

Deterring Rape: Intolerance through Capital Punishment

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Abstract:

Sexual offences are one of the biggest problems that India faces in the 21st century. The government focusses on increasing the rights of women in order to ensure their safety. Through the Criminal (amendment) Act, 2013, the government has played two moves to ensure that firstly, the definition of rape and various other provisions including reporting of crime, trial and investigation have been made women friendly and secondly, the punishment has been made more hostile to the offenders. Through this essay, the author will argue that the death penalty is a viable option for deterring sexual offences. The question of morality of death penalty will also be revisited and the justification of introduction of capital punishment or rape and death will also be discussed. The scope of this essay will be limited to those people who are aware of the penal provisions because those who are unaware of the consequences of their actions have no reason to be deterred by any law. The author will then argue that the Criminal Amendment Act, 2013 will be successful in fulfilling all the ingredients of deterrence as understood by modern day criminology, i.e. certainty, swiftness and severity of punishment.

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The following essay shall be divided into four parts. Part A will deal with the various arguments in favour and against the death penalty keeping the focus on the role of the State as a moral and legal entity in executing a criminal and digging into the truths about claims that capital punishment does not deter crime. Part B will focus on the various schools of thoughts which explain why rapes occur and will also focus on the Criminal Law (Amendment) Act, 2013. Part C will discuss whether death penalty is a correct punishment for sexual offences keeping in mind the unsafe environment for women in the country. This part will also discuss the attitude of the Indian Courts toward the capital punishment.

Part A

The first dilemma that one faces is whether the state has the legal, as well as moral right to kill a person since no person has the right to do it. The right to life has been recognised as the most basic human right² and has also been recognised as a fundamental right in the constitution of India.³ However, this right can be taken away by procedure established by law as stated in the constitution. From the state of nature, as Hobbes defined it, where life was nasty, brutish and short,⁴ the society has adopted the social contract where, through the collective will of the people, a sovereign has been chosen, who has been transferred the rights.⁵ The right to use force has also been transferred to the sovereign since the right to try and punish the criminal only vests with the state as a crime is seen as a harm done to the society at large and not merely to one person.⁶ The highest form of punishment that India recognises is to hang a person by the neck until death.⁷ The death penalty in India has been often unsuccessfully challenged as unconstitutional. The courts in India treat death penalty as an exception to the general rule of punishment, hence it passes the test of constitutionality.⁸

Respect for humanity and human dignity are some of the basic moral principles that are widely recognised. Natural law is a school of thought that believes in respect for all things created by nature and that none shall have the right to defy the laws of nature. ‘To live consistently with nature’ is the most familiar maxim for the Stoics, who are among the

²*Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, AIR 2000 SC 2083.

³Article 21, Constitution of India.

⁴THOMAS HOBBES, *LEVIATHAN*, Penguin Books, (1982).

⁵JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, J.M. Dent and Sons, Limited ed. (1920).

⁶*State bank of India and Ors. v. R.B. Sharma*, AIR 2004 SC 4144.

⁷Section 354(5), The Code of Criminal Procedure, 1973.

⁸*C. Munniappan and Ors. v. State of Tamil Nadu*, AIR 2010 SC 3718.

founders of natural law.⁹ Human rights are rights that are bestowed on us by virtue of being human, hence are often deemed inviolable and absolute.¹⁰ Dignity is also a value that is attached to humans because of their intrinsic worth.¹¹ The universal declaration of human rights also recognises the right to life and dignity as important human rights.¹² This right is considered so sacrosanct that even the person himself is not allowed to take his own life. According to many, the death penalty is dehumanising and completely disregards the value of human dignity as the person is not only being executed, but is being restrained from saving himself by tying his hands.¹³ What is considered worse is the public acceptance of such actions of the state which is opposed by many.¹⁴

Another school of thought believes that the roots of death penalty lie in the theory of eye for an eye which is an ancient, as well as a barbaric concept and must not be allowed to continue.¹⁵ If the principles of eye for an eye were to be upheld, then we would lead to a situation where rapists are raped, torturers are tortured, those who rape and murder and raped and murdered. However, that is not how the law treats the criminals, therefore, why is there an exception in the case of murder? The guilty is not given to a chance to repent on the wrong that he committed and it only promotes vengeance which is not the purpose of criminal justice system.¹⁶ A utilitarian thinker will also be opposed to the death penalty and the idea of revenge since he believes in the benefits that come out from the existence of life rather than its extinguishment.

