

## IS CAPITAL PUNISHMENT A DETERRENT FOR RAPE IN INDIA

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### ABSTRACT

*The increasing crime rate against women is worrisome. It prompted me to write an article on present-day law and can capital punishment act as a deterrent for rape in India. The current situation of Rape in India is disturbing, and though there have been several amendments to the law, there has been very little change. The new criminal laws provide for stricter punishment and faster investigation which give a ray of hope, but the real question is what all is needed to put an end to rape in India? The article focuses on Capital Punishment its need, provision in law and to what extent it can act as a deterrent. It also talks about state amendments and punishment in other countries. Lastly, the article emphasises the need for better implementation of the law and provides some long-term solutions that the author is hopeful will bring meaningful changes.*

**Keywords:** Rape, Capital Punishment, Deterrent, Long-Term Solution, Implementation.

### INTRODUCTION

The recent rape and murder of a Doctor in Kolkata, has shaken the conscience of our Nation and everywhere there is remorse and fear in the society regarding the safety and well-being of women across the nation. Crime against women in India remains a deeply concerning issue and poses challenges to the Nation's progress towards Gender Equality. India represents an appalling contrast where women are worshipped, where there is an increasing participation of women in various fields but at the same time, there is a rise in Crime and no end to increasing offences and discrimination against Women. Ever since the infamous Delhi Gangrape case that shook the nation, several reforms have been made in law and legislative policy still, the situation is grim. This article critically analyses whether capital punishment can act as a deterrent and what other solutions are needed to curb the menace of Rape crimes in India.

### CURRENT SITUATION OF RAPE AND PENALTY IN INDIA

In India, rape is the fourth leading crime against women. According to the National Crimes

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Records Bureau's<sup>1</sup> (NCRB) 2021 annual report, 31,677 rape cases were filed in India in the year 2021, or around 87 rape crimes each day on average were recorded. Among this data, Rajasthan has the largest number of rape cases in the country, followed by Madhya Pradesh and Uttar Pradesh. Since a substantial number of incidents go unreported in India, the country has been labelled as having one of the lowest per capita rates of rape recorded. India's predicament is worrisome. For the same reason, India has been labelled as the most hazardous country for women.<sup>2</sup>

**Section 63** of Bhartiya Nyaya Sanhita <sup>3</sup>defines Rape, It states that

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 so as to cause penetration into the vagina, urethra, anus or any part of the 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, or 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: —

(i) against her will.

(ii) without her consent.

(iii) 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.

(iv) 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

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<sup>1</sup> NCRB Official Website < <https://ncrb.gov.in/en/search/node/rape> > accessed on 29 September 2024

<sup>2</sup> Tushar Singh Samota, 'Capital punishment for Rape' < <https://blog.ipleaders.in/capital-punishment-for-rape/> > accessed 16 September 2024

<sup>3</sup> Bhartiya Nyaya Sanhita 2023, s 63

lawfully married.

(v) with her consent when, at the time of giving such consent, by reason of mental illness 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.

(vi) with or without her consent, when she is under eighteen years of age.

(vii) 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.

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

**Section 64**<sup>4</sup> Outlines the punishment for rape offences. It states that

(1) Whoever, except in the cases provided for in subsection (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,

(a) being a police officer, commits rape,

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

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<sup>4</sup> Bhartiya Nyaya Sanhita 2023, s 64

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central Government or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape, on a woman incapable of giving consent; or

(j) being in a position of control or dominance over a woman, commits rape on such woman; or

(k) commits rape on a woman suffering from mental illness or physical disability; or

(l) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(m) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

**Section 65**<sup>5</sup> talks about punishment for Rape in Specific Cases

- 1) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Provided further that any fine imposed under this sub-section shall be paid to the victim.

- (2) Whoever commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

**Section 66**<sup>6</sup> talks about punishment for causing death or resulting in a persistent vegetative state of the victim.

Whoever commits an offence punishable under sub-section (1) or sub-section (2) of section 64<sup>7</sup> and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

The definition of GangRape and Punishment for it is given under **Section 70**<sup>8</sup>. It states that

- (1) Where a woman is raped by one or more persons constituting a group or acting in furtherance

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<sup>5</sup> Bhartiya Nyaya Sanhita 2023, s 65

<sup>6</sup> Bhartiya Nyaya Sanhita 2023, s 66

<sup>7</sup> Bhartiya Nyaya Sanhita 2023, s 64

<sup>8</sup> Bhartiya Nyaya Sanhita 2023, s 70

of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

(2) Where a woman under eighteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

Another Important Provision is **Section 71**<sup>9</sup> which talks about punishment for repeated offenders.

