

## **CAPITAL PUNISHMENT FOR CHILD SEXUAL OFFENDERS: A CRITICAL ANALYSIS OF POCSO ACT**

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### **ABSTRACT**

Capital punishment for child sexual offenders is a contentious topic, especially concerning the Protection of Children from Sexual Offenses (POCSO) Act. This act is aimed at safeguarding children from sexual abuse and exploitation, covering various offenses such as sexual assault, sexual harassment, and pornography involving children.

While some argue for the imposition of capital punishment as a deterrent against such heinous crimes, others oppose it on ethical, moral, and practical grounds. Proponents argue that the fear of facing the death penalty could deter potential offenders from committing such crimes, thereby protecting children. Capital punishment is seen as a form of justice for the victims and their families, offering a sense of closure and retribution.

Child sexual abuse is considered one of the most abhorrent crimes, causing severe physical and psychological harm to the victims. Some believe that such crimes warrant the harshest punishment available. Capital punishment carries the risk of irreversible error, with the possibility of innocent individuals being wrongly convicted and executed.

Critics argue that there is insufficient evidence to support the claim that capital punishment acts as an effective deterrent against crimes, including child sexual abuse.

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Many oppose capital punishment on the grounds that it violates the inherent right to life and constitutes cruel and unusual punishment, particularly when applied to offenders who may have themselves been victims of abuse or trauma. Instead of focusing solely on punishment, opponents advocate for preventive measures, such as education, awareness, and rehabilitation programs, to address the root causes of child sexual abuse and support victims.

In the context of the POCSO Act, the debate over capital punishment underscores broader discussions about the efficacy and morality of using extreme penalties to address complex social issues, including the protection of children from sexual offenses.

## INTRODUCTION

"The capital punishment or death penalty is an aggression of the right of and the ultimate cruel, inhuman and degrading punishment"<sup>2</sup>

**-Amnesty international**

Capital punishment is punishment by death. It is a government approved practice of killing an individual as a punishment for an offense. It is generally only applied as a punishment for especially serious forms kinds' murder, but in some nation treason, types of frauds, adultery and rapes are capital offences. In India the death penalty is considered as an approved punishment system in India and is allowable for some offences according to IPC, 1860, as well as other laws<sup>3</sup>.

Capital Punishment has often been one of the controversial issues worldwide. In the rarest of rare case capital punishment can be inflicted on the convicted persons. As per Art21 of the Indian Constitution, any individual will be deprived of their life or individual freedom except as per procedures established by IPC. This research article is an effort to access the applications of the doctrine of 'rarest of rare' by the Supreme

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<sup>2</sup> Amnesty International, The Capital punishment: A Cruel, Inhuman and Arbitrary Punishment, 1 May 1995, ASA/22/03/95

<sup>3</sup> Paranjape N.V. , Criminology and penology, Central law publication,14th edition,2009

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Court of India. It would be remarkable subject to examine, whether a uniform pattern can be deciphered regarding the concepts of rarest of rare or is it reliant on the personal philosophy of the judges. Some of them points out, a number of inconsistencies in the application of the principle and in this background the query to be answered is that whether the decision that an individual should live or die depend on the court.

Sexual offenses against women and children are among the most abhorrent crimes against humanity, prompting a genuine and justified public concern for addressing these issues. Consequently, there has been a growing demand for harsher penalties, including the death penalty, to deter such offenses.

On Human Rights Day 2020, the Maharashtra cabinet approved the Shakti Bill, which expands the scope of mandatory sentences, including the death penalty, for non-lethal rape cases (excluding Marital Rape). This bill reflects a broader legislative trend, exemplified by the Disha Bill in Andhra Pradesh, which also seeks to impose the death penalty for the rape of adult women (awaiting presidential assent).

Implementing the death penalty in such cases often deflects attention from addressing systemic issues and seeking lasting solutions. It suggests that the primary cause of these crimes is the belief that punishment is not severe enough, rather than tackling deeper societal problems.

In 2018, incidents of violent child rape and murder in Kathua and Unnao, led to inclusion of death sentence for the first time for rape (without murder) of girls below the age of 12 years. This was followed by the amended in the Protection of Children Against Sexual Offences Act, in 20-19 where the death penalty was introduced for penetrative sexual assault of children below the age of 18 years.