Also, since the state is equally morally responsible for its acts and omissions, it should address the failure to deter murder equal to awarding death penalty, that is to say, it should treat the lives of both the innocent as well as the guilty equally important, hence the murder of the innocent must not be punished with the death of the offender.¹⁷

On the other hand, the supporters of death penalty would argue that the first objection does not hold water since the state has a plethora of other rights that the individuals do not, why

⁹J. M. RIST, STOIC PHILOSOPHY, (1969)

¹⁰Ms. Mohini Jain v. State of Karnataka, AIR 1992 SC 1858.

¹¹Christopher McGuinness, *Human Dignity and Judicial Interpretation of Human Rights*, EJIL (2008), Vol. 19 No. 4.

¹²UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (last visited Aug. 17, 2014, 9 AM).

¹³Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, Stanford Law Review, Forthcoming; Harvard Public Law Working Paper No. 125. Available at SSRN: <http://ssrn.com/abstract=859384> (last visited Aug. 17, 2014, 9 AM).

¹⁴*Id.*

¹⁵Dawinder S. Sidhu, *On Appeal: Reviewing The Case Against Death Penalty*, 111 WVLR 453 (463).

¹⁶JONATHAN GLOVER, RESPONSIBILITY, Routledge & Kegan Paul (1970), p. 145.

¹⁷Supra note 11.

aren't all of them challenged? The state has taken monopoly over violence because it is the most accountable entity in the society, hence it is best that the use of force is regulated. While discussing the role of the state, famous philosopher R. Nozick described that the state shall move from a minimalistic state or a night-watchman state as described by the classical liberal theory to an ultramimimal state. What is common between the former and latter is that the state focusses its citizens against violence and the legitimately exercises force.¹⁸

Contrary to popular belief, a very recent US study has shown that one execution deters at least 18 murders.¹⁹ However, isolated instances of awarding death penalty do not cause any deterrence. Only when executions cross a certain threshold, do they cause deterrence.²⁰ From a consequentialist point of view, based on the studies, the death penalty seems to be morally permissible if not morally obligatory since it is the duty of the state to save the maximum number of lives. The above figures if true, shake the entire moral ground of the opponents of death penalties since a criminal justice system with death penalty saves more lives than one without the death penalty, therefore they cannot oppose it on the grounds of protecting human lives.

A pluralistic society like ours does not follow a particular set of morals as different cultures have different conceptions of moral values. Different ideologies preach different moralities, therefore, for example a human rights activist or a person believing in a reformatory system would suggest that the death penalty is inherently immoral, therefore its use as a tool for deterrence too becomes immoral. The group of people who believe in liberalism, a political philosophy that believes in liberty and equality, founded by John Locke, constantly oppose death penalty as an immoral act. On the other hand, the retributivists and conservatives would strongly advocate in favour of the death penalty. The moral question posed by the Criminal Amendment Act, 2013 is whether it is viable to instil a fear of death in the mind of the perpetrator in order to stop him from committing the rape? In order to answer this question, it is important to first discuss the various theories behind rape.

It can also be argued that revenge is normal if it helps the victim in healing from the trauma that he has gone through. In fact, the calls for proportionality of punishment have their basis in revenge, eye for an eye and equalising crime, therefore it can be argued that revenge and

¹⁸See R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

¹⁹Paul H. Rubin &Ors., *Does Capital Punishment have a deterrent effect?*available at <http://ssrn.com/abstract=259538>.

