

Research Article

Human Right Versus Retributive Justice: The Debate on Capital Punishment of Rape

Sampada Gautam*, Dr. Mahendra Singh Meena**

* Research Scholar, University of Kota, ** Assistant professor, Government Law College, Kota (Rajasthan).

Corresponding Author: Sampada Gautam

Abstract: This article analyses the controversial matter of the death sentence in allegations of rape, investigating its consequences on human rights and the constitutional right to life. A historical review of the development of the death sentence follows the introductory section, which establishes the context for the debate. The article subsequently explores the correlation between crime and punishment in Muslim Law, therefore offering a framework for the ongoing discussion. A comprehensive analysis is conducted on the legal status of the death sentence in India, with a specific focus on its implementation in cases of rape. Furthermore, the latest modifications in Indian criminal legislation are also examined. The article contends that the death sentence infringes on human rights, breaching the Indian Constitution's assurance of the right to life. The conclusion succinctly outlines the results, underlining the significance of adopting a well-balanced strategy that gives equal importance to justice and the preservation of human rights.

Keywords: Capital Penalty, Constitutional Rights, Fundamental Human Rights, Islamic Law, Statutes Against Rape

INTRODUCTION

The concept of death penalty as an punishment started from last of 18th century B.C. It was in the Code of King Hammurabi of Babylon who initiated this for more than 20 crimes. In Britain it was initiated somewhere in tenth century A.D. By influence of Britain America also initiated the punishment of capital punishment in fact in more than 220 crimes as listed by their government. If researcher study about the historical background of death penalty in Indian aspects, then it can be seen from way back of 4th century. *Kalidas* has beautifully observed the need of death penalty.¹ India is such country where crime and criminals are such huge in number. Law is a tool to control the society. Crime and criminals are running parallely with never ending process. There is controversy on the question of abolition of death penalty. One side it is the procedure established by law and is awarded for the most heinous and grievous offense.²

Authors categorised controversy in to two parts:

↑ control crime by imposing punishment

↓ Article 21, No Person shall be deprived of his life except process established by Law.

¹ Quoted in Shukla Das , Crime and punishment in Ancient India , Abhinav Publications, New Delhi , 1977.p56

² Available at, <https://knowlaw.in/index.php/2021/05/24/death-penalty-judicial-dilemma-sentencing/>

Though IPC {Now Bhartiya Nyay Sanhita, 2023 (BNS, 2023)} provides a death sentence as a punishment for various offenses such as criminal conspiracy, murder, waging war against the government, abetment of mutiny, dacoit with murder, and anti-terrorism. Since independence, there have been fifty-two capital punishments that have taken place in India and twenty-two capital Punishments that have taken place since 1995.³

EVOLUTION OF DEATH PENALTY

In fact, need of capital punishments have been discussed in Ramayana and Mahabharata. The Ashoka great also not denied capital punishment in case of state offences. The basis of the Dandniti in India were deterrence and mental rehabilitation. The concept of social defence clearly and non-correctional theory is the very much apparent factor in Indian penal system. it is also found in the Kautilya's work.

According to Kautilya:

Punishment was the universal means of ensuring public security.

According to some jurists of law Brahmins were exempted from death penalty and they were awarded banishment otherwise, while still we can see some examples in the history were death penalty was awarded to a Brahmin and therefore, they cannot be called to be totally exempted.⁴ The Muslim jurisprudence also state about the concept of capital punishment, the main purpose death penalty is to deterrent society to do such acts which are against their personal laws or laws meant or declared by Prophet Mohammad.⁵

CRIME AND ITS RELATIONSHIP WITH PENALTY IN MUSLIM LAW

The universal Declarations of Human right 1948 mentioned that-

"everyone has the right to life" and "no one shall be subject to torture or to cruel , inhuman or degrading treatment or punishment"

In American Declaration of the Rights and duties of Man also state about the above said declaration in their constitution.

In drafting of UDHR 1948, drafters have seen all nations constitution in which it found that the right to life is basic right and hence, it has been added in UDHR. However, it is also true that all nations have borrowed ideas of framing of constitution from each other nations. Broadly from: Britain, America, French declaration etc. But after framing of UDHR 1948 the concept of Right to life has been taken broader concept than it was before in other nations because it has included various aspects in this.

