



## **Navigating Death Penalty for Sexual Offences via Recent State Amendments**

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### **ABSTRACT**

The rising spate of death penalty for sexual offences reflects upon the changing jurisprudence of the Indian Criminal Justice System. The debate which started with abolition of death penalty by terming it inhumane and arbitrary, has taken the route towards mandatory death penalty for sexual offences with the recent state amendments. This development puts forth several questions for the liberal democracy projected by the Indian constitution, asking for the basis and evidence for the implementation of such a rule. The State amendments implementing death penalties for sexual offences can be criticized on all fronts including political, legal, social and economic factors. This article shall criticize the actions of State government in the light of above factor to highlight the notion that apart from lack of conclusive evidence to support the provision, mandating death penalty for sexual offences will not have isolated impact but would have far reaching negative consequences on the Criminal Justice System.

### **1. CAPITAL PUNISHMENT: AN OVERVIEW**

Capital Punishment also known as ‘Death penalty’ is an integral part of Criminal Justice System across the world. Although with the rise in jurisprudence of human rights and pluralism, the debate over its implementation is discussed in majority of legal system yet it remains intact in many states across the world. Capital punishment can be understood as punishment wherein the convict is executed by the State upon a judicial decree for committing an offence punishable with death. This form of punishment is of the highest degree under any penal law across the world and is only awarded in cases of most heinous offences such as murder, crime against humanity, crime against state and terrorism.

The judicial decree awarding death penalty is known as death sentence and therefore capital punishment is a legal process wherein an individual is put to death for the capital offence committed by him. The actual process of implementing the sentence in the prescribed manner (determined by the State) is known as execution of the punishment. Death penalty has been a part of Indian criminal justice system since time immemorial; however, in modern system this form of punishment was a part of penal laws during British era and the same was adopted by India after independence in 1947. Although the system of awarding capital punishment for any offence

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changed significantly after independence, as the constitution and criminal procedure focused on Rule of Law and access to justice to every citizen, which was not the case during British era.

Although the statistics suggest that around 140 nations across the globe have partially or wholly abolished death penalty as a form of state recognized punishment; Ninety Eight of which have abolished it wholly and seven nations abolished the said punishment for only ordinary crimes and retained the penalty for heinous offences; other forty nations have not removed the death penalty from statues but have abolished it in practice.<sup>1</sup> Interestingly, the rest of the nations which have yet not abolished death penalty in law or practice include India, China and United States which are the most populous nation in the world, meaning that a large section of people in the world are still subjected to this highest degree of punishment in the modern era.

### 1.1. POSITION OF DEATH PENALTY: INDIAN CONTEXT

The fundamental right to life enshrined in the Article 21 of the Constitution of India, which imposes an obligation upon the State to not take away life or restrict the liberty of any person without reasonable cause.<sup>2</sup> This provision has been the root of the various challenges for awarding of death penalty in India on various occasions. Death penalty is awarded for various offences under Indian Penal Code such as for offence of waging war against the government,<sup>3</sup> abetting a mutiny against the State,<sup>4</sup> murder<sup>5</sup> and murder with dacoity<sup>6</sup>, etc.; it is also awarded under the NDPS Act,<sup>7</sup> POCSO<sup>8</sup> and Anti-terror laws.<sup>9</sup>

The first case which questioned the constitutional validity of the capital punishment in India was *Jagmohan Singh* case;<sup>10</sup> here the appellant presented three main arguments against the enforcement of capital punishment under section 302 of the Indian Penal Code. Firstly, it was

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<sup>1</sup> Law Commission of India, "262<sup>th</sup> Report on Death Penalty" (August, 2015).

<sup>2</sup> The Constitution of India, art. 21.

<sup>3</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 121.

<sup>4</sup> *Ibid*, s. 132.

<sup>5</sup> *Ibid*, s. 302.

<sup>6</sup> *Ibid*, s. 396.

<sup>7</sup> The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985).

<sup>8</sup> The Protection of Children from Sexual offences Act, 2012 (Act 32 of 2012).

