

## DILEMMA OF THE DEATH SENTENCE: A STUDY OF ARTICLE 21 AND THE “RAREST OF RARE”

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### ABSTRACT

*Capital punishment, or the death penalty, has always been a topic of controversy not only in India but also in several developed countries. In India, the motive for providing punishment is based on two aspects: the first is that the offender should suffer for the pain and injury he/she cast upon the victim, and the second motive is to discourage others from committing wrongs by sanctioning punishments. This paper focuses on Capital Punishment in India, which is also known as the death penalty, which is awarded by the Court in very rare cases. To understand the present status of capital punishment in India, it is important to know the history of the advent of capital punishment and why it is given only for certain crimes, making it a contradictory topic from a moral point of view. Therefore, this paper shall deal with the history of Capital Punishment, followed by landmark cases decided by the Indian Courts. To acquire clarity on capital punishment on a large scale, it is essential to have knowledge of the differentiating ideologies of other countries as well. Furthermore, this paper also explores the constitutional validity of capital punishment in the context of the Indian Judiciary. Ultimately, this article will seek to assess whether the death penalty for rape is an effective measure in curbing the heinous crime of rape.*

### INTRODUCTION

The very horrific incident of a 23-year-old girl, known as Nirbhaya, who was gang-raped and killed on a bus in Delhi, India, on December 16, 2012, led to outrage and protests all over the country. The event provoked a drastic change in the criminal justice system of the country, as the government spoke about tougher legislation and the death penalty for some types of rape. This paper discusses the legal and ethical issues associated with the death penalty that has been given to the four accused in the Nirbhaya<sup>1</sup> case in India and the issues surrounding capital punishment.

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<sup>1</sup> Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1

Death penalty or capital punishment is one of the legal punishments in India and is given to offenders of murders, rape cases and traitors. The following basic principle tends to underpin the idea of the death penalty – the individual who commits the crime is a menace to society and deserves to pay the penalty with his/her life. It is also used as a method of prevention in the sense that it is believed to act as a deterrent and refrain people from committing criminal activities. India supports the restorative justice theory, where offenders are made to realize the damages they have caused to others and are helped to be good again.

Restorative punishment theory is one of the essential pillars of the death penalty. This theory believes that the perpetrators of the gruesome crimes get to feast on the meat, so they deserve to get killed, too. This is because the death penalty serves as a mechanism through which society produces 'effects', especially the creation of fear in people.

The penalty of death has been eradicated in many countries around the world, such as Australia, Netherlands, Denmark, France, and Portugal, and the United Nations has encouraged the eradication of the same. However, the judgement elsewhere also does not exclude capital punishment for a criminal. The apex court at present stands from the standpoint of eradicating the death penalty to the extent of awarding it only in rare cases.

Currently, the death penalty in India is limited to the doctrine of the 'rarest of the rare' and very often, such a punishment is commuted to life imprisonment with the use of Presidential or Governor's mercy. Irrespective of researchers deeming the death penalty as immoral, India continues to uphold this practice in their criminal justice system.

### **MEANING OF DEATH SENTENCE**

The death penalty has been a mode of punishment from time immemorial that is practised for the elimination of criminals and is used as the punishment for heinous crimes.<sup>2</sup>

### **THE ONLY MEASURE WHILE TAKING THE DEATH PENALTY INTO CONSIDERATION**

The use of the death penalty in response to rape is a complicated and contentious issue. There is no universal agreement on whether the death penalty is an appropriate or just punishment for rape, as opinions vary greatly depending on cultural, religious, and moral beliefs. Some

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<sup>2</sup> Fatima, T. Constitutionality of Death Penalty, Bureau of Justice Statistics.  
<<https://bjs.ojp.gov/topics/corrections/capital-punishment>>accessed: 19 June 2024

supporters argue that the severity of the crime and the victim's suffering justify the use of the death penalty. Others believe that the death penalty is an excessive and inhumane form of punishment that fails to address the root causes of sexual violence. Finally, the decision to use the death penalty in rape cases is a matter of personal conviction and societal norms.

In the end, whether or not to use the death penalty in rape cases is a matter of personal belief and societal values, and it varies greatly from country to country.