In European convention of Human Rights, it came into existence in 1950's it also broadly deals with the provision of Right to Life, here also it has been stated clearly that the right to life is subject to conditional on execution of death penalty if it is specified by the particular law of the land.

These examples of international laws in context of death penalty. However, by virtue of article 6⁶ of international covenant on civil and political rights it has been cleared that the death penalty

³ *Ibid.*

⁴ Dr.Sen P.N. *Hindu Jurisprudence.*

⁵ chapter -2 historical background – origin and evolution of the concept "shodhganga" (Also available at shodhganga.inflibnet.ac.in

⁶ *Ibid.*

cannot be used as matter of course rather it required some exceptional cases which contains the seriousness in intention and crime also.

In fact General Assembly recognized that:

"In case of death penalty there is need for high standard of Fair Trial"

Trial should be Just, Fair and Reasonable. Due process of law and rule of law are basic two elements to execute death penalty as one of the punishments.

DEATH PENALTY AND ITS LEGAL POSITION IN INDIA

The death sentence has been given in Indian legislation not as matter of course rather it is based on theory of rare and rarest cases.

• Indian legislature on capital punishment

There are various legislatures in India which manifest capital punishment. There are almost 18 legislations which have been enacted by central government and that contains around 59 sections in these enactments. The central enactments which deals with the capital punishment are as follows:⁷

○ *Capital punishment in BNS, 2023:*

- a) Section 147: Treason, for waging war against the Government of India
- b) Section 160: Abetment of mutiny actually committed
- c) Section 230: Perjury resulting in the conviction and death of an innocent person
- d) Section 232: Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
- e) Section 103: Murder
- f) Section 107: Abetment of a suicide by a Minor, insane person or intoxicated person
- g) Section 109: Attempted Murder by a Serving life Convict
- h) Section 140: Kidnapping for ransom
- i) Section 66: Rape and injury which causes death or leaves the woman in a persistent vegetative state
- j) Section 71 Certain repeat offenders in the context of rape

DEATH PENALTY IN RAPE CASES

In spite of legal restriction imposed on illegal sex indulgence, the incidence of this vice is on a constant increase. The obvious reasons for the upward trend in sex offence is that sexually which is bio –physiological phenomenon is as essential to human organs as food and water.⁸

• The Doctrine of Rarest of rare:

In India there is perplexing aspects in implementation of death penalty. In entire world there are more than 110 countries which have completely discarded death penalty in any form of crime, irrespective of gravity in nature of offences. But in Indian laws it is not banned or abolished rather it has become more active from last few decades. Here, in India capital punishment is not award as matter of course rather award on the basis of theory of *Rarest of Rare Cases*, as we have already mentioned the list in aforesaid paragraphs, that which sections of Indian penal code and other enactments applies or deals with death penalty. However, the most common death row convicts are in cases of Rape including murder in cases of terrorism.

⁷ Prof. N. V. Paranjape, *Criminology, Penology, Victimology* 17 (Central Law Publication, 17th edn., 2017)

⁸ *Ibid.*

Before theory of rarest of rare case there was a judgement:

Jagmohan Singh vs The State of U. P on 3 October 1972

In this case Supreme Court Left the discretion upon the judge to fix the maximum penalty and stated that the imposition of the death sentence is the exercise of discretion.⁹ In this case Marshall, J. observed as follows:¹⁰

"There is but one conclusion that can be drawn from all of this -i.e., the death penalty is an excessive and unnecessary, punishment which violates the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have laboured to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally as well. And they have done so with great success. Little if any evidence had been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that Judges can determine not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment."

