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Deconstructing capital punishment and its deterrence to rape

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Abstract

India today is torn between a constant debate over whether the four men convicted for gang-raping and murder (eventual death) in the infamous *Nirbhaya case* in December of 2012, should be sent to the gallows or not. The frequency & rampancy of sexual violence, the cleavages within the criminal justice system, and its failure to check the cycle has often led to outcry for harsher punishments. A significant majority of the population, also the family of the victim find satisfaction in knowing that justice will be served, that the perpetrators will pay in the same way the victim did — with their lives. Setting aside the retributive undertones in this understanding of justice, we are confronted with a more important question: is death penalty a deterrent to rape? Does it do anything to reduce the frequency of these crimes? Or is it the handy tool at the disposal of a State with vested interests of the courts and politicians to capitalize on the inexorable pain of the family of the victims and make the case a matter of nation's honour giving false hope to the citizens that the harshest punishment will prevent any such incidents in the future? Awarding capital punishments is the easiest alternative available, which helps the State mask their incompetence and shortcomings on several levels. The shortcomings in the state policy and action for protection of women and children, the incompetence of the police to act, file a charge-sheet and take action and the short coming in the other executive authorities to implement the laws. The motive of the judiciary should be to give justice to the victim while setting an example for the entire society to bring a positive change, not to satisfy the feeling of revenge of the victim. Because if the punishment is given with a feeling of revenge the actual underlying issues that are perpetuating endemic violence against women are left unaddressed.

Keywords: Justice, punishment, death row, ethical, legal

Introduction

The idea of justice occupies centre stage in our lives both in ethical and legal/ political terms. We apply it to every individual action and form our perception of a person based on whether their conduct is just or not. Justice has been considered to be a one of the four cardinal virtues of the social institution. It is considered to be a fundamental right of every person under all laws of the world. It is in fact punishment that has always been viewed as the most essential instrument in achieving justice. Punishment has been an integral part of the society from times immemorial. *Manu* (writer of the Manusmriti, a lego-theological treatise on the Hindu concept of 'dharma') defines it as follows: "Punishment governs all mankind; punishment alone preserves them; punishment awakes while their guards are asleep; the wise considers the punishment (danda) as the perfection of justice." ^[1] The methods and techniques of punishment in the primitive societies were mostly retributive. The principal of 'an eye for eye' was followed as the basis of criminal administration. But over the years punishments became a form of communication more than a mere penalty. It was held that punishment is justified not because the penalty as such reforms or deters but because punishment is a moral lesson, an appropriate rebuke to the criminal, a sufficient emphatic denunciation of the crime.

Though philosophers consider punishment as much a necessity in today's modern society as it was 1000 years ago, with the ever-evolving understanding of human rights jurisprudence, there is a need to have defined limits/ extents/ kinds of the punishment that should be awarded to wrongdoers. With the steady strides of human civilization, there has been corresponding change in how we view punishment, moving from retributive justice, to a rehabilitative approach, a balance between reforming the criminal and deterrence.

Among many theories of punishment, “*just deserts*” (part of retributive system of justice) has been most approved of. Since crime is defined as the violation or disturbance of the “right” relationships in the society, the goal of the retributive theory of justice is to reconcile these relationships. Reconciliation only happen if the offender is made to pay for the inconvenience caused by his demeanour. The basis of this theory is proportionality. The severity of the punishment must be equal to the seriousness of the wrong. In other words, we can say that the objective of retributive justice is to restore the balance as an immediate effect which in the long run does no good to the victim, criminal or the society at large. There were several ways to punish the wrongdoers- by imposing fines, through imprisonment, corporal punishment or sometimes even by taking their life. The origin of death penalty can be traced back to seventh century ancient Greek where the retributive system of justice was prevalent. The emperors being short sighted would simply get rid of the criminal and not the crime per se. They would leave the deeper issues of why the crime took place and how to prevent it in the future, unaddressed.