In August 2019, India amended the POCSO Act, 2012, to authorize the death penalty for the rape of children under the age of 12. In what was described as "extrajudicial killings," four men accused of raping a 27-year-old veterinarian in Hyderabad were fatally shot by the police in December 2019, purportedly while attempting to escape. Following this

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incident, the Andhra Pradesh Legislative Assembly passed a bill to permit the death penalty in rape cases.<sup>4</sup>

Vinay Sharma v. Union of India<sup>5</sup>, usually known as the Nirbhaya gang rape case, shocked the country's still, small voice. The sad and brutal misfortune happened on a transport in the chilly climate of Delhi. Six of the respondents violently raped the girl, bringing about her demise. An iron pole was driven into her private areas also, and she was thrown bare onto the street. All her physical and close to home torture finished in her demise. At the point when the matter preceded the court, one of the respondents ended it all in prison, and one more was a minor. Consequently, he was not killed. In any case, the other four suspects were sentenced to death and were hanged. This choice was arrived at in the wake of thinking about the exasperating and relieving contemplations. Assuming any moderating factors existed, they were overpowered by the exasperating elements. Capital punishment was given since life detainment was considered deficient considering the pertinent realities of the wrongdoing and the brutal torment caused for the person in question, which brought about her demise.

The Ministry has approved of the capital punishment for individuals in minor rape cases under 12, responding to extensive outrages over the rape of a teenage girl (Kathua Case) and other assaults and crimes against minor girls. It will need the approval of Parliament in 6 months to become laws. But in the meantime, suspect can be prosecuted under the orders. The government has passed legislations doubling prison term for rapist to 20 years and criminalizing voyeurism, stalk and the trafficking of girls and woman. Indian government and policy makers also voted to lower to 16 from 18 the age at which an individual can be tried as adults for terrible offence.

POCSO Act stands as a bastion of legal protection against the egregious violation of children's rights through sexual abuse and exploitation. Enacted in, this legislation

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<sup>4</sup> Swagata Yadavar, <https://scroll.in/article/951493/india-is-increasingly-handing-out-death-penalty-to-rapists-and-most-cases-are-stuck-in-court>

<sup>5</sup> Vinay Sharma v. Union of India AIR 2020 SC 1451

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embodies India's commitment to safeguarding its most vulnerable citizens from the scourge of sexual offenses.

Despite the comprehensive legal framework provided by the POCSO Act, the persistently alarming rates of child sexual abuse underscore the need for robust deterrent measures and stringent penalties. In this context, the proposition of capital punishment for child sexual offenders has emerged as a contentious issue, eliciting impassioned debates within legal, ethical, and societal spheres.

The imposition of capital punishment represents the apex of punitive measures within any legal system, reserved for crimes deemed most heinous and reprehensible. Advocates of its application in cases of child sexual abuse argue for the unequivocal denunciation of such abhorrent acts and the imperative of deterring potential offenders through the imposition of the severest penalty.

However, the proposition of capital punishment within the framework of the POCSO Act demands careful consideration of multifaceted dimensions. Beyond its potential deterrent effect, questions of efficacy, proportionality, and ethical implications loom large. Moreover, the psychological impact on victims, the risk of wrongful convictions, and the broader implications for the justice system warrant meticulous examination.

This study embarks on a comprehensive exploration of the proposition of capital punishment for child sexual offenders within the ambit of the POCSO Act. By delving into legal precedents, international standards, empirical evidence, and stakeholder perspectives, this research endeavors to provide a nuanced understanding of this complex and contentious issue. In doing so, it seeks to inform policy discourse, legal deliberations, and societal dialogue aimed at enhancing the protection of children from sexual exploitation and advancing the cause of justice.

Indian legal system doesn't support death penalty for an imprecise period, but they also don't entirely oppose it. Even if the capital punishment in India has been restricted to the "rarest of rare" case, there are still different constitutions that inflict capital punishments

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in spite of the offences not being severe enough. Sec. 121 (war against the country), 302 (murders), 364A (kidnapping), etc of the IPC 1860 defines capital punishment. Terrorism and rape cum murder are the most usual cases comprising key death row convict<sup>6</sup>.