The Doctrine of rarest of rare case has been originate in way back 1980's in case of **Bachan Singh v State of Punjab**¹¹ in this case Hon'ble Supreme court of India determined the constitutional validity of death sentence but such punishment would be given on this doctrine i.e 'Rarest of rare case'. In this case the Hon'ble court elaborated two questions in which stated where life imprisonment would be insufficient:

I. Was there something unusual about the crime interpreting a life imprisonment sentence insufficient.

- **Doctrine in Rape cases:**

In the case of **Nirmal Singh & others v. State of Haryana**¹², here in this case accused Dharampal and Nirmal were convicted for murder of 5 persons on the evidence of two eye witness s, in first case against accused committed rape on Poonam , due to which he imprisoned for ten years but he wanted to go for appeal , and then during appeal he given treats to all family members of Poonam whose deposition was responsible for Dharampal's conviction. But he killed all five members of Poonam from khulhari in which hon'ble court awarded him death sentence as such merciless and brutally killing falls in rarest of rare case theory.

Sushil Murmu v. State of Jharkhand¹³, reiterated the 'rarest and rare case' doctrine and held, "when collective conscience of the community is shocked and it will except the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence must be awarded."

⁹ Available at, <https://knowlaw.in/index.php/2021/05/24/death-penalty-judicial-dilemma-sentencing/>

¹⁰ Available at, <https://indiankanoon.org/doc/1837051/>.

¹¹ AIR 1980 SC 276

¹² AIR 1999 SC 1221

¹³ AIR 2004 SC 394

In ***Priyadarshini Mottoo Rape case***¹⁴, held that where the court feels some difficulty in, making choice between the award of death sentence or life imprisonment, the appropriate course would be to award lesser sentence while choosing between the two punishments, both aggravating and mitigating circumstances should be weighed. In the instant case, the appellant committed rape and murder of a hapless junior colleges LLB student for having rebuffed his amorous overtures after causing her long harassment. He inflicted her 19 injuries after raping her. His acquittal by the trial court was reversed by the Delhi High Court and he was sentenced to death. In CASE - ***Mukesh & Anr v. State of NCT Of Delhi & Ors (2017)***

This case is the one which typically crossed all limits of inhuman treatment, here accused treated female named "Nirbhya" as an object. One night of Delhi on 16th December 2012, a 23-year-old girl was brutally raped in moving bus. She was returning with her friend after watching movie and they boarded an off-duty bus at bus stand in which six other men included driver were there. But after some time, the friend of Nirbhya found that the bus is moving in off route direction. The friend of her found suspicion and asked to driver to stop the bus but they could not.

Thereafter, they beaten her friend then all of them assaulted the female and gang raped her for an hour there after they drove the bus in entire Delhi. One of accused who is Juvenile attackers inserted an iron rod into her genital area. Due to which she got major injuries and after that they through her outside of bus.

Due to these injuries, she could not survive. But after 7 years of this brutality, she not justice as the decision executed on date 20th March 2020 on which all four accused hanged till death.

ALTERATION IN INDIAN CRIMINAL LAWS

There are certain Amendment relating to rape in Indian penal code (now Bhartiya Nyay Sanhita, 2023)

- ***The criminal Law Amendments Act of 1983:***

- *Amendment relating to Indian Penal Code:*

This amendment came into effect after Mathrua Rape case, in year 1972, this case broadly dealt with the custodial rape case which happened within the police station of Desaijanj in Maharashtra. It was alleged by the victim that she has been ravished by two police officer of the same station. But the conviction was not given to accused persons rather they acquitted in final appeal of supreme court of India.

But this judgement given huge outcry in public at public at large and insisted the government to bring amendment in IPC by The criminal law amendment act 1983. The broad area relating to provisions of rape amended such as, section 228-A i.e. Disclosure of identity of victim of rape, section 375-Rape IPC (s.63 BNS, 2023), section 376 (s.64 BNS, 2023) i.e. Punishment of rape, Section 376 A (s.66 BNS, 2023) - intercourse by a man with his wife during Separation, Section 376 B (s.67 BNS, 2023) - Intercourse by public servant when woman is in police custody, section 376 C (s.68 BNS, 2023) - Intercourse by superintendent of jail, remand home etc, Section 376 D (s.70 BNS, 2023) Gang Rape, section 498 A (s.85 BNS, 2023) Husband or relative of husband of woman Subjecting her to Cruelty.

¹⁴ AIR 2012 SC 3565

- **Code of Criminal Procedure, 1973**

Section 327 (2) and 327(3) {s.413 Bhartiya Nagrik Suraksha Sanhita, 2023 (BNSS, 2023)} relating to rape trial, that to be conducted in camera proceedings and no person to be allowed to publish or print any matter relating to proceeding.

