
DEATH PENALTY IN RAPE CASES: ANALYSIS OF NIRBHAYA VERDICT, 2020

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Introduction

A woman is a wonderful and the most beautiful creation of God- a mother, a sister, a wife, a friend, she plays all her roles lovingly and with utmost care and affection. Her status as an individual as well as a group has undergone innumerable upheavals overtime, especially in India. On one hand she has been worshipped as a Goddess and on the other, she has been veiled, confined to the four walls of the house, humiliated, tortured and suppressed.

The Indian society based on patriarchy inflicted strictures on her, reducing her status to a mere plaything or a slave of man's whims and fancies. She has been suppressed in the name of adjustment. She has been tortured in the names of customs and usages. The patriarchal society tends to show more of nonacceptance towards women rising and demanding equal rights and status. They are slammed by the orthodox sections of the society and are a mere creature who is supposed to just obey!

Humiliation, harassment, torture, and exploitation of women are as old as the history of family life and in the present era, there has been an alarming decline in the respect and morality towards women which in result has increased crimes against women in the society. Women have been looked upon with disdainful contempt. Incidents of heinous crimes like rapes, acid attacks, dowry deaths, domestic violence have increased at an alarming rate.

Despite the severe punitive approach to criminal law and the efforts to end their suppression and subjugation, they are exploited, abused and assaulted sexually, physically and mentally. It is unfortunate that in the recent years, the crime against women is on the rise. Of all the crimes against women, rape is the most heinous and disgusting crime which shatters the foundations of their lives. It is a gruesome attack on her integrity and dignity and an unjustifiable disregard of her control over her body. It inflicts wounds not only on the body of the victim but also on her soul. It is an act of physical and mental humiliation, pain, fear, and serious injuries.

Rape is a crime not only against the person of the woman; it is a crime against the whole society. It destroys her mental equilibrium and pushes her into profound mental crisis. It is the violation of the most basic and cherished right of the victim enshrined under Article 21.

Meaning of term 'Rape'

The term 'rape' has Latin origin which implies 'to snatch, to carry off, to grab'. It implies forcible seizure. The Cambridge Dictionary defines rape as, "forcing someone to have sex when they are unwilling, using violence or threatening behavior".¹ According to Merriam-Webster Dictionary, "rape is an unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception".²

Rape is a type of sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without that person's consent. The act may be carried out by physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent. It has been defined under Section 375 of the IPC.³ It is the unlawful sexual

¹ Merriam Webster, <https://www.merriam-webster.com/dictionary/rape> (last visited on July 21, 2022)

² Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/rape> (last visited on July 21, 2022)

³ The Indian Penal Code, 1860, Sec. 375: A man is said to commit "rape" if he-

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) Inserts, to any extent, any object, or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) Manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus, or any part of body of such woman or makes her to do so with him or any other person; or

(d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: -

First. -Against her will.

Secondly. -Without her consent.

Thirdly. -With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. -With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. -With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. -With or without her consent, when she is under eighteen years of age.

Seventhly. -When she is unable to communicate consent.

Explanation 1.-For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.-Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.-A medical procedure or intervention shall not constitute rape.

intercourse between a man and a woman without her consent or against her will under the circumstances mentioned under the section.

International Perspective on Rape Laws

With the growing concern over the status of women and violence against them, various international instruments have been adopted which have recognized their rights. Various policies and guidelines have been laid down to be adopted by the countries to curb crimes against women. The UN Declaration on the Elimination of Violence against Women, 1993 calls out the States to eliminate all forms of violence against women.⁴

The Rome Statute of International Criminal Court, 1998 has recognized Rape, along with other crimes, as an offence against humanity. Different countries have adopted varying methods to curb the menace of rapes. Some have adopted zero-tolerance policy while some have adopted time bound and fixed procedure for fast-track trials.

