CHAPTER-IV
CRIES FOR AND AGAINST CAPITAL PUNISHMENT FOR RAPISTS: A REFLECTION

"Love for life is a basic feature of human behaviour. It is the most valuable treasure for an human being and not only for an human being, even an animal does not want to loose it. Everyone wishes to enjoy it upto the fullest extent. For a human being nothing can be dearer than life and death penalty is that form of punishment which snatches this dearest property."

Capital punishment means a sentence of death. It is the severest i.e., an extreme point of sentence. The punishment is extreme because it extinguishes the very existence of human life. This irreversible punishment is to be awarded only for very gruesome, horrifying, grievous and disgusting crimes against humanity. Though the definition and extent of such crimes vary from country to country and time to time, there is probably no country in the world where death sentence has never existed. It has been in practice from the time immemorial. The very object of punishment has always been to guard the society against the criminal and unsocial elements.

The United Nations Organization, is often speaking regarding the abolition of Death Sentence from criminal justice system UNO has also disposed the proposal for the acceptance of the members of UNO meanwhile the vice Prime Minister of India, and Home Minister, Mr. L.K. Advani stated in Parliament that rapists should be punished with death sentence and the state governments should make the laws for rapists. Though it was not for the first time, the similar statement was given by Advani ji in 1998.

Thus, the rapist’s suitable punishment is the burning issue of the present society. The National Women Commission, Social Institutions and Law Commission itself directly or indirectly have been against the Death Penalty, the ongoing debate is that can this heinous and inhuman crime really be controlled by awarding death sentence? The answer can be traced by

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questioning that whether other crimes have been controlled for which our Penal Code provides Death Penalty. If not so, how can we check this crime by Death Sentence. Today, this crime is increasing enormously while we have sufficient provisions of punishment under Indian Penal Code. Just for the moments sexual pleasure the rapist spoils the whole life of an innocent girl.

According to the majority of experts opinion, this crime cannot be checked by giving them simply the highest penalty because rape is the result of uncontrolled pent-up lust of the rapist which cannot be deterred by capital punishment. If we provide death sentence then the frequent killing of women will increase and the offender would often try to remove relevant evidences.

In response to an unprecedented increase in the heinous cases of rape, The Central Government had proposed a Bill. The Indian Penal Code (Amendment) Bill 1992, provided that “whoever commits rape on a woman when she is under ten years of age, shall be punished with death.” Similarly, “whoever, being a relative of a woman, commits rape on such woman when she is under 18 years of age, shall be punished with death.”

This move is based on the opinion that the offence of rape must be dealt in the most strictest way possible. The controversy regarding death penalty has once again been brought forth by the introduction of this bill.

[A] ARGUMENTS AGAINST IMPOSITION OF DEATH PENALTY

(i) Deterrence is one of the important objectives of the Criminal law. The opponents of the Bill argue that capital punishment is no more an effective deterrent. They also refer to some empirical studies conducted in this regard. They maintain that death penalty will not be able to deter effectively the other sexual offenders because these crimes are committed in the fury of lust and to extinguish a life only for a crime committed in fury can never be held just, fair and reasonable. Some of the members of Rajya Sabha are also of the view that capital punishment to rapists would not serve as a greater deterrent.

(ii) Secondly, since there are no set guidelines laid down by the legislature or the judiciary with regard as to when punishment of death is to be
invoked. The Supreme Court had simply said that it is "to be used sparingly. If the proposed Bill is indeed passed. Then how it is to be determined whether a particular rape case is a fit one for the punishment of death, while another cases is deserving only of a lower punishment? Any attempt of categorizing such crimes would lead to injustice. This would seem to leave only the choice of a mandatory sentence of death to a rapist, which in turn may be challenged as violative of the Right to life.

(iii) Thirdly, death penalty is such penalty in which there is no chance of reformation. That's why it would be the highest cost to be paid by the accused for his guilt.

(iv) Fourthly, Capital punishment is unjustified on the basis of retribution. Justice, it is often insisted, requires death penalty as the suitable retribution for heinous crimes only. It could be defended on retributive grounds only for the crime of murder and not for any crime such as rape.