- **Indian Evidence Act, 1872**

Section -113 A {s.117 Bhartiya Sakshya Adhinyam, 2023 (BSA, 2023)}, Presumption as to abetment of suicide by married women. Section -114 A {s.120 Bhartiya Sakshya Adhinyam, 2023 (BSA, 2023)}, Presumption as to absence of consent.

- **Criminal law Amendment Act of 2013**

This Amendment came into existence after the Rape case of Nirbhaya 2012, this case given a big blow on the protection of women at Global level. This incident given united call of all people to ask from entire system, to bring change in Criminal law, and to bring harsh punishment in such kind of heinous crime. However, In March 2020, Four Remaining accused were hanged till death.

- **Amendment in BNS, 2023 are as follows:**

Section 199 - Public servant disobeying direction under law

Section 200 - Punishment For Non treatment of Victim

Section 74 - Assault or criminal Force to woman with intent to outrage her modesty

Section 75 to Section 78

DEATH PENALTY AS VIOLATION OF HUMAN RIGHTS

Article 21 as constitutional right to life:

"No one can take life of other without following Due Process of Law".

There are different issues which one raised with Death Penalty. Indian penal code (IPC) provides for Death Penalty as one of the forms of punishment. On the other hand, as per International convention, Article 6:

"Every human being has an inherent Right to life"

This convention has been ratified by India. So, according to this ratification, it is very clear that India is in favour of abolition of Death Penalty. By these, two issues, there are two groups who are standing in favour & against the abolition of Death Penalty.¹⁵

In favour of abolition of death penalty:

"Death Penalty is inhuman and violation of Constitutional Rights to life of a human being".

On the other hand, those who are against to abolition of Death Penalty has contention that¹⁶:

"it Death Penalty is abolished, then there may not be effective justice system in the society and the graph for crime against innocent section will raise too high"

The most practicable and representative public opinion of India was concluded by our first Prime Minister Pt. Jawahar Lal Nehru:¹⁷

¹⁵ Sarda Mukund, Capital Punishment: A Violation of human rights: A Study (January 5, 2016), Available at SSRU: <https://ssru.com/abstract=2711104>.

¹⁶ *Ibid*.

¹⁷ Venugopal Rao, Facets of crime in India (1962); pg.136.15 The Times of India, March 3,1983.

"At one time I was strongly opposed to death penalty and in theory my opposition still continues. And yet with all my repugnance for executions feel that some method or eliminating utterly undesirable human being will have to be adopted and used with discretion."

Similarly, Mrs. Indira Gandhi stated as¹⁸:

"I am personally in favour of abolition of capital punishment. But certain crimes were heinous in nature and deserved punishments."

HUMAN RIGHTS AND INDIAN CONSTITUTION

Indian constitution is not directly and expressly dealing with human rights but there may implied expression which is as follows¹⁹:

I. Human Rights are implied as civil liberties in form of fundamental rights i.e. Article 14 to 32 under Indian Constitution.

II. Human rights are also implied as Democratic rights in form of DSPP under Indian Constitution.

There is also accepted fact about the human rights is that they have always been regarded as the backbone of every democratic country or set-up.

CONCLUSION AND SUGGESTION

Question concluded that:

Whether death penalty is treated as tool to infringe the fundamental right or Human rights to live or not?

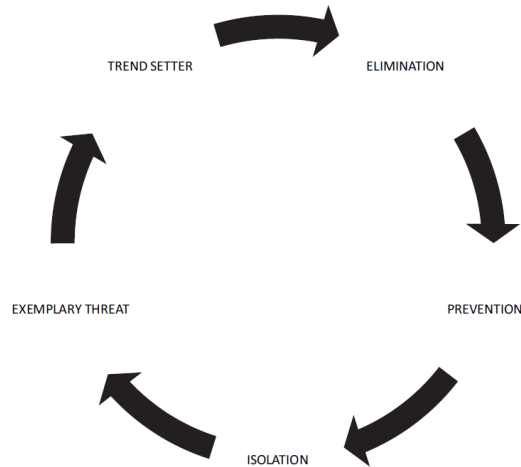
Researchers summed up that if death penalty is executed as per due process of law then it can be prove as best tool to control heinous crime against society. If we make punishment free India then there is every chance that crime rate against society will break records. It is somewhere impossible to control society without deterrent theory. Researcher here wrap up this discussion with the question - Whether any other punishment can possess all the advantages of Death Penalty is a matter of doubt?