²⁰ Joanna M. Shepherd, Deterrence versus Brutalization: Capital Punishment's differing impacts among states (Emory Legal Scholarship Working Paper No. 1, 2004).

vengeance are inherent parts of criminal justice system.²¹ Also, there is nothing immoral about revenge or hatred in the mind of the victim for the criminal since the former can only ask for the highest punishment that our penal system allows, therefore, he exercises only his options in asking for the harshest punishment²² and would not be outside the bounds of justice.²³

In modern day criminology, the focus of criminal justice system and punishment has moved from the body to the mind.²⁴ From physical torture, mutilation etc., the criminal justice system now recognises the human rights of the offenders and promotes reformation rather than retribution.²⁵ Juvenile homes have been created to treat the young differently from adults, prisoners are educated in the prisons and taught good behaviour. Tihar Jail for example has a competition known as Tihar Idol where musical talents are recognised.²⁶ Painting classes also take place inside the prison. Most recently, a restaurant has also been opened in Tihar where the prisoners will be serving.²⁷ All such steps are some of the ways which show that punishment in today's world seeks to reform the criminal in such a way that he becomes productive once he leaves the prison, he leads a meaningful life.

One of the prime reasons why death penalty is contested frequently is because of the arbitrary nature in which it is awarded to the convicts. In India, the category of rarest of rare has been introduced since the landmark decision of the Supreme Court in *Bacchan Singh v. State of Punjab*,²⁸ where the court held that the death penalty was not the general rule but an exception and a tool in the hands of the judiciary that is to be used sparingly and only when the acts of the convict shock the conscience of the court. This decision was taken due to the provision of the CRPC that special reasons need to be given when the court has to award death penalty in situations when lesser punishment was available.²⁹ In the past 40 years, our

²¹MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE, Beacon Press (1998) p. 11.

²²Steven M. Eisenstat, Revenge, Justice, and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment. Wayne Law Review, Vol. 50, p. 1141, 2004. Available at SSRN: <http://ssrn.com/abstract=962175> (last visited Aug. 17, 2014).

²³*Id.*

²⁴MICHEL FOUCAULT, DISCIPLINE AND PUNISH, Vintage Books (1977) p. 1.

²⁵*Id.*

²⁶Tihar Looks for Its Own 'Idol', Plans its own album, INDIAN EXPRESS, Apr. 19, 2012, available at <http://archive.indianexpress.com/news/tihar-looks-for-its-own--idol--plans-music-album/934280/> (last visited Aug. 17, 2014).

²⁷Tihar sets up restaurant, inmates to cook and serve food, THE HINDU, Jul. 13, 2014, available at <http://www.thehindu.com/news/national/tihar-sets-up-restaurant-inmates-to-cook-and-serve-food/article6206383.ece>(last visited Aug. 17, 2014).

²⁸(1982) 3 SCC 24.

²⁹Section 354(3), The Code of Criminal Procedure, 1973.

country has witnessed only 52 death penalties in total³⁰ which leads to the question as to what exactly amounts to rarest of rare and makes this field very subjective whereas the focus of the law is to be more objective in order to be fair to all.

Some of the highly debated issues that always remain are what gives the right to the state to kill and how is the state action any different from murder. However, this paper will not address these questions about the right of the state to execute criminals. This paper is an insight into the deterrent effects of death penalty on sexual offences which comes only after establishing that the state does have the right to execute criminals.

Part B

The offence of rape is mentioned under the chapter of sexual offences in the Indian Penal Code, 1860. It has been defined in section 375 and the punishment has been given in the following section. However, before we further delve into the legal meaning of this term and the punishment, it is important to understand the various perspectives on rape.

The biological theory on rape suggests that one of the evolutions of rape was due to direct selection for obtaining a large number of consensual partners without romantic commitment.³¹

“There are at least six hypothetical psychological rape adaptations: (1) a psychological mechanism linking the vulnerability of victims to the use of rape by men; (2) a psychological mechanism linking the lack of resources to the use of rape by men; (3) a psychological mechanism causing males to have a different preference in rape victims than in consensual sexual partners; (4) a psychological-physiological mechanism producing changes in the sperm count of ejaculates during rape that show specific functional design for rape; (5) a psychological mechanism producing differences in the arousal of males to depictions of rapes than to consensual matings; (6) a psychological-physiological mechanism producing marital rape as a sperm competition tactic.”³²

³⁰ Mark Magnier, *India Gang Rape: Protesters demand speedy executions for 4 sentenced*, LA TIMES, Sep. 13, 2013, available at <http://www.latimes.com/world/worldnow/la-fg-wn-india-gang-rape-4-sentenced-to-death-20130913-story.html> (last visited Aug. 17, 2014, 9 AM).