### **HISTORY OF CAPITAL PUNISHMENT**

The beginning of the Capital punishments can be evolved in 18<sup>th</sup> Century B.C in the “Code of King Hammurabi of Babylon, wherein the capital punishment was codified for 25 different crimes. The capital punishment can also be outlined in the Draconian Code in Athens, which made the capital punishment compulsory for all the types of crimes committed. The first record of legislation that includes capital punishment was in the 18th century BC, in ancient Babylon under King Hammurabi. The Code of Hammurabi, the best-preserved legal text from the ancient Near East, had the capital punishment as punishment for 25 different crimes”.

Talion or lex talionis in Latin was a principle first present in the Code of Hammurabi and later in early Roman and Biblical laws. It's generally renowned for the "tit for tat, a tooth for a tooth, a life for a day to day existence" saying. This standard is the premise of a retributive equity approach and is intended to guarantee that punishment is relative to the wrongdoing, not lesser, however not more noteworthy, by the same token.

An outrageous illustration of regulations consolidating capital punishment can be found in antiquated Greece. In 621 BC, the overseeing blue-bloods of Athens approved Draco, a lawgiver, to compose the Athens code of regulation. Proficient Athenians

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<sup>6</sup> Pandey, Kritarth, Indian Judiciary on Death Penalty, SSRN, (February 21, 2014)

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could peruse the law openly at focal areas, stamping one of the main strides towards Athenian majority rules system<sup>7</sup>.

Notwithstanding India's position on capital punishments, the legal executive recovers it for outrageous infringement of regulation. As indicated by the Art.21 of The Constitution of India, "no individual will be denied of his life or individual freedom besides as per system laid out by regulation." Capital punishments have generally been a disputed matter in the Judiciary, in India as well as in most evolved nations. The state's power is both addressed and laid out after the execution of a capital punishment. India has made its position clear regarding this situation in Dec 2007, when it dismissed UN's supplication for an overall ban on capital punishment which was further.

Regardless of India's position on capital punishments, the legal executive recovers it for outrageous infringement of regulation. In the beyond 10 years the Indian Judiciary has condemned 1,303 individuals to no end except for just four have been hung till death in this whole ten years.

## **THE PURPOSE OF CAPITAL PUNISHMENT**

### **Specific and General Deterrence**

Discouragement forestalls future wrongdoing by terrifying the respondent or general society. "The two kinds of prevention are explicit and general discouragement. Explicit discouragement applies to a singular respondent. Whenever the public authority rebuffs a singular respondent, the person is hypothetically more averse to perpetrate another wrongdoing in light of dread of another comparative or more regrettable punishment. General discouragement applies to the general population at large. At the point when

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<sup>7</sup> Manresa, Henry. (2019). Running head: ABBREVIATED LITERATURE REVIEW ON CAPITAL PUNISHMENT IN AMERICA 1 Abbreviated Literature Review on Capital punishment in America. Forensic Science.

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the general population learns of a singular respondent's punishment, people in general is hypothetically less inclined to perpetrate a wrongdoing on account of dread of the punishment the litigant experienced. At the point when people in general learns, for instance, that a singular litigant was seriously rebuffed by a sentence of life in jail or the capital punishment, this information can move a profound feeling of dread toward criminal indictment<sup>8</sup>.

### **Incapacitation**

Incapacitation prevents future crime by removing the defendant from society.” Examples of incapacitation are incarceration, house arrest, or execution pursuant to the capital punishment”.

### **Rehabilitation**

Rehabilitation forestalls future wrongdoing by changing a respondent's way of behaving. "Instances of rehabilitation incorporate instructive and professional projects, treatment focus arrangement, and directing. The court can join rehabilitation with imprisonment or with probation or parole. In certain states, for instance, peaceful medication wrongdoers should partake in rehabilitation in blend with probation, as opposed to submitting to imprisonment. This relieves the burden of correctional facilities and penitentiaries while bringing down recidivism, and that implies reoffending.

### **Retribution**

Retribution forestalls future wrongdoing by eliminating the craving for individual avengement (as attack, battery, and criminal murder, for instance) against the litigant. Whenever casualties or society find that the respondent has been sufficiently rebuffed

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<sup>8</sup>Dr. K.N Chandrasekharan Pillai and Dr. N.S Soman, Rarest of rare case-A Myth, 25

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for a wrongdoing, they accomplish a specific fulfillment that our criminal method is working successfully, which improves confidence in policing our administration.

