

IMPOSING THE DEATH PENALTY FOR THE OFFENCE OF RAPE

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Introduction

The offence of rape is one of the most heinous and egregious crimes against humanity, violating the dignity, autonomy and bodily integrity of an individual. It transcends physical violence, leaving deep psychological and emotional scars on the victim, often altering their life irreparably. The offence of rape takes multiple forms *inter alia*, statutory rape, gang rape, rape that leaves the victim in a permeant vegetative state, or that leads to death and the punishment for the respective forms varies from country to country. The given heinous nature of rape has ignited intense debates across nations regarding the applicability of the death penalty as the highest punishment in such cases, including within Sri Lanka. While the United Nations Human Rights Commission and the scholars such as Morine Chauvris¹, Mickell Branham², Maiko Tagusari and Zimring³ advocate that the death penalty is not the answer to rape based on certain perspectives, the alarming incidents taking place during the last couple of decades, emphasize the need to enforce death penalty in the cases of rape on the basis of retributive and deterrent theories.

My thesis will address two key aspects of the debate, namely: - the arguments opposing the implementation of the death penalty on sociological, psychological, pragmatic, utilitarian and human rights grounds; and how the imposition of death penalty for certain forms of rape (child rape⁴, rape that is of such a grievous nature as to warrant death penalty or when the rape leads to the vegetative state or death

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¹ Morine Cahuvis, “Why is the Death Penalty not the answer to rape?” Published on 8 July 2024.

² A Report by Eleos Justice- Monish University, Anti Death Penalty Asia Network

³ Leavides Domingo-Cabarrubias, “Why Capital punishment for rape is a regressive step for women’s rights?” Published on 8 March 2023.

<<https://www.monash.edu/law/research/euos/blog/euos-justice-blog-posts/why-capital-punishment-for-rape-is-a-regressive-step-for-womens-rights>>accessed on 2 January 2025.

⁴ By this, the author means the rape committed against a child under the age of twelve years, following the stand of India.

of the victim) in Sri Lanka can be justified from the perspective of the victims of rape, by drawing support from retributive theory and cases in Sri Lanka and India.

Death penalty in Sri Lanka

Sri Lanka has had a *de facto* moratorium on the death penalty from 1976.⁵ Nevertheless, the courts continue to impose death sentences leaving the final decision to commute those sentences to the discretion of the President of Sri Lanka. In all such instances, death sentences have been automatically commuted by the country's presidents.

The Penal Code of Sri Lanka doesn't recognize the offence of rape as an offence for which the perpetrator can be executed. Thus, the imposition of the Death Penalty in cases of rape has never been a part of the law of Sri Lanka. The highest punishment that is available for rape is rigorous imprisonment for a term of twenty years.⁶

The necessity to think about legalizing the death penalty for the offence rape in Sri Lanka arises from certain tragic incidents that took place during the last decades. The need was recently felt when a trainee doctor in Kolkata was raped and murdered.

Sri Lanka ranked as the third country globally in searching for the rape and murder video of the trainee doctor in Kolkata within a single day, according to a report by a prominent news channel.⁷ The prevalence of individuals who exhibit a disturbing eagerness to view such brutal content raises significant concerns about the safety of women in the society and insists the point that we need strict laws than we have in our hands, based on the fact that the alleged offender of the Kolkata case found to be a person with a sexually perverted mentality and was addicted to explicit content.⁸ Based on this perspective, the death penalty can be justified as the highest punishment.

⁵ Parliamentarians for Global Actions, "Sri Lanka and Death Penalty" <<https://www.pgaction.org/ilhr/adp/lka.html>> accessed on 9 January 2025

⁶ Penal Code No 2 of 1883 s 364.

⁷ Sri Lanka's Number One News Source

<www.adaderana.lk> accessed on 3 December 2024.

⁸ Rohit Khanna, "Kolkata Doctor Rape-Murder Case: Accused A Sexual Pervert, Has Animal-Like Instincts" Published on August 22, 2024

<<https://timesofindia.indiatimes.com/city/kolkata/kolkata-doctor-rape-murder-case-accused-a-sexual-pervert-has-animal-like-instincts/articleshow/112691268.cms>> accessed on 3 December 2024>.