The punishment for the offence of rape varies majorly from country to country. Some countries like US have abolished the death penalty for the offence of rape while some countries continue to retain it. The following table puts light on the punishment for the offence of rape in different countries:

Country	Punishment
China	Death penalty or Castration
Iran	Hanging or shot to death in public
France	15 years of imprisonment which may extend up to 30 years or life depending on the harm and injuries caused to the victim
Afghanistan	Shot in the head within 4 days of conviction
North Korea	Shot dead by the firing squad

Exception 2.-Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

⁴ Rome Statute of International Criminal Court, 1998, Art. 7

Russia	3 years of imprisonment which may extend up to 30 years depending on the harm and injuries caused
United States	Under federal law- life imprisonment Under state laws- varies from state to state
Egypt	Public hanging
Pakistan	Death penalty
United Kingdom	10 years to life imprisonment depending on the degree of harm and injuries
UAE	Death penalty
Bangladesh	Death Penalty
Greece	Incarceration

Statutory Provisions on Rape Laws in India

With the changing times, the Indian law has been modified to inculcate the rights of the women and to afford adequate protection to them. The Constitution of India recognizes rights of the women and guarantees equality. Various statutes have also been formulated to curb violence against them.

a. The Constitution of India, 1950

The Constitution of India guarantees every individual the right to dignity, adequate growth, and a life free of discrimination. It also guarantees equality and right to life⁵ to all the persons. These are the most cherished rights which are important for the overall development and wellbeing of the person. The Constitution protects the rights of women in several ways.

Gender equality is ensured through Article 14. It prohibits discrimination on the ground of sex, along with other grounds.⁶ The Constitution along with recognizing these principles also

⁵ Indian Constitution, Art. 21

⁶ Id Art. 15(1)

empowers the State to enact special provisions for women and children⁷ keeping in mind their status and the exploitation they have been subjected to since ages. It also prohibits trafficking and exploitations⁸, something to which women are commonly subjected to.

The Directive Principles of State Policy also cast an obligation on the State to protect the rights of the women through various articles like Article 39 and 42. The fundamental duties cast a duty on all citizens through Article 51A(e) to renounce all practices derogatory to the dignity of women.

b. Under Criminal Laws

The Indian criminal law is governed by 3 major statutes- The India Penal Code, 1860 (IPC), The Code of Criminal Procedure, 1973 (CrPC) and The Indian Evidence Act, 1872 (IEA) out of which IPC is the general penal statute that lays down the offences and their punishments. Many special statutes have also been enacted that protects the rights of the women and aims at curbing violence against them, e.g., Sexual Harassment of Women at Workplace Act, 2013, The Protection of Women from Domestic Violence Act, 2005, The Protection of Children from Sexual Offences Act, 2012 etc.

i. The Indian Penal Code, 1860

As discussed earlier, the term rape has been defined under Sec. 375 of the IPC. Sec. 376 of the IPC prescribes the punishment for rape. Prior to the amendment in 2013, the section provided a meager punishment of 2 years of imprisonment with or without fine. In certain aggravated circumstances the imprisonment extended up to life with a minimum of 10 years of rigorous imprisonment plus fine. The infamous Nirbhaya gang rape case shook the conscience of the whole nation.

A 23-year-old medical student was brutally gang-raped by 5 men in a moving bus on the night of December 16, 2012, and consequently she died due to the grave injuries. This case triggered a huge public outcry demanding strict and harsher punishments for the culprits. This led to Criminal Law (Amendment) Act, 2013 which expanded the definition of rape and enhanced the punishment for rape to a minimum of 7 years which may extend to life imprisonment along

⁷ Id Art. 15(3)

⁸ Id Art. 23

with fine and in certain aggravated forms it shall not be less than 10 years which may extend up to life imprisonment (remainder of person's natural life).

The amendment also amended other sections related to rape:

SECTION AND OFFENCE	PUNISHMENT PRIOR TO 2013 AMENDMENT	PUNISHMENT POST 2013 AMENDMENT
Sec. 376A- Punishment for causing death or resulting in persistent vegetative state of victim (new addition)		RI of not less than 20 years but which may extend to life imprisonment (remainder of natural life) or with death.
Sec. 376B- Sexual intercourse by husband upon his wife during separation	Imprisonment of either description for a term which may extend to 2 years plus fine (earlier Sec. 376A)	Imprisonment of either description for not less than 2 years but which may extend to 7 years plus fine.
Sec. 376C - Sexual intercourse by a person in authority (new compiled offence)	Imprisonment for a term which may extend up to 5 years plus fine. (Different heads under Sec. 376B, 376C, 376D)	RI for not less than 5 years but which may extend up to 10 years plus fine.
Sec. 376D- Gang Rape (new addition)		RI for not less than 20 years but which may extend to life imprisonment (remainder of natural life) plus fine
Sec. 376E- Punishment for repeat offenders (new addition)		Life imprisonment (remainder of natural life) or death.