<sup>9</sup> The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

<sup>10</sup> (1973) 1 SCC 20.



argued that the execution of death penalty violates the fundamental rights granted to every citizen under Article 19 and 21 of the Indian constitution; hence this form of punishment cannot be held to be reasonable and is against the interest of public.<sup>11</sup> It was also pointed out that there exists no standard or guideline for imposing death penalty for any offence; lastly it pointed the vast judicial discretion which is unguided and can be based only on the basis of judge's preference to punishment in a particular case. The Hon'ble Court rejected the arguments of the appellants and held that death penalty is constitutional and is not a violation of any fundamental rights as it falls within the ambit of reasonable restrictions.<sup>12</sup>

The Law Commission of India has also undergone extensive research and study on the subject of death penalty in India, in its report the commission held that no argument for or against the application of death penalty can conclusively conclude the debate and therefore the Commission was not in a position to single out any argument but considering the diversity of opinion, the Indian society, public opinion and the situation of law and order, the commission concluded that at that point of time India cannot take chances with the experiment of abolition of death penalty in India.<sup>13</sup> The 262<sup>nd</sup> Law Commission Report which was submitted in 2015 also discussed the issues related to death penalty. The Commission concluded in its report that unlike the popular notion, death penalty does not fulfil the penological goal of giving a deterrent effect; the commission also stated that focusing on capital punishment as a medium of justice for the victim hampers the restorative aspects of criminal justice system.<sup>14</sup>

Supreme Court passed a landmark judgment on the validity of capital punishment in the case of *Bachan Singh*,<sup>15</sup> wherein the Court gave birth to the doctrine of 'rarest of rare' which is still applied in cases to allow death penalty in any case. The Court held in this case that the Constitution allows for death penalty in certain extreme cases, however, there always arises a concern pertaining to the dignity of life and therefore the courts should show resistance to take the life of any individual; therefore this punishment should be given in only rare cases where the alternative punishment does

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<sup>11</sup> *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 SCC 20.

<sup>12</sup> *Ibid.*

<sup>13</sup> Law Commission of India, 35<sup>th</sup> Report on Capital Punishment (December, 1967).

<sup>14</sup> Law Commission of India, "262<sup>nd</sup> Report on the Death Penalty" (August, 2015).

<sup>15</sup> *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.



not justify the extraordinary situation of the case.<sup>16</sup> It was mentioned in this judgment that the courts must pay equal regards to the criminal and crime and both aggravating and mitigating factors are to be taken into consideration.

An important judgment with respect to mandatory death penalty was delivered by the Hon'ble Supreme Court in the case of *Mithu v. State of Punjab*;<sup>17</sup> this judgment is considered important because it declared the mandatory death penalty under section 303 of the Penal Code as unconstitutional and invalid. Section 303 deals with the repeat offenders who have already been convicted with imprisonment.<sup>18</sup> The Court also held that such mandatory nature of death penalty violates the Article 14<sup>19</sup> and 21<sup>20</sup> of the Indian Constitution. The doctrine of 'rarest of rare case' which was formulated by the Court in the case of *Bachan Singh* was elaborated by the court in the case of *Macchi Singh v. State of Punjab*.<sup>21</sup> Hon'ble Justice M.P. Thakkar laid down 5 factors which must be considered before punishing the accused with death penalty.

### **Manner of Commission of Murder**

This signifies such instances where the accused commits the offence of murder in a very brutal, diabolic and heinous manner, so as to provoke intense indignation of any community or group of people. Few examples of such instances can be where the accused burns down a house so as to roast alive multiple lives; or if the victim was subjected to brutal and inhumane torture before the death; or if the victim cuts the body of the victim in various pieces and disposes it, etc.

### **Motive for Commission**

If the Court feels that the murder was committed for reasons which demonstrate complete dissoluteness and inhumanity he can be awarded the death penalty. Such circumstances can involve murder by hired killer for money, or for inheriting the property of parents or betraying the nation.

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<sup>16</sup> *Ibid.*

<sup>17</sup> AIR 1983 SC 473.

<sup>18</sup> The Indian Penal Code, 1860 (Act 45 of 1860).

<sup>19</sup> The Constitution of India, art. 14.

<sup>20</sup> *Ibid*, art. 21.

<sup>21</sup> 1983 SCR (3) 413.

**Anti-Social Nature of Crime**

This generally involves those cases where the murder was committed with the motive of targeting the marginalized communities such as Schedule castes and Schedule tribes. The murder is not committed for personal reasons but to target such communities. This can also include targeting any gender for exerting dominance over them; this is generally in cases of dowry death or sati or committing sexual offences against women with such motives.