### **ETHICAL CONSIDERATIONS TAKEN INTO ACCOUNT WHILE USING THE DEATH PENALTY**

When deciding whether or not to use death penalty in India, several ethical considerations should be taken into account: When deciding whether or not to use capital punishment in India, several ethical considerations should be taken into account:

#### **Human Rights**

According to those principles, the death penalty infringes on the right to life but also corresponds to cruel, inhuman or degrading treatment or punishment.

#### **Fair Trial**

A right to life means that capital punishment would only be allowable after one has been tried and convicted; the case must undergo a fair trial in line with all the procedural laws and protection from discriminative and arbitrary use of the death penalty. There is no substantial enough proof that can recommend capital punishment as a deterrent measure towards crime, and it rather tends to have a brutalizing effect in society.

#### **Rehabilitation**

In a criminal justice system, capital punishment eliminates the option of reincorporation of the offender into society, which is an important issue of ethics. Thus, the potential for convicting an innocent individual is inherent in any system of criminal justice, and the irreversible nature of the death penalty means that some innocent people will be executed.

#### **International Human Rights Law**

India has ratified international treaties on death rights, which aim at restricting the death penalty while advocating for its phasing out.

These should be taken into account while deciding whether India should use the death penalty or not, as they are core issues of ethicality that are human dignity, justice and the right to live.

### **DOES THE DEATH PENALTY ACTUALLY DETER RAPE?**

The lower house in India's parliament adopted laws leading to the death penalty for any convicted rapist of a minor below the age of twelve. The Women and Child Development called for an Amendment to the Prevention of Child Sexual Offenses Act (POCSO)

Union Minister for Women and Child Development said that, at least, it would help to reduce sexual abuse of minors.

Stating the facts mentioned in the National Crime Records Bureau (NCRB) of 2016, it can be noted that the number of cases of child rape in India has risen tremendously. From the data, we can see that in 2016 there were 19,765 reported cases of child rape. That is 8% up from the 2015 numbers, and this growth will continue to rise in the coming years. On this criterion, Uttar Pradesh recorded the highest increase in child rape incidents, increasing by 256% within the same period.

According to the list of nations that are most frequent in the sexual assault of minors, India takes the third place. The number of children reported across the country in 2016 was 10,854 in this regard, in comparison with the previous year's figure of 8,541.

The gross status of child rape cases during 2016 has been highlighted state-wise to ascertain the number of cases in a maximum number of states. The investigation indicates that the maximum number of cases was 2467 only in Madhya Pradesh, whereas Andhra Pradesh topped 1393 and Karnataka at 1270, followed by Tamil Nadu at 1119, Gujarat at 1036 and Maharashtra at 925.

India has one of the lowest reporting rates at only 4% for the crime of rape. However, it is home to 47 % of the total number of cases of rape. Certain aspects of such occurrences have explosive areas left unaddressed yet. However, the propensity for reporting such cases has tended to rise over the recent past after several instances have been highlighted in various media platforms<sup>3</sup>.

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<sup>3</sup> Chandra, R, 'THE HEINOUS CRIME OF CHILD RAPE: WHETHER DEATH PENALTY IS THE ANSWER?', *INTERNATIONAL JOURNAL OF LEGAL DEVELOPMENTS AND ALLIED ISSUES*, (2018) 4(4) accessed 19 June 2024

Currently, there are rules that state that a person can be given the death penalty only when the victim died as a result of the rape, but there is new legislation that proposes that a judge is allowed to give someone the death penalty for raping a child of twelve years and below even if the child did not die. Even after all these amendments, India can still be referred to as a nation that is somewhat reluctant to employ the death penalty. It is now admissible in only a very limited scenario known as the 'rarest of rare' circumstances, whilst the true meaning of the term 'rarest of rare circumstance' is left to the discretion of the judge. The last executions in the country were carried out on March 20, 2020. But the new amendment has not been without any criticism who have been questioning the Court whether the death penalty was a deterrent enough than a punishment. Sexual assault has in recent years been brought to light in India following the December 2012 fatal gang rape (Nirbhaya Case). This is a topic that has been debated all over the world: Does increasing the degree of punishment decrease crime?

### **THE DOCTRINE OF THE RAREST OF RARE CASES**

In India, the doctrine of rarest or rare is used to justify capital punishment. It is based on the proportionality principle, which states that the punishment should be proportionate to the crime.

In *Bachan Singh V State of Punjab* (1980)<sup>4</sup>, the apex court proposed the doctrine of 'rarest of rare', and since then, life imprisonment has become the rule and the death penalty the exception. In India, it is awarded only in the gravest of cases.