Even after providing for strict laws the incidents of rape did not cease. Rape cases of innocent minor girls started escalating. The infamous case of Kathua rape⁹ again brought the weak

⁹ An 8-year-old girl was raped in Kathua, a district of Jammu and Kashmir. It has been alleged that she was kept in a Shrine for several days and raped continuously and later murdered.

implementation of law into the limelight, public outcry, and demand for further enhancing the punishments. The Criminal Law (Amendment) Act, 2018 was a consequence of this heinous rape case.

SECTION AND OFFENCE	PUNISHMENT PRIOR TO 2018 AMENDMENT	PUNISHMENT POST 2018 AMENDMENT
Sec. 376(1)- Punishment for rape	RI of not less than 7 years but which may extend to life imprisonment plus fine	Minimum 10 years RI which may extend to life imprisonment plus fine
Sec. 376(3)- Punishment for rape (new clause added rape on a woman under sixteen years of age)	-	Minimum 20 years RI which may extend to life imprisonment plus fine
Sec. 376AB- Punishment for rape on woman under twelve years of age. (New addition)	-	Minimum 20 years of RI which may extend to life imprisonment or death.
Sec. 376DA- Punishment for gang rape on woman under sixteen years of age (new addition)	-	Life imprisonment plus fine.
Sec. 376DB- Punishment for gang rape on woman under twelve years of age (new addition)	-	Life imprisonment plus fine or death.

c. Other Statutory Provisions

i. The Protection of Women from Domestic Violence Act, 2005

The Act aims at providing effective protection of the rights of the women who are the victims of domestic violence. The Act includes sexual abuse¹⁰ within the ambit of domestic violence and empowers the Judicial Magistrate to pass adequate relief orders.

ii. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

This Act aims at preventing and prohibiting all forms of sexual harassment of women at their workplaces. The Act was enacted after the highlighted and landmark case of Vishaka v. State of Rajasthan¹¹. Under the Act, any unwelcome act or behavior of sexual nature or physical contact shall be construed as sexual harassment. Provisions have been laid down for the setting up of Internal Complaints Committee in every office to inquire into the complaints filed by the aggrieved woman.

iii. The Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

This Act aims at strengthening the laws for the protection of children from sexual offences. The term 'rape' has not been used in this Act, rather the term 'penetrative sexual assault' has been used to indicate the same. Prior to the amendment in 2019, the maximum punishment under the Act was life imprisonment. Now it has laid down death penalty for the offence of aggravated penetrative sexual assault.¹²

Death Penalty in Rape Cases- Is It a viable Solution?

In India, death penalty is awarded only in the "rarest of rare" cases, an option that courts have exercised under a range of statutes including those related to murder, terrorism, kidnapping with murder, rioting with murder, drug offences and murder with rape.

More than 40% of those sentenced to death in 2018 and half (52.9%) of those in 2019 were convicted for cases that included sexual offences and murder, said Death Penalty India 2019,

¹⁰ The Protection of Women from Domestic Violence Act, 2005, Sec. 3 Explanation 1 (ii)- Sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of woman.

¹¹ Vishaka v. State of Rajasthan (1997) 6 SCC 241

¹² The Protection of Children from Sexual Offences Act, 2012, Sec. 6

an annual report by the National Law University (NLU), New Delhi¹³. As it can be observed, prior to the amendments the punishments were nominal. Keeping in view the brutality and gravity of the offence, such punishments have no deterrent effect on the minds of the potential criminals.

Also, the increasing incidents of rapes have compelled the legislators to rethink about the existing provisions and the need to amend the same. The amendments done in 2013 and 2018 have created new provisions and have enhanced the punishments as well. With the 2013 amendment, death penalty was prescribed under Sec. 376A which provides for the offence of rape that results in death or in persistent vegetative condition of the victim and under Sec. 376E which deals with punishments for the repeat offenders. With the 2018 amendment, death penalty has been prescribed for the offence of rape and gang-rape wherein the victim is less than 12 years of age. Generally, with these cases comes the common slogan: “Hang the rapists”.

The demand of hanging the rapists has seen an increasing trend over the past few years and death sentences are increasingly being meted out for cases involving sexual violence as a response to public anger and anxiety. But this also poses certain questions that need to be answered. Will death penalty stop this menace? Is death penalty the answer to the gender-based violence that is deep-rooted in the Indian culture? Is death penalty a viable solution for controlling the rape cases? There are arguments both in favour and against the contention of imposing death penalty in rape cases which will be discussed in this paper.

