RAPE LAWS VIS-A-VIS DEATH PENALTY IN INDIA- A STUDY

Dissertation submitted to National Law University and Judicial Academy, Assam in partial fulfilment for award of the degree of
ONE YEAR LL.M DEGREE PROGRAMME

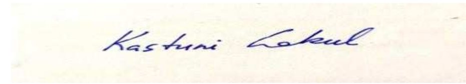
Submitted by
Nabanita Baruah
UID- SF0222014
2nd Semester, 2022-23

Supervised by
Dr. Kasturi Gakul
Assistant Professor of Law

National Law University and Judicial Academy, Assam
(June, 2023)

SUPERVISOR'S CERTIFICATE

This is to certify that **NABANITA BARUAH** has completed her dissertation titled **"RAPE LAWS VIS-À-VIS DEATH PENALTY IN INDIA-A STUDY"** under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.



Date: 8th July, 2023

Dr. Kasturi Gakul

Assistant Professor of Law

National Law University and Judicial Academy

DECLARATION

I, **Nabanita Baruah**, pursuing Master of Laws (LLM) from National Law University and Judicial Academy, Assam, do hereby declare that the present dissertation titled **"RAPE LAWS VIS-A-VIS DEATH PENALTY IN INDIA- A STUDY"** is an original research work and has not been submitted either in part or in full anywhere for any purpose, academic or otherwise, to the best of my knowledge.

Date: 8th July, 2023

Nabanita Baruah

Nabanita Baruah

UID: SF0222014

National Law University and Judicial Academy, Assam

TABLE OF CONTENTS

CONTENTS	PAGE NO
Acknowledgment	i
Table of Cases	ii
Table of Statutes	iii
Table of Abbreviations	iv
CHAPTER 1: Introduction	1-13
Introductory Note	1-5
Statement of Problem	5
Detailed Literature Review	5-10
Aim	10
Objectives	10
Scope and Limitations	10-11
Research Questions	11
Research Methodology	11-12
Chapterization	12-13
CHAPTER 2: International and Regional Protection against Rape and Sexual Violence	14-34
Meaning and Concept of Rape under International Law	14-15
Rape as an International Crime	15-19
International Human Rights Instruments Criminalizing Rape and Sexual Violence	19-34
Universal Declaration of Human Rights	20-21
International Covenant on Civil and Political Rights	21-22
International Covenant on Economic, Social and Cultural Rights	22
Convention on Elimination of Discrimination	

against Women 22-23
Rome Statute of the International Criminal Court
and Sexual Violence 23-27
Rape in International Humanitarian Law 27-30
Regional Human Rights Instruments Against Rape
and Sexual Violence 30-32
American Convention on Human Rights 32
Inter-American Convention on the Prevention,
Punishment and Eradication of violence against women 32-33
European Convention for the Protection of
Human Rights and Fundamental Freedoms 33-34

CHAPTER 3: Rape and Criminal Law in India 35-53
Meaning of Rape 35-36
Kinds of Rape 36-42
Rape Laws in India in context of reforms under t
he Criminal (Amendment) Act, 2013
Definition of Rape under the Indian Penal Code 44-46
Consent of the victim as an essential for the
offence of rape 46-47
Marital Rape 47-48
Protection of Children against Sexual Offences Act 48-49
Juvenile Justice Act 49
Landmark Rape Cases in India 49-53

CHAPTER 4: Judicial Approach Towards Death Penalty for Rape
in India 54-70
Meaning and Concept of Death Penalty 54-55
Evolution of Death Penalty in India 55-56
Constitutionality of the Death Penalty in India 56-61

Doctrine of Rarest of Rare Cases 61-62
Application of the doctrine of rarest of rare
in rape cases 62-70

CHAPTER 5: Conclusion and Suggestions 71-75
Conclusion and Findings of the Study 71-74
Suggestions 74-75

Bibliography vi-ix

ACKNOWLEDGMENT

A research work always needs good guidance and proper support. Without having such support, it would not have been possible for me to complete this dissertation. I have a list of people to express my gratitude, to who has helped me in completing this dissertation.