### **Restitution**

Restitution prevents future crimes by punishing the defendant economically. “Restitution is when the court orders the criminal defendant to pay the victim for any harm and resembles a civil litigation damages award. Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress. It can also be a fine that covers some of the costs of the criminal prosecution and punishment”<sup>9</sup>.

### **METHODS OF CAPITAL PUNISHMENT:**

#### **Hanging**

Hanging was first received as a technique for execution around 2500 years back in Persia. It was saved for male crooks as it were. It was considered as less abhorrent, less wicked and a modest technique for execution. Also, no talented killer was expected to play out the activity. Hanging is as yet polished in certain nations like Singapore, Japan, India, Pakistan and three states in USA.

lectrocution – In this method, the perpetrator is bound to a chair and a high-voltage current is passed through his body, quickly killing a guy. It also leads to organ failure (especially heart).

Tranquilization – This method causes the criminal to die slowly and painlessly by injecting toxin injections into his body. It can take up to several hours for the criminal to die.

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<sup>9</sup> Capital Punishment in India by Dr. Subhash C. Gupta, 2010

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Beheading – Arab and Gulf countries commonly use this method of capital punishment. In this, they just sever the person's head from their body using this manner.

Stoning – It is a kind of capital punishment in which the criminal is beaten to death. It's also the most agonizing technique of execution.

Shooting – In this approach, the culprit is shot either in the head or in the chest.

Impalement

No wrongdoer on the planet merits this punishment, at all his wrongdoing may. The technique incorporates wounding a long stake through one finish of the body and taking it out from the other. The stake would be embedded in the private organs of the wrongdoers.

These were a portion of the techniques for capital punishment. There are records of other vicious and fierce execution strategies being polished in that time. Countless individuals upon whom capital punishment was exacted shows that wrongdoing can't be hindered by turning to such brutal practices. They can just end the criminal profession of a solitary convict, yet society can never be genuinely liberated of wrongdoing except if the reason for wrongdoing itself is killed

Tit for tat would make the entire world visually impaired. - Mahatma Gandhi.

This is a well known expression that numerous individuals refer to when they pitch for the abolishment of capital punishment from the legal procedure. The extensive rundown of the terms which are not exactly adequate in a vote based system starts with terms like capital punishment and capital punishment. That, in any case, doesn't imply that this type of punishment isn't worthy in a vote based system. Truth be told, two of the biggest majority rule govts on the planet - India and the US of America, both have the arrangement for capital punishment as a piece of their legitimate framework.

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## I. LITERATURE REVIEW

Sneha Mahawar, “Capital punishment for rape,” *ipleaders*, December 30, 2022. In this article, the author discussed the concept of Section 375 of the Indian Penal Code, 1860. The conversation will be bolstered by discussing the provision of capital punishment for rape, as well as its related judicial decisions. The author attempts to discuss Section 375 of the Indian Penal Code, 1860 by examining its objectives and essentials in this article. The article will also discuss capital punishment for rape by going over all its punishment provisions. The last decade has witnessed major legislative expansion of the death penalty with the introduction of new capital offences, the majority of which were direct responses to specific sexual offences that were widely reported in the media and sparked outrage and protests.

Rhea Reddy, “Death Penalty for child rape”, *South Asian Law Review Journal*, 2019, in this paper, the author attempted to answer whether the imposition of a death penalty on child sexual offenders indirectly places additional burdens on the victim in the criminal justice system. Consequently, the question that this paper aims to answer is whether imposing the death penalty on child sexual offenders indirectly places additional burdens on the victim in the criminal justice system.

Mayank Sharma, “Inclination of Judges to Sentence Death Penalty in Cases of Murder involving Sexual Offence,” 2021, is based on the observation of a shift in the pattern of judgment pronouncement. In 2018, trial courts imposed the death penalty on 162 people, which is higher than the 102 people sentenced to death in 2019. However, the proportion of death penalties imposed for sexual offenses increased in 2019. In 2016, trial courts imposed the death penalty on 150 people, 27 of whom were convicted of murder or sexual offenses. In 2017, the trial court imposed 108 death sentences, 43 of which were for murder and sexual offenses. In 2018 it was 67 out of 162, and in 2019 it was 54 out of 102.