Analysis of Nirbhaya Gang-Rape Case

On the night of 16th December 2012, a paramedical student was brutally beaten, tortured, robbed and gang-raped in a moving bus who later on died due to the grievous injuries inflicted upon her by the 6 rapists, out of them one being a juvenile. This incident led to huge public outcry and protests with the major demand of hanging the rapists. The Court indeed sentenced the 4 accused (one of the accused Ram Singh committed suicide in the jail and the juvenile was sentenced to 3 years stay in special correction home by the Juvenile Justice Board) to death.

The courts at various levels have constantly been upholding the death penalty imposed on the accused keeping in view the brutality with which they raped her and placed the crime in the category of rarest of rare cases and fit for the imposition of death penalty. The mercy pleas

¹³ India Spend, <https://www.indiaspend.com/death-penalty-for-sexual-offences-up-53-in-2018-but-most-rape-cases-stuck-at-trial/> (last visited on July 21, 2022)

were also rejected by the President, and they were finally executed on March 20, 2020, after a 7-year long litigation.

The case took 7 years to reach its conclusion, even though it was being tried by a fast-track court setup for the hearing. This indicates the loopholes that are present in the criminal justice system that are exploited by the accused to the fullest. The legal remedies available to the accused in cases where death penalty is imposed on them are many. From review petitions to the appeals, from mercy pleas to curative petitions, the time gap in between exercising their rights and availing these remedies evidently highlights the faulty system that though talks about ensuring speedy justice but fails miserably.

The legal remedies available to them were availed by the 4 accused on different dates with long gaps in between. These are the basics tactics used by the accused these days to delay the matter. Such delay and the possibility of creating such delay are provided by the law itself. These delay and pendency not only create hurdles in the path of justice for the victim and her family, but it also affects the society at large and in many ways the family of the accused as well!

Death Penalty in Rape Cases: Pros

Death penalty in rape cases is favored by a large section of the society and is the foremost demand put forward to ensure justice to the victim in such cases. They put forward many contentions in its favor like

i. Deterrent effect

One of the basic contentions favoring death penalty for rape cases is that it will act as a deterrent for the potential criminals. Imposing death penalty for the offence of rape will create fear in the minds of the potential offenders and they will not commit such offence. Imposition of most harsh and strict penalties will dissuade them from committing such violent crimes. It will set an example for the society.

ii. Increased reporting

With the strict laws coming into force, people's faith in the criminal system and justice delivery is strengthened. This gives hope to the victims who keep quiet under pressure and fear to come out with their stories and report them. The National Crime Record Bureau's report (2019) showed a spike in the reporting of the rape cases after the Nirbhaya case

iii. Justice Delivery

Imposition of death penalty is considered as justice delivery. It is believed to be a just form of retribution. It is taken to be a way to impart justice to the victim and to ensure safety of the public at large. By keeping capital punishment as an option within society, we create an appropriate consequence that fits the actions taken by the criminal. The death penalty ensures that the individual involved will no longer be able to create havoc for the general population because they are no longer around. That process creates peace for the victims, their families, and the society in general.¹⁴

iv. Death penalty brings closure of the victim's family

It is argued that death penalty brings closure for the family of the victim. The execution satisfies the retributive feeling that grows in their minds, and it helps them to move on in their lives by putting aside their loss.

Death Penalty in Rape Cases: Cons

Being the other side of the same coin, there also exist a section of the society that demands abolition of death penalty in such cases and puts forward the contentions against it:

i. Failure to act as an absolute deterrent

The increasing cases of rapes even after the enactment of strict and stringent laws clearly points out that such penalties have failed to act as a deterrent. Further, nobody has been able to conclusively say that the death penalty is an effective deterrent. Especially in countries like India, where the certainty of punishment is relatively low and legal trials are often harder on victims than on the accused (leading to them withdrawing the case), simply changing the quantum of punishment owing to few famous incidents is unlikely to deter others, as most cases either languish in the courts or are dismissed due to lack of evidence.

ii. Increased risk of murder and extreme violence

Once the death penalty is highly probable in rape cases, it may in fact have the opposite impact – instead of acting as a deterrent, it could lead to perpetrators making sure the victims are left