**Magnitude of Crime**

If the crime is committed on multiple people or all members of family or targeting a locality or community, it can be understood as a crime of high magnitude. Terrorism act which causes death of multiple people are considered crimes of high magnitude.

**Personality of Victim of Murder**

If the victim is an innocent child or a helpless woman or any physically or mentally disabled person or person of old age or guardian of victim or a social-political figure killed for political reasons, such mitigating factors pertaining to the personality of victim must be considered by the court while deciding the punishment of the offence.

**2. Laws providing Death Penalty for Sexual Offences in India**

Sexual offences happen in a lot of forms and in different situations with people. Some of the most commonly discussed sexual offences are rape, sexual harassment and molestation. This century has witnessed a rise in feminist jurisprudence and therefore strict laws against sexual offences are now implemented. The laws in India pertaining to sexual offences are often referred as “Laws for protection of women” stating that sexual offence laws are not gender neutral. Although there has been a rise in demand for gender neutral laws, the laws are made advantageous in favour of women due to patriarchal norms prevalent in Indian society.

The sexual offences laws in India can be divided into few categories namely: Protection under Indian Penal Code, Protection against child sexual abuse, and Protection from harassment at workplace and anti-sodomy law.



Sexual offences are considered to be one of the most heinous forms of offences in the jurisprudence of crime against women due to its severe impact on the mental and physical well-being of the victim; and therefore, attract imprisonment which is extended up to death penalty in certain cases. Both Indian Penal Code and POCSO have provisions of death penalty for certain sexual offences; these provisions are mentioned below.

Section 376A of the Penal Code states that if any offence is committed which is punishable under sub-section 1 and 2 of section 376 and the act causes death of the victim or causes the victim woman to be in a persistent vegetative state, in such cases the minimum punishment shall not be less than twenty year and can be extended to life imprisonment for the rest of the convicts natural life, or death.<sup>22</sup> This was one of the additions done to sexual offences law by the Criminal Law Amendment of 2013.

Section 376E of the Penal Code provides for the punishment of the repeat offenders of sexual offences and states that such offenders can be punished with life imprisonment for the rest of natural life or with death penalty.<sup>23</sup> Section 376AB prescribes for punishment which can be extended to death if the rape is committed against victim who is below twelve years of age.<sup>24</sup> Section 376DA prescribes for minimum punishment of up to twenty years extendable up to life imprisonment for remainder of natural life if the victim of gang rape is below sixteen years of age.<sup>25</sup> Similarly in S.376DB prescribes for punishment up to death penalty if the victim of gang rape is below twelve years of age.

Under section 6 of POCSO, the punishment for aggravated penetrative sexual assault can also be extended up to death penalty, while the minimum punishment for the said offence has been kept at rigorous imprisonment up to twelve years.<sup>26</sup>

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<sup>22</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 376A.

<sup>23</sup> *Ibid*, s. 376E.

<sup>24</sup> *Ibid*, s. 376AB

<sup>25</sup> *Ibid*, s. 376DA.

<sup>26</sup> The Protection of Children from Sexual offences Act, 2012 (Act 32 of 2012), s. 6.



## 2.1. ANDHRA PRADESH DISHA ACT, 2019

The act<sup>27</sup> was passed by the Andhra Pradesh State Legislature in December 2019 as a response to the veterinary doctor rape and murder case in Hyderabad which caught the attention of national media. The act has been passed to bring in a series of changes in the sexual offence law and impose deterrent punishment to the offender of such crimes.

### 2.1.1. HIGHLIGHTS OF THE ACT

The radical changes brought through this act have been termed as ‘revolutionary’ by the government following the passing of the bill in the State legislature. The act grants power to the State Government to constitute a Special Police Unit under the Deputy Superintendent of Police for investigation into cases falling within the scope of the act.

#### **Introduction of Registry of Women and Child offenders**

The introduction of a Registry of Sexual Offenders was first introduced by the Union Government,<sup>28</sup> however the same is not digitalized and therefore confidential. In this act, the State legislature has initiated a digitalized registry or data which can be availed by the law enforcement agencies for the purpose of investigation.