Sir Winston Churchill notes that “the mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailling tests of the civilisation of any country.” Death penalty has been admitted to be an extremely barbaric and regressive act of justice by most countries. Leading to more than 160 members states of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, either abolishing it completely or not practising it. Justices Potter Stewart in *Furman v. Georgia* (Supreme Court of United States of America) while talking about death penalty said that, “The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”^[2]

Certain provisions like Section 302 (punishment for murder) and 376A (punishment for rape which results in death or persistent vegetative state) in the Indian Penal Code 1860, give the courts discretion to award death sentence to the offenders. In the case of *Machhi Singh and Others vs State Of Punjab*^[3] in 1983 the Supreme Court of India established the legal test that death penalty should be reserved for the “rarest of rare” cases in which the manner of commission or the motive behind the crime were unusually cruel. Setting legal precedent for the standard guideline to Indian courts for issuing of the death penalty, making it the least possible option. But the question that still remains is whether capital punishment is an effective deterrent? As has been rightly observed by legal scholars oft, it is ultimately ‘certainty more than severity of punishment which is the real deterrent’. In the specific Indian context, the delay in trials make the deaths sentence ineffective and is simply a prolonged wait for the accused and his family. There were 371 prisoners on death row in India in December, 2017 with the oldest case being from 1991 out of which only 4 death row prisoners were executed in the last 13 years. “Death row prisoners continue to face long delays in trials, appeals and thereafter in executive clemency,” the Law Commission of India 2015 report on the death penalty^[4] said, “During this time, the prisoner on death row suffers from extreme agony, anxiety and debilitating fear arising out of an

imminent yet uncertain execution.” The longest time spent by a convict for his death sentence to be executed has been 21 years. Therefore, it can clearly be seen that we need and alternate punishment, which is more focused on the reformation and rehabilitation of prisoner. There have been cases where in-prison vocational and reformation training courses have helped the convicts to live a life of dignity and respect after being released.

On February 01, 2020 India will witness the execution of four men convicted for gang-raping and murder (eventual death) of Nirbhaya (meaning “fearless”, the name given to her owing to Indian laws that prohibit revelation of names of victims of sexual offences) in December of 2012. The incident attracted unprecedented public outrage in the national capital (where the crime was committed), owing mainly to the unimaginably brutal nature of the assault the victim was subjected to. The frequency & rampancy of sexual violence, the cleavages within the criminal justice system, and its failure to check the cycle has often led to outcry for harsher punishments, and this time the furore was unparalleled. A committee was immediately constituted to audit existing laws governing sexual offences, and to suggest changes to the same, materialising eventually into the Criminal Law (Amendment) Act, 2013 — bringing wide-ranging changes to the definition of rape, consent, and the minimum sentence for the various categories of rape provided in the Indian Penal Code, and some minor changes to the Indian Evidence Act and the Code of Criminal Procedure, 1963.

A significant majority of the population, and also the family of the victim find satisfaction in knowing that justice will be served, that the perpetrators will pay in the same way the victim did — with their lives. Setting aside the retributive undertones in this understanding of justice, we are confronted with a more important question: is death penalty a deterrent to rape? Does it do anything to reduce the frequency of these crimes? Or is it the handy tool at the disposal of a State with vested interests of the courts and politicians to capitalize on the inexorable pain of the family of the victims and make the case a matter of nation’s honour giving false hope to the citizens that the harshest punishment will prevent any such incidents in the future? To mask its failure on multiple fronts: in policing better, in bringing about fundamental changes in how a society views its women. Per the *National Crime Records Bureau* (NCRB) statistics of 2018, 34,000 cases of rape were reported in that year, which translates to 1 rape per 15 minutes. These figures have not come down since the amendments to the Penal Code post 2013. Further, rape is the fourth most common crime against women in India, accounting for almost 12% of the total crimes against them. These statistics are based on the cases that get reported, which per NCRB 2013 annual report^[5] are only 14% of the actual occurrences.

