
THE DEATH PENALTY IN INDIA: LEGAL FRAMEWORK, ETHICAL DILEMMAS, AND THE CHALLENGE OF DETERRENCE

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Introduction

Capital punishment, also known as the 'death penalty or death sentence,' is awarded for capital offences such as murder or multiple murders, rape, or any other offence where the death penalty is prescribed by law. The fundamental concept underlying the imposition of a death sentence is that those who commit such an offence are regarded as a threat to society. The death penalty is also used to serve as a deterrent in society. Although India adheres to the restorative justice theory, which states that after being punished for the offence and serving the sentence, the offender may redeem himself for the harm he caused to society and to make him/her understand that the offence committed by him/her caused harm, as well as to discourage them from causing further harm to society.

The theory of retributive justice is central to the case for the death penalty. This theory holds that the person who has committed such a heinous crime must also suffer the same fate. The death penalty is used to create a deterrent effect on society so that people do not commit crimes and be afraid of the consequences of the offence.

Death penalty has been abolished in many countries and the United Nations has stated that countries must abolish the death penalty, the question of constitutional validity has been raised before the Supreme Court in a number of cases. Since the right to life is enshrined in Article 21¹ of the Indian Constitution, the Constitution is a fundamental right that cannot be taken away; it is one of the most important and compelling arguments for abolishing the death penalty even in the most egregious of cases, but the Supreme Court has not ruled out capital punishment as of yet. The Supreme Court has ruled in favour of the death penalty in a series of judgements.

¹ *Constitution of India, Article 21.*

Section 104 of Bharatiya Nyaya Sanhitha 2023², gives an alternate punishment for the life-convict murderer as death 'or with imprisonment for life, which shall mean the remainder of that person's natural life.

In India, the death penalty is based on the doctrine of the "rarest of rare cases," which frequently results in the reduction of such sentences to life imprisonment through the exercise of clemency powers by the President or Governor. India is the world's most populous country, with a population of 1.46 billion people of over 146 crores³, it is natural for the crime rate to be high and ever increasing. To reduce crime, harsh punishments such as the death penalty may be required.

Even though human rights advocates have called the death penalty "immoral," it remains an essential part of India's criminal justice system.

Meaning of Death Sentence

Death penalty has been a mode of punishment from time immemorial which is practiced for the elimination of criminals and is used as the punishment for heinous crimes.⁴

Historical Background

The death penalty has been a part of the Indian Penal Code⁵ since its inception in 1860. It has survived since its inception, but with a few minor changes that were necessary due to changing times, and it was also the way forward. When the code was enacted, Section 303⁶ provided for the mandatory death penalty. However, under Section 303, only those who had previously been convicted of life imprisonment and committed murder were sentenced to death. There was no such thing as a murder classification, but the only difference between Section 302 and 303 was that the mandatory death penalty would only be applied to offenders who had committed the crime of murder and were serving life sentences.

² Bharatiya Nyaya Sanhitha, Section 104.

³ World Population Review, <https://worldpopulationreview.com/countries/india> (last accessed on 25th June 2025)

⁴ Fatima, T. (no date) Constitutionality of Death Penalty, Bureau of Justice Statistics. Available at: <https://bjs.ojp.gov/topics/corrections/capital-punishment> (Accessed: February 7, 2023).

⁵ Indian Penal Code 1860.

⁶ Indian Penal Code 1860, Section 303.

The only measure while taking Death Penalty into consideration. It is a complex and divisive topic to utilise the death penalty in cases of rape. Opinions on whether the death penalty is a proper or just punishment for rape vary widely based on culture, religion, and moral principles, hence there is no general consensus on the subject. While others contend that the severity of the crime and the suffering of the victim make the death sentence appropriate. Some people think that the death sentence is an excessively cruel type of punishment that doesn't deal with the underlying issues that lead to sexual assault. The decision to impose the death penalty in rape cases is ultimately an issue of moral belief and community expectations. The decision to apply the death sentence in rape cases ultimately comes down to one's personal beliefs and societal standards, and it varies significantly from nation to nation.

Crimes Punishable with death penalty in India.