#### **Exclusive and Mandatory Punishment**

Under the present penal law of India, the punishment for rape is a life sentence or death in certain extreme cases; however, the new Act provides for exclusive death penalty for rape if there is conclusive evidence before the Court.<sup>29</sup>

#### **Reduction in the Period for Pronouncing Judgment**

After the Criminal Amendment Act of 2018, the judgment period in cases of rape was four months i.e. two months for investigation by the police and the other two months for completion of trial by the Court. This period of four months has been reduced to twenty-one days by the Disha Act in which seven days are provided for the investigation and the rest fourteen days for the completion

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<sup>27</sup> The Andhra Pradesh Disha Bill, 2019 (L.A. Bill 47 of 2019).

<sup>28</sup> National Database on Sexual Offenders, available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1558130> (last visited at: May 25, 2021).

<sup>29</sup> Disha Act, the new law of Andhra Pradesh, available at: <https://blog.ipleaders.in/disha-act-the-new-law-of-andhra-pradesh/#Introduction> (last visited at: May 26, 2021).



of the trial. The said changes will be implemented via amendment in section 173 and 309 of CrPC.<sup>30</sup>

### **Separate Recognition of Social Media Harassment**

In cases of harassment of women or children on social media platforms via text or any means of digital harassment shall be punishable under the Penal Code up to two years for first conviction and subsequently for repeat offence for four years.<sup>31</sup>

### **Reducing the Period of Appeal**

The period of appeal for the disposal of cases of rape has been reduced from previous six months to three months to facilitate speedy disposal of cases and seek justice for the victim.<sup>32</sup>

### **2.1.2. ISSUES CONCERNING DISHA ACT, 2019**

One of the most highlighted cases of sexual offence in Indian jurisprudence is the 2012 Nirbhaya case where all the organs of criminal justice system worked hand in hand to complete the trial of the case and procure a judgment at the earliest. In spite of all the efforts the trial still took around nine months to complete and convict all the accused. This example displays the ground reality of our criminal justice system. Now by further shortening of the time for judgment, the legislature has put extra pressure on the police and judiciary to hurry the process of investigation and trial within the prescribed time period.

The focus of the new law has been on punishment of the accused and fast-tracking the process of justice, but the legislature has failed to adequately understand the hardship and issues concerning investigation and the rights of the accused which are also protected under the Constitution of India.

The new law has been justified under the Right of Speedy Trial which is an absolute right under Article 21 of the Indian Constitution,<sup>33</sup> the same has been held by the Hon'ble Supreme Court in the landmark case of *Kartar Singh v. State of Punjab*.<sup>34</sup> On the other hand right to fair trial is also

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The Constitution of India, art.21.

<sup>34</sup> 1962 SCR (2) 395.





an integral part of Article 21 of the Constitution and in case of *Zahira Habibullah Sheikh v. State of Gujarat*,<sup>35</sup> it was held by the Hon'ble Supreme Court that a fair trial requires a fair judge along with an atmosphere of judicial calm and a trial which does not cause prejudice against the accused.<sup>36</sup>

The primary issue in this act is to draw a rational between the right of the victim to speedy trial and the right of the accused to fair trial; this can also be pointed out as the conflict between two well-known quotes of criminal jurisprudence i.e., “Justice Delayed is Justice Denied” and “Justice hurried is Justice Buried”. One of the major criticisms of the Indian judiciary is the increasing number of pending cases which has led to overburdening of the judicial system. In such circumstances the reduction in the period of trial shall lead to additional burden on the court with the cases relating to other offences not being given enough attention by the court as the number of sexual offence cases is high in almost every state of the country.

In addition to this, the state government has not provided any sufficient data or research which backs the decisions taken by the legislature in this act. The public support to the encounter of the rape accused and the demand by public for stringent laws is been considered as the sole reason of the amendment. The absence of research and data has the potential to overburden both police and judiciary which may act not only against the aim of the amendment but also has the potential to substantially harm the fundamental right to fair trial of the accused.

## **2.2. THE SHAKTI CRIMINAL LAWS (MAHARASHTRA AMENDMENT) BILL, 2020**

Following the footsteps of Andhra Pradesh, the State Cabinet of Maharashtra approved the Shakti Bill of 2020 on the Human Rights day which aims at providing harsher punishment and moreover mandatory sentences to the sexual offence convicts.

Alike Disha Act, Shakti Bill will also amend the Penal Code and the Criminal Procedure Code along with POCSO with respect to the application of these laws in the state of Maharashtra. The aim of the new bill is to provide a deterrent effect to sexual offences and ensure speedy justice.