Arguments against the death penalty along with arguments justifying the death penalty

Utilitarian Perspective

While abolitionists argue that the death penalty never carries a deterrent effect, the following arguments made by Louis P. Pojman can be submitted as making a convincing case that the death penalty carries a deterrent effect. Even though the argument was made in regard to the offence of murder, it is not wrong to cite it here, since the rationale behind the citing of the argument is to show that the death penalty carries a great deterrent effect.

His argument is based on two bases. Pojman argues that, “There is an ancient tradition endorsed by the main streams of philosophers including Plato that, a fitting punishment for murder is the execution of the murderer. One prong of this argument is the deterrent theory.”⁹

By presenting a hypothetical scenario he argues that immediate executions of the murderers would deter the murderers at large and the real question that need- our attention at this situation is “how do we institute the death penalty in a manner that would have the maximal deterring effect?” Furthermore, he suggests that public executions of the convicted murderers would serve as a reminder that crime does not pay.¹⁰

He adds that while abolitionists argue that there is no statistical evidence in favour of the deterrent effect of death penalty, common-sense arguments may be made in favour of the deterrent effect of death penalty as cited below.

People fear death more than any other punishment - imprisonment constitutes one evil, the loss of freedom. But the death penalty imposes a more severe loss, that of life itself. One will fear losing life more than losing freedom. Therefore, people will be deterred more by the death penalty than other penalties.

⁹ Louis P. Pojman, “A Défense of the Death Penalty” in Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons Incorporated, Second Edition 2014)

p 159.

¹⁰ Louis P. Pojman, “A Défense of the Death Penalty” in Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons Incorporated, Second Edition 2014)

p 162.

He cites an argument made by Richard Gernstein¹¹ that statistics cannot tell us how many potential criminals have refrained from taking another's life through fear of the death penalty. He further quotes a statement by Judge Hyman Barshay- "The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we don't hear about the ships the lighthouse guides safely on their way."¹²

Based on the above arguments, the death penalty can be fairly justifiable. Further, it can be argued that the deterrent effect of the death penalty depends on proper implementation. Given the context of our country, the recent government changes will undoubtedly instil a sense of fear and accountability among perpetrators that the laws will be implemented equally and thus will have a greater deterrent effect.

Sociologists' Argument

Sociologists such as Marine Chauvris¹³ and Mickell Branham argue that "Rape is a social problem. It isn't just another heinous crime. The roots of rape lie deep in social, cultural and economic conditions." A remark made by J.V.R. Krishna Iyer can be cited as an apt example of this view "The special reason must relate, not to the crime but to the criminal."¹⁴

This may be apt for other offences. But, when it comes to rape, many practical incidents suggest that they are not the sole conditions for rape, rather it is coupled with the desire to pursue gratification. In turn, even if the social conditions alone led to rape, it should not be taken as a defence, especially when the rape falls under above

¹¹ Former Prosecuting Attorney for the state of Florida.

¹² Louis P. Pojman, "A Défense of the Death Penalty" in Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons Incorporated, Second Edition 2014).

p 164.

¹³ Morine Chauvris, "Why is the death penalty not the answer to Rape?" Published on 8 July 2024

<https://worldcoalition.org/2024/07/08/why-is-the-death-penalty-not-the-answer-to-rape/#:~:text=The%20underlying%20logic%20is%20that,%E2%80%9Cprotection%E2%80%9D%20of%20women%204> accessed on 2 October 2024

¹⁴ Shreya Gautam, Amity Law School, Delhi (GGSIPU), "Death penalty for rape- Does it actually deter?" Indian Journal of Integrated Research in Law, Volume II Issue II | ISSN: 2583-9538.

enumerated categories. For human beings are endowed with reason, and thus have the capacity to distinguish between right and wrong.

The following case analysis negates the stand of the sociologists.

The Nirbhaya case¹⁵

The defendants raped Nirbhaya, inflicted diabolic injury on her body and tore her guts out. After 13 days, she died due to cardiac arrest, multiple organ failure and internal haemorrhage. Their initial intention was to rob those who get into that off-duty bus. Mukesh Singh, one of the perpetrators, stated that, “A decent girl won’t be roaming in the road after 9.00 p.m. Women is far more reason for rape than a man.”