At the outset I express my sense of profound gratitude to my learned guide **Dr. Kasturi Gakul** Assistant Professor of Law, National Law University and Judicial Academy, Assam, whose insightful guidance, valuable suggestions, encouraging nature and affable treatment enabled me to carry out and complete my dissertation. In every area of my dissertation, her assistance has been really helpful to me. She also showed a great deal of interest in my work and growth, helping me to refine my thoughts with her extensive academic background and knowledge. This dissertation would not have been possible if she had not provided direction and assistance.

I would also like to place on record my sincere gratitude to our worthy Vice Chancellor Dr. V. K. Ahuja for his assistance and support. I also really appreciate the efforts of librarian, along with the library staff at National Law University and the Judicial Academy, Assam for the well maintenance of the library. It greatly aided me in easily gaining access to resources and literature.

I am grateful to the various authors of books and articles I consulted and referred to in preparation for the dissertation.

Above all, I am indebted to my parents and friends for their encouragement and the support they have given me in every possible way.

Lastly, I wish my deep reverence and folded hands to thank God for giving me the strength to complete the research endeavour.

Place: Amingaon, Assam

Date: 8th July, 2023

Nabanita Baruah

UID: SF0222014

National Law University and Judicial Academy, Assam

TABLE OF CASES

1. *Aydin* v. *Turkey*
2. *Bachhan Singh* v. *State of Punjab*
3. *Common Cause (A Regd. Society)* v. *Union of India*
4. *Independent Thought* v. *Union of India*
5. *Jagmohan Singh* v. *State of Uttar Pradesh*
6. *Machhi Singh* v. *State of Punjab*
7. *Mithu* v. *State of Punjab*
8. *Mukesh & Anr* v. *State of NCT Of Delhi & Ors*
9. *Nirmal Singh & others* v. *State of Haryana*
10. *Prosecutor* v. *Dominic Ongwen*
11. *Raquel Marti de Mejia* v. *Peru*
12. *RIT Foundation* v. *Union of India*
13. *State of Delhi* v. *Santosh Kumar Singh*
14. *State of Uttar Pradesh* v. *Chotey Lal*
15. *Sushil Murmu* v. *State of Jharkhand*
16. *Tarkeshwar Sahu* v. *State of Bihar*
17. *The Prosecutor* v. *Bosco Ntaganda*
18. *The Prosecutor* v. *Germain Katanga*
19. *The Prosecutor* v. *Jean-Pierre Bemba Gombo*
20. *The Prosecutor* v. *Thomas Lubanga Dyilo*
21. *Tukaram and another* v. *State of Maharashtra*

TABLE OF STATUTES

INTERNATIONAL INSTRUMENTS

1948- Universal declaration of human rights

1966- International Covenant on Civil and Political Rights

1966- International Covenant on Economic, Social and Cultural Rights

1979- The Convention on Elimination of Discrimination against Women

1993- Declaration on the Elimination of Discrimination against Women

REGIONAL INSTRUMENTS

1950- The European Convention on Human Rights

1950- The European Convention on Human Rights

1959- The inter-American Commission on Human Rights

1969- American Convention of Human Rights

1981- The African Charter on Human and Peoples' Rights

1994- Inter-American Convention on the Prevention, Punishment and Eradication of violence against women

2011- Convention on Preventing and Combating Violence Against Women and Domestic Violence