Whoever has been previously convicted of an offence punishable under section 64<sup>10</sup> or section 65<sup>11</sup> or section 66<sup>12</sup> or section 67<sup>13</sup> and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

This detailed note on provisions in BNS, tells us that the law is well-defined, similar provisions exist around the world and apart from a few small changes nothing new is added in State Amendments too.

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<sup>9</sup> Bhartiya Nyaya Sanhita 2023, s 71

<sup>10</sup> Bhartiya Nyaya Sanhita, s 64

<sup>11</sup> Bhartiya Nyaya Sanhita, s 65

<sup>12</sup> Bhartiya Nyaya Sanhita, s 66

<sup>13</sup> Bhartiya Nyaya Sanhita, s 67

## SOME MAJOR DEVELOPMENT IN RECENT YEARS

### Criminal Law Amendment Act of 2013

This Criminal Law (Amendment) Act, 2013 widens the ambit of the offence of “rape” so as to provide harsher punishments for the more grievous acts. It also enlarged the provision to cover certain non-penetrative acts like oral sex and inserting any object or any other part of the body into a woman’s body as an offence under the definition of “rape” under Section 375. Although under Section 376, the punishment for the offence of “rape” has not been enhanced, after the Criminal Law Amendment Act 2018, it was later increased to a minimum of 10 years imprisonment, which may extend to life imprisonment. However, the Amendment of 2013 has added provisions and enhanced punishment for more grievous forms of rape.

### Provisions For The Authorities

Section 166A and Section 166B were inserted after the amendment to make the authorities, like public servants or hospital authorities, liable if they failed to discharge their duties against the victims of the crime.

The Criminal Law Amendment Act 2013 has made changes to the Code of Criminal Procedure, 1973 so as to provide a congenial atmosphere for women while conducting investigations, trials, and examinations and to adapt new provisions inserted in the Indian Penal Code in the First Schedule of the Code of Criminal Procedure.

Some major changes in the Evidence Act, of 1872 include the exclusion of previous sexual experience in India, presumption of the absence of consent, nature of the questions asked in cross-examination, and provision for dumb witnesses.<sup>14</sup>

Also, the new criminal laws brought in 2023 have stricter punishments **section 69**<sup>15</sup> of Bhartiya Nyaya Sahita provides for punishment which may extend to 10 years of imprisonment and fine if a person involves in sexual intercourse by employing deceitful means or by making promise to marry to a woman without any intention of fulfilling the same. Deceitful means include inducement for, or false promise of employment or promotion, or marrying by suppressing

<sup>14</sup> Pragya Agrahari, 'Criminal Law (Amendment) Act,2013' <<https://blog.ipleaders.in/criminal-law-amendment-act-2013/>> accessed 16 September 2024

<sup>15</sup> Bhartiya Nyaya Sanhita 2023, s 69

identity.

Thus we have seen a steady evolvement in criminal laws in recent years.

### **STATE AMENDMENTS TO PUNISHMENT FOR RAPE CRIME**

There have been amendments brought by Maharashtra, Andhra Pradesh and Bengal state governments that prescribe death penalty for Rape Crimes. Though these bills require President's assent, they put forward a perspective of only capital punishment for the convict, if the rape leads to the death of the victim or causes her to be in a vegetative state, amending Section 66 of BNS.

The section lays down a 20-year jail term or life imprisonment or death for the perpetrator in such a scenario. The Aparajita Bill also amends Section 70 of BNS, doing away with the option of a 20-year jail term for gangrape convicts and providing only life imprisonment and death in such cases.

These bills also provide enhanced fines and stricter punishments like rigorous imprisonment or imprisonment for life till the natural death of the convict.

### **A BRIEF PEEP INTO PUNISHMENT FOR RAPE IN OTHER COUNTRIES**

Death Penalty for Rape has been an ancient practice but is not something unheard of, even in the 21<sup>st</sup> century. Though many countries and international organizations are promoting the abolition of the death penalty, it is not obsolete, its popularity is reduced, rightly so as the death penalty is not a permanent solution for rape or other crimes. Now, whether it acts as a deterrent or not is debatable, with no accurate data available on rape crime in countries like China, North Korea etc.

