DEATH PENALTY IN RAPE CASES: ARE WE MAKING INDIA SAFE FOR ITS WOMEN?

**Shivika Choudhary**

I. INTRODUCTION

"There should be exemplary punishment in view of the unparalleled brutality with which the victim was gang raped and murdered, as the case falls under the rarest of rare category. All be given death."

- Additional Sessions Judge Yogesh Khanna in the infamous Delhi gang-rape case

On the fateful night of December 16, 2012, they showed the young woman no mercy, repeatedly raping her and brutally pulling out her intestines with an iron rod. While handing down the maximum punishment to the four convicts on September 10, 2013 the Court observed, "when crime against women is rising on day-to-day basis, so, at this point in time court cannot keep its eye shut." Even though the horrific events of December 16 evoked widespread protest and candle-light vigils, yet the wave of rapes still rage across the nation. The spring and summer of 2013 were marred by barbaric events such as the rape of five year old girls in Delhi and Gurgaon, the gruesome rape and murder of 20 year old college girl in Kolkata, and, most recently, the gang rape of a photo journalist in Mumbai as well as countless other incidents.

As per the report by National Crime Records Bureau, “Crime in India 2012” with 24,915 victims of rape, the year 2012 saw an increase of 3.0% in the number of rape cases over 2011. Alarmingly, offenders were known to the victims in as many as 24,470 (98.2%) cases. These figures not only

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**2nd year, LL.M. (Human Rights), National Law School of India University, Bangalore. Email: shivika.c@nls.ac.in**


2 Id.


present the violence against women, rather they symbolize the pitiable condition of the State machinery in its inability to protect its own citizens, its own women. The prevailing emotion at all branches of government and the masses at large, is the demand for withdrawal of the protective arm of society in such heinous cases, that is award capital punishment.

A. Death Penalty in Rape: the Indian Scenario

The roots of capital punishment lie in the theories of deterrence and retribution based on the idea that guilty people deserve to be punished in proportion to the severity of their crime. This argument states that real justice requires people to suffer for their wrongdoing, and to suffer in a way appropriate for the crime. India is one of the 78 retentionist countries (118 are abolitionist either completely or partially)\(^5\) on grounds of ‘rarest of rare cases’ and ‘for special reasons’\(^6\). The challenge to death penalty as being unconstitutional was rejected by Supreme Court in *Bachan Singh’s case*\(^7\), but the Court restricted the application of the death penalty to cases wherein ‘the alternative option is unquestionably foreclosed’. In a plethora of judgments, the court has repeatedly held that death sentence doesn’t offend article 21 of the Indian Constitution. Death penalty in rape cases is rarely awarded, for instance in the case of *Dhananjay Chatterjee*\(^8\). In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty.\(^9\) However, giving representation to the popular sentiments the Criminal Law (Amendment) Act, 2013 was assented on April 2, 2013. It has tremendously amended the Indian Penal Code, 1860 [IPC] and the Code of Criminal Procedure, 1973 [CrPC], and provided death in **only** two cases:

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\(^7\) Bachan Singh vs State of Punjab, AIR 1980 SC 898.

\(^8\) Dhananjay Chatterjee vs State of West Bengal. 1994 SOL Case No 275.

Sec. 376E provides that any person punished under sec. 376, sec. 376A or 376D and subsequently convicted of any of those sections, then he is liable to be punished with life imprisonment or death.

Sec. 376A provides punishment for causing death or vegetative state with imprisonment for 20 years to life imprisonment or death and fine.

It is, therefore, evident that capital punishment for rape may be awarded in cases of repeat offenders and causing death or vegetative state. On the other hand, there are countries that authorize death penalty for non-homicidal rape viz. Cuba, China, Egypt, Saudi Arabia and United States.

B. International Demand for Abolition of Death Penalty

There has been international movement for abolition of the death penalty based on the assumption that it fails to achieve the stated objectives of punishment, i.e., deterrence and just deserts. Cesare Beccaria wrote in 1764 that capital punishment is founded on vengeance and retribution, and not on reformation of the criminals and prevention of future crimes, which is the purpose of punishment. The International Covenant on Civil and Political Rights 1966 restricts death penalty under article 6 stating that ‘no one shall be arbitrarily deprived of his life’ except for ‘most serious crimes’ with ‘right to seek pardon or commutation of the sentence’. It further prohibits death penalty on ‘persons below eighteen years of age’. India being a signatory to this covenant is obliged by it. The United Nations [UN] Human Rights Committee’s Report noted in 2005 that “extension of the scope of application of the death penalty raises questions as to the compatibility with article 6,” thus calling on States “not to extend its application to crimes to which it does not at present apply.” Thus, there is a trend towards abolishing death penalty which is evident from its elimination from the Statute of International Criminal Court under article 77.