INDIA

1860- Indian Penal Code

1872- Indian Evidence Act

1950- Constitution of India

1983- Criminal (Amendment) Act

1985- Narcotics Drugs and Psychotropic Substances Act

2012- Prevention of Child Sexual Offences Act

2013-The Criminal (Amendment) Act

2019- Andhra Pradesh Disha Act

2020- Shakti Criminal Laws (Maharashtra Amendment) Bill

UNITED KINGDOM

1976- Sexual Offences (Amendment) Act

2003- Sexual Offences Act

UNITED STATES

1994- Violence Against Women Act

CANADA

1892- Criminal Code of Canada

TABLE OF ABBREVIATIONS

ACHR	:	American Convention of Human Rights
CBI	:	Central Bureau of Investigation
CEDAW	:	Convention on Elimination of Discrimination against Women
DEVAW	:	Declaration on the elimination of violence against women
DFSA	:	Drug-facilitated sexual assault/Rape
ECHR	:	European Court of Human Rights
ICC	:	International Criminal Court
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
IEA	:	Indian Evidence Act
IHL	:	International Humanitarian Law
IHRL	:	International Human Rights Law
IPC	:	Indian Penal Code
JJB	:	Juvenile Justice Board
PFSA	:	Psychedelic facilitated sexual assault
POCSO	:	Prevention of Child Sexual Offences Act
UDHR	:	Universal Declaration of Human Rights
UN	:	United States
WHO	:	World Health Organization

CHAPTER 1
INTRODUCTION

Introductory Note

The frequency of crimes against women is a growing concern in today's society, particularly with regard to the alarming rise in instances of rape. This heinous crime against women has witnessed a rapid increase in recent times, and it is crucial that it is never excused under any circumstances. Unfortunately, rape is occurring on a daily basis in various parts of the world, and in many cases, the perpetrators manage to evade justice due to a multitude of reasons. Regrettably, numerous women are unable to exercise their privilege to report incidents of rape.[1]The global issue of rape and sexual violence persists despite existing laws, leading to a lack of accountability in criminal proceedings. This problem arises from the insufficiency of current rape laws and their enforcement, resulting in impunity for perpetrators. However, there are potential remedies and reforms suggested by International Human Rights Law (IHRL) to address this issue, with the goal of prosecuting individuals who commit such horrific crimes.[2] Several significant human rights organisations and legislative systems openly address and forbid rape and sexual violence. These include the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of Discrimination against Women (CEDAW), the Declaration on the Elimination of Discrimination against Women, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Furthermore, sexual violence in any form is also strictly forbidden under International Humanitarian Law (IHL). Sexual acts are classified as war crimes, crimes against humanity, genocide, and breaches of the Geneva conventions, highlighting the gravity and international recognition of these offenses.[3]

---

[1] Payal Rana, 'The Capital Punishment in Context of Rape: A Study of Nirbhaya case' (LL.M, Swami Vivekananda Subharti University 2019).

[2] Maria Alejandra Gómez Duque, 'Towards a Legal Reform of Rape Laws under International Human Rights Law' (2021) 22/3 The Georgetown Journal of Gender and the Law https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2021/08/towards-a-legal-reform.pdf accessed on 31 May 2023.

[3] 'International Framework of Sexual Violence' (*Wikipedia*) https://en.wikipedia.org/wiki/International_framework_of_sexual_violence accessed on 31 May 2023.

The horrible act of rape in India is punished severely by the Indian Penal Code, which prescribes harsh punishments. However, there were questions about the adequacy of rape laws, which has led to the revision of laws through "Criminal (Amendment) Act 1983". These issues led to the change in the criminal laws. In spite of the fact that there was a need for more rigorous rape legislation, significant changes weren't implemented until the horrible Nirbhaya gang rape episode that took place in December of 2012. Significant alterations were brought about as a result of "Criminal (Amendment) Act of 2013. Recently, there has been a notable expansion of what it means to rape in India to encompass sexual acts beyond peno-vaginal intercourse. This change reflects a significant shift in recognizing and addressing various forms of non-consensual sexual activity. The new legislation covers any and all types of sexual acts carried out by men against women that do not involve consent and are invasive in nature. Additionally, it made clear that in order for consent to be valid, there must be a clear and unmistakable agreement to take part in a specific sexual activity. In addition, the new legislation created new crimes, including as voyeurism, forced stripping, voyeurism, and stalking, and it made attacks with acid a criminal offence. In general, the passage and subsequent execution of India's Criminal (Amendment) Act 2013 constituted a significant watershed moment in the development of the country's legal framework regarding rape and other sexual assaults.[4]