³¹ Randy Thornhill, *The Biology of Human Rape*, 39 *Jurimetrics J.* 137(1999), p. 143.

³² *Id.*

Another well recognised theory of rape is the commodification theory.³³ Sex and sexuality are considered properties and de-recognition of women's rights over their sexuality is what transforms into rape. There is no doubt that women's sexuality has become a commodity in our society, for example, advertisements for fragrances for men focus on marketing sexuality, rarely giving details about the fragrance which makes it look as a by-product. This leads to increased desire, as well as a sense of entitlement to women's sexuality.

The following two theories are more relevant in a society like ours:

Rape can also be understood as a gender based offence.³⁴ Many of the rapes are in fact committed by people who are known to the victim and such instances are majorly driven by a hate based crime. Most of these rapes are premeditated and calculated. A study conducted by the National Crimes Record Bureau suggested that out of 24, 923 rapes committed in India, 24, 470 of them were committed by people known to the victim (family, neighbours, other acquaintances). Brutal attacks on the victim after raping her, like mutilating her genitals, acid attacks, murder etc. can be best defined only by this theory.

Feminist groups suggest that rape is an expression of control that men seek to impose on the women.³⁵ In a highly patriarchal society, women's rights are seldom recognised. Very often, they are put in positions inferior to men from where the latter can dominate the former. Rape in such a case becomes another tool to further strengthen the patriarchal norms in the society. Gender inequality therefore is a root cause of rape. The perpetrator does not view it as a crime, but only as a way to maintain domination over the other sex.

Having understood the various theories behind rape, it is time to discuss the viability of death sentences in sexual offences.

Part C

Under Section 376A, punishment for rape and inflicting injuries that result in death of the victim is punishable, inter alia, with death. This amendment was pushed in the archaic penal code of India after the infamous Delhi Gang Rape incident. After a lot of pressure from the

³³Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563 (1997).

³⁴ Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 2 Harv. Women's L.J. 123.

³⁵See Stephen R. Gold's Review of: *Sex, Power, Conflict: Evolutionary and Feminist Perspectives*, Oxford University Press, New York, (1996).

public, the govt. was forced to step up and introduce certain much required changes in the way sexual offences were defined in the Penal code.

Before discussing the legal viability of the death penalty, it is to be questioned whether any form of punishment, harsher than the one mentioned under Section 376 prior to the 2013 amendment is viable at all. The act of rape has been stereotyped and stigmatised to such an extent that it becomes difficult to analyse it only as a criminal act, independent of its implications in society. On a personal visit to Tihar Jail, on speaking with some of the inmates, I learnt that even in prison, the rape offenders never disclose their crime even to fellow inmates because they are secluded from the rest of the inmates otherwise. The calls for stricter punishment come from the schools of thought which believe that rape is one of the gravest crimes in the society. However, what one fails to realise is that the conception of rape as among the gravest crimes itself stems from the stigma that is attached to it. Loss of honour of the family is one of the examples of such stigma. While claiming to put an end to the injustice of patriarchy, treating rape as the social death of the victim/survivor, only strengthens the patriarchal norms. Due to its rampancy in today's day and age, it should be looked at as a challenge to the society that needs to be eradicated. The reason for rape being a challenge to the entire society is not because it is one of the gravest crimes, but because it is one of the crimes that is spreading like an epidemic and poses a serious threat to the security of women forcing them back away from public spaces. There are two ways of putting an end to an epidemic. One is building immunity of the victims and the other is destroying the virus that is causing the epidemic with the strongest available medicine. Building immunity can be equated with according more rights to women and destroying virus can be equated to punishing the criminal with the most effective form of punishment.

