

DEATH PENALTY FOR RAPE: DEBATE ON DEATH AS A DETERRENT SENTENCING POLICY IN INDIA

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Abstract: *In order to deter criminal behaviour and make the offender pay for their actions, all punishments must have deterrent and punitive effects. Executing a criminal is what is meant by the death penalty. While it is permitted by law, doing so would violate Art. 21's protections for life and human dignity in India's constitution. This article provides a synopsis of the discussion around the death sentence in India. In addition, the background of the death penalty and the results of various Law Commission studies are detailed. The research's ultimate goal is dissected with discussions of the death penalty's many applications and various methods of execution. The research found that all verdicts granted in heinous crimes were reached with the general population in mind, leading to the conclusion that awarding a death sentence in the rarest of rare situations is rational and fair. Human rights are violated, and the report argues that the law should use some other kind of capital punishment instead. Case in point: mandatory life sentences.*

Keywords: *Capital Punishment, Sexual Assault, theory of Deterrence, Rarest of the rare.*

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Introduction

The death sentence, sometimes called capital punishment, is the most severe kind of punishment that may be meted out to criminals. Only the worst criminals, those who commit murder, rape, or treason against their nation or state, are put to death. An notion that every criminal should be punished for his crime is the cornerstone of all punishments worldwide. There are two main foundations upon which all punishments are founded.

The first is that those who break the law should feel the consequences, and the second is that the threat of punishment deters would-be offenders and deters others from engaging in criminal behaviour. Hence, it discourages others from engaging in similar behaviour. The purpose of all punishments, including the death penalty, is to discourage criminal behaviour. The ultimate punishment is reserved for the most heinous of crimes against humanity and that is the death sentence. As one would expect, it differs from country to country. Human rights advocates consider this as a threat to Article 21 of the Indian constitution.

In terms of punishment, the United Nations is more committed to "the Reformatory Theory of Punishment" than the Deterrent Theory. The precise cause must relate, not to the offense but to the



criminal, as J. V.R. Krishna Iyer pointed out in a case. It's possible that the criminal is not deserving of the death sentence, no matter how horrible the crime was. Forgiveness or postponement of death sentences is a power granted to the President and Governor of the Country or State under the Indian Constitution. If the court determines that the defendant's crime warrants a more severe sentence than life in prison, the death penalty may be imposed.

Despite the fact that the death penalty is constitutional in the country, just seven persons would have been put to death in India between the years 1998 and 2020. Between 2004 and 2013, 1303 people were given the death penalty for their crimes, but only three of them were put to death. No executions were carried out at any time between 2004 and 2012. There were 3,751 people whose death sentences were changed to life sentences throughout the preceding two decades. In July 2007, a court found Yakub guilty and condemned him to death along with 11 others. By a special court for involvement in the 1993 explosion in Bombay that killed over 260 people and injured many more. The Supreme Court confirmed Memon's death sentence in March 2013, but commuted the sentences of ten others to life in prison and one person subsequently died in jail.

1. Capital Punishment During Ancient Times

Capital punishment, as the death sentence is commonly known, has been a contentious issue in the courts of many contemporary nations, not just India. Throughout India's history, kingdom rulers have often used the death sentence as a means of dispensing justice. An eye for an eye, a hand for a hand, etc., was the guiding principle of punishment during the Mauryan dynasty. The monarchs of such nations also had the power to inflict the death sentence, which may take the form of anything from a slash to the neck to a slow and painful death by dragging the corpse behind a horse.

King Hammurabi of Babylon formalized the death penalty in his criminal code in the 18th century BCE, making it the first such legislation in the world. The death sentence is in effect for over twenty-five offenses under Hammurabi's law, including theft and perjury.

In the 7th century B.C., during the time of The Draconian Code of Athens, the sole punishment for any offence was the death sentence. The word Draconian is now often used to describe severe penalties. To carry out a death sentence in the United Kingdom in the 10th century, hanging was a typical procedure. There were around 200 crimes in Britain that carried the death penalty in the 1700s, making it one of the countries with the highest rates of execution.

In 1608 during the United States' colonial period, authorities from the government of Virginia recorded the first documented execution of the death sentence for a crime related to a plot to betray the British to the Spaniards. The death sentence was routinely used in 1612, even for very minor offences.