Some Islamic countries and Southeast Asian countries have the death penalty for rape, In the context of India, the use of "rarest of rare doctrine" is applied. Some examples of punishment for Rape in countries across the world.

1. **France:** It's 15 years for life which may extend to 30 years depending on brutality and extent of crime.
2. **China:** they believe in swift justice, punishment includes death and even castration



3. **Saudi Arabia:** Punishment is beheading after injecting with a sedative.
4. **North Korea:** Death by Firing Squad
5. **Afghanistan:** Shot in the head or hanged to death
6. **Egypt:** Death by hanging.
7. **Iran:** Hanged to Death
8. **Israel:** 16 years to life, it includes other forms of Sexual offence also.
9. **USA:** It Depends on whether the crime falls under state or federal law, under federal law maximum punishment is imprisonment for life.
10. **Russia:** It takes 3 to 20 years ( in rarest crime)
11. **Norway:** 4 to 15 YEARS in prison depending on how heinous the crime is. They have one of the best prisons though!<sup>16</sup>

Thus punishment for Rape in other countries, like India depends upon their policy, crime rate, and ideology which they follow.

### **DEATH PENALTY AS A DETERRENT FOR RAPE CRIME IN INDIA**

Journal of Legal Research and Juridical Sciences

The death penalty is legal in India, though the constitution of India guarantees the right to life, liberty and human dignity. United Nations advocate the abolition of the death penalty, despite being a member of the UN, the death penalty is a part of our legal system. This is due to the fact that in today's society, the conditions and circumstances of crime are terrible, with some of the most terrible incidents being the Delhi gang rape case, the Hyderabad gang rape case, and the Unnao rape case. As a result, society expects justice to be Swift, Visible and as terrible as the crime committed. Death Penalty ensures to deliver justice to those who have been put to death by the culprits, Death Penalty is necessary to deliver justice, especially to victims of homicide and utmost violence. Capital punishment provides for retribution against perpetrators and ensures they pay for their actions. Without the death penalty, it's otherwise difficult to make murderers pay sufficiently for their crimes, as no punishment other than death really

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<sup>16</sup> Rohit Bhattacharya, 'This is what they do to rapists in different countries around the world'  
<<https://www.scoopwhoop.com/inothernews/punishing-rape-globally/>> accessed 16 September 2024

equates to that of the crime of killing.

Death penalty is given in India, as an exception and not as a rule, it is reserved for only 'Rarest of rare' cases. But nowhere is the term 'rarest of rare case' defined, it is left unto the judiciary to decide, depending upon case to case. The expression "rarest of rare cases" was first used in a Supreme Court judgement in 1983, in *Machhi Singh v. State of Punjab*<sup>17</sup>. In the *Machhi Singh* case, the court established certain criteria for determining the circumstances of a case where a crime falls within the category of "Rarest of rare instances formula," as well as certain recommendations to be followed in order to determine the rarest of rare instances.

In *Saibanna v. State of Karnataka*<sup>18</sup>, the accused had previously been sentenced to life in prison for a crime. When he was on parole, he murdered his wife and daughter. The Supreme Court sentenced him to death and declared that the death penalty is required for criminals who are already serving a life term. However, in *Mithu v. State of Punjab*<sup>19</sup>, the Supreme Court struck down Section 303 of the IPC, which established the provision for mandatory death punishment for convicts serving a life sentence. Rather later the Supreme Court ruled that the Court is required to specify the rationale for giving the death sentence rather than life imprisonment.

The Death Penalty is of immense importance in lieu of protecting society. Some criminals are so difficult to be reformed that they cannot be simply allowed to live in society, this is because every moment they are viable is another minute that they are dangerous to society. The Death Penalty is Necessary for Families of Victims to Move on Properly, capital punishment is needed as many families who suffer the pain of being a victim of a violent incident will always live in trauma and fear of being the victim again if they know that the person who did the inhuman act of executing their family members is still viable. The fear of being affected again by the criminal always grips the families of the victims even if the criminal is placed in the most established tight security facility possibly available.

One of the most disputable controversies for capital punishment is that the cost of keeping the criminal imprisoned for the duration of their natural life is immense. Death Penalty is cheaper than a lifetime prison term. It would be unjust if the expenditure levied on criminal maintenance while being in life term imprisonment is taken from the pockets of the society i.e. the taxes.