Coming to the legal aspect, the rule of thumb is, higher the punishment, stricter the scrutiny of the case which is clear from the fact that the judges ponder many times before sending a convict to the gallows.³⁶ Stricter scrutiny would include victimisation of the family of the rape victim, longer investigation and slower trial. The reason why many rape accused go scot free is because the judges are too often not inclined to send the accused to jail for 7 years since the extremely high burden on the prosecution does not seem to be discharged. On the other hand, if the punishment is even lowered from 7 years, the trials are bound to end quicker and delivery of justice does not take a beating since the burden of proof immediately

³⁶Erik Lillquist,*Absolute Certainty and the Death Penalty* (August 23, 2004). Seton Hall Public Law Research Paper No. 10. Available at SSRN: <http://ssrn.com/abstract=581281> (last visited Aug 17, 2014, 9 AM).

drops to a great extent. However, a lower punishment might up the risk of repeat offenders. Therefore, what must be considered is the deterrence of lesser sentence vis-à-vis the deterrence of a higher sentence.

The rate at which rapes are taking place in India has been increasing even after various protests and awareness programs that have been initiated throughout India. The National Crimes Record Bureau has claimed that rapes in India have gone up from 24,923 in 2012 to 33,707 in 2013.³⁷ Some people claim that the conviction rate of rape is not encouraging and does not act as a deterrent to the criminals.³⁸ Since reducing crime rate is one of the ideas behind criminal justice system, it is pertinent to embark upon the question as to what is going to cause deterrence in the minds of the people that the number of rapes come down as much as possible. As the legislature is being pressurised to reform laws, it is left with two options, either to reduce the sentence for rape or to increase it. Though having lower punishment has its own merits, being under pressure from the public to make stricter laws, it is difficult to imagine that the legislature would have reduced the sentence as it would have immediately lost the confidence of the citizens. The indirect proportionality between number of rapes reported and conviction rate leads us to the question whether high conviction rate has any relation with deterrence at all.

In order to best answer that question, it is important to understand deterrence. The theory of deterrence is accredited to three major philosophers. Thomas Hobbes in his Leviathan explained how human acts were driven by self-interest, therefore for a punishment to have a deterrent effect, it must have a greater effect than the benefit one seeks to achieve from committing the act.³⁹ Jeremy Bentham⁴⁰ and Cesare Beccaria⁴¹ were two strong opponents of the death penalty and argued that it was an unjustified form of deterrence to crime. Modern day criminology regards severity, certainty and swiftness as the three ingredients of deterrence.⁴² Deterrence has a two-fold object, firstly, specific deterrence, which will deter the individual from committing the same or other offences in the future. The second object is as

³⁷Christin Matthew Philip, 93 Women are being raped in India every day, NCRB data show, THE TIMES OF INDIA, Jul. 1, 2014, available at <http://timesofindia.indiatimes.com/india/93-women-are-being-raped-in-India-every-day-NCRB-data-show/articleshow/37566815.cms> (last visited Aug. 17, 2014, 9 AM).

³⁸FP Staff, A 24.21 percent conviction rate for rape in India, lower every year, FIRSTPOSTINDIA, Sep. 10, 2013, available at <http://www.firstpost.com/india/a-24-21-per-cent-conviction-rate-for-rape-in-india-lower-every-year-1096959.html> (last visited Aug. 17, 2014, 9 AM).

³⁹THOMAS HOBBES, LEVIATHAN, Penguin Books, (1982).

⁴⁰JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION, Clarendon Press, (1879).

⁴¹CESARE BECCARIA, ON CRIMES AND PUNISHMENT, Hackett Publishing, (1986).