(v) According to Rani Jeth Malani, Advocate, Supreme Court, 'Rapist should not be given the death sentence. According to theories related to sentencing of criminals, you don't want to exterminate the victimizer. It is the cause of crime and psychology of the rapist that have to be dealt with, and not the victimizer himself, whose examination would not solve the problem to stop brutalities on women, we have to reform rapist and adopt suitable measures to generate ethos and empathy.'

(vi) 'Vir Sanghvi had observed that there are two problems with the death penalty for rape approach. The first is that it doesn't seem to work and the second is that by demanding that we hang or castrate all rapistS, we are focusing on the least worrying part of the problem. The problem with the death penalty is that it actually decreases the chance of conviction.\(^2\)

The evidence from all over the world has shown that when judges are about to take the extreme step of ending a man’s life, they are nearly always assaulted by doubts and look for reasons to acquit.

"There are two other problems. There is no evidence that the death penalty while it does satisfy society’s thirst for revenge actually works as deterrent to potential criminals. So even if we hang all rapists, women would still be at risk. Moreover in all rape trials, it is the victim who identifies the rapist. If a rapist knows that his crime carries the death penalty than he will simply kill the victim after raping her to make sure that she can never testify against him. Even if he is caught and charged with murder, what’s the worst that can happen: he’ll get the death penalty, which he would have got for rape in any case. Therefore hanging does not provide the solution,"

(vii) The death sentence cannot solve the traumas of a rape victim and in no way can it stop or reduce the crime of sexual assault or rape. The death penalty is a violation of human rights. However, if rapists are sentenced to rigorous imprisonment, it might discourage others from committing this crime. Rape is definitely a heinous crime but death sentence should not be given for the criminals. Rather the rapist should be given a chance to reform apart from undergoing rigorous sentence. What we need is an honest and effective implementation of our existing laws accompanied by speedy trial. Efforts should be made to include moral values and respect for women.

(viii) A death sentence to the rapist means a death sentence for the victim also, because of his fear of being identified later and putting to death, in such circumstances, the rapist would tend to eliminate the evidence by killing the victim. If he commits death of the victim the case becomes be fit one for “rarest of rare” and in such situation it will take long time and then mercy petition will pour in and conviction rate will surely decrease.

3 Ibid.
(ix) It is submitted that the proposed mandatory death penalty is least going to serve the purpose in its true perspective. Undoubtedly, the rates of murders of the victims would surely increase at the hands of the perpetrators of the heinous crime in order to save themselves from identification by the victims. Moreover, we are already having maximum punishment for the rapists, i.e., the life imprisonment. Therefore, in its presence, the death sentence would seem to have little impact. Further the existing principle that death penalty must be awarded in the rarest of rare cases” will ensure that a distinction is to be made first amongst the offence of rape to identify the ‘rarest of rare’ amongst them.4

Thus, we may conclude that death sentence leaves no room or opportunity for a rapist to reform himself. Thus, death penalty for a rapist seems to be an unviable form of crime control. Thus, the opponents of the proposed bill are of the view that the Government should rather evolve long term measures which address the problem of rape from a social and ethical angle, educational, rather than purely a penal point of view.

[B] ARGUMENTS IN FAVOUR OF DEATH PENALTY

The supporter of death penalty in rape cases have their own arguments. Rape is an atrocious act. It is an act of inhumanity and is a criminal offence. A rape is committed not only with simple intention but with malicious intention. It makes the life of the victim worst than hell as the victim has to live with the horrible traumas throughout her life. Thus, the rapist has no right to live freely after committing such a heinous and outrageous offence. The rapist convicted should be given only death sentence, as only giving them a few months of imprisonment or fine won’t deter them for committing the offence again, this is not proper justice to the victim as it would be a meager punishment for their horrible crimes. Death penalty for the perpetrators would be the best justice awarded to the victims who pass through the horrible traumas which linger on

their minds forever after the assault. The incidence leaves a deep scar in their minds which can never be wiped out in the whole life span of the victims.

Rapists outraging the modesty of a woman leave a permanent scar on the entire psychology of the victim. It is a brutal assault on the dignity of that person. Unfortunately, the accused often goes Scot free for one reason or the other. Rape is the most atrocious crime and rapists should be given the death penalty.