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<sup>17</sup> *Machhi Singh v. State of Punjab* [1983] SCC 470

<sup>18</sup> *Saibanna v State of Karnataka* AIR ONLINE 2005 SC 1081

<sup>19</sup> *Mithu v State of Punjab* 1983 (2) SCC 277

Continuous amendments in Criminal laws state that Courts can grant death punishment to convicts when the crime results in the death of a victim, further Prevention of Child Sexual Offences Act (POCSO)<sup>20</sup> allows a judge to impose the death punishment on someone guilty of raping a kid under the age of 12, even if the youngster does not die. Thus somewhere the need for death punishment was felt by the judiciary, lawmakers and society as a whole.

Looking at all these points, we can say that though the death penalty is not the only solution but is still required in India under certain circumstances. It can be justified if we look at it not from a convict-centric but victim-centric point of view.

### **SOLUTIONS OTHER THAN DEATH PENALTY**

It is argued that the death penalty is not a permanent solution as there is no proof that it results in a reduction of crime. In a civilized society, the aim is always to finish the crime and not the criminal. The compulsory death penalty may result in non-accounting of crimes as mostly the perpetrators are known or related to the victim, and due to the harsh punishment it may result in the non-filing of complaints. Due to the provision of the compulsory death penalty, the judge is under more scrutiny and may not convict the perpetrator for that crime, The death penalty is a non-retrievable act and thus there is a fear of wrongly convicting a person. In such a situation death penalty is not the best solution. Some other reforms would include:

1. **Simpler laws:** The laws have to be simpler and uniform with a more victim-centric policy.
2. **Investigation:** The investigation has to be more scientific and professional with a blend of compassion towards the victim. It should be fast and accurate at the same time.
3. **Police and Judicial Reforms:** Urgent Police and Judicial Reforms are needed, as however good the law may be, its implementation is the key, brave and honest police officers can alone ensure the “Rule of law”. They are the backbone for the proper investigation of crime and justice to be served. Similarly, judicial Reforms are needed for speedy justice, and limited adjournments, with a clear policy of replacements in the absence of a sitting judge to ensure continuous hearing of cases. This is very important as unnecessary delay affects the merit of the case.
4. **Political Will:** This is of utmost importance since a strong political will can only ensure

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<sup>20</sup> Protection of Children from Sexual Offences Act (POCSO), 2012

accountability, free and fair trial, with delivery of speedy justice. It has the potential to ensure the effective use of law and implementation of deadlines as the police machinery comes under the Home Ministry and the judiciary does not interfere in it.

5. **Fast Track Investigation And Trial With Proper Use Of Technology:** With the establishment of fast track Court, there has been some improvement, still there is a limit as to the proceedings of the court, therefore to expedite the proceedings, investigation deadlines have to be met and maximum 2 years of the period has to be set for completion of process and justice to be met. The use of technology to gather authentic evidence, in investigating the crime and during the trial process to ensure speedy justice is the need of the hour.
6. **Infrastructure:** More Forensic Labs, Courtrooms, Prisons, Women and Children Rehabilitation centres, well-lit streets, safe public places and transport are all urgently needed in a country with a continuously growing population and crime rate.
7. **Another Agency:** A National Investigating Agency similar to CBI, only dedicated to crime against women can also be set up to avoid interference from political influence and ineffective state police machinery.
8. **Education:** Gender Sensitisation and teaching to both boys and Girls, from a young age about Good touch and Bad touch etc, making laws more gender neutral, society more sensitive and aware of sexual crimes against both men and Women, teaching of Self Defence, understanding of concepts like privacy and consent etc.
9. Doing away with the general apathy towards the crime against women which can be seen from non-usage of the Nirbhaya fund, improper media reporting and non-participation of the general public in asking for accountability and justice.

## CONCLUSION

For any human society, the safety and well-being of women is at its core. The new reforms in criminal laws have some major changes such as the filing of an online FIR, gender-neutral laws, and provisions for speedy investigation that help to fight crime against women. Capital Punishment is a deterrent only to some extent, significant change can be achieved only through long-term process that includes police, judicial and infrastructural reforms, participation of Women in policy-making, gender sensitisation, public education etc. Though the Road ahead

seems steep, it is not impossible, countries like Japan, Singapore and Bhutan have achieved it, with community participation and especially united women helping each other there will be dawn for sure.