⁴²<http://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (last visited Aug. 17, 2014, 9 AM).

to general deterrence, i.e. convincing others that crime does not pay.⁴³ The focus of this paper is on general deterrence, which is of two types. First, is the deterrence of conviction, i.e. the probability of a person getting convicted that deters one from committing a crime.⁴⁴ Higher the probability, higher the deterrence. Second, deterrence of severity of punishment. This form of deterrence makes the potential offender balance out his actions and the consequences that may follow once he is convicted. Various studies propose that the deterrence of conviction is higher than the deterrence of severity.⁴⁵ However, an underlying assumption behind the theory of deterrence is that all human beings act rationally and assess all the risks before committing a crime.⁴⁶

In the first section of the paper we have seen that death penalty deters murders provided that it is awarded uniformly and not arbitrarily and crosses a minimum threshold. Therefore, the question is whether the death penalty can be given to more number of people? With the current judicial trend, it is unlikely that the death penalty is going to be given to more number of convicts even though many of the cases of rape and murder are horrific. Recently, the Apex Court decided that it will further streamline on the way death penalties are given, hence the sentence of death penalty will be even rarer.⁴⁷ It is often that cold blooded, pre-meditated murder gets the ultimate punishment. All the studies therefore, that have been done focus solely on the crime of murder. However, rape is a crime that is very different from murder as we have seen above.

While rape is a crime against the sexuality of a person, murder is a crime against life. The consequences in the latter are far severe than the former. The amendment that has been made in 2013 which adds section 376A does not mention murder, as understood in Section 300 of IPC. Even if the offender has no intention of killing the victim, if any injury is inflicted on the victim or victim dies as a result of the rape, the offender can be punished with death. Even unintentional death of the victim is punishable with capital punishment. For the offender therefore, the consequences are disproportionately stronger than the action itself. If rape is merely a biological crime where the offender is only looking for acceptance beyond

⁴³ See HARRY E. ALLEN, CRIME AND PUNISHMENT, Free Press (1981), p. 735.

⁴⁴ Valerie Wright, *Deterrence in Criminal Justice, Evaluating Certainty vs. Severity of Punishment, The Sentencing Project*, available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (last visited Aug 17, 2014, 9 AM).

⁴⁵ *Id.*

⁴⁶ *Supra* note 41.

⁴⁷ Dhananjay Mahapatra, *SC attempts to eliminate error in award of death penalty*, THE TIMES OF INDIA, Jul. 16, 2014 available at <http://timesofindia.indiatimes.com/india/SC-attempts-to-eliminate-error-in-award-of-death-penalty/articleshow/38455597.cms> (last visited Aug 17, 2014, 9 AM).

consensual sex, where the offender is able to rationalise his choice, it is likely to cause deterrence in his mind since it is neither a crime of passion, nor a pre-meditated act. It is a spontaneous feeling towards an opposite sex.

If rape is to be understood using the commodification theory, where the offender looks at rape as merely taking away property, the severity of punishment once again comes as a strong deterrent to the person. Death for theft is certainly not a proportional reaction on part of the state. Therefore, most offenders would rationally calculate the risks and then decide to go ahead or not.

In a country like India that is still in the clutches of patriarchy, where instances of Kangaroo Courts ordering men to rape women are rampant,⁴⁸ where there is a massive disregard for law, it is extremely hard to defend that a harsher law will be a deterrent since the issue does not seem to be with the law, but its enforcement. However, even then, I propose that the death penalty must be kept part of the punishment because every organ of the government must make all necessary efforts to ensure that rapes are deterred.

Let us look at the development of the idea of deterrence of death penalty as envisaged by the Supreme Court and the Law commission of India since the 1980s.

Soon after the Bacchan Singh's case, the Law commission in its 35th report on the Mode of Execution of Death Sentence showed support to the legality of capital punishment and stated that whenever there is a serious crime, the society feels a sense of disapprobation. By reserving death penalty for murder, and thus visiting this gravest crime with gravest punishment the law helps the element of retribution merge into the element of deterrence.⁴⁹

Despite the claims of many about the actual deterrent effects of capital punishment, the Supreme Court has time and again re-affirmed the belief that the highest form of punishment is still to be seen as a tool for general deterrence for the public. While addressing the concerns raised by various activists against the death penalty, one must also be cautious of the warning given by the Supreme Court in *Mahesh v. State of MP*,⁵⁰ that "to give a lesser punishment to the appellants would be to render criminal justice system of this country

⁴⁸VasundharaSirnate, *Good Laws, Bad Implementation*, THE HINDU, Feb. 1, 2014, available at <http://www.thehindu.com/opinion/lead/good-laws-bad-implementation/article5639799.ece> (last visited Aug. 17, 2014, 9 AM)

⁴⁹35th Report, Law Commission of India (1982).