## II. STATEMENT OF THE PROBLEM

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Nowadays in India sexual abuse is considered as a most heinous crime in the country. Due to this reason, even the Indian Judiciary is in great chaos. Some of the famous jurists and the social organisation working for the benefit of women have a view that to make the crime less active in the country the Judiciary must make the amendment in the punishment of sexual abuse and rape and make capital punishment in the cases of rape. But in the mean while Judiciary have their own reasoning which state that if they make the capital punishment is the punishment in the cases of sexual abuse. Sometimes it will take the undue advantage of the other party. The problem is that how to decide the rarest of rarest in certain cases. Now it would analyse the all-relevant aspect related to making capitals punishment in cases of offences of sexual abuse.

Whether capital punishment is essential in the case of sexual offences in Indian judiciary? What is the approach of Indian society on the issue of death penalty as the punishment in sexual offences case?

### **CONCLUSION AND RECOMMENDATIONS**

In 2018, a law was established that stipulates that anyone convicted of raping a girl under the age of 12 years will face the death penalty. However, the question remains as to what happens to girls and women over the age of 12. Why don't we understand that rape is rape no matter who the victim is or what age group they belong to? This new rule could protect children under the age of 12 years old because rapists are terrified of death, they will think twice about raping a child under the age of 12, but what about girls over the age of 12? When a woman is raped, she suffers not only physically but also mentally. It completely devastates a girl's life.

Giving life imprisonment or imposing a fine, in my opinion, will not change the mindset of a rapist, nor will instant death change the mindset of a rapist. Our main goal is to control heinous and brutal crimes against women, which is why some people believe that imposing the death penalty or simple imprisonment will deter rapists from committing there is little data to show that the death penalty is more effective than imprisonment in reducing crime. Notably, despite the implementation of the Criminal Law (Amendment)

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Act, 2013, which stipulates the death sentence and life imprisonment for sexual assaults that result in the victim's death or reduction to a chronic vegetative state, brutal rapes have not diminished in India.

So, if we wish to regulate rape, we must instil dread in the perpetrators so that they consider it 100 times before committing this horrific crime. Third-degree torture is the simplest way to torment and instil terror in them, and they should be mercilessly tortured so that they might serve as an example to other rapists. In the Nirbhaya Gang Rape case, the fourth rapist, who was a kid, was not treated equally to the other rapists in the case, even though it was established that he was more savage toward the victim and that his actions resulted in the victim's death. He was spared the death penalty just because he was a minor. In my opinion Even if a minor commits a crime like rape or murder, he should be brutally tortured. Rape is considered the most heinous crime against women, and data reveal that it is pretty widespread in India. The distinction between will and consent is essential in such an offence. The Indian Penal Code provides a clear definition of consent. On the other hand, the will is still not well defined. Because there is no correct definition, consent and will are understood as the same thing, so a distinction must be made between these concepts. Typically, the expression 'against her will' refers to a man having sexual contact with a woman despite her objections and reluctance. On the other hand, an act of reason followed by thought would be included in the term 'without her consent.' Section 375 of the Indian Penal Code is one of the most discussed parts owing to the growth in the number of rape cases in India in the last few years has brought substantial modifications in the Section but there are still quite a few existing issues that need to be rectified.

Therefore capital punishment must be retained for hardened and incorrigibles but its use should be limited to rarest of rare case" that is to say, it should be used sparingly. Its retention in the statute books is necessary as a penological expediency. Moreover option under Art.303 has been quashed and there is an inordinate delay in execution of sentence then it is converted into life imprisonment. If capital is totally abolished, it

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would mean giving a long rope to dangerous criminals to commits murders and other heinous crimes with impunity. Also some of the countries that has abolished capital punishment in the past are reinstating it because of its deterrent effects thus, capital punishment should remain but a more decent, more humane, simple, less cruel, less painful methods of execution like lethal injection should be employed as it insures instantaneous and pain less death.

The capital punishment is no doubt unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatory, freakishly or wantonly, but if it is administrated rationally, objectively and judiciously, it will enhance people's confidence in criminal justice system.

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