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Death Penalty in Rape-The Western Viewpoint

The American Civil Liberties Union and the NAACP Legal Defense and Educational Fund filed a "amicus brief" in favor of the defendants in *Kennedy v. Louisiana* in 2008. In this filing, it was contended that "the death sentence was legally illegal for any violent offense where the victim was not dead, including child rape."

The death penalty for rape has traditionally been a Southern occurrence, meted out mostly to black prisoners and in cases where allegations of rape against a white woman or child were made. While raping a white woman constituted a capital offence in every Slave State, no white man was ever put to death for the crime. If a white man attempted to rape a white woman in the Slave States, he faced the death sentence. Slave owners had the legal authority to compel their slaves to engage in sexual acts with them, and rape of the an African woman was regarded as an offense against property. When the Georgia penal code was enacted in 1816, it "stated explicitly that sexual assault chosen by a white man would have been penalized by the jail sentence of or not more than twenty years, and tried

¹Shivani, "Execution of capital punishment in India: Is it a violation of human rights?" 8 *IJAR* 254 (2020).



sexual assault by a prison term of not more than five years, but that slaves" faced a maximum sentence of twenty years in prison.

With the end of slavery and the Civil War, lynchings and other forms of extrajudicial killing became commonplace. Almost a quarter of all lynchings in the South between the end of Reconstruction in 1877 and 1950 were motivated by accusations of sexual assault, according to the study *Lynching in America* by the Equal Justice Initiative. Hundreds of other African-Americans were killed for petty offences such as accidentally brushing against a white lady.

There were 405 black people there (89.1%). The death sentence for rape remained mostly a Southern phenomenon: Former Confederate states accounted for 443 (97.4%) of the rape-related executions.²

Sexual assault and other forms of sexual misconduct often include a lack of consent. To violate the law, one must either force another person to engage in sexual contact against his or her will, or establish that the other person lacks the mental capacity to provide informed consent. Regardless of whether or not a child under the age of fourteen or fifteen may understand the reason for the behavior and reject, they are legally deemed too young to provide informed consent (though see "Sexual Activity with a Minor," below).

Sexual Conduct by A Person In Authority

It is also unlawful in many locations for a teacher, police officer, or prison guard to have sexual relations with a pupil, person in police custody, or prisoner over whom the teacher, officer, or guard has authority. The argument in favour of criminalising such conduct is that the student or even other individual's ability to consent is compromised by the teacher's or other authority figure's position of power over them.

Sexual activity between a psychotherapist or some other mental health care physician as well as a client or patient is illegal in many states on the grounds that the client's or patient's vulnerable status and the nature of the therapeutic relationship make it impossible for the client or patient to give informed, voluntary consent.

Deterrents and Punishment

The victim's age or social standing, as well as the specifics of the offence, may all affect the severity of the sentence imposed for rape. In certain states, a judge must impose a jail term without the possibility of probation or early release.

Rape and other forms of illicit sexual penetration are often seen as serious crimes under the law and constitute sexual assault. Several states classify rape as either first or second degree depending on whether the victim was particularly vulnerable, the kind of force used, if the rape caused serious physical injury, and whether or not a hazardous weapon was used, such as a gun. The duration of a sentence and whether or not it may be served on probation rather than in jail is a matter of discretion for the judge in various countries.

The U.S.A. Experience

There is a system in place in the United States for tracking and alerting the public about sexually violent criminals in every single state. Those who have been found guilty of a sex crime are required by law to report the conviction to the state's central registry of sexual offenders. Sex offences encompass any crime that involves sexual penetration or sexual intercourse.

The most horrific of all crimes, rape and other forms of illicit sexual intercourse are sex offences. The defendant faces the possibility of a long prison term and the social stigma that comes with a felony conviction (and felons lose the ability to vote or own firearms). As the label "sex offender" carries such a negative connotation, the necessity to register as a criminal is seen by many as the worst punishment.

Defendants should get competent representation as soon as possible for these reasons. Your criminal defence attorney's job is to investigate your case thoroughly, help you present your case with the

² "Race,Rape,andtheDeathPenalty,*availableat*:<https://deathpenaltyinfo.org/policy-issues/race/race-rape-andthe-death-penalty.>"



strongest possible defence, and guide you through the criminal court system. Although sex offender registration is required for convictions of sexual assault, many of these cases end in plea deals for lower charges. If you decide to pursue a favourable plea deal, you will need the assistance of an expert who is familiar with the way local prosecutors and courts handle cases like yours.