While these facts seem to reflect some socio-economic base for the conduct of the offenders, it cannot be accepted that, it is the sole basis. If the economic conditions are the issue, then they would rob her or if they believed that her conduct was not good, they would have beaten her. There is no base for rape and torture. Thus, the reason behind the rape was something else, as affirmed by a statement of one of the perpetrators: “If she allowed us that day, she might not have died.”

Thus, the brutal rape coupled with torture was not for any other reason but her resistance. Furthermore, their acts of inserting an iron rod into her private parts and pulling and ripping apart her intestines can’t be justified by any conditions. The Three-judge bench, categorizing the case under the bracket of the rarest of the rare principle ordered death penalty to the offenders. Public celebration of the execution of the defendants, underscores the social endorsement of the death penalty for such crimes.¹⁶

The international outrage generated by this cruel incident resulted in bringing major changes to Indian Penal Code through the Criminal Law (Amendment) Act 2013. Mainly, a new section, 376A had been added to the effect of empowering the judiciary to impose lifetime imprisonment or death penalty, where the sexual assault leads to the

¹⁵ Mukesh & ANR v State for NCT of Delhi & ORS [2017] 6 SCC 1.

¹⁶ Suryanshi Bothra, “Retributive Theory of Punishment” Published on March 15, 2024, <<https://blog.ipladers.in/theories-of-punishment-a-thorough-study/>> accessed 9 January 2025.

death or vegetative state of the victim.¹⁷ Further, the Criminal law (Amendment) Ordinance, 2018, extended the penalty for rape and gang rape of girls below the age of twelve up to life imprisonment or death.¹⁸

The Vidya Case

The brutal rape and murder of Vidya in Sri Lanka was a well-planned, crime committed in an inhuman way.¹⁹ Background facts revealed that one of the reasons behind this cruel conduct is to take revenge from her family. Still the perpetrators deserve the highest penalty. The high court of Jaffna sentenced the offenders to death. Anyhow, the order was not carried out due to our stand towards the abolition of death penalty.

Seya's Case

Seya's case, which was considered to be the high-profile criminal case at that time, can be cited as another evidence of denying the argument of sociologists. Letting the offender of rape and murder of a five year child to be alive, based on whatever the reasons, is highly unreasonable. In this case also, even though the High Court of Negombo sentenced the offender, it should be remembered that the death penalty was given for murder and not for rape. Nevertheless, it was not implemented.

These cases further establish a clear distinction between the situation in India and our country. India was ready to execute the offenders at least where the cases fall under the category of rarest of rare case even in the absence of a legislation, and now the stand is further strengthened by passing the legislation. But unfortunately, the situation in Sri Lanka is not same, though the court ordered the death sentence in the above cases, it was not carried out due to executive decisions. Thus, to protect women through an effective criminal justice system passing an amendment to legalize the death penalty is vital.

¹⁷ Aarthi Sharma – “An Evolution of Anti-Rape Laws in India after Nirbhaya’s case: An Analysis”

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¹⁸ Legislative Brief- The Criminal Law (Amendment) Ordinance 2018

<<https://prsindia.org/billtrack/prs-products/prs-legislative-brief-3028>> accessed on 8 January 2025.

¹⁹ <<https://www.sundaytimes.lk/171001/news/inhuman-and-brutish-crime-against-schoolgirl-vidya-planned-for-porn-mafia-261883.html>> accessed on 2 December 2024.

Human Rights Perspective

Countries around the world are moving towards the abolition of death penalty to comply with the standards of International Human Rights Law. The international instruments such as International Covenant on Civil and Political Rights, called for signatories to abolish the death penalty on the basis that it violates the right to life of the perpetrator. Life is precious not only for perpetrator, but also to the victim. This quote applies to rape cases on the basis that, as Human Rights Activists say, the right to life does not mean mere living, but rather living with dignity: “Offences against women are not women’s issue alone, but a Human Rights Issue.”²⁰

The Aruna Shanbaug case can be said to be the perfect example to illustrate this argument. Aruna Shanbaug, an Indian nurse died in 2015, after spending 42 years in a vegetative state after being raped and strangled by a ward attendant in 1973. Her attacker was not even charged for raping her because sodomy was not considered rape under Indian laws at the time²¹ and he was freed after seven years sentence for robbery and attempted murder. While a person who spoiled her entire life was living an ordinary life, Aruna, who desired to lead a happy life spent almost her entire life in the vegetative state, due to the want of sexual pleasure of her attacker.