(i) The advocates of the proposed Bill maintain that death penalty is definitely more deterrent. Life naturally is dearest to all and no one wants to lose it. The fear of death has always been deterrent and will remain so. *Hasn't the fear of getting HIV -positive deterred many from going for free sex and when merely the fear of a disease has deterrent effect then why not the fear of death? Isn't it strange to say that death sentence has no deterrent value under such circumstances?*

(ii) Secondly, to say that the rapes are committed in fury of lust is not always true. Consider the cases of gang-rapes in which girls are kidnapped in a well planned and concerted manner, carried to a pre-settled and lonely place and beastly raped for hours (sometimes for many days too); the perpetrators threaten to kill not only the girl but even the whole family and sometimes killings do take place. Is it only a fury of lust? Isn't it a heinous crime? Can it be curbed only by the award of liberal punishment? Thus the most important question which emerges in once mind is that can a woman at night, walk on road free and without fear? Not even a single day passes without the news being reported relating to rapes, molestations, eve teasing etc.

(iii) Thirdly, the opponents often say that death penalty is appropriate only in very heinous crimes. When rapes are committed on children of four, five or seven years of age and are sometimes killed, then whether these rapes are not heinous? Is it lust only? Can a girl child of 4 or five years arouse the sexual feelings of a boy of 20 years?
Fourthly, ours is a male-dominated society but when those who are the protectors and the guardians (such as family members, police etc) of law commit rapes on their children or close relatives; don't they deserve a harsher punishment? Can we tolerate a society where a daughter is not safe with her father, brother or uncle even in her own home?

Thus, keeping in view all the above mentioned propositions and realising the gravity of rapidly increasing sexual offences (like gang-rapes, child rapes, strangulation of the victims or killing of any other relatives etc.) it would not be improper to submit that the award of capital punishment would lie a viable punishment for such inhuman and heinous perpetrators of crime.

[C] JUSTICE MALIMATH COMMITTEE'S REPORT: A Critique

(i) Justice Malimath Committee has out rightly rejected death sentence for rapists and the Committee is not in favour of imposing death penalty for the offence of rape because in its opinion, the rapists may kill the victim. Instead, the Committee recommended sentence of imprisonment for life without commutation or remission.

(ii) As instances of non-penal penetration are on the increase and they do not fall in the definition under the offence of rape under Section 375 of the IPC, the Committee felt that such non-penal penetration should be made an offence prescribing a heavier punishment.

(iii) The Committee however felt that investigation and trial of rape cases should be done most expeditiously and with a high degree of sensitivity. The Committee therefore, made the following recommendations:-

(iv) Forcible penetration, penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence under the IPC prescribing appropriate punishment on the lines of Section 376 of the IPC.

(v) The Committee was not in favour of prescribing death penalty for the offence of rape. Instead the Committee recommended sentence of imprisonment for life without commutation or remission.
(vi) A suitable provision should be made requiring the officer for investigation to complete investigation of cases of rape and other sexual offences on priority basis and requiring the court to dispose of such cases expeditiously within a period of four months.

(vii) Specialized training should be imparted to the Magistrates in regard to trial of cases of rape and other sexual offences to instill in them sensitivity to the feelings, image, dignity and reputation etc. of the victim.

(viii) Provision should be made in the Penal Code permitting filing of FIRs in respect of offences under Section 376, 376A, 376B, 376C, 376D and 377 of IPC within a reasonable time.

Thus, after taking into consideration the various arguments in favour and against the death penalty to the rapist, it can be safely concluded in general that in all cases of rape, death penalty is not the viable solution except those instances of serious gravity like gang-rapes and child-rapes. We are reflecting the wrong part of the problem (i.e. punishment) to some extent. We should be more worried about how we handle the rape cases in the country. If we award the death penalty to the rapist, the victim may be killed and the case would be fit one for "rarest of rare" and to judge the case as the 'rarest of rare' would take a long time. Mercy petition would pour in and conviction rate would surely decrease subsequently. Moreover the death penalty is also essential in such cases to do justice against the crime and to create deterrence in the like minded people apart from instilling confidence in the public at large.