¹⁴ Connect Us, <https://connectusfund.org/16-advantages-and-disadvantages-of-the-death-penalty-and-capitalpunishment> (last visited on July 21, 2022)

dead or in no state to make a complaint or recognize the perpetrators.¹⁵ There is an evident risk of increased violence and murder of the victim. Further, various reports and statistical data has constantly pointed towards the fact that death penalties have not acted as a deterrent especially for the hardened criminals and they end up killing the victim to escape the punishment and to avoid being caught. Justice Malimath Committee had out rightly rejected death sentence for rapists and the Committee was not in favor 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.

iii. Fear of reporting

With the argument of increased reporting coming in favor of death penalty, there is a counter reaction to it as well. People opposing death penalty state that with the increased risk of murders by the rapists, the victims might keep quiet instead of reporting the cases. In many instances there is family pressure on the victim for non-reporting, especially in cases which involve family members as offenders.

iv. Automatic assumption that the person cannot be reformed

In many cases the crime of rape is committed in an unprecedented and uncontrollable lust. The offence shatters the life of the woman and brings along the automatic assumption that the offender is a hardened criminal and cannot be reformed and deserves to die. Death penalty leads to an assumption that the only way to curb the crime is to eliminate the offender instead of trying to reform the offender.

v. Risk of an innocent person being executed

The criminal system prevalent in the country is faulty and there is no doubt in that. There is always a risk of an innocent being punished for the deeds of someone else. There is always a risk of manipulation and withholding of evidence or giving false evidence in the court which may lead to the conviction of innocent persons and in such cases might lead to the imposition of death penalty.

vi. Advocacy for abolition of death penalty by human rights activists

¹⁵ The Wire, <https://thewire.in/women/rape-death-penalty> (last visited on July 21, 2022)

The human rights activists and organizations, especially Amnesty International opposes the death penalty in all circumstances, regardless of the circumstances or the nature of the crime. It is the ultimate cruel and inhuman punishment, and a violation of a fundamental human right - the right to life.

vii. Killing in the name of justice?

Killing someone for the bad deeds he did is not justified in any sense. By legitimizing the very behavior that the law seeks to repress i.e., killing, capital punishment is counterproductive in the moral message it conveys and it won't make the things right. Taking a human life is unethical, whether it is a crime or whether it is done in the name of 'justice'.¹⁶

Conclusion & Suggestions

People celebrated the execution of Nirbhaya rapists by chanting 'death to the rapists. But the point here is that whether such stringent laws and imposition of death penalty makes the women safer? The obvious answer is NO. The arguments put forward in favour of death penalty gets right away negated with more incidents of rape taking place in the country even after the passing of stringent laws and imposing death penalties to the offenders.

The rape and murder of 27-year-old vet in Hyderabad, killing of the witnesses and the father of the victim in the Unnao rape case clearly points towards the direction in which the criminal system is moving. The death penalty has failed to act as deterrence, it has failed to deter the offender from satisfying his sexual gratification and sadism by overpowering another human being and this is clear. Offenders make sure that the victim is not left alive to escape law.

Though it may be said that it brings closure to the family of the victim but on the other side, it creates a void in the family of the accused. It can securely be concluded in general that in all instances of rape, death penalty is not the viable solution aside those instances of genuine gravity like gang-rapes and child-rapes. Instead of focusing on the punishment we need to focus on the patriarchal thinking and the mentality that treats women as a mere property. The wrong piece of the problem is being reflected up on and focused. We ought to be more worried about how we handle the rape cases in the nation.

¹⁶ Debating Europe, <https://www.debatingeurope.eu/focus/arguments-death-penalty/#.XzUTnPMzb3g> (last visited on July 21, 2022)

When we talk about the death penalty, we also need to discuss about the accepted social norms that perpetuate rape culture and the systemic failings that either silence women or victimize them further. With the huge public protests, slogan raising, dharnas, the death penalty acts as a distract or. This is where the media needs to step in. When we quote a leader's effusive praise for the death penalty, and when we report on a convict being sentenced to death without adding context, we feed into a populist narrative that regards capital punishment as some sort of magic bullet. We do a disservice to the cause of fighting violence against women.

Hence it can be said that merely raising of slogans and dramatic statements about castrating rapists or accusing the police cannot bring the ideal outcome. Rather a "Zero Tolerance" policy should be embraced. Further, to check the crime against women there must be the establishment of special courts which must hold speedy trials to ensure that any man who insults a woman's sexuality is punished quickly and adequately. Therefore, there is a need for appropriate implementation of laws with utmost sincerity rather than referring to severe punishments provided in Criminal code.