Furthermore, when it comes to the specific context of Sri Lanka regarding the Human Rights violations, given the history of Sri Lanka, which includes a history of genocide and mass rape during the civil war, of which the perpetrators left with no punishment at all and a number of custodial death cases, where the deceased persons are often brutally tortured and died as a consequence, including, Sriyani Silva case²² where the SC ordered only fine and compensation, imposing the death penalty for a heinous offence like rape can be fairly justifiable.

Moreover, it is to be noted that, if legislation was passed to amend the law to include the death penalty to rape in Sri Lanka, it would be

²⁰ Mukesh & ANR v State for NCT of Delhi & ORS [2017] 6 SCC 1.

²¹ Tanisha Maheswari- “Case analysis of Aruna Ramachandra v Union of India” Published on July 14 2022.

²² Sriyani Silva V Idamalgoda, Officer-In-Charge, Police Station Paiyagala and Others (2003) 2 Sri L.R.

implemented prospectively. So, one who commits rape thereafter is responsible for his end.

Retributive Theory in favour of the death penalty

The proposition that, the guilty deserve to be punished in proportion to the severity of their crime, is the main stand of the retributivists.²³ The only goal of the retributive theory is to provide justice to the victim and punish the offender with a punishment that is proportionate to the wrong they committed.²⁴ It helps in giving moral justice to the victim as well as to instil a feeling of trust within society towards the criminal justice system.

A common argument made by both human rights activists and sociologists against the imposition of the death penalty based on the retributive theory is that “True a criminal should be punished for his crime, but the goal of the civilized society should be to eliminate the offence, not the offender. We must educate and guide them in order to improve their lives and the lives of future generations. This is the primary distinction between humans and animals.”

I would say the preceding argument is a result of confusing retribution with revenge as mentioned by Louis Pojman.²⁵ Vengeance signifies inflicting harm on the offender out of anger because of what he has done. Retribution is the rationally supported theory that the criminal deserves a punishment fitting the gravity of his crime. It's also within the goal of a civilized society. If the gravity of the seriousness of the crime warrants the elimination of the perpetrator from the society, it should be made.

The death penalty for rape can be fairly justified based on the retributive theory since when it comes to the offence of rape, ensuring justice to the victim holds greater importance than purely deterring

²³ Louis P. Pojman, “A Défense of the Death Penalty” in Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons Incorporated, Second Edition 2014)
p 160.

²⁴ Suryanshi Bothra, “Retributive theory of punishment” Published on March 15 2024 <<https://blog.ipleaders.in/theories-of-punishment-a-thorough-study/>> accessed 10 January 2025.

²⁵ Louis P. Pojman, “A Défense of the Death Penalty” in Andrew I. Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons Incorporated, Second Edition 2014)
p 161.

the crimes. The heinous nature of the rape and the suffering experienced by the victims, in the above discussed case, supports this stand.

Despite the shift to preventive and reformatory theories of punishment, application of the retributive theory of punishment is still visible in the legislation as well as landmark cases in India. Death penalties are guided by the principles of proportionality hence they are often discussed in the context of retribution.²⁶ E.g., the Nirbhaya case.

Conclusion

An overall analysis suggests that it is reasonable to introduce death penalty in cases of rape when the rape falls under specific categories such as child rape, rape of a grievous nature, rape that leads to a vegetative state or death, in order to ensure justice to the victim and to prevent similar tragic events in the future. Despite the claims by the abolitionists, the need to impose the death penalty in cases of rape is deeply felt by society in certain times. The noted incidents emphasize that death penalty should be legalized in Sri Lanka in order to make the offender to meet the proportionate punishment for what he has done.

²⁶ Suryanshi Bothra, “Retributive theory of punishment” Published on March 15 2024 <<https://blog.ipleaders.in/theories-of-punishment-a-thorough-study>> accessed 10 January 2025.