Indian Law Commission Report on Death Penalty

In 1967, The Law Commission released its 35th Report on "Capital Punishment," which overwhelmingly favored the institution of the death penalty. The Commission says that when it comes to the choice between the death penalty and life in prison without parole, "the vesting of these discretion is fundamental and the legislation conferring this discretion are acting acceptably." The group also reached the conclusion that "India also couldn't take a risk by removing the death penalty," which would put people's lives at danger. The document goes on to say that "those that lack the financial means or for other reasons cannot sue in court, the law looks to be unfair to them," and that these people instead "concentrate on legal help rather than actual criminal law."

But, in 1987's *Mithu v. State of Punjab*, the Supreme Court struck down this clause as unconstitutional. Back in 2003, the Law Commission released a study titled "Mode of Execution of Death and Incidental Problems" (No. 187).

2. Cases in Death Penalty

Case I: Tukaram v. the State of Maharashtra³

The prosecution said that defendants 1 and 2 fondled the victim's privates inside the police station while committing a sexual offence. This was because her brother had filed a complaint against her spouse and his family. Police officer 1 is accused of separating the victim from her family and repeatedly sexually assaulting her. "This case did not meet the threshold for a conviction of rape under section 375 of the Indian Penal Code, the Supreme Court held. The justices ruled that there was no clear evidence to show physical damage or consent under fear since she was whisked away from her relatives secretly by the accused. The fact that she repeatedly altered her statement throughout the trial casts serious doubt on the veracity of her first evidence. As a result, the accusations against the defendant were dismissed."

The Criminal Law Amendment Act of 1983 was enacted as a result of this trial. Section 114A of the Indian Evidence Act was revised by the Act to make it clear that permission is not implied until it is granted expressly. The penalty for rape while in custody was likewise increased from 3 to 7 years in prison, and the burden of evidence was shifted on the accused after sexual intercourse was established.⁴

Case II: Vishaka & Ors. v. State of Rajasthan⁵

These private lawsuits (PILs) were filed in an effort to prevent sexual harassment of women in the workplace. The Court determined that the right to a risk-free workplace is a constitutionally protected interest under Articles 14(2), 19(1)(g), and 21. The Court also offered many recommendations for companies to implement in order to create a more positive and secure workplace for female employees. The federal government and the states were given orders to implement these policies by passing legislation.

The full extent of sexual harassment was decided by the Supreme Court. The law considers any unwanted sexual advances, comments, or gestures towards women, or any expression of sexual desire or a desire for women's sexual favour, to constitute sexual harassment. The court's order made it quite clear that a process for addressing claims of sexual harassment in the workplace must be put in place.

³1979AIR185,1979SCR(1)810.

⁴RachitaGarg, "LandmarkjudgmentsonoffencesagainstwomenundertheIndianPenalCode,1860" *IBLOGPLEADER*(2020)

⁵(1997) 6 SCC 241.



Case III: Laxmi v. Union of India⁶

In 2013, the case of Naeem Khan v. State raised attention to the issue of acid assault under Section 307 when Laxmi, a 16-year-old girl, was subjected to an appalling acid attack by the accused. This lawsuit was filed in response to this incident. Acid attacks are "crimes of passion" driven by emotions like rage or envy. Acid attacks on women are often perpetrated as a form of revenge for being refused sexual favours, marriage proposals, or dowry payments. Victims of acid attacks are disfigured and put through excruciating physical and emotional pain, yet the perpetrators of these attacks feel satisfied by their acts of revenge and jealousy. According to Section 357(1), the victim was awarded damages for her physical and mental suffering once the defendant was found guilty (b). The Laxmi case was filed to help pay for victims' medical bills and recompense them for their losses. Since the victim's suffering was so tremendous, the penalty outlined in the IPC isn't nearly enough to bring the perpetrator to justice.

The victim of an acid assault, Laxmi, filed a public interest litigation (PIL) petition with the Supreme Court. After the PIL, the Indian Parliament and Supreme Court adopted a set of recommendations for the humane provisioning and redress of those who had survived an acid assault. The evolution of Indian law affects many other statutes, not only the Indian Penal Code.