Journal of Legal Research and Juridical Sciences

In *Machhi Singh v the state of Punjab* (1983)<sup>5</sup>, the Supreme Court held that the death penalty should be awarded only when the crime is so heinous that it shocks the collective conscience of the entire community. The Court laid down certain criteria for assessing when a case could fall within the purview of rarest to rarest. The criteria are analyzed with examples:

1. Manner of committing murder - when the murder is committed in an extremely cruel, rebellious or reprehensible manner so as to arouse intense and extreme outrage in the community.

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<sup>4</sup> *Bachan Singh vs State Of Punjab* AIR 1980 SC 898.

<sup>5</sup> *Machhi Singh And Others vs State Of Punjab* (1983) AIR 957

For example,

- a. When the victim's house is set on fire with the intention of baking her alive.
  - b. When the victim's body is mercilessly mutilated or cut into pieces.
2. Motive for murder - When a murder is intended to be a total act of insanity or cruelty.

For example,

- a. A hired killer is killed just for the reward of money.
3. Nature of crime - When a person belonging to a backward class is murdered. Cases of burning of the bride, popularly known as dowry death, are also included in this.
4. The magnitude of the crime - when the proportion of crime is very high.

For example, in cases of multiple murders.

5. Personality of the Victim of the Murder - When the Victim of the Murder is an innocent child, a helpless woman or person (due to old age or infirmity), a public figure, etc.

### **CONCEPT OF THE DEATH PENALTY IN RELATION TO ARTICLE 21**

According to Article 21 of the Indian Constitution, "No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>6</sup> This right is a fundamental right and is available to all the citizens of the country; however, the government has the power to restrict or regulate this right in the best interest of the security of the state and its people and to maintain public order.

In this regard, capital punishment has been said to be unconstitutional in India on the basis that it is a violation of the right to life enshrined in Article 21 of the Constitution. Opponents of the death penalty have pointed out that the punishment is cruel and deprives a person of the most basic right, the right to live.

On the other hand, supporters of the death penalty argue that it is a necessary means of punishment for the most serious crimes and that it serves as a deterrent to crime and helps to maintain public order.

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<sup>6</sup> Constitution of India 1950, art 21

However, the use of the death penalty has been regulated by the Supreme Court of India with regard to certain guidelines that included using the death penalty only in the "rarest of rare cases" as a last resort after all other forms of punishment have been considered and excluded. The Court has also held that the right to life under Article 21 of the Constitution does not include the right to life without a fair procedure and that the death penalty, in accordance with the due process of law, does not infringe on the right to life.

## CONCLUSION AND SUGGESTIONS

The death penalty should not be eliminated, and it should be employed only in certain dire situations. Most of the countries in the world today, including India, have endorsed the International Covenant on Civil and Political Rights, and specifically under this covenant, it is unlawful to impose the death penalty; however, most of the members of this covenant have not complied with this and are still using this penalty. The death penalty should never be abolished based on the fact that there are people who are scared of it. The argument is that the death penalty entails a violation of Articles 14, 19, and 21 of the Indian Constitution, and hence, it should be abolished, yet it is utilized only in extreme circumstances. And what about the rights of such individuals whose lives have been taken, and what about the rights of those individuals whose rights were infringed by these criminals? The death penalty should not be abolished, although certain rules must be followed while the convict is sentenced to death; the provision of the death penalty must remain in the books of law.

Death Penalty should not be abolished because it instils fear in the minds of the criminals. Abolishing it completely shall put the country at a greater risk. India has not yet become a country sufficient to experiment with such extreme conditions. There is no proper implementation, lack of effectiveness of laws, and legal loopholes; multiple attempts were made to prevent the execution of a death sentence in the Nirbhaya case, and it is not difficult for the criminals to run away from the crimes committed by them. As was recently exhibited in the Pune car accident (2024), the boy who took the lives of two innocent people was asked to write an essay. Escaping from liability when one is rich is quite easy; being powerful and influential lets one escape without taking liability. The boy's mother begged the driver to make a statement stating that he was the one driving and the accident was committed by him. It is so easy to give money to the poor, unprivileged, and victims and cover up the whole situation; with the help of increasing social media interaction, people get to know about what is happening in the world.



In the year 2012, in the gang rape case, people from all over the world came forward in support of the victim (Nirbhaya), and that's how justice prevailed.

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