 'draconian'*, available at <https://theprint.in/theprint-essential/the-maharashtra-shakti-bill-on-crimes-against-women-children-why-its-called-draconian/567660/>.

Chapter 3 - Death Penalty Vis-À-Vis Society's Collective Conscience

- *Deterrence theory of punishment*

Often a times, whenever we listen about such heinous incidents, the very first reaction that comes out is to hang the offender. So is the calling of the mass population. To begin with, it is important to look from the policy point of view, as to why it still exists in our criminal justice system. One of the foremost reason is the “*Deterrence theory*”, as it is widely believed that harsher the punishment, stronger the effect. If a person is given death penalty, others would think twice before committing the same crime. However, it has been observed that not much efficacy of the theory is seen in the past few decades. The increase in rate from 121 to 186 in the span of one year i.e. 2017 to 2018.²³

On the other side, many scholars argue that in Indian scenario, where trial is time consuming and torturous for victim, the harsher punishment serves no purpose in favour of victim. It is also a fact that to avoid shame, and unnecessary delay victims often do not report the cases, then merely amending the amount of punishment will not solve the actual problem.²⁴

It is wiser to examine the efficacy of death penalty by observing the numbers, and the statistics speaks in against of death penalty having deterrent effect in the society. The best solution to the problem is strengthening the executive and judiciary which can remove the impediments in the way of criminal justice system, so that real efficiency of capital punishment in Indian scenario be realised.

- *Capital Punishment or political Blandishment?*

It has been often a times, scrutinised that to hide a bigger problem, politicians tend to resort to some unethical ways using the veil of ethics. Similarly, instead of solving the actual cause of rape and improving safety valves for women, they take harsher measures on the offender, in order to skip the wrath of public. Institutional reformation has never been their priority, which can be the solution ultimately. Scholars have analysed that vote bank politics is one of the reasons behind it. Even if the state lacks capacity to take any reformative action, they resort to harsh punishments so that they can be remembered during their tenure.²⁵

²³ Ministry of Home Affairs, National Crime Records Bureau, *Prison Statistics of India 2018*.

²⁴ Ministry of Home Affairs, National Crime Records Bureau, *Crime in India Statistics 2019*.

²⁵ DAVID GARLLAND, *The Culture of control: crime and social order in contemporary society*, (2001).

Chapter 4 – Feminist Theory Vis-À-Vis Death Penalty

“Words of sexual or racial abuse and humiliation will be nonsensical syllables in a society where equality is a truth, not just a term.”

- Catharine A. MacKinnon

It has often been contested by many feminist scholars that capital punishment or death penalty is a staunch promoter of the patriarchal mind-set. They pose this argument defining the fact that women’s honour and respect is not associated with her sexuality. The fact that women have the right to choice as do men have, is disregarded when the claim of death penalty is arisen, as in this way it promotes the notion that life of a women is equivalent to a dead person after she is raped. This in a way, also leads to double victimisation of women, limiting her scope of reconciliation with the society.²⁶

However, the other school of law promoting deterrent theory of punishment argue that the heinousness of the crime cannot be responded in any other way but death, and it shall bar other people of society in committing the same.

The paper, nonetheless opines that this incessant debate needs a lot of deliberation, in light of the practical difficulty a victim faces post the crime. The mental agony she suffers is irreparable. Therefore, the approach should not only be to punish the accused but also to take steps to bring the victim’s life back on track.

Chapter 5 - Substitutive Solutions To Death Penalty **And The Need Of Sentencing Policy**

One of the major flaws in our criminal justice system is lack of a stringent framework for the judiciary and executive to adhere to. The famous *Malimath committee* took the initiative to highlight the need and importance of sentencing policy in India.²⁷ It cannot be denied that under political and societal pressure, the judiciary tends to take subjective decisions. In order to avoid the situation, in which a person’s right to life is taken back and the other person is given relatively lesser punishment in similar circumstances at some other place, the desire to bring uniform framework was posed. For curbing this uncertainty, it was proposed that there should be an establishment of a body headed by the retired judges of the apex court which can draft

²⁶ N. MENON, *Statement by women’s and progressive groups and individuals condemning sexual violence and opposing death penalty*, (2012) available at http://www.chsj.org/uploads/1/0/2/1/10215849/womens_statement_english.pdf

²⁷ Justice Malimath Committee, *Report of the Committee on Criminal Justice Reforms* (2003).

the policy. But like any other proposal, this was not given much heed, however, the matter was brought up again by *Dr Menon*²⁸. Taking into consideration that the penalty for rape varies widely from ten years to capital punishment, it is of utmost significance to have a defined policy framework. Various high courts and Supreme Court from time to time have also discussed the issue, but all in vain till date. Hon'ble Supreme Court in *Prem Sagar's case*²⁹, determined that penalty varied from state to state for similar circumstances, and held that it was highly problematic. In another case, it highlighted that sentencing policy is the most fragile aspect of the entire system.³⁰

This research paper is however, of the opinion that even though it is not wrong to say that India is in dire need of uniform and stringent sentencing policy, but it cannot be denied that a certain amount of discretion has to be vested on the judiciary. No two rape cases are absolutely same in nature, and it the case is highly dependent on the circumstances, henceforth a little amount of subjectivity has to be present in the decision. The author also extends the support in favour of such policy to come into existence which can remove the loopholes in the system mentioned above.

- *Alternative to Capital Punishment*

The argument of human rights versus death penalty acquires fire whenever anyone is penalised with the same. There has been a drastic change in the approach taken by the public at large. The public who at once, supported the idea of capital punishment as the only solution is now thinking in a different way and accepting feminist view point and restorative justice.

