



DEATH TO DETER RAPE: HOW EFFECTIVE IS CAPITAL PUNISHMENT?

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INTRODUCTION

On August 10 2018 Indian becomes 14th country to introduce death penalty for child rape. The Indian Parliament has passed the ‘Criminal Law Amendment Bill 2018. By passing the Amendment Bill 2018 there were certain amendments in different statutes have been done. One of the major amendment in the history of the “**Criminal Justice System**” of India that is death penalty for the rape of a girl below the age of twelve years. Giving death penalty to someone is not the easy task for the judiciary on the other hand it is the burden over the judiciary and the interpretation of which is left to the court. To this end, the Bill amends provisions of Indian Penal Code (IPC), Code of Criminal Procedure, Indian Evidence Act and Protection of Children from Sexual Offences Act (POCSO). Under the old codified penal laws which are prevalent from last many years the punishments for heinous crimes like for rape, murder are defined. Now the question arises that the existing punishments have deterrence effect or not? Because the need of this amendment regarding death penalty is also depends on above mentioned this issue. Before passing of the ‘Amendment Bill 2018’ there was an ordinance promulgated by Central Government in April 2018, in wake of the public outcry over Kathua incident of rape and murder of a minor girl. The parliament passed the

Amendment Bill 2018 which has replaced the Ordinance.

The 2018 Amendment Bill is not the consequence of just the one case or of the two cases but it the effect of many rape incidents which are happening from last many years and these offences increasing day by day and the punishments in the penal laws are not sufficient to stop these crimes. One of the rape incident in December 2013 where a medical student aboard a moving bus in the capital Delhi that had shaken the whole Country and the justice making system of the Country come under the question. The government announced that death penalty would be applicable to those convicted of rape resulting in death. The new amendments will enable a court to hand out death penalty to the accused that convicted of raping a child under 12, even if it does not result in death.

FEATURES OF CRIMINAL LAW AMENDMENT BILL

1. Amendment in IPC, 1860 where the punishment for rape of women has been increased from seven years to ten years.
2. Minimum punishment for rape and gang rape of girls below the age of 12 years is imprisonment of twenty years and is extendable to life imprisonment or death.
3. Punishment for rape of the girls below the age of 16 years is imprisonment of twenty years or life imprisonment.

Major changes by the Criminal Law (Amendment) Bill, 2018

<u>Age of woman</u>	<u>Offence</u>	<u>Punishment under IPC, 1860</u>	<u>Criminal Law (Amendment)</u>



			<u>Bill, 2018</u>
Below 12 Years	Rape- Gang Rape-	-10 years to life imprisonment -20 years to life imprisonment	-20 years to life imprisonment or death -Life imprisonment or death
Below 16 Years	Rape- Gang Rape-	-10 years to life imprisonment -20 years to life imprisonment	-20 years to life imprisonment Life imprisonment
16 Years and above	Rape-	-7 years to life imprisonment	-10 years to life imprisonment

DETERRENT EFFECT OR RETRIBUTIVE JUSTICE OF THE CRIMINAL LAW AMENDMENT BILL, 2018

Reason behind passing the Amendment Bill and increasing the punishment is to reduce the crime rate, but the it is a very debatable topic from the beginning that imposing death penalty for rape convicts has any deterrent effect to reduce the crime rate or not, because death penalty itself is very debatable it doesn't matter it is the punishment for rape convicts or the punishment for murder. The question that has been debated around the world- does toughening the sentence actually reduce crimes? Because the major argument against imposing the death penalty is that it actually deters the system from handing out conviction.

While describing death penalty for “**rarest of rare case**” that is specified in the case of terrorism. Now execution in the case of rape it has to be that the rape is at the equal footing of terrorism. The cases of rape and gang rape are continuously increasing while conviction rates remain abysmally low. Sometimes the system and the law enforcing authorities are under the question while performing their duties for maintaining law and order. The issue raised that police are biased against women and are hesitant to even register cases of gang rape as that would mean the death penalty for a group of men. In many cases form the history of India where police tend to broker compromises, encouraging survivors, under threat or coercion, to withdraw their complaint, so that the accused is set free on the basis of “low probability of conviction”.

- The investigation into the rape of child under the provision of **Cod of Criminal Procedure, 1973** must be completed within three months. The bill reduces this time period to two months for all the rape cases.
- According to the Amendment Bill. 2018 the anticipatory bail is not granted in cases of rape of minor girls below 16 years of age. Further, any appeal against a sentence for rape cases must be disposed of within six months.¹

¹ Mandira Kala, *Legislative brief of Criminal Law (Amendment) Bill, 2018*, July 18, 2018, available at <http://www.prsindia.org/>.