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<sup>35</sup> (2004) 4 SCC 158.

<sup>36</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158.



The key feature of the bill is the introduction of death penalty for heinous offences against women and children. These offences include offences such as grievous hurt due acid, rape and gang rape. Under the Penal Code, these offences are punishable up to life imprisonment but the bill seeks to extend the punishment to mandatory death penalty in case the court finds that there is conclusive evidence against the accused.<sup>37</sup>

Apart from death penalty the bill also extends the punishment for other sexual offences to add deterrent effect to the laws relating to sex crimes as a measure to prevent such offences in the future. The bill also provides for the investigating agency or officer to seek relevant data from the social media platform or the telecom operator which is required for the purpose of investigation for the offences related to crime against women and children. The failure on the part of social media platform or the other relevant service providers would also constitute a punishable offence under the penal code.<sup>38</sup>

In another step to safeguard the dignity of the victims of sexual offences, the Bill proposes to protect the identity from disclosure of the victims of sexual harassment, voyeurism and stalking in addition to rape which is already protected under criminal law.

This bill also provides for a different timeline for the disposal of the cases related to sex crimes. It provides for fifteen days for the purpose of investigation, this period of investigation can be extended by seven days if needed; further it sets the timeline of thirty days for the completion of trial by the Court, this period of thirty days shall start from the date of filing of the charge sheet by the police; it also provides for a shorter period for disposal of appeal against the sentence of the trial court, it reduces the period to forty-five days from the 6 month period provided under the Criminal Procedure Code.<sup>39</sup>

The bill also amends the provision of CrPC which requires any person who is aware of the commission or preparation of the offence of dacoity or robbery to the nearest police station;<sup>40</sup> this

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<sup>37</sup> The Shakti Criminal Laws (Maharashtra Amendment) Bill, 2020, s. 9.

<sup>38</sup> *Ibid*, s. 3.

<sup>39</sup> *Ibid*, s. 16.

<sup>40</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 39.



provision has been extended to include the offences against women and children such as sexual harassment, rape and stalking.

### 3. REASONS FOR NON-IMPLEMENTATION OF DEATH PENALTY FOR SEXUAL OFFENCES

The increasing instances of Indian legislature passing various amendment acts to provide more stringent punishment are mostly motivated by the public outrage and widespread protest throughout the nation following the various instances of rape and murder of women and children which gets the attention of national media. The debate over the adequate punishment resurfaces with the news of every new instance of a sexual offence.

The tolerance towards such news of offences has been very low in recent time, with demand for legitimate response from the government of their steps to prevent such offences from being committed. These demands paved way for the legislature to re-invent the approach towards sexual offences which lead to its decision in favour of death penalty for offences which do not result in the death of the person i.e., non-homicidal cases.

The legal fraternity seems to be widely divided on the issue of death penalty for sexual offences; this includes the statement of Rajya Sabha MP Jaya Bachchan suggesting the public lynching of the accused along with other leaders such as DMK's P. Wilson suggesting chemical castration to give a deterrent effect to the offence.<sup>41</sup>

On the other hand, the chief of UN human rights in October 2020 stated that while the offences of sexual nature must be strictly dealt by the nations and the accused must be held accountable but death penalty or other draconian means such as castration or torture are not the valid means to do so. He emphasized that such draconian means look tempting to general public but will lead to a negative shift in the focus of justice from reparation of justice to the punishment of accused.<sup>42</sup>

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<sup>41</sup> 'Death Penalty, Lynching, Castration': Rajya Sabha MPs React to Hyderabad Rape-Murder, *available at*: <https://thewire.in/women/hyderabad-rape-murder-rajya-sabha> (last visited at: May 29, 2021).

<sup>42</sup> Rape is wrong but death penalty, castration, not the answer: UN rights chief, *available at*: <https://news.un.org/en/story/2020/10/1075452> (last visited at May 29, 2021).