10 CESARE BECCARIA, ON CRIMES AND PUNISHMENT (1764), (Trans H Paolucci, 1963).

Amidst this international movement against death penalty, there is a contrary demand and public outcry for death penalty to rapists. With the rate of crime committed against women being 41.7 in 2012\textsuperscript{12}, the implications of death penalty on reduction of rape need examination.

II. CASE FOR DEATH PENALTY: CONSIDERATIONS AND JUSTIFICATIONS

The incapacitation effect of death penalty saves lives. Furthermore, the individual deterrent effect also proves that executions save innocent life. Regarding this, following are the considerations and justifications for death penalty:

A. Psychological and Social Considerations

Thus spoke Justice A S Anand while confirming the death penalty given to Dhananjoy Chatterjee\textsuperscript{13}: \textit{“If the security guards behave in this manner who will guard the guards? The faith of the society by such a barbaric act of the guard gets totally shaken and its cry for justice becomes loud”}.

These sentiments were shared by a majority of people and media years after they were first uttered when they protested the December 16 incident. Public outrage brought back the debate on death penalty centre stage in a case which abolitionists found difficult to defend.

- **Justice to the Victim:** The society demands for justice to the victim and society at large by punishing the accused and preventing prospective criminals. Capital punishment is favoured because it expungs the criminal from society, drains ‘dangerous criminals’ of their power completely and permanently.

- **Retribution:** Retribution has its basis in religious values, which have historically maintained that it is proper to take an "eye for an eye" and a life for a life. Although the victim and the victim's family cannot be restored to the status which preceded the murder, at least an execution brings closure to the murderer's crime (and closure to the ordeal for the victim's family) and ensures that the murderer will create no more victims.


\textsuperscript{13} Dhananjoy Chatterjee vs State of West Bengal. 1994 SOL Case No 275.
Failure of reformation: The argument that murderers are the least likely of all criminals to repeat their crimes is not only irrelevant, but also increasingly false. A US Study revealed that 6% of young adults paroled in 1978 after having been convicted of murder were arrested for murder again within 6 years of release.\textsuperscript{14} When the death penalty becomes real, murderers fear it the most.

Deterrence: The most conclusive evidence that criminals fear the death penalty more than life without parole is provided by convicted capital murderers and their attorneys. 99.9% of all convicted capital murderers and their attorneys argue for life, not death, in the punishment phase of their trial.\textsuperscript{15} While it is obvious that the fear of execution did not deter those murderers from committing a capital crime, it is also clear that such fear is reduced because executions are neither swift nor sure in India.

These arguments further the thought that capital punishment has deterrent effect both against the accused and the society at large.

B. Legal Considerations

In \textit{Machhi Singh vs State of Punjab},\textsuperscript{16} a three judge bench of Supreme Court laid down the elements that deserve the death penalty:

(1) Manner: Murders committed in an “extremely brutal, grotesque, diabolical, revolting or dastardly manner”, in a way that arouses “intense and extreme indignation”.

(2) Motive: Murders committed with a totally “depraved” or “mean” motive.

(3) Nature: Murders that are of an “anti-social” or “socially abhorrent” nature, committed under circumstances that arouse “social wrath”.

(4) Magnitude: Murders of an “enormous proportion”, e.g., of all members of a family, or a large number of persons of a particular caste, community or locality.


\textsuperscript{16} Macchi Singh vs Punjab, AIR 1983 SC 957
(5) Victim: Murders where the victim of the murder is an innocent child, helpless woman, generally loved public figure, or person over whom the murderer exercises a position of dominance or trust.

The court thereafter observed that in order to apply these guidelines the following questions may be answered: (a) Is there something uncommon about the crime, and (b) Whether there is no alternative but to impose the death sentence? While awarding death sentence in rape cases, the Court has to look into these considerations and evaluate the crime against its criteria of ‘rarest of rare’.

C. Political Considerations

As the Supreme Court has not laid down a stark distinction of what constitutes the ‘rarest of the rare case’ and left it to the discretion of the judges hearing the case which is ruled by the judge’s conscience and political beliefs, and influenced by the social fervour. Though the Supreme Court was shocked by the manner of the offence in Soni Thomas’s case, it overturned the death penalty given in the case of rape and murder of an 11-year old girl by the co-paying guest, and in Mohd Chaman’s case, the court gave a life sentence for the murder and rape of a one and half year old girl. The murders were equally brutal, shocking and arguably fulfilled the ‘rarest of the rare’ criteria, but the court for reasons recorded in the judgment did not deem fit to give capital punishment.

On the other hand, nation-wide protest and demand motivated the court to award capital punishment in Nirbhaya’s case. This case also exposed the deterrent effect as one of the four convicts, Pawan Gupta, broke down, Vinay Sharma was in a state of shock and Mukesh Singh was heard saying, “we would have to face the consequences for what we have done.”