- Murder- Murder is a heinous crime as per section 302 of IPC. **Bachchan Singh v. State of Punjab**,⁷ The Supreme Court held that the death penalty can be said to be constitutional only if it is invoked as an extraordinary punishment in heinous cases.
- Terrorism related crime – Any act which endangers the life of the people or causes serious damage to property, the use of explosion comes under terrorism, which can also be punished with death.
- Rape -When the rapist causes the victim's death in the course of crime, treats her body mercilessly, or those who commit gang rape can be sentenced to death.
- Treason- When anyone tries to wage war against the government, he can also be given the death penalty.
- Kidnapping- Unlawful detention or intimidation of a person can also be punishable with death.

Ethical consideration taken into account while use of Capital Punishment.

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

⁷ AIR 1980 SCC 684

- Human rights: The death penalty calls into question the right to life as well as the prohibition on cruel, inhuman, or degrading treatment or punishment.
- Fair trial: Capital punishment should be imposed only after a fair trial, ensuring due process of law and protection against the death penalty being applied arbitrarily and discriminatorily. There is no clear evidence that capital punishment is an effective deterrent to crime, and it may even have a brutalising effect on society.
- Rehabilitation: In a criminal justice system, capital punishment precludes the possibility of rehabilitation and redemption for the individual, which is an important ethical consideration. The risk of wrongful conviction exists in any criminal justice system, and the irreversible nature of capital punishment means that innocent people may be executed.
- International human rights law: India has signed international human rights treaties that limit the use of the death penalty and advocate for its gradual abolition.

These ethical considerations should be considered when deciding whether or not to use the death penalty in India, as they touch on fundamental values such as human dignity, fairness, and the right to life.

Does it actually deter rape?

The lower house of India's parliament passed legislation that will result in the death penalty for anyone convicted of raping a child under the age of 12. Women and Child Development requested that the Prevention of Child Sexual Offenses Act (POCSO)⁸ be amended.

Minister Maneka Gandhi expressed her hope that it would prevent sexual assaults on minors. It was the latest in a series of high-profile child-abuse cases, including the rape and murder of an eight-year-old girl in Indian-administered Kashmir and the rape of a young girl in Madhya Pradesh, a state in central India. Child rapes increased from 8,541 in 2012 to 19,765 in 2016, according to official crime statistics in India. Following the outrage caused by the rape and murder of a medical student on a moving bus in Delhi, India, in 2013, the government declared that anyone convicted of rape resulting in death would face the death penalty. The proposed

⁸ *Prevention of Child Sexual Offenses Act 2012 (POCSO Act)*

legislation would allow a judge to sentence someone to death for raping a child under the age of 12, even if the child did not die. Despite these legislative changes, India remains a country that is hesitant to use the death penalty. It is now only required in the "rarest of rare" cases, with the interpretation left open to the court. The most recent execution in the country took place on March 20, 2020. Although widely praised, the new amendment has been criticised by a small group of campaigners who question whether the death penalty is truly an effective deterrent. Since a fatal gang rape in 2012, sexual assault has received increased attention in India. This is a topic that has been debated all over the world: does toughening the punishment reduce crime? Evidence from neighbouring countries suggests the opposite.

Challenges

- **Executability:** Even if a death sentence is imposed, there is no guarantee that it will be carried out because India lacks a standardised execution procedure. This means that death row inmates may have to wait years, if at all, before their sentence is carried out.

This also undermines the death penalty's credibility and effectiveness as a deterrent.

- **Cost:** The death penalty is an expensive process that necessitates the participation of lawyers, judges, and other legal personnel. This raises the cost of enforcing the death penalty and may place a burden on taxpayers.
- **Lack of Expertise:** There is a lack of expertise in the application of the death penalty in India. This can lead to errors in the sentencing process, resulting in miscarriages of justice and undermining the death penalty's credibility.
- **Social Stigma:** In India, the death penalty is a contentious issue, with many people opposing it due to religious or moral beliefs. This means that the death penalty may face significant social opposition, potentially undermining its effectiveness.
- **Poor prison conditions:** Prisons in India are commonly overcrowded and lacking in basic amenities, resulting in inhumane and degrading conditions for those on death row. This raises concerns about the treatment of people sentenced to death and the conditions under which they are held.