The UN human rights chief stressed that the punishment for the offence is only one aspects of the whole jurisprudence and the States must focus on the key aspect i.e. access to justice and delivery of it as the certainty of punishment has more deterrent effect on the offence as compared to the higher degree of punishment.<sup>43</sup>

### **Non-Reporting of Cases and Increased Violence Against Victim**

There are indeed many associated issues with introduction of death penalty in sexual offences specially the case of mandatory death penalty in such cases. Foremost of which is the fear of non-reporting of the sexual offence if the punishment is increased to death penalty; this is because the data by NCRB suggests that in majority of the cases, the perpetrator is a person known to the victim and not a stranger, this has already been identified as a reason for under-reporting of cases. In the 2019 report published by NCRB, among all the cases of rape against women and children (under POCSO) the percentage of cases where the perpetrator was known to victim was 94.2%.<sup>44</sup> This signifies that if the accused is under the threat of death penalty, being a relative, the victim would be under immense pressure from the family, relatives and also society to either not report or to turn hostile later during the trial.

Along with under-reporting another unintended consequence of mandatory death penalty could be increased violence against the sexual offence victim and in such cases instead of acting as a deterrent, death penalty could be the reason for high probability of deaths in cases of rape, so as to decrease the chances of prosecution to a certain level.<sup>45</sup>

### **Socio-Economic Discrimination**

The unintended effects of any law can be analysed in various aspects, accordingly in cases of mandatory sentences, death penalty and strict stand of judiciary regarding bail in such cases, the state can face an issue of over-population of prisons which is already an alarming issue in the

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<sup>43</sup> *Id.*

<sup>44</sup> National Crime Record Bureau, Report: *Offenders Relation to Victims of Rape (Section 376 IPC) – 2019* (2019); National Crime Record Bureau, Report: *Offenders Relation to Child Victims of POCSO Act (Section 4 & 6) - 2019* (2019).

<sup>45</sup> Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape, available at: <https://thewire.in/women/rape-death-penalty> (last visited at: May 29, 2021).



Indian context. Due to pending cases, there are vast numbers of under trial prisoners, the over criminalization in sexual offences can worsen the situation even further.

There have been various studies which suggest that among all the prisoners in India, the population of minorities and economically marginalized group is over-represented. In one of the reports on this issue, it was found that the population of Scheduled Caste (SC) and Scheduled Tribes (ST) represents only 24% of Indian Population but it amounts to 34% of Prison population in India.<sup>46</sup> This signifies that the progressive criminal law of India which was made stringent affected mostly the marginalized communities (socially and economically) of India. This happens mainly due to lack of resources to ensure fair trial and access to competent lawyers. This unintended discrimination can be compared to the racist discrimination against the African-Americans in the USA wherein the community is exposed to over-criminalization due to existing social prejudices and often due to lack of resources.

### **Can Rape and Death be Equated?**

The argument and demand of mandatory death penalty for rape has been due to a pre-conceived notion that in the rape is equal to death of the women in the society. This logic or reason has been central to many statements made by various politicians including late Sushma Swaraj who referred the victim of rape as '*Zinda Laash*' meaning a living corpse.<sup>47</sup> This reasoning goes against the feminist jurisprudence in which the life and honour of the women is directly linked with her sexuality and virginity. This has been accepted as a classic example of women's suppression in a patriarchal society and is out rightly rejected by all feminist groups across the world.

Thus, accepting death penalty in cases of non-homicidal rape would be accepting the patriarchal notion of the society which relates to women only on the basis of society, to fight a crime which is also expressed as patriarchal violence against women.

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<sup>46</sup> National Dalit Movement for Justice (NDMJ) and National Centre for Dalit Human Rights (NCDHR), "Criminal Justice in the Shadow of Caste" (2018).

<sup>47</sup> Be much more careful in choosing words: Brinda Karat to Sushma Swaraj, *available at: <https://economictimes.indiatimes.com/news/politics-and-nation/be-much-more-careful-in-choosing-words-brinda-karat-to-sushma-swaraj/articleshow/29915901.cms?from=mdr>* (last visited at: May 29, 2021).



### **No Conclusive Data in Favour of Death Penalty**

The provision for death penalty for sexual offences has been added only to provide a deterrent effect to the offence by way of such punishment. However, no report or research has been able to conclusively prove if capital punishment does act as deterrent factor in criminal cases. The lack of such information gives rise to many questions and critique to the laws which suggest or mandates death penalty for any offence; as such laws are not backed by research or any credible data to support it. This makes death penalty nothing more than just a PR stunt by the elected government to clear the image in the mind of the general public.