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17 2000 SOL Case No 705.

18 HT Correspondent, We will have to suffer for what we did: Delhi gang-rape convict, HINDUSTAN TIMES, Sep 10, 2013, available at http://www.hindustantimes.com/India-news/Chunk-HT-UI-IndiaSectionPage-DelhiGangrape/We-will-have-to-suffer-for-what-we-did-Delhi-gang-rape-convict/Article1-1120072.aspx
III. COUNTERVIEW: WHETHER DEATH PENALTY IN RAPE CASES IS DISADVANTAGEOUS?

The demand for death penalty in rape cases is not foolproof and has its own brickbats to deal with. Some of the concerns regarding the same are:

- There is also a practical problem that by threatening to hang rapists, it provides incentive for them to kill victims and witnesses in order to avoid identification.

- Death penalty may be counter-productive for women’s rights. In the world of 2013 there is a close correlation between executions for rape and women’s rights – and it turns out to be negative. The death penalty for rape persists primarily in enclaves such as Saudi Arabia, Iraq, and Pakistan, where women are treated as property and where “honour killings” reflect the perverse valuation of sexual purity over human life. To appropriate the feminist slogan, Indian women need the protection of capital punishment like a fish needs a bicycle.

- The courts might have to cheat on “rarest of rare” doctrine in absence of incriminating evidence. In the Delhi case, we will probably never know for certain which of the offenders actually caused the injuries that led to the victim’s death. In the context of this uncertainty, Indian courts would have to cheat on their “rarest of the rare” doctrine to identify even a single candidate for state killing. And if the defendants receive effective assistance of counsel (as the law says they must), then a capital trial will be torture for the victim’s relatives.

- There is issue of inconsistent death sentencing in India. Two decisions of the Supreme Court in the first half of 2011, present puzzlingly contradictory views. In May 2011, the Court advocated the use of the death penalty against the perpetrators of “honour killings” in the case of Bhagwan Dass vs Delhi19. In doing so, the Court no doubt evaluated the depravity of the motive involved in committing an honour killing. If the death penalty must be awarded in any case at all, awarding it in those cases where the murderer’s motives are tainted by a depraved desire to punish the exercise of sacrosanct fundamental rights is perhaps justified. However, only a few months earlier, in the infamous Graham Staines murder case20 the Court declined to apply the death penalty against a

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19 (2011) 5 SCALE 498

20 Dara Singh vs Union (2011), 1 SCALE 615
man who murdered a Christian missionary and his two minor sons for converting “poor tribals” to Christianity, despite the fact that the right to profess and propagate religion is considered “fundamental” by the Constitution. It is evident that the sole interpretation of what constitutes ‘rarest of rare’ case rests in the hands of the higher judiciary. In the 2013 judgment of *Mohinder Singh vs State of Punjab*\(^2\) a two judge bench of the Supreme Court commuted to life sentence the death penalty awarded to a man accused of raping his minor daughter and killing both his wife and daughter. Surprisingly, the hon’ble court stated that even though the crime was ‘gruesome’ and ‘grotesque’, it could not be categorized as ‘rarest of rare’; this raised a question on the doctrine of rarest of rare case. A study of the Supreme Court’s judgments from 1950-2006\(^2\) by Amnesty International and the People’s Union For Civil Liberties disturbingly highlights that the cases in which the death penalty was imposed are often indistinguishable from those in which it was commuted.

- Delayed Execution violates right to dignity of the accused and is a harassment. As of February 11, 2013, there are 476 convicts on death row in India. States with the maximum number of prisoners on death row are Uttar Pradesh (174), Karnataka (61), Maharashtra (50) and Bihar (37).\(^3\) Whereas, in last 8 years only 2 executions have taken place in India.

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\(^1\) Criminal Appeal Nos. 1278-1279 OF 2010


IV. Observations and Recommendations

Poet Hyman Barshay has expressed on death penalty, “The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way.”

For a criminal justice system to have credibility and deterrent value, two factors are required: (1) a high rate of arrest and (2) punishment which reflects the severity of the crime, the criminal’s record and the demand for justice. The Indian system has neither. The human rights of victims and future victims are consistently ignored. However, to address the Indian position in rape cases, the paper makes the following observations and recommendations:

1. Timely Recording of FIR

Sec. 154 of the CrPC provides for recording of the First Information Report. It needs to be evaluated that whether police has an obligation or not to investigate allegations of rape before registering an FIR.

It is a fact that police investigation takes time and it might undermine the purpose of recording the FIR. As amended by Criminal Law (Amendment) Act, 2013 Sec. 166A (c) of the IPC punishes failure to record information under sec. 154 in some crimes including rape with imprisonment from 6 months to 2 years. The ambitious Crime and Criminal Tracking Network and Systems on which the centre has spent a whooping Rs 2,000 Cr will enable e-filing of FIR\(^\text{24}\). However, the programme will be implemented in 2015 and there are issues of frivolous FIR that need to be addressed.