The Indian Penal Code encompasses provisions for various punishments. These include capital punishment, life imprisonment, imprisonment of both rigorous and simple nature, forfeiture of property, and fines. In the case of rape, Section 376 of the IPC outlines the penalties. The convict can face prison for seven years, a fine, or both. Alternatively, life imprisonment is also a possible punishment. However, Section 376(2) of the IPC specifies that the severity of the punishment can be significantly higher depending on the circumstances. In such cases, rigorous imprisonment of at least 10 years is mandated. This provision applies to instances where the nature of the offense warrants a more severe penalty. Additionally, the law addresses the crime of gang rape. If multiple individuals are involved in the rape of a woman, they are all considered guilty of the offence of gang rape. This crime is also punishable by a minimum of 10 years of hard prison time.[5]

---

[4] Supra Note 1.
[5] Ibid.

The "Criminal Law (Amendment) Act 2013" played a crucial role in expanding the definition of rape in India. This amendment broadened the scope of rape to include any form of penetration, regardless of the bodily part involved, in the case of women or girls. It specifically recognized penile vaginal penetration as a clear instance of rape. This amendment was significant in ensuring that the law treats all instances of non-consensual sexual penetration as significant offenses deserving serious legal consequences.

The Justice Verma Committee, which was formed to propose amendments to the Criminal Law (Amendment) Act 2013, conducted a thorough examination and made several recommendations. One of the most important things they said was that there was a lot of evidence that the death penalty did not work as a good deterrent for horrible crimes like rape. As a result, the committee advised against applying the death penalty in cases of rape. Instead, it recommended that life imprisonment be the suitable punishment for such offenses. This recommendation aimed to align the penalties with the committee's understanding of the criminal justice system's objectives and the need for appropriate punishments that would serve justice in cases of rape.[6]

However, the Criminal Amendment Act of 2013 only allows for death in two circumstances: a) Section 376E states that anyone who violates Sections 376, 376A, or 376D and is later found guilty of any of those violations is subject to a punishment of life in prison or death; and b) Section 376A of the IPC prescribes severe penalties for individuals who cause the death or permanent vegetative state of another person. For these kinds of crimes, the punishment can be anywhere from 20 years to life in prison, or even the death penalty, and there may also be a fine. So, it's clear that rapists who do it more than once and cause death or a vegetative state can get the death penalty.

In India, the death penalty is a punishment that is only given in the most extreme and rare cases. It is not usually given for rape. However, during the drafting of the Prevention of Child Sexual Offences Act (POCSO), the Rajya Sabha, the lower house of Parliament passed a law that could lead to the death penalty for people who are found guilty of raping a child younger than 12 years old. Despite rising number of cases and these legislative modifications, India has been cautious and hesitant in applying the

[6] Harsimran Kalra, 'Report of the Justice Verma Committee on Amendments to Criminal Law, 2013' (*PRS Legislative Research*, 25 January 2013) https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary accessed on 21 April 2023.

death penalty in such instances. It is only in exceptional cases, determined at the discretion of the court, that the death penalty may be deemed necessary.[7]

Even though the number of rape cases is rising, it is still not required to give the death penalty for rape. This is because it is not clear that the death penalty violates human rights. Under Article 21 of Constitution of India[8], every person has the constitutional right to life, besides under Article 6 of the ICCPR[9], it is provided that "every human being has an inherent right to life." India has ratified this convention. Therefore, it is evident from this that India supports the abolishment of the death sentence. It had two groups: those who are for the death penalty and those who are against it. When it comes to the death penalty for rape, people have different ideas. Two groups have formed, one in favour of the death penalty and the other against it. This demonstrates that the matter is a subject of ongoing debate and consideration within the legal and societal framework of India.

It is believed that the death sentence has a deterring impact on society. It is the procedure of putting to death someone who has been found guilty of a terrible crime for the sake of justice. According to the principles of human rights, it is more than a punishment and unjust because it exhibits a disregard for human life. In India, reformative theory is followed which gives an offender a chance to retribute and improve. Hence, reformative theory is given more emphasis than deterrent theory of punishment in India. Even though the United Nations (UN) is against it and India is a member of the UN, the death penalty is part of the Indian legal system.

Statement of Problem

The problem undertaken in the present