It must also be pointed that under the Criminal Justice System in India, the probability of punishment for any offence is relatively low; this leads to extreme victimization of the complainant which effects in withdrawal of cases, witnesses turning hostile and issues of under-reporting. If such condition keeps prevailing, the provision of death penalty would not be able to show any deterrence.

The Justice Verma Committee which was formed after the 2012 Gang Rape Case suggested that addition of mandatory death penalty would not be an effective method for the prevention of sexual offences in the country. The report held that implementation of the draconian law of death penalty would not be a progressive step in cases of non-homicidal cases.<sup>48</sup>

It has been stated various times by various legal experts that regressive approach towards punishment can have serious consequences on the nation. A society cannot seek justice solely by way of judicial punishments; it can only be a temporary measure to suppress the issue but the only way to restore the justice is progressive approach in handling the circumstances and causes of crime.<sup>49</sup>

### **Chances of Arbitrariness in Death Penalty**

It has been argued above that death penalty in non-homicidal sexual offence is not a data driven legal solution but a populist opinion of general public which can open gates for vast number of

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<sup>48</sup> Justice J.S. Verma, “*Report of the Committee on Amendments to Criminal Law*” (January, 2013).

<sup>49</sup> K. Balagopal, “Of Capital and Other Punishments” *Economic and Political Weekly* (1998).



unintended legal issues. The expansion of capital punishment for sexual offences can hamper the jurisprudence even further as the death penalty sentencing framework is very vague and inconsistent and can only be awarded after analysing very broad guidelines provided by the Hon'ble Supreme Court in the case of *Bachan Singh*.<sup>50</sup> In this case Justice Bhagwati in his dissenting opinion held that death penalty in form of judicial discretion is an unstructured framework and can be subject to arbitrariness violating Article 14 of the Constitution. This opinion of Justice Bhagwati can be verified on the basis of various reports published on Death Penalty in India.

The PUCL-Amnesty India report stated that the public outrage often fails to recognize the difference between justice, punishment, revenge and vendetta; therefore the legal policymakers have to rise above emotions to dissect the issue by reason and logic and not just to kill the offender.<sup>51</sup> The report has also concluded that the guidelines and safeguards placed by the Supreme Court in awarding death penalty has not be adequately followed leading to the fact that in majority of case the punishment of death lies with the discretion of judge and the inherent bias (if any) that exists.

The same was concluded in the Project 39A report which analysed the trial court judgment in three states of Maharashtra, Delhi and Madhya Pradesh. It concluded that the effect of death penalty has been widely disproportionate on the socio-economically weaker category due to structural inequities because of their marginalization.<sup>52</sup>

#### 4. CONCLUSION

Amid all the debate and amendment of death penalty for sexual offences, the legislature has not made enough efforts to address the systematic flaws that exist in the Indian Criminal Justice System; these issues include the under-reporting of sexual offences cases, the swiftness of complaint registration, issues with the police investigation and easing the victim rehabilitation and

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<sup>50</sup> AIR 1980 SC 898.

<sup>51</sup> Amnesty International India and People's Union for Civil Liberties (PUCL), "Lethal Lottery: The Death Penalty in India" (2008).

<sup>52</sup> NLU-Delhi: Project 39A, *Death Penalty India Report* (May 2016).



protection. The debate has been restricted to merely punishment to the accused; hence making the development accused-centric, focusing on punishment instead of victim-centric, which should focus on access to justice. This is creating a hostile environment for the discussion on the above-mentioned issues which have the potential to create more positive approach and development of sexual offences jurisprudence in India. As stated above, the positive approach for development of sexual offence jurisprudence must start from the deep-rooted issue of under-reporting of such offences and the sensitization of investigating agencies on the underlying issues. Sentencing in any criminal case comes at a later stage and can be rightly done if the gaps of the criminal justice system are adequately addressed. Moreover, apart from the legal measures, little to no steps have been taken to reduce the existing prejudices related to sexual offences and gender issues which have time and again been held to be vital for prevention of crimes in long term. The government has been merely responding to the public outrage and has not focused on taking steps which shall be helpful to address the issue in a long term. The enhancement of punishment is a remedy of short term, with no conclusive proof of its effectiveness. Laws intending to bring social reforms along with attempting to fill the existing gaps in criminal justice system must be the primary approach of the government in the case of sexual offences.