

● DEATH SENTENCE IN INDIA: EXPLORING FEMINIST PERSPECTIVE



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"Death penalty is the rarest of all punishments. Attitudes toward it are rooted deep in the sentiments of people and arouse powerful emotions whenever its justification is questioned. So long as the status quo is undisturbed nothing happens, but the moment it is attacked either by abolitionists or by retentionists, the debate begins".

Thorsten Sellin

Abstract

In India, Death sentence is the most severe punishment accorded on the most serious crimes since time immemorial. However, with the passage of time it has been viewed and interpreted differently by different organizations, institutions and authorities. Death sentence has been debated, delayed and denied in number of cases. It has often been alleged to be imposed arbitrarily and whimsically. There is no settled law on sentencing. Feminist scholars have highlighted that the authorities in general, and the judiciary in particular have shown biases if death sentence is to be imposed on female offenders. The gendered dimension on female offending becomes instrumental while imposing death sentence on them. Therefore, the paper makes an attempt to explore the allegations on capital sentencing from feminist perspective to determine up to which extent the allegations are true mainly in Indian context. The thematic aim of the paper however stresses on a de-facto moratorium on death sentence.

Key words

Death Sentence, Female Offender, Feminist Criminology, Theories of Female Criminality.

I Introduction

The paper is divided in VI parts. First part introduces the theme of the paper. Second part deals with death sentence in India. Death sentence has a protracted and grisly history in India. No other issue has been as contentious as the death sentence has been. It becomes divisive while discussing theories of punishment.¹ The correlation between deterrence and severity of punishment is complicated. It cannot be assumed that severity of punishment correlates to deterrence to an extent which justifies the restriction of the most fundamental human right, the right to life, through the imposition of death penalty. At times, it becomes contentious on the basis of new horizons of

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¹Law Commission's 262nd Report on Death Sentence, Chapter IV, Penological Justifications for the Death Penalty, at 83, August (2015).

criminal acts to be treated as capital offences. Whereas, some other times it becomes an agenda of vote bank politics.²

In short, the discretionary Death sentence and mandatory Death sentence, the Constitutionality of Death sentence, the Crime test³ (aggravating circumstances), the Criminal test (mitigating circumstances) and the perception of society (collective conscience) test (Rarest of Rare, hereinafter ROR), the abolitionist's and retentionist's arguments, the delay in execution, the per-incuriam judgements, the supervening circumstances and alike are a few examples of incessant debate. It seems that authors writing on Death sentence use to set their mind prior to down their pen as to whether they should be tagged as retentionists or abolitionists.⁴

Third part attempts to discuss theories of female criminality developed in due course of time by classical thinkers and feminist scholars respectively. Feminist scholars have criticised mainstream criminology⁵ as male stream criminology because of its prejudiced and biased notion of gender when female criminality is questioned.⁶ It is also blamed for viewing male and female criminality with different lens and angle where women are awarded harsher punishment in comparison to their male counterparts⁷ because of some classical notions which does not suppose females as offenders. Feminist criminology, deals with all three dimensions ie; female offenders, female victims and female in criminal justice systems.⁸ It emphatically submits on the one hand that the violent women should not be cast as cold, callous, calculating, and vicious as an

²In a time frame continuum, different political communities have dealt with it differently and its have and have not depends on the socio economic conditions, state structure and political milieu of a particular society. A proper treatment to capital punishment depends also on the degree of scientific approach with human content of the societal reaction towards this diabolic penalty. Mahendra P. Singh, "Capital Punishment: A Political Compromise", Banaras Law Journal, 92-101 (1981). See also, Law Commission's 262nd Report, at 20

³In Santosh Kumar Satishbhushan Bariyar, S. B. Sinha J. felt that 'public opinion' hardly fits in the rarest or rare matrix. People's perception, according to him, is neither an objective circumstance relating to crime nor to the criminal. Infra note 15

⁴V.R.Krishna Iyer, Death penalty: an unmitigated evil?, "Perspectives in Criminology, Law and Social Change", Allied Publisher Private Limited, New Delhi, (1980)

⁵The facts about crime tend to be based on the sex of the offender and not the crime itself. This 'sexism' in criminology also influences the sentencing, punishment and imprisonment of women who are not expected to be criminals. Gender role expectations continue to define acceptable behaviours and attitude for female and males' deviation. Researchers have shown that when cases of male aggression reach the court, gender is not marked. But this is not the case, however, when the defendant is a female. See, Bibha Tripathi, "Feminist Criminology: Some Reflections", Vidhigya, , 1-6, Vol.9, Issue 1(2014)

⁶Meda Chesney-Lind, Girls' Crime and Women's Place: Toward a Feminist Model of Female Delinquency. *Crime and Delinquency* 35(1):5-29.1989, Morris Allison and Ania Wilczynski, *Rocking the Cradle: Mothers Who Kill Their Children*. In *Moving Targets: Women, Murder, and Representation*, ed. Helen Birch. Berkeley: University of California Press. (1994)

⁷Daly, Kathleen and Meda Chesney-Lind, *Feminism and Criminology*, *Justice Quarterly* 5:497-538.(1985)

⁸Amanda Burgess, "Intersections of Race, Class, Gender, and Crime Future Directions for Feminist Criminology" *Feminist Criminology* 2006; 1; 27 <http://fcx.sagepub.com>, see also, Richard A. Wright, "Women as "Victims" and as "Resisters": Depictions of the Oppression of Women in Criminology Textbooks", *Teaching Sociology*, Vol. 23, No. 2, Teaching about Inequality and Diversity: Age, Class, Gender, and Race/Ethnicity (Apr., 1995), pp. 111-121, American Sociological Association <http://www.jstor.org/stable/1319341>. Accessed: 30/08/2013 04:14 (last visited on 2-09-2021)



antithesis of the caring, nurturing wife and mother⁹ and on the other hand it opines that female offenders should be considered “doubly victimised” in spite of “doubly deviant”(as considered by classical thinkers).