Even though the reform was introduced on April 2, 2013, yet news afloat plenty wherein cops have refused to file FIR in rape cases and instead offered bribe to the victim\(^\text{25}\). It is an appalling reality that no action was taken against the erring cops. Until the e-filing of FIR becomes possible, it is required that appropriate action should be taken against non-filing of FIR and not dismissed as a mere departmental inquiry.

\(^{24}\) Aparna Viswanathan, A Task only half finished, THE HINDU, at 10, August 28, 2013.

2. Punishment for Non-treatment of Victim

While the newly inserted Sec. 166 B of IPC provides punishment for failure of the management or staff of hospital, private or public, to treat a victim as punishable with extending to 1 year and fine; the duty on bystander or public servant to take the injured victim to the hospital is still unclear and unaddressed.

3. Problems with Execution

As discussed earlier, Indian courts are criticised for arbitrary and discriminatory enforcement of the death penalty as they have failed to lay down a test for the ‘rarest of rare’ case. Further, only two executions have taken place in last eight years. Convicts awaiting execution violates human right to dignity. Even though the judgment was delivered in 1994, Dhananjoy had to wait a long time before being executed in 2004.

4. Encouraging Accountability and Independence of Police

While the Model Police Act 2006 drafted by Police Act Drafting Committee suggested reforms and amendments to the archaic Indian Police Act 1861. The PADC envisioned a modern police force which was responsive to the needs of the people through the following major reforms:

- Encouraging professionalism by abolition of the rank of constable through introduction of Civil Police Officer Grade II at primary level. Every Civil Police Officers Grade II will undergo three years intensive training before being posted to the Service as a stipendiary cadet, and upon successful completion of training, have a graduation degree in police studies.

- Principle of accountability by introducing criminal penalties for the most common defaults of police such as non-registration of FIR, unlawful arrests, detention, search or seizure.

26 Sec. 3, Criminal Law (Amendment) Act, 2013.


29 Sec. 24, Model Police Act, 2006.
Functional autonomy was viewed as a means of removing nexus between police and politicians who treat police as their personal security guards. The PADC felt that law, rather than politicians, should be the master of the police. Thus, a fixed tenure of 2 years was suggested to avoid arbitrary transfers.

This Model Act should be accepted as it ensures greater accountability and independence for the police to function efficiently. In absence of the same, strict action should be taken under the newly inserted sec. 166B of IPC.

5. Credibility of Fast Track Courts

As amended in 2013, Sec. 309 of CrPC provides that trial of offences under sec. 376 and sec.376A-D of the IPC must be completed within two months of filing of the chargesheet. However, the Delhi rape case being prosecuted in fast track courts has already taken more than 9 months. Further, in camera proceedings in this case without there being a matter of national security or privileged communication, have resulted in it being secluded from media attention thereby reducing public pressure. Therefore, procedural rules must be examined including grounds for order of in camera proceedings.

6. Retrospective Application of the Amendments

While the law states that an accused can be punished for a crime if it was a crime when he committed it, what should be done if the law is inadequate to deal with the crime. Then should the subsequent amendments or later laws be applied to the case? Well, in the present context of the Delhi rape case the law appeared inefficient to deal with the crime, thus, the court may at its discretion apply the newly amended criminal law to give enhanced punishment. It is submitted that the Nuremberg Tribunal, Tokyo Tribunal, International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda were all set up after the crimes were committed. These international courts applied laws that were formulated post the commission of the impugned acts and accordingly punished the accused. Thus, state practise exists at international level of framing a law to address human rights violations.
V. CONCLUSION: TOGETHER WE CAN MAKE A DIFFERENCE

While Nirbhaya’s mother begged for justice for her daughter who was brutally murdered, her eyes glistened with tears of joy when she heard the court’s verdict; “Our daughter has finally got justice. I would like to thank all those who supported us.”

Even though the final fate is doubtful as the case would go through a series of appeals and reviews, the girl’s village celebrated the verdict and the country hailed the judicial courage in awarding the punishment. Capital punishment is advocated as a means of justice to the victim and method of deterrence. The fallacies of excusing an innocent can be ruled out by DNA Testing and other methods of modern forensic science. It gives closure to the victim's families who have suffered so much.

However, there is a felt need for change in societal behaviour. In a country where sexual harassment and assault are endemic and where (according to a recent UNICEF Global Report Card on Adolescents 2012) more than half of young males think wife beating is justified, the belief in capital punishment requires an Olympian leap of faith across the root causes of rape with eyes wide shut. Let us first respect women at our own personal and individual level. As far as the law is concerned, it stands good lest it is implemented properly and in time.

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