Case IV: Mukesh & Anr Vs State for NCT Of Delhi (Nirbhaya Rape Case)⁷

In one instance, a group of men gang-raped a girl while she and her companion were walking home from the theatre. One of the six male perpetrators was a minor of just 17 years of age. The convicts also attacked and beat up her friend, who was trying to protect her. Gang members raped Nirbhaya and did demonic things to her body. They ripped out her insides, leaving her naked and deformed. After almost a month of treatment, she passed away on December 29th, 2012 from cardiac arrest, multi-organ failure, and internal haemorrhage.

The three-judge panel of the Supreme Court acknowledged the defendant's heinous crime. The court recognised her case as the "rarest of the rare" and condemned her to death after assessing the nature of their deeds, how they damaged her physique, and how they lost her dignity. As a result of this case, Indian criminal law underwent extensive changes. The Criminal Law Amendment Act, which was passed in 2013, was the most major change.

Death Penalty as Deterrent

According to recently passed law in India's lower house of parliament, the maximum penalty for raping a child under the age of 12 is capital punishment. In an effort to prevent child sexual assaults, India's Minister for Women and Child Development, Maneka Gandhi, pushed for the change to POCSO. An 8-year-old girl was recently murdered and sexually assaulted in Indian-administered Kashmir, while a young girl was recently raped in Madhya Pradesh, the country's heartland. This is only the most recent of many high-profile cases of child abuse in India. The number of reported occurrences of child rape in India increased from 8,541 in 2012 to 19,765 in 2016, according to official crime statistics. When a medical student was raped and killed on a bus in Delhi in 2013, the Indian government resolved to execute all convicted rapists.

If passed, these rules will empower a court to order the death penalty against anybody found guilty of raping a child less than 12 years old, regardless of whether or not the victim dies as a result of the crime. India is still unwilling to employ the death penalty, even after these changes were made to the law. With the interpretation left to the courts, it is now only required in the "rarest of rare" circumstances. On March 20, 2020, the nation carried out its most recent execution.

International Instances of Rarest of Rare Case

While it is seldom carried out, the death sentence is authorized in India. The difficulty is that the phrase "rarest of rare situations" is not defined anywhere, neither by the Act nor by the Supreme

⁶(2014) 4 SCC 427.

⁷(2017) 6 SCC 1.



Court. The Supreme Court first used the expression "rarest of rare circumstances" in the 1983 case *Machhi Singh v. State of Punjab*. The expression "Rarest of the Rare Cases" references to the fact that the court, in a criminal trial, must choose the appropriate sentence by weighing the type and degree of the violation.

In *Sabiana v. State of Karnataka*⁸, Previous criminal convictions resulted in a life sentence for the accused. He killed his family while out on parole. The Supreme Court upheld a death sentence for him and said that murderers currently serving life sentences must also face the death penalty.

To reduce the overuse of the death sentence, the Supreme Court used the aforementioned method, which was well applauded. Nevertheless, it seems that lawmakers reacted negatively to this policy by adding new crimes to the criminal code for which the death penalty is granted. "Courts were required, until 1973, to provide written explanations for their decisions to impose life sentences rather than the death penalty for capital offences."

The Supreme Court ruled in *Jagmohan Singh v. State of Uttar Pradesh* that the death penalty is constitutional since it "would not only lower crime but also deter society from committing similar crimes." The Supreme Court, however, has made it very apparent that the death sentence is an exception that calls for case-by-case analysis rather than blanket judicial guidelines. To put it another way, "the new Code of Criminal Procedure, 1973, U/S 235(2) compelled the Court to explain the reasons for awarding the death sentence rather than life imprisonment."

3. Conclusions

The use of the death penalty is deeply divisive on moral and ethical grounds. Executing a person who has been found guilty of a heinous act in the name of justice is more than simply a punishment; it also shows a callous disregard for human life, which is contrary to the ideals of human rights. One's opposition to capital punishment does not always indicate sympathy for the perpetrator.

Constitutions in nations that allow the death penalty must nonetheless protect citizens' rights to life and dignity. Notwithstanding India's active membership in the UN and the UN's dedication to abolishing the death penalty, our nation still uses capital punishment. This is due to the fact that the current social climate is very hostile to victims of crime, as seen by shocking incidents like the gang rapes in Delhi, Hyderabad, and Unnao. To reflect the gravity of the offence, the punishment should be as severe. Thus, the death penalty is still in practise in India. The legislators and the judiciary should think on the elimination of crime rather than offenders when drafting new laws. To punish those who commit the most horrific crimes, the death penalty is not the only option.

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⁸(2005) 4 SCC 165



[14] (2005) 4 SCC 165

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