It has been hypothesised in the paper that the female offenders are being sentenced with capital punishment with prejudice and biases and apart from established grounds (the triple test) for inflicting death sentence, when it has to be implemented on a female offender, her educational status and role as daughter/wife is significantly marked and becomes a determining factor for sentencing.

Fourth part of the paper deals with imposition of death sentence on female offenders to explore the gendered dimensions of Death sentence from feminist perspective.¹⁰ Though the paper has been written in an Indian context but two random cases have been chosen from USA and Iran respectively to lay bare that had they been committed in India the Supreme Court of India would have inflicted death sentence on them or not? The second last part of the paper consciously discusses an Indian case where death sentence has not only been imposed rather death warrant has also been issued.

Therefore, the paper attempts to explore and compare the cases on the basis of facts and circumstances. The judicial drift though shows a chequered history on the functioning of death sentence and has been tagged as judge centric in place of principle centric¹¹ approach. The cases of female offenders have been analysed in the paper from the principle centric approach and attempt has been made to reach on a fair and just (gender just) conclusion. Last part concludes the paper with some viable suggestions.

II Death sentence

In India, death sentence has been the sternest punishment applied on most sombre crimes since time immemorial. With the passage of time it has been viewed and

⁹Infra note 26

¹⁰Feminism is a technique of objectivity in epistemological, psychological and social- as well as legal terms. See, Ann Acales, "The Emergence of Feminist Jurisprudence: An Essay" 95 Yale L J 1373(1986), Feminism does not refer to a unitary theory. Rather, there are multiple perspectives that fall under the rubric of feminism, each of which involves different assumptions about the source of gender inequality and women's oppression. See, Jane Freedman : Feminism, at 2, Viva Books Private Limited, New Delhi, First South Asian Edition, 2002

See also, Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression*, at 6, Routledge, London and New York (1989). All versions of feminism assert that the existing relations between the sexes, in which women are subordinated to men, are unsatisfactory and ought to be changed; Feminist proposals for change always encounter resistance although the nature and strength of this resistance is variable; Even the most moderate advocate of women's right must take the view that men have rights which are unjustly denied to women.

¹¹Retribution, deterrence, incapacitation, collective conscience and social justice are some important principles adopted by the Courts while awarding death sentence. It is pertinent to note that in the recent past the Supreme Court, on occasions more than one, has admittedly highlighted the fact that sentencing in capital offences has become 'judge-centric' rather than 'principle-centric'. In *Swamy Shraddananda (2) @ Murali Manohar Mishra v. State of Karnataka* (2008) 13 SCC 767, it, in no unclear terms, has admitted that the question of award, confirmation or commutation of a death sentence by the apex court, as a matter of truth, is 'not free from the subjective element' of the deciding judge/bench and it depends on his/their 'personal predilection'. In *Sangeet v. State of Hariyana* (2013) 2 SCC 452 the court observed that to award death sentence, the aggravating circumstances (crime test) have to be fully satisfied (i.e., 100%) and there should be no mitigating circumstance (criminal test 0%) favouring the accused. K I Vibhute, *Choice Between 'Death' and 'Life' for Convicts*, *Journal of the Indian Law Institute*, July - September 2017, Vol. 59, No. 3 (July - September 2017), pp. 221-264 <https://www.jstor.org/stable/10.2307/26826606>, visited on 22 July (2019)

interpreted differently by different organizations, institutions and authorities. Death sentence has been debated delayed and denied in number of cases, it has often been alleged to be implemented arbitrarily, randomly and whimsically. There is no settled law on sentencing.

It is worth noticing that certain period in the penal history of India has been referred to as de- facto moratorium of death sentence.¹² Latest Law Commission¹³ in its 262nd report on death sentence¹⁴ recommended for abolition barring for terrorism and national security offences.¹⁵ However, the legislature intends to retain Death sentence in not only the traditional offences of murder rather awarding in cases of human trafficking too.¹⁶ The three tier of judicial system has witnessed maximum imposition of Death sentence by the Trial Courts gradually condensed by the High Courts and Supreme Court respectively.¹⁷ It seems that the executive, the legislature and the judiciary have retained it and applied it with different objectives and justifications.

III Theories of female criminality: from classical thinkers to feminist scholars

The entry of feminist scholars in the field of law has turned law as not only a tool of struggle but also a sit of struggle too. There are various shades of feminism. Liberal,

¹²2004 to 2012 has been an execution free zone and accordingly viewed as de - facto moratorium on death sentence. However, it has been argued as to what is meant by de- facto moratorium. When there is no execution, or when there is no offence punishable with death is committed or where judiciary has not given the death sentence to any offender? Obviously only an execution free zone is termed as de- facto moratorium. The UNGA adopted a resolution in 2007 to call upon countries that retain death sentence to establish a world wide moratorium.