In many countries like in Bangladesh, where the parliament has passed the **Oppression of women and Children (Special Provisions) Act in 1995** to facilitate stringent punishments, including the death penalty in the case of rape, gang rape, acid attacks and trafficking of children. But here also, the severity of the punishment meant many of accused walked free due to “insufficient evidence” and because there was no option of less harsh sentence. Deterrence of the crime and the victim’s access to justice require both better implementation of existing laws and systematic changes that indicates that access to justice, and not sentencing in a handful of cases, is the problem that need to be solved as far as retributive justice is concerned. It is very difficult for a particular legal provision to have all form of reparation that can be decided on the basis of the nature of the crime, so death penalty is also silent on victim support and rehabilitation, despite evidence pointing to the need for one so that victim can be facilitated at every stage from the police station, to hospital and courts.² As far as victim compensation in concerned there are five ways of reparation (to repair what the victim has suffered) to the victim these are:

1. Retribution
2. Compensation
3. Rehabilitation
4. Satisfaction
5. Guarantee for non-repetition

Victimology in the criminal justice system comprises five ways of reparation depends

² Divya Arya, *India death penalty: Does it actually deter rape*, July 31, 2018, available at <https://www.bbc.com/>.

on different- different cases like if we talk about monetary compensation then it is not possible in the case of heinous crimes like murder and rape where there is punishment has decided that are imprisonment for certain years or life imprisonment or death sentence.

Retributive justice talks about giving punishment inflicted on someone as vengeance for a wrong or criminal act. When we say ‘death to the rapist’, that is either a retributive action where the retribution for a heinous crime or a deterrent action which the affected party is seeking would act as a preventive factor against the crime from occurring.

Punishing child rape with death penalty that will definitely lead reduction in crime is a fallacy. It may lead some short-term reduction since the causes of rape are variable and subjective. But if the question comes to signify retribution, then the death penalty for the child rapists makes perfect sense. Capital punishment is all about retribution, which does comprises the reformatory aspect of the criminal justice system, and it is said to have little deterrent effect.³

ARBITRARINESS IN TERMS OF AGE

One of the striking features of the amendment is its arbitrariness in terms of the cut-off age of 12 years. According to the study of Rahat, the socio-legal support arm of Majlis Legal Centre looked at 644 children rape-related FIRs registered between 2008 and 2012 by Mumbai Police

³ Shalini Nair, *Why death penalty for child rape, or not*, April 30, 2018, available at <https://indianexpress.com/>.



under the IPC and the POCSO Act. It found that children aged between 11 and 18 are most vulnerable, accounting for almost 51% of the total cases. Only 2% of the assault cases against children aged between six and 10 resulted in acquittals, while the proportion of acquittals was as high as 38% in cases involving children aged between 11 and 15 years, and 54% in cases where the victim was aged between 16 and 18. It suggested a tendency to disbelieve adolescents or a trend of the victims turning hostile.

There is also the issue of “sentencing arbitrariness” cited by the Justice Verma Committee. Again, a 2016 study by the Centre on Death Penalty found that a majority of death row inmates belonged to the backward section or religious minorities, and were economically vulnerable.⁴

ADDED BURDEN FOR VICTIMS

Death penalty is the harsher and biggest punishment in the Indian legal system or any other country’s legal system. Because death penalty is the biggest punishment that is not easy to give to a person committing petty offences so it is very necessary for the judges to look each and every aspect of a particular case because the crime should be proved beyond the reasonable doubt so far as **adversarial system (based on accusatorial method)** is concerned. The concern has been voiced by many Indian activists who oppose the death penalty for rape. Reporting a case related to crime against women is a problem because the perpetrators are mostly known to the victims and there are all sorts of dynamics at play

that cause victims and their guardians to not report the crime.

Another issue is that, in many rural areas in particular, there is a stigma exists with regard to rape that diminishes the reputation in the society if they raise voice against the criminals. The victims are under the fear that is why they do not enforce their rights so it doesn’t mean that punishment is harsher or not? Stronger laws do not encourage victims to come forward.

YEARS SPENT WAITING FOR JUSTICE

The slow pace of the justice system has also been cited as an issue. Because of Long-drawn-out trials in India victims have to wait for many years to get justice. And it cases where the death penalty has been given to the persons have many chances to appeal against their sentence. The consequence of a prolonged legal process is that it often adds to the victim’s suffering. Because of these lacunas giving death penalty is not the result of justice but the result of adding the suffering of victims. Death penalty potentially has a negative impact on getting justice of the survivor. Without the efforts of law enforcing authorities like police, judiciary, government officers and society robust laws would have a very limited impact in reducing the crime.⁵

MANDATORY REVIEW FOR PROPORTIONALITY

Every legal system supports this argument that whatever punishment is given it should proportionate to the crime that has been done. Usually the death penalty is criticized on two important grounds first that it is the

⁴ Ibid.