Answer of this question is deterrent theory of punishment. This theory emphasis more on protection of the society from offenders by eliminating offenders from society. Deterrent punishment such as death penalty should be an example to society and person who have tendency to commit similar crime. This theory results in eye for eye , So it reduce crime rate in society by elimination of criminals.

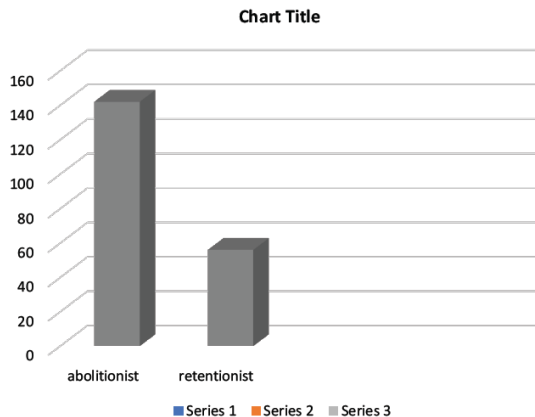
Application of this theory has following justification:

¹⁸ The Times of India, March 3,1983.

¹⁹ Rakesh Bhatnagar, Capital punishment violates human rights and the constitution, for more details see, [http:// the quint.com](http://thequint.com) , published on 06 , September 2015.



So, the world scenario for the death penalty for its retention and abolition is described in the given below image²⁰:



Most countries, including almost all experience first world war nations, have proposed abolished capital punishment either in law or in practice. The notable exceptions are the :

- I. United states,
- II. Japan
- III. South Korea
- IV. Taiwan

Additionally, capital punishment is also carried out in China, India and most Islamic states. The United States is the only western country to still use the death penalty.²¹

As we all know crimes against women have increased to such an extent which has become matter of concern for the lawmakers and it is now very high time which is essentially requires to know the actual root cause of this problem. It is also notable whenever there is a crime against women, children, old-age people or mentally challenged people and such crimes are barbaric in

²⁰ Data is collected from secondary source, https://en.wikipedia.org/wiki/Capital_punishment, accessed on 09 September 2020.

²¹ Available at, https://en.wikipedia.org/wiki/Capital_punishment, accessed on 12- September 2020.

nature then the law should be as strict as it can be. No mercy should be awarded against those criminals.

Whenever any heinous crime such as Rape and Gang Rape committed then the punishment for those crimes should be very strict and by virtue of that punishment there must be a message to the entire society that is if anyone would dare to do such kind of heinous and barbaric in nature. Further, there should be more swiftness for punishment for these kinds of crimes and there should be no mercy petition allowed.

If these kinds of hard steps would take then only a positive message would go to the society and there should be zero tolerance against such crimes. There can be no doubt about that punishment of capital very justified in its nature whether it being moral or legal. If India being such a huge democratic country removed this punishment from its execution, then it will be very easy for criminal to move freely after killing someone or after doing any kind of heinous crime specially Rape and gang rape. In final analysis, it can be seen that the punishment of death sentence, is not against social justice and protection of society from hard core criminals.

The death penalty cannot be asked on the ground of its constitutionality. Yes of course it should not be imposed arbitrarily, unreasonably, discriminatorily, freakishly or wantonly, but if it is administered rationally, objectively and judiciously, it will develop people confidence on Indian legal and judicial system.

Citation: Sampada Gautam & Dr. Mahendra Singh Meena 2024. "Human Right Versus Retributive Justice: The Debate on Capital Punishment of Rape". *International Journal of Academic Research*, 11(3): 175-183.

Copyright: ©2024 Sampada Gautam & Dr. Mahendra Singh Meena. This is an open-access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.