The *International Covenant on Civil and Political Rights (hereinafter ICCPR)*, establishes the international legal instrument which favours the right to life and human rights of each individual.³¹ Even though the covenant does not have the authority to completely ban the capital punishment globally, however it sets up the plan which directs the states regarding commutation of sentencing etc. Similarly, organisations like *COSA (Circles of support and accountability)* have demanded the sentencing system to take a back gear and shift to restorative justice, which will ultimately preserve the human rights.³²

It is important to understand what actually is meant by restorative justice. Where other forms of punishment focuses on penalising one party in order to give justice to the other, restorative justice provides opportunity to both victim and offender to reconcile with the society and a

²⁸ Professor Dr. NR Madhava Menon Committee, *Report of the Committee on Draft National Policy on Criminal Justice* (July, 2007).

²⁹ *State of Punjab vs. Prem Sagar and Others*, SLP (Crl.) No.4285 of 2007.

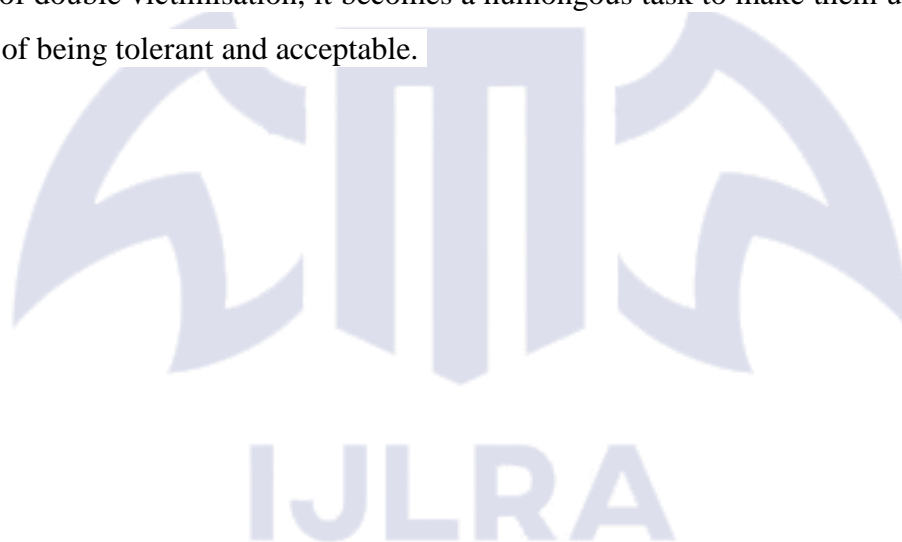
³⁰ *Soman v State Of Kerala*, CRIMINAL APPEAL NOS.1533-1534 OF 2005.

³¹ 262nd Law Commission Report, 2015.

³² International Covenant on Civil and Political Rights, Article 6.

chance to guilty to repair the harm caused.³³ It gives an option to offender for self-realisation and limits his chance to re-commit the crime, additionally preserving his right to life and his role in the society. The major objective of COSA is two-fold that is to establish a sense of duty in each individual of the society towards one another and simultaneously finish the root cause. However, the approach seems easy in principle but is very difficult to apply as it requires each member of the society to be acceptable and tolerant enough to let the offender reconcile with them and behave normally with them.³⁴ Considering its positive effect, it can curb the problem in a long term basis. Statistical data of COSA has from time to time shown the positive outcome as the number of re-offence committer has reduced radically.³⁵

Nonetheless, the paper would like to highlight its shortcomings in the third world countries. India is a country where women are given the status of goddess, but if any mis-happening occurs, then the same women find death to be the safer option than to live in the society that questions her integrity again and again. Where the mass population is illiterate and is the perpetrator of double victimisation, it becomes a humongous task to make them understand the importance of being tolerant and acceptable.



³³ Demleitner, *Types of Punishment*, THE OXFORD HANDBOOK OF CRIMINAL LAW (2014).

³⁴ HAZEL KEMSHALL, *Understanding the community management of high risk offenders*, (2008).

³⁵ M. HOING, *A more ethical way of working: Circles of Accountability*, The Wiley Blackwell Handbook of aspects of sex offender's treatment and management, (2013).

Conclusion

Death penalty in all circumstances has been a matter of controversy and bone of contention between two schools of laws, one which advocates the right to life of each individual and the other which sees the deterrent effect of it. Post the 2018 amendment in criminal law parlance, scenario has changed a lot as it catered to the need of rational and justified cause before administering the capital punishment in rape cases of minor girls. The argument of morality in capital punishment can be used in both ways, favour and against. India, has shown a substantial support towards the capital punishment which can be witnessed from the statutory framework present. Using the qualitative and quantitative method of research, the paper has highlighted how far has the capital punishment or death penalty been successful in causing deterrent effect in the society. The paper has come to the conclusion based on the empirical data that the goal of the law makers has not been fulfilled and it is time for bringing the changes in the criminal justice system, not only in sentencing policies but also spreading awareness in the mass. The paper also concludes that it is high time to end the patriarchal notion prevailing in the society that women's honour is related to her sexuality and any harm to it will end her honour. She has similar right to choice as men. There is a dire need of policy change and institutional restructuring. Restorative method can be opted via help of closely knitted people's association and NGOs, who deal with public at ground level. As has been mentioned by judges, a stringent sentencing policy should be formulated. The paper opines that complete removal of discretionary power of judiciary is not a viable option, and therefore it needs to be considered while drafting the blueprint.