The slew of changes introduced by the legislature in 2013 were aimed mostly at evolving progressive laws for women bringing about the Criminal Law (Amendment) Act, 2013 which made certain amends on laws relating to sexual offences, added death penalty for rape resulting in the death of the victim. The laws relating to rape were further amended in 2018, by the Criminal Law Amendment Act, 2018 which brought about stringent laws for sexual abuse against children yet adding another death penalty for gang rapes and rape for children below the age of twelve. Despite

such amendments the conviction rate in rape cases in 2017 were reported to be as low as 32.2%. Statistics show that since the 2013 criminal law amendment the rate of murdering the victim after raping her has gone up by 28%, data also go on to show that in 94.6% out of 38,947 reported cases in 2016^[6] the rapist was someone known to the victim. Thus another thing to be kept in mind is that if rape is punishable with a death sentence then it will further discourage women to come out and talk about it or report the incident as they will be under added pressure from their family and the society and a burden on their conscience.

But before thinking of nothing less than capital punishment for rape as an adequate solution we must look at it radically with a more pragmatic approach. We must try and understand the adverse effects that it can possibly have. Since the offence of rape is committed in a closed space where only the victim is the eye witness, if capital punishment is the ultimate result which the perpetrator knows he will be sentenced to, then he most certainly has a motive to kill the victim after raping her, because her staying alive is a risk to his own life. If death is prescribed then the offender would want to get rid of all evidence and clear all the traces of his crime, and since the victim is the only eyewitness, killing her is in his best interest. This is exactly what happened in the gang rape in Hyderabad (India) on November 27, 2019, where after gang raping the girl her body was completely charred so as to erase all possible evidence of the crime.

Awarding capital punishments is the easiest alternate available, which helps the State mask their incompetency and shortcomings on several levels. The shortcomings in the state policy and action for protection of women and children, the incompetency of the police to act, file a charge-sheet and take action, and the short coming in the other executive authorities to implement the laws. Statistics show that almost two third of the complaints that reach the police are not even registered. A recent example of police failure can be seen in the same Hyderabad case, where to cover-up for their failure in filing the report of a missing girl, the police later shot dead the five accused men in the middle of the night in an encounter. Even this illegal and extrajudicial step of the police was celebrated as a heroic act as people believe the only equivalent justice to rape is death. The encounter conveniently settled the matter and hushed all the outcries and protests. It did not even take the public a couple of days to forget about the entire incident, which was exactly what the State intended to do.

It is also important that we break the patriarchal notions and shackles which equate the "honour" of a women to her sexuality. Attaching the dignity of a woman to her sexuality also discourages women from coming out and reporting cases, as in the end they are the ones whose "honour" is at stake. The people arguing in support of death penalty for perpetrators of rape are the same people who consider the crime equivalent to death. When the former External Affairs Minister of the ruling party, Bhartiya Janta Dal Party Late Mr. Sushma Swaraj infamously referred to Nirbhaya as a living corpse, a lot of feminist activists resented the statement and said the stereotype based on the belief that rape is a fate worse than death for a woman needs to changes. Woman should be supported and made to feel safe, so they are able to speak out fearlessly. They should not have to feel any kind of shame, or as though they have no place in the society. It has to be understood that rape is a

tool of patriarchy and violence for men to prove their superiority, it has nothing to do with the "dignity" or "purity" of a woman or the judgment of her "character".

In conclusion, death penalty is a violation of the basic right to life and must be opposed unconditionally. Indian law makers have been under tremendous pressure from activists, human rights bodies and the United Nations to reconsider the death penalty as a punitive measure for rape as not only is it inhumane and cruel but there is enough data to show that contrary to the popular belief it was not a deterrent.

The motive of the judiciary should be to give justice to the victim while setting an example for the entire society so as to bring a positive change, not to satisfy the feeling of revenge of the victim. Because if the punishment is given with a feeling of revenge the actual underlying issues that are perpetuating endemic violence against women are left unaddressed. The psychological aspects of why rapes are committed must be highlighted and dealt with, men in the country need to be educated, the real problems like alcoholism, exaggerated sense of masculinity, low opinion of women, having been raised in strong patriarchal families among others need to be focused on. Imposing death penalty for sexual violence and crime would only worsen the situation as the judges will hesitate in giving such harsh punishments leading to delay in the process of justice. As the former Chief Justice of India, P.N. Bhagwati observed: 'There are no objective standards regulating the imposition of the death penalty. Life is too precious a thing to be submitted to the subjective decision of a judge.' Rather than awarding capital punishment the woefully low conviction rate for these crimes must be addressed and make the process must be made effect and efficient

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