⁵ Supra note 2.



violation of human rights and the second ground is that it is not proportionate to the crime that is the violation of the natural justice. Also where the mandatory review of all death sentences is provided as per the proportionality or that should be imposed on the basis of constitutionality. The court must look at-

- Whether the sentence was imposed under influence of passion, prejudice, or arbitrary factors.
- Whether the evidence supported a finding of statutory aggravating circumstances.
- Whether the sentence, in view of both the offense and the offender, is disproportionate to the penalty imposed in other cases.

A punishment is unconstitutional if it is excessive in nature as per the severity of the offense. A punishment is excessive in nature if -

- It is grossly out of proportion to the severity of the crime.
- Makes no measurable contribution to the acceptable goals of punishment, and hence is nothing more than the needless imposition of pain and suffering.

On the basis of these two test the excessiveness and the constitutionality of a punishment determines. These test used as an arguments against giving death penalty in rape cases or the justification that the death penalty is not excessive and unconstitutional in nature. In determining whether a punishment is disproportionate to a given crime, a must weigh three factors: (1) the Severity of the penalty, (2) the gravity of the

offense, and (3) a times the blameworthiness of the defendant.⁶

HUMAN RIGHTS

It has said that who has given the birth that is the God, has only the right to take it. This is the reason because of that death penalty is always opposed by humans. Those who are against the death penalty say that it is the violation of human rights of fundamental rights because our constitution protect the right to life under Article 21 of the Constitution.

Justice Verma Committee:

The committee led by former chief justice of India JS Verma set up after the incident of 2012 Delhi gang rape case. Its mandate was to suggest possible amendments to the criminal law to provide for quicker trial enhanced punishment for sexual crimes against women.

The submissions of the working group on Human Rights in India and resolutions adopted by the UN Commission on Human Rights have been examined by committee. The latter, the committee's report states, has adopted four resolutions to impose a moratorium on death penalty until death penalty is fully abolished. The first resolution is dated on December 18, 2007. It has also examined the Jurisprudential aspect of death penalty and emphasized on "rarest of the rare" case that the death penalty is awarded in 'rarest of the rare' case. It had acknowledged that rape is very often accompanied by physical injury to the victim is still in a position from which she

⁶ Manvin S. Mayell, *Proportionality Review of Death Sentence Not Required*, 1984, available at, <https://www.bloomberquint.com/>.



can, with some support from the society, overcome the trauma and lead a normal life. In other words we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.⁷

According to the reports of the committee there is considerable evidence that the deterrent effect of the death penalty on serious crimes is actually a myth. Hence it is suggested that the amendment regarding death penalty is the violation of Human rights.⁸

United Nations on death penalty:

When the Hon'ble Supreme Court ordered capital punishment for the four accused in the Delhi Gang rape case, the United Nations Human Rights Council (UNHRC) has recommended that India do away with death penalty. United Nations also against the death penalty which according to UN is the violation of Human Rights that is excessive in nature and not proportionate to the crime of rape. UN Human Rights High Commissioner Navi Pillay's statement is significant: "Popular support for the death penalty today does not mean that it will still be there tomorrow. There are undisputed historical precedents where laws, policies and practices that were inconsistent with human rights standards had the support of a

majority of the people, but were proven wrong and eventually abolished or banned."⁹

CONCLUSION

Capital punishment in all cases is a highly controversial and divisive issue, and it comprises many limitations regarding its enforcement. Giving death penalty in rape cases where the 2018 Amendment Bill gives death penalty in the cases where victim is below the age of 12 years, need strong reason and justification that why the death penalty has been introduced. A clear view of the Constitution is also necessary to know its functioning, that is why we need to understand the meaning of the amendments and their importance in the society. The intention may not be to increase the gravity, awfulness and inhumanity through these punishments. What about the gravity, awfulness and inhumanity which are increasing through crimes and offenders. These crimes are all blamable and ought to be punished. The arguments related to the morality of death penalty sometimes will not stand because it is a part of debate which is still hot issue nowadays. Only one argument that has its stand is about the deterrent effect of the punishment if it has its deterrent effect then it is fine but if not then it is worthless. To demonstrate the irregularities, inequalities, so many errors, so many flaws in the criminal justice system, these kinds of amendments and punishments are necessary from which constitutionality can be imposed and carried out. Capital punishment as we have observed not only at the National level but also at the international level is fraught with too many flaws: the flaws of

⁷ Payaswini Upadhyay, *2013 Committee Had Cautioned Against Death Penalty for Rape*, April 22, 2018, available at <https://www.bloomberquint.com/>.

⁸ Ibid.

⁹ Mohammad Buhari, *UN slams death sentence for raped Sudan teen*, May 18, 2018, available at <https://www.news24.com/>.



discrimination, the flaws of incompetency, the flaws of professional negligence, the flaws of corruption etc. and each and every flaw has its own justification but it is not considerable when the gravity of the crimes is more than the flaws and where there is no other option except to introduce these punishment for the deterrent effect and the for the sake of retributive justice in the Criminal Justice System.