⁵⁰AIR 1987 SC 1346.

suspect. The common man will lose faith in the courts. In such a case, he understands and appreciates the language of deterrence more than reformative jargon.”

The Apex Court has also held in several instances that the idea of punishment has been envisaged keeping in mind the objective of deterring crime from taking place.⁵¹ The punishments are imposed to make the threat credible.⁵² The Court cited with acceptance a venerated British Historian, Arthur Bryant who wrote, "The sole justification for the death penalty is not to punish murderers but to prevent murder." It then referred to Professor Ernest Van Den Haag who stated:

“The murderer learns through his punishment that his fellow men have found him unworthy of living, that because he has murdered, he is being expelled from the community of the living. This degradation is self-inflicted. By murdering, the murderer has so dehumanised himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of execution.”⁵³

A few years later, it was once again affirmed that the death penalty has a deterrent effect and does serve a social purpose and that the time was not ripe for the abolition of death penalty.⁵⁴

Recently, in *Bantu v. State of UP*,⁵⁵ the court laid down strengthened the argument made in *Mahesh v. State of MP*,⁵⁶ and reminded the courts' of their duty to not show mercy on criminals by providing inadequate sentence in the following words:

“Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could no long endure under such serious threats. It is therefore duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed.”

Most recently, a decision that can be seen as a huge leap away from the settled rule of rarest of rare, held “this (death penalty) is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate ‘honour killing’ should know that the gallows await them”.⁵⁷

⁵¹ *Machhi singh v. State of Punjab*, (1983) 3 SCC 470.

⁵² *Triveniben v. State of Gujarat*, AIR 1989 SC 1335.

⁵³ Ernest van den Haag, *The Ultimate Punishment*, 1986 HLR Vol. 99 p. 1699.

⁵⁴ *Smt. ShahiNayar v. Union of India*, AIR 1992 SC 395.

⁵⁵ (2008) 11 SCC 113.

⁵⁶ *Supra* note 47.

⁵⁷ *Bhagwan Das v. State (NCT of Delhi)*, (2011) 6 SCC 396.

The fact that 99.9% of the criminals guilty of capital crimes argue for a life sentence instead of death penalty shows that the criminals fear death as a punishment and want to avoid it at every cost possible.⁵⁸ Further, the fact that various convicts approach the president for pardoning their death sentence just strengthens the idea that the fear of losing life is extremely high and drives the convict into applying for all possible options to save his life.

The court has in the past too punished the accused guilty of rape and murder of a girl with death. The most famous case before the Delhi Gang Rape case was that of the execution of Dhananjoy Chatterjee in 2004. The court while upholding the death penalty held that justice demands that courts should impose punishment fitting to the crime so that the courts reflect the public abhorrence of the crime.⁵⁹ Recently, the President rejected the mercy petition of Rajendra Wasnik, who had been convicted for raping and murdering a three year old girl.⁶⁰ However, the court has also often rejected death penalty in a few cases of rape and murder citing the reason that they did not fulfil the criteria of rarest of rare.⁶¹

Since the incidents of rape are increasing at an alarming level, what must be asked is whether a legal system without death penalty would be more effective or a legal system that allows for death penalty. As has been iterated in part A of the paper, a minimum threshold needs to be passed in order to ensure that death penalty has a deterrent effect, therefore, this would imply that the courts will have to pass the decision of death a lot more frequently than it presently does, thereby essentially going against the long standing judicial precedent of rarest of the rare category. After the change in law, courts are not wary of pronouncing death sentence in cases of rape and death. Two famous examples are those of the Delhi Gang rape case and the Shakti Mills rape case which clearly shows the judicial attitude is leaning toward prescribing death sentence in more cases as such dastardly acts in themselves constitute rarest of rare.⁶²