¹³Arghya sengupta, Ritwika Sharma Death Penalty in India: Reflections on the Law Commission Report, Economic and Political Weekly, Vol. 50, No. 40 pp. 12-15 (OCTOBER 3, 2015),

<https://www.jstor.org/stable/24482617>, visited on 19-02-2021 17:00 UTC, see also <https://www.thehindu.com/opinion/editorial/the-case-against-death-penalty/article7608365.ece>

¹⁴2015, the Supreme Court in Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (6 SCC 498) and Kisan Rao Khade v. State of Maharashtra asked the Law Commission to resolve the issue of death sentence by examining whether it is deterrent? Or retributive or serves incapacitative goal? The commission in its 35th report (1963), recommended for retention of death sentence in view of the condition of India variety of social upbringing of its inhabitants to the disparity in the level of morality and education in the country. Here, it is also submitted that the condition has considerably been the same even today. Again in its 42nd report (1971) recommended for retention not because of retribution but because it shows societies anger towards criminal. The 187th report of Law Commission on Mode of execution and incidental matters, (2003) upholds hanging as constitutional mode of execution. Permanand Katara v. U.O.I AIR 1989, 2039 case held that the hanging beyond a reasonable time is violation of dignity of person.

¹⁵Law Commission of India, "Chapter VII: Conclusions and Recommendation," Report No 262 on the Death Penalty, 2015, Ministry of Law and Justice, New Delhi, (2015): "Chapter IV: Penological Justifications for the Death Penalty," Report No 262 on the Death Penalty, 2015, Ministry of Law and Justice, New Delhi. Available at <http://lawcommissionofindia.nic.in/reports/Report262.pdf>. (Last visited on 4-08-2020)

¹⁶<https://theprint.in/theprint-essential/what-is-draft-anti-trafficking-bill-2021-and-how-it-is-different-from-the-2011-bill/692096/#:~:text=According%20to%20the%20draft%20bill,who%20has%20residence%20in%20India.> <https://wcd.nic.in/sites/default/files/DRAFT%20TRAFFICKING%20IN%20PERSONS%20%28PREVENTION%2C%20CARE%20AND%20REHABILITATION%29%20BILL%202021%20%281%29.pdf> (last visited on 2-08-2020). section 26(4)

¹⁷<https://www.thehindu.com/opinion/editorial/death-sentences-trial-and-error/article7448579.ece> (last visited on 1202-2018)



Radical, Marxist and Post- Modern feminism are few of them. The liberal feminist scholars demand equality even in sentencing too. They demand no chivalry towards women on the ground of sex. Whereas, the radical feminists demand that men should be replaced by women from position of power.

Feminist criminology also deals with theories of Female criminality to highlight the gendered dimension of main stream classical criminologists who intend to make female offenders as doubly deviant. Number of studies has been done to discern the role of gender in sentencing jurisprudence.¹⁸

The theories of Female criminality can mainly be divided into two groups. First, theories propounded by classical or mainstream criminologists like Cesare Lombroso, Otto Pollock, Sigmund Freud etc. and second, theories propounded by feminist criminologists as a reaction on mainstream criminology. The theories propounded by feminist criminologists can also be divided into two groups, first, early feminist theories and second, late feminist theories.

Cesare Lombroso

Cesare Lombroso described female criminality as an inherent tendency of women who are biological atavists. Female offenders were characterized by physiological immobility, psychological passivity, and amorality featuring a cold and calculating predisposition. Criminal women, then, were in fact more masculine than men in some ways. Lombroso observed that criminal women could adjust more easily than men to mental and physical pain. He argued that criminal women often adjusted so well to prison life that it hardly affected them at all. For Lombroso, criminal women were abnormal.¹⁹

W. I. Thomas

W. I. Thomas has put emphasis on physiological explanations of female crime. In his book on *The Unadjusted Girl*,²⁰ Thomas shifted his position on female criminality in two directions. First, he argued that female delinquency was normal under certain circumstances given certain "assumptions about the nature of women". However, Thomas did not specify the nature of these assumptions. Second, Thomas shifted his focus from punishment of criminals to rehabilitation and prevention as a radical departure from the Lombrosian approach of locking away the criminal or sterilization as a preventive strategy. Thomas relied on the dichotomy of good and bad women.