Lack of a Consistent Legal Framework in Death Penalty.

- Bhullar v state of NCT of Delhi⁹ this case addressed the constitutionality of the death penalty for terrorist acts and demonstrated the punishment's discretionary and arbitrary nature. The court ruled that the death penalty for terrorist acts could only be imposed in the "rarest of rare" cases, and that the decision to impose the death penalty was subject to the judge's subjective interpretation.
- Union of India v. Shatrughan Chauhan¹⁰: This case addressed the constitutionality of the death penalty in terrorism cases, highlighting the lack of clear criteria for determining when the death penalty should be imposed. The court ruled that the death penalty should be imposed only in the "rarest of rare" cases, and that the decision to impose the death penalty was subject to the judge's subjective interpretation.
- Mithu v. State of Punjab¹¹: This case addressed the constitutionality of the death penalty and demonstrated its discretionary and arbitrary nature. The court ruled that while the death penalty was not inherently unconstitutional, its discretionary application could result in arbitrary and inconsistent results.

These cases demonstrate India's lack of a consistent legal framework for the death penalty, as well as its arbitrary and discretionary application. This calls into question the fairness and effectiveness of the death penalty as a form of punishment, particularly in rape cases. It is impossible to overstate the importance of a comprehensive and consistent legal framework for the death penalty, one that prioritises the protection of human rights and the rights of the accused.

Prevalence in miscarriage of justice.

There have been several cases in India where a prevalence of miscarriages of justice have occurred in cases of rape. Some examples include:

Tukaram vs State of Maharashtra¹²: Mathura, a tribal girl, was raped by two police officers

⁹ (2013) 6 SCC 195

¹⁰ 2014 AIR SCW 793

¹¹ 1983 AIR 473

¹² AIR 1979 SC 185

while in custody. Despite medical evidence supporting Mathura's allegations, the accused were acquitted by the trial court. The case became a landmark case and highlighted the systemic bias against survivors of sexual violence.

The Delhi Gang Rape Case¹³ (2012): A 23-year-old woman was raped and murdered by six men on a bus in Delhi. Despite overwhelming evidence against the accused, including eyewitness testimony and DNA evidence, the defense used tactics such as victim blaming and shaming to discredit the survivor. The case highlighted the systemic biases and prejudices that survivors of sexual violence face in the criminal justice system.

These cases demonstrate the prevalence of miscarriages of justice in cases of rape in India and highlight the need for a fair and impartial criminal justice system that prioritizes the rights of survivors and ensures that perpetrators are held accountable.

Suggestion

The death penalty should never be abolished, and it should only be used in the most extreme of circumstances. Despite the fact that many countries around the world, including India, have signed the International Covenant on Civil and Political Rights. The death penalty should be abolished under the covenant, but many signatory members have not done so and continue to use it. The death penalty should never be abolished simply because people are afraid of it. The argument that the death penalty violates Articles 14, 19, and 21 of the Indian Constitution¹⁴ and should be abolished, but it is only used in the most extreme cases, and what are the rights of those people whose lives have been taken? and what about the rights of those people whose rights were violated by these criminals. The death penalty should never be abolished, even if some guidelines must be in place for sentencing a convicted to death, but it should never be abolished and should remain in the penal provision.

Conclusion

Based on the current information and study, it is possible to infer that the death sentence has no substantial deterrent effect on crime rates and may even lead to an increase in crime. Because of the complexities of crime and the lack of empirical evidence to support the claim that the

¹³ (2017) 6 SCC 1

¹⁴ Constitution of India, Article 14, 19 and 21.

death penalty has a deterrent effect, it is not an effective solution for reducing crime.

Furthermore, the risk of wrongful convictions and the disproportionate use of the death penalty against marginalised communities undermines public trust in the criminal justice system, raising serious concerns about its fairness and effectiveness. It is important to note that the conclusion that the death penalty has no deterrent effect is not universal, and research and debate on the subject are ongoing. However, current evidence suggests that the death penalty is ineffective at reducing crime and may have unintended negative consequences. Alternative punishments, such as life imprisonment, may be more effective in holding perpetrators accountable while reducing the risk of wrongful convictions and miscarriages of justice.