Another amendment that has been made to the Criminal Procedure code is that the trial under Section 376A must be complete within two months of filing of chargesheet. Therefore, the element of swiftness is now guaranteed. The amendment also introduces that previous

⁵⁸L. SEHBA & G. NATHAN, FURTHER EXPLORATIONS IN THE SCALE OF PENALTIES, 24 BRITISH JOURNAL OF CRIMINOLOGY, (1984) p. 221, 239.

⁵⁹Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.

⁶⁰Yogesh Naik, *Two Sisters from Maharashtra Kolhapur may become the first women to be hanged in India*, THE TIMES OF INDIA, Aug 14, 2014, available at <http://timesofindia.indiatimes.com/city/pune/Two-sisters-from-Maharashtras-Kolhapur-may-become-the-first-women-to-be-hanged-in-India/articleshow/40249975.cms> (last visited Aug. 17, 2014, 9 AM).

⁶¹Mohd. Chaman v. State of NCT of Delhi, 2000 SOL Case no. 705.

⁶²Rebecca Samvel, *Mumbai Shakti Mills rape cases: Death Penalty for 3 repeat offenders*, THE TIMES OF INDIA, Apr. 4, 2014, available at <http://timesofindia.indiatimes.com/city/mumbai/Mumbai-Shakti-Mills-rape-cases-Death-penalty-for-3-repeat-offenders/articleshow/33238680.cms> (last visited Aug 17, 2014, 9 AM).

character or previous incidents of the girl engaging in sexual activities will not be considered relevant to prove her consent to the act. Various cases of the Supreme Court have let the accused scot free on the basis that the girl was habitual to sexual intercourse, the most infamous example being the case of *Tuka Ram v. State of Maharashtra*.⁶³ The same logic has been applied by the Supreme Court in various cases like *Devinder Singh and Ors. v. State of Himachal Pradesh*,⁶⁴ *State of Punjab v. Ramdev Singh*⁶⁵ and *Prem Prakash v. State of Haryana*.⁶⁶ However, recently, in 2014, in *State of Rajasthan v. Roshan Khan and Ors.*,⁶⁷ the court held that mere reason of the girl being habitual to sexual intercourse was not grounds sufficient enough to prove that there was no rape. Also, what must be kept in mind is that only in cases where the victim has died or is left in a vegetative state that death penalty is accorded, which will point to the fact that sexual intercourse was without her consent or forcibly since it is hard to presume that anyone would inflict such heinous injuries in case of consensual sexual intercourse. As has been iterated above, that the intention to kill need not be proven, hence there only needs to be a link proven between sexual intercourse and infliction of injuries. The second ingredient, i.e. certainty of conviction will also go up. Mere fact that death penalty is part of the statute as a punishment is therefore deterrent enough to the offender.

From the above discussion, it is clear that India requires the death penalty to be part of the statute book as a punishment for the crime of rape and death. A system that is devoid of capital punishment is bound to have a lesser deterrent effect because one of the ingredients of deterrence is the severity of punishment. The author also believes that the perpetrators of rape are not irrational beings, as they are not fanatics who rape because of passion, but only due to certain misguided norms of the society. It is this distinction between murderers and rapists that can help the author conclude that the principles of deterrence are more likely to affect rapists. Rape is not a crime that happens at the spur of the moment, but a continuous attack on the sexuality of a woman. It is clear in the mind of every rapist what his actions are and the consequences of it. The principles of deterrence work best on those who can rationalise their actions and the consequences. Therefore, it is the case of the author that death penalty can deter rape.

⁶³AIR 1979 SC 185.

⁶⁴AIR 2003 SC 3365.

⁶⁵(2004) 1 SCC 421.

⁶⁶(2011) 11 SCC 687.

⁶⁷ (2014) 2 SCC 476.