¹⁸Laura M. Argys and H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, *The Journal of Legal Studies*, Vol. 33, No. 2 (June 2004), pp. 255-282 Available at, University of Chicago Press for The University of Chicago Law School Stable URL: <https://www.jstor.org/stable/10.1086/421570>, See also, Julian Abele Cook, Jr. *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, *Federal Sentencing Reporter*, Nov. - Dec., 1995, Vol. 8, No. 3, *Gender and Sentencing* (Nov. - Dec., 1995), pp. 145-147, University of California Press on behalf of the Vera Institute of Justice available at, <https://www.jstor.org/stable/20639878>, See also, Etta A. Anderson, *The "Chivalrous" Treatment of the Female Offender in the Arms of the Criminal Justice System: A Review of the Literature*, *Social Problems*, Feb., 1976, Vol. 23, No. 3 (Feb., 1976), pp. 350-357 Oxford University Press on behalf of the Society for the Study of Social Problems, Available at <https://www.jstor.org/stable/799780>

¹⁹Infra, note, 58 Lilly, Cullen and Ball, 210, See also, Lombroso C and W. Ferrero, *La Donna Delinquente*, Torino, Roux, (1893). 37. Lombroso, "Crime, its Causes and Remedies", Boston, 1911. 38. Cited in, Frances Heidensohn, *The Deviance of Women: A Critique and an Enquiry* *The British Journal of Sociology*, Vol. 19, No. 2 (Jun., 1968), pp. 160-175, See also, Lombroso C and W. Ferrero, "The Female Offender", London, Fisher Unwin, (1895)

²⁰Thomas W. I., *The Unadjusted Girl* New York: Harper and Row, Infra note, 58 Lilly, Cullen and Ball, 211,

Sigmund Freud

Freud has also been considered to be a mainstream classical criminologist who emphasized upon anatomical inferiority. According to Freudian theory of female criminality, the deviant woman is one who is attempting to be a man. Female aggression and rebellion, for example, were expressions of longing for a penis, and if not treated, women would only end up neurotic.²¹ Freudianism has been used for decades to maintain female sexual repression, sexual passivity, and the woman's place in the nuclear family. Although he has been considered as a very controversial and discredited theorist, his early legacy influenced the writing of many scholars including Pollak.²²

Otto Pollak

Pollak extended the idea that women were inherently deceitful because of physiological reasons. This deceitful nature permitted them to commit undetectable crimes. False accusation and shoplifting are the crimes which are mainly committed by women.²³ He failed to consider that female criminals often were poor or were women who had stepped outside of chauvinistic, classist, and racist definitions of women's proper roles.

Emancipation theory

The Emancipation theory appeared in 1975, with the publication of Freda Adler's *Sisters in Crime* and Rita James Simon's *Women and Crime*.²⁴ Adler and Simon both contended that women's lower rates of participation in criminal activity could be explained by their confinement to domestic roles and by the discrimination they faced which limited their aspirations and opportunities.²⁵ However, with the advent of the women's movement, the situation could be expected to change. Adler saw increasing participation in violent crime as inevitable as women became more like men as a result of their social and political emancipation. Simon believed that opportunities created by women's higher levels of formal labour market activity would lead to higher arrest rates for property and occupational crimes, such as fraud, larceny, and embezzlement.

While this argument has an obvious appeal for opponents of the feminist movement, even empirically, the theory has received very little support.²⁶ There is now a fairly broad consensus that Adler and Simon's work would not fall within the purview of feminist

²¹Klein, D. "The Etiology of Female Crime: A Review Of Literature," *Issues In Criminology*, 1973, cited in, J. Robert Lilly, Francis T. Cullen and Richard A. Ball, *Criminological Theory context and consequences*, Sage Publications, 2007 See also, S. Freud, "Some Psychological Consequences of the Anatomical Distinction between the Sexes" [1925], in *Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. J. Stachey (London: Hogarth Press, 1964). 5. H. Deutsch, "The Psychology of Women: Motherhood" (New York: Grune & Stratton, 1944).

²²Ibid, Lilly, Cullen and Ball, 212-13

²³Supra note 20

²⁴Adler, Freda. *Sisters in Crime: The Rise of the New Female Criminal*. New York: McGraw-Hill.(1975)

²⁵Daly, Kathleen and Meda Chesney-Lind, *Feminism and Criminology*, *Justice Quarterly* 5:497-538.(1985), See also, Judith Resnik, *Sentencing Women*, *Federal Sentencing Reporter*, Nov. - Dec., 1995, Vol. 8, No. 3, *Gender and Sentencing* (Nov. - Dec., 1995), pp. 134-136 Published by: University of California Press on behalf of the Vera Institute of Justice, Available at <https://www.jstor.org/stable/20639875> (last visited on 15-01-2019)

²⁶Dana M. Britton, "Feminism in Criminology: Engendering the Outlaw", *Annals of the American Academy of Political and Social Science*, Vol. 571, *Feminist Views of the Social Sciences* (Sep., 2000), pp. 57-76 Sage Publications, Inc. in association with the American Academy of Political and Social Science, <http://www.jstor.org/stable/1049134> Accessed: 06/07/2010 00:47



criminology.²⁷ This raised an important question that if increased occupational opportunities do not explain increased female crime, then what does. Steffensmier and Cobb²⁸ provided data indicating that law enforcement and court attitudes toward female offender are changing and that now there is a greater willingness to arrest and prosecute women.

However, in addition to documenting the levels of women's criminal offending, feminist criminologists have drawn attention to women's (and men's) treatment by police, courts, and the prison system. Contradicting popular stereotype, studies of women's experiences with the criminal justice system have revealed that women do not benefit, at least not uniformly, from chivalry at the hands of police, prosecutors, and judges. In some instances, such as juvenile offenses, girls are subject to much harsher treatment than boys.²⁹ Feminist studies have shown that women who are married and have children do sometimes receive more leniency than other offenders. This effect, however, is double edged since women who do not conform to traditional stereotypes of wives and mothers or who are perceived to shirk their responsibilities may be dealt with especially severely.³⁰

Robert Agnew: General Strain Theory

He opined that men and women react differently in general stress situation. Men become angry and commit crime whereas women become sad and depressed resulting in self destruction or drug abuse. When women commit crime, strain theory views it as some sort of "weakness" which betrays the double standard.

John Hagan: Power-Control theory³¹

This theory suggests that family class structure shapes the social reproduction of gender relations and in turn the social distribution of delinquency. Different work patterns for mothers and fathers lead to different levels of gender authority in workplace and power in the home resulting in different parenting styles for boys and girls combined affecting free-floating patriarchal ideologies of control generating different patterns of delinquency. Evelyn K. Sommers³² has been supportive of Hagan's theory. He has used common themes to explain women criminality, such as: -1) Economic, 2) Drug involvement, 3) personal anger, 4) Fear or need etc.

Sommers concluded that women's criminality is based on two underlying issues: 1) the effort to maintain connections within relationships (such as mother and child, sometimes fiancé- murder of husband), 2) as a personal quest for empowerment (as

²⁷Morris and Gelsthorpe, cf. Brown, Beverley. *Women and Crime: The Dark Figures of Criminology*. *Economy and Society* 15(3): 355-402 (1986),

²⁸Steffensmier, D.J and Cobb, M.J, "Sex difference in urban arrest paterns", 1934-79, *Social Forces* 1981,

²⁹Chesney-Lind, Meda, *Girls' Crime and Women's Place: Toward a Femi-nist Model of Female Delinquency*. *Crime and Delinquency* 35(1):5-29.(1989)

³⁰Morris Allison and Ania Wilczynski, *Rocking the Cradle: Mothers Who Kill Their Children*. In *Moving Targets: Women, Murder, and Representation*, ed. Helen Birch. Berkeley: University of California Press. (1994)

³¹John Hagan, *Structural Criminology*, New Brunswick, N. J. Rutgers University Press, 1989 Cited in Frank Schmalleger, *Criminology Today*, New Jersey, Second Edn, (1999)

³²Evelyn K. Sommers, *Voices from Within: Women Who Have Broken The Law* Toronto, University Of Toronto Press, (1995) Cited in Schmalleger, (1999)

single mothers are expected to be independent and capable of providing for themselves and their children).

Blurred boundary theory

It believes that women's offending is intimately linked to their previous victimization. Victimization during childhood or adolescence is a risk factor for both male and female.³³ However, it is a stronger predictor among females. Studies have shown that women in prison are six times more likely to report prior sexual abuse than their male counterparts.

IV Female offenders and death sentence

It is simply a matter of fact that there has been diminutive research on death penalty and gender discrimination.³⁴ In general, it is presumed that if there has been gender discrimination on capital punishment it would have favoured female offenders either by not awarding them death sentence or by not executing a female death row prisoner. It has even been submitted by some scholars that as a matter of both logic and political necessity, feminists must embrace either gender-neutral even handedness or abolitionism.³⁵

The present paper does not compare the total number of capital offences committed by men and women, rather randomly picks some cases attracting the glare of media at global level to test the hypothesis.

Case of Kelly Rence Gissendaner

The execution of Kelly Rence Gissendaner, an American woman, in U.S State of Georgia was a first case of its own since 1945. She conspired to kill her husband with her paramour. He received life imprisonment for killing and Kelly was executed for conspiring. It has been observed that her execution was scheduled for February 25, 2015, then after, due to whether delay it was rescheduled on September 29, 2015, but delayed again and finally she was executed on September 30, 2015.³⁶ Since the rate of execution of female offenders happens to be lower in comparison to their male counterpart therefore; it has been viewed as favourable treatment to women.³⁷

³³Elizabeth Cauffman, *Understanding the Female Offender, The Future of Children*, Vol. 18, No. 2, *Juvenile Justice* (Fall, 2008), pp. 119-Princeton University, <http://www.jstor.org/stable/20179981>. Accessed: 30/08/2013 05: see also, Sibylle Artz, *Sex, Power, and the Violent School Girl*, New York: Teachers College Press, (1999),

³⁴Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, *Law & Society Review*, 1991, Vol. 25, No. 2, *Special Issue on Gender and Sociolegal Studies* (1991), pp. 367-384, Wiley on behalf of the Law and Society Association, available at, <https://www.jstor.org/stable/3053803>, mates. The question of the death penalty and gender discrimination appears to be fundamentally a question of social ideology. At p.382, See also, Timothy F. Hartnagel, *Modernization, Female Social Roles, and Female Crime: A Cross- National Investigation*, the *sociological quarterly* 23 (Autumn 1982): 477-490

³⁵Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, *Law & Society Review*, 1991, Vol. 25, No. 2, *Special Issue on Gender and Sociolegal Studies* (1991), pp. 367-384, Wiley on behalf of the Law and Society Association Stable URL: <https://www.jstor.org/stable/3053803> (Last visited on 15th may 2021)

³⁶https://en.m.wikipedia.org/wiki/Kelly_Gissendaner, see also, http://news.bbc.co.uk/2/hi/middle_east/4172551.stm, visited on 07 July 2021. When the Supreme Court of USA lifted the moratorium on capital punishment in *Gregg v. Georgia*, 17 women have been executed in U.S.A

³⁷Women represent less than 1.2% of the 1,533 executions performed in the United States since 1976, *Ibid*;



Case of Afsaneh Norouzi

This case has also been deliberately chosen to highlight the Iranian law for women. In Iran, women are persecuted for adultery, witchcraft, and lesbianism. These persecutions of women are not mentioned in history books. This exemplifies the historical silence on women who have been killed by the patriarchal society. From the time of witch hunts to the imposition of death sentence from a court of law, women have been condemned to death, differently with discriminating principles.³⁸ In Iran,³⁹ a married woman who is raped, risks the death penalty for adultery if she cannot prove, she was violated. If she kills her attacker, she may also face the death sentence for murder. The instant case was of self defence. The fact of the case was that Afsaneh Norouzi and her family were visiting Mr Moghaddam, an intelligence officer on the holiday island of Kish in the Persian Gulf, in 1997 when her husband was called away. Mrs Norouzi said she had tried to defend herself with a knife when the officer attempted to rape her.

Afsaneh Norouzi was arrested on 10th July 1997 in Tehran along with her husband, Mostafa Jahangiri. As a result of the prolonged physical and psychological tortures, Afsaneh Norouzi repeatedly attempted suicide, once by trying to hang herself with a rubber hose in the toilet and several times by cutting her wrist.

A court in Kish eventually found her guilty of murder and condemned her to death, a sentence initially upheld by the Supreme Court. The prison officials instructed Afsaneh Norouzi to sign her death warrant. Iran's law requires only a 48-hour minimum notification of a death warrant before actual execution.⁴⁰

However, under pressure from women's rights activists and reformist politicians, the head of the judiciary finally ordered a review before the Supreme Court, which in July quashed the death verdict⁴¹ and ordered a new ruling from the Kish court, which could have led to a further sentence for Mrs Norouzi.

Therefore, Behzad Aghdam Moghadam's family (his mother and two children) was requested to forgo Afsaneh Norouzi's qisas-e-nafs death penalty, by offering the family an exorbitant 50 million Tuman in "blood money" (diyeh) (a normal diyeh in Iran is 22 million Tuman). Officials announced on 11th January 2005 that they had obtained their consent. Consequently, Afsaneh Norouzi, like any other murder convict graciously pardoned by the victim's family, became liable for paying the agreed diyeh. As the public once again took action to support Afsaneh Norouzi by making contributions for the payment of the diyeh, judicial officials announced on 26 January 2005 that the state has re-negotiated and paid a lower amount of diyeh (31 million Tumans) to Moghadam's family. A day later, Afsaneh Norouzi was finally released after spending 2760 days in detention. In the court of public opinion, Afsaneh Norouzi's pardon, like her infamous death sentence, epitomizes the disastrous state of the Iranian Islamic justice system, a

³⁸Whitney George, *Women on Death Row, Off Our Backs*, January 1998, Vol. 28, No. 1 (January 1998), pp. 16-17, *Off our backs*, <https://www.jstor.org/stable/25775962>, visited on 14th July (2021)

³⁹Cad , *debonny heart, jennie ruby and karla mantilla*, Iran: woman sentenced to death for killing rapist, *Off Our Backs*, Vol. 32, No. 5/6 (May-June 2002), p. 5 <https://www.jstor.org/stable/20837565>, visited on 12-07-2021 12:57 UTC

⁴⁰<https://www.amnesty.org/download/Documents/88000/mde130232005en.pdf> visited on 18th July (2021)

⁴¹http://news.bbc.co.uk/2/hi/middle_east/4172551.stm visited on 18th July (2021)

system riddled with laws that blatantly flout human rights, procedures and practices that contradict standards for fair trial.

V Shabnam v. Union of India and Anr⁴²

The case of Shabnam from India is discussed in the second last part of the paper. So far as the theories of female criminality are concerned, the case of Shabnam can be tested on Power-Control theory propounded by John Hagan and duly supported by Evelyn K. Sommers. The first proposition of Sommers that women commit crime to maintain connections within relationship seems appropriate. It was the relationship of Shabnam with Saleem which became the motive of murder.

It is worth mentioning that Independent India has no history of execution of any female offenders, though there are some female death row convicts.⁴³ The paper deliberately omits to discuss other cases and exclusively deals with Shabnam case because her issue recently simmered when the Trial Court issued a death warrant for her execution.

The chronology of the case tells that Shabnam and Salim were co-accused in a murder case that was tried against them on the allegation that they had committed murders of seven persons, who were the members of Shabnam's family during the intervening night of 14th and 15th April, 2008. They were tried together and after the trial, the learned Sessions Court pronounced death sentence on both vide Judgment and Sentence dated 15.07.2010, subject to confirmation by the High Court. The High Court of Allahabad confirmed the death sentences of both these convicts vide Judgment and order dated 26.04.2013. The Judgment of the High Court was challenged in Supreme Court and on 15.05.2015 appeals of the convicts was dismissed by the Apex court and death sentence imposed on them was confirmed.

Subsequently, writ petitions were filed on the allegation that the death warrants issued by the learned Sessions Judge on 21.05.2015 are impermissible in as much as various remedies which are available to the convicts, even after the dismissal of the appeals by this Court, are still open and yet to be exercised by them. In these circumstances, the execution of the death warrants within six days of the dismissal of the Criminal Appeals was challenged as illegal and contrary to the provisions of Article 21 of the Constitution of India.

In light of this, Justice A.K.Sikri and Justice U.U.Lalit opined that the death warrants were signed by the Sessions Judge in haste, without waiting for the exhaustion of the remedies on the part of the convicts and are therefore liable to be set aside and quashed.

On February 18, 2021, Shabnam's now 12-year-old son who was born in jail following which her friend took his custody as guardian, appealed to the President of India to "forgive" her. Despite having her mercy plea rejected the first time, the same day, Shabnam moved a second mercy petition before the President as well as the Governor of Uttar Pradesh.⁴⁴

⁴²27 May, 2015, Indian Kanoon - <http://indiankanoon.org/doc/46910974/> (Last visited on 14-07-2020)

⁴³<http://images.assettype.com/barandbench/import/2016/05/Death-Penalty-India-Report-Volume-1.pdf>. (Last Visited n 22-08-2020)

⁴⁴There have been many cases of pardon. In *Govindasamy v President of India, Government of India*, the then President of India Pratibha Patil pardoned a condemned prisoner Govindasamy who murdered his five relatives brutally in their rest in 1984. In June 2010, when Dharmender Singh and Narendra Yadav of Uttar



The gendered dimension in Shabnam case

The Trial Court while convicting Shabnam and Saleem focussed mainly on the role and responsibility of the daughter. The society perceives love /affair / pregnancy as an illicit relationship if happening between an educated girl and an uneducated boy. The Trial Court observed that of all the crimes that shock the souls of men, none has ever been held in greater abhorrence than parricide,⁴⁵ which is by all odds the most complete and terrible inversion, not alone of human nature but of brute instinct. Such a deed would be sufficiently appalling were the perpetrator and the victims were uneducated and backward, but it gains a ghastly illumination from the descent, moral upbringing, and elegant respectful living of the educated family where the father and daughter are both teachers. Here is a case where the daughter, appellant-accused Shabnam, who has been brought up in an educated and independent environment by her family and was respectfully employed as a Shikshamitra (teacher) at the school, influenced by the love and lust of her paramour has committed this brutal parricide exterminating seven lives including that of an innocent child. Not only did she forget her love for and duty towards her family, but also perpetrated the multiple homicide in her own house so as to fulfill her desire to be with the co-accused Salim and grab the property leaving no heir but herself. The appellant-co-accused Salim hatched the intricate plan with her, slayed the six deceased persons with an axe, escaped the crime scene, hid the murder weapon and supported the false story of occurrence. Both the appellants-accused wrench the heart of our society where family is an institution of love and trust, which they have disrespected and corrupted for the sake of their love affair.⁴⁶

The Allahabad High Court too upheld the decision of the Trial Court, stating that the nature of the crime was “diabolical and calculated with methodical planning”. The three Judge Bench of H.L. Dattu, C.J., S.A. Bobde and Arun Mishra, JJ., observed that Parricide is one of the most heinous crimes and in the case at hand the crime has been committed in the most inhuman and grotesque manner by the appellant- accused, which shows their lack of remorse, kindness and humanity. Therefore death sentence for them is the only punishment which is in proportion to their crime.⁴⁷ Chief Justice of India HL Dattu said, "You (Shabnam) are also a mother. But you didn't show any mercy or affection to your family. Even you killed 10-month-old baby of your brother. We can't grant any relief."⁴⁸

Pradesh were pardoned, who had slaughtered a family of five, including a 15-year-old girl, three of them were killed while a 10-year-old boy was thrown alive into the fire. See, Devesh Singh, <https://feminisminindia.com/2021/03/10/shabnam-amroha-murders-death-penalty/> (Last visited on 1-05-2017)

⁴⁵Number of times the courts have decided cases of female feticide but neither the courts nor the societies ever reacted in the same manner.

⁴⁶<https://www.lawyerservices.in/Shabnam-and-Another-Versus-State-of-UP-2015-05-15> (Last visited on 12-09-2019)

⁴⁷Shabnam v. State of U.P., 2015 SCC OnLine SC 492, decided on 15.05.2015, <https://www.sconline.com/blog/post/2015/05/21/death-sentence-of-the-couple-guilty-of-parricide-upheld/> (Last visited on 5-09-2020)

⁴⁸<https://www.ndtv.com/india-news/supreme-court-confirms-death-sentence-of-a-woman-and-her-lover-for-killing-7-members-of-her-family-759604> (last visited on 2-09-2020)

The awarding of the sentence suggests that the punishment is based on a one-eyed-justice principle, which does not comprehend that the fault of the crime lies as much in society as with the criminals.⁴⁹

It has been argued that given the iniquitous gender politics that is practiced in the name of honour, it is time to think about rehabilitative justice, not retributive punishment. If today, Shabnam can teach her fellow inmates how to read and write and Salim can rehabilitate him through, for example reading in jail, and then there is reason to believe that death penalty is not the desired outcome for these two.⁵⁰

Here, the Apex court's decision on commutation of death sentence of Susheel Sharma,⁵¹ who murdered his wife Naina and then cut her body into pieces and burnt it to destroy the evidence, becomes relevant to establish the gendered dimension of the courts approach. The paper does not criticise the commutation of death sentence into life imprisonment but rather criticises the grounds recorded for commutation. His commutation was not only argued on the grounds of mitigating circumstances rather it was recorded that "the deceased was a qualified pilot...She was an independent lady...not a poor illiterate helpless woman...it would be difficult to come to the conclusion that the appellant was in a dominant position qua her. The evidence on record shows that the appellant suspected her fidelity and the murder was the result of his possessiveness".⁵² The paper criticises courts' opinion on deceased's ambition and educational status⁵³ as it should never be recorded either as aggravating circumstances if she is the murderer or when she is a victim.

The Sociology of Shabnam case

The paper attempts to do a sociological analysis of murders committed by Shabnam. Since mainstream society has not acknowledged the horrors of violence against women and children, it is not a surprise that they also silence the women who kill to protect their own or their children's lives.

Shabnam was three months pregnant when jailed and her child lived with her till six years as per the existing provisions of prison manual. The other side of Shabnam case is revealed by her junior Usman Saifi who has adopted her child and his wife decided not to have her own child for the sake of welfare of Shabnam's child.

Mr. Saifi reminded the court that there was no witness to the gruesome murders and it was Shabnam who first raised the alarm. "Police managed to solve the case on the basis of circumstantial evidence, call details, the post mortem report, and the fact that Saleem and Shabnam turned against each other during the trial,"

Mr. Saifi said that the angst against Shabnam is so strong in the region that any relief for Shabnam would not be supported. "Even my relationship with her and my intention for

⁴⁹Women on Death Row: Death Penalty and Social Politics in ...<https://www.epw.in> › engage › article › women-death-r. Shikha Vats, Vol. 55, Issue No. 11, 14 Mar, 2020 (Last visited on 12-08-2021)

⁵⁰Ibid

⁵¹Susheel Sharma v. NCT Delhi MANU/SC/1024/2013 S

⁵²Bibha Tripathi, Judicial trend on mitigating circumstances of commutation of death sentence into life imprisonment, BANARAS LAW JOURNAL,VOL 42 NO 1,44-50(2012)

⁵³National Law University Death Penalty Research Project 39 a volume 1, pp. 108-9 (2016)



taking the custody of Taj is questioned,”⁵⁴ The people in Bawankheda in Amroha district of western Uttar Pradesh call Shabnam stone-hearted. The judiciary described her crime as “the rarest of rare”, particularly because she committed parricide despite being educated. Mr. Saifi remembers Shabnam, a double MA in English and Geography, as a caring senior who used to treat him as her younger brother. “The Shabnam that I knew was very different from the one that the world loves to hate”.⁵⁵

VI Conclusion and Suggestions

The last part of the paper draws some concrete conclusions and extends some viable suggestions. So far as the hypothesis is concerned, it can be said that it is proved and clearly be gauged from the Shabnam case. Furthermore, it can also be said that it has been proved on the basis of 'special reasons' extended by the Supreme Court of India either while inflicting death sentence (by highlighting educational background and role of a daughter in Shabnam case) or while commuting it to life imprisonment (by highlighting the educational background, ambition and connection with friend after marriage in Susheel Sharma case).⁵⁶ It has also been proved that women offenders enter into the trial procedure with diminished credibility and sympathy, which tends to lead to harsher sentencing.⁵⁷

Though the Supreme Court has implicitly relied upon the triple-test in Shabnam case, authorities have observed that even the triple-test raises few doubts about its claim of ensuring 'principle-centric' sentencing. It has been observed that the triple-test thus, has neither emerged as a viable alternative to the twin-limbs of the ROR case formulation nor received judicial support for further articulation and acceptance.

In media too, when a woman is convicted of murder, it is often portrayed as exceptionally shocking. When a mother kills her children, the public is outraged. Yet the fact that hundreds of women and children are abused and killed by men every day does not ignite the same firestorm and outrage. It is pertinent to mention here that the paper never advocates undue sympathy to women offenders rather it does advocate uniform attitude on sentencing. If a criminal act satisfies all the three tests (the crime, the criminal and the collective conscience) then also the offender can be given life imprisonment for a fixed term.

It is submitted through the paper that time has come to revisit those offences in which the option of reductivism in the name of unconstitutionality can be applied. It is also submitted through the paper that apart from judicial efforts of establishing 'supervening circumstances' two major studies,⁵⁸ recently performed, have favoured abolition of death sentence for one reason or the other. Therefore, de facto moratorium (no execution) on death sentence has become the need of the hour. The Supreme Court of India must lead the entire world through its special prerogative of commuting death sentence even

⁵⁴Supra note 47

⁵⁵<https://www.thehindu.com/news/national/other-states/the-shabnam-that-i-knew-was-very-different/article33949536.ece> (Last visited on 22-02-2022).

⁵⁶Supra note 47

⁵⁷Supra note 51

⁵⁸Supra note 1 and 53

when the mercy petition is rejected by the President of India if the total period spent in prison is more than 20 years. This submission, if accepted shall also establish a gender neutral approach on administration of death sentence and may bring considerable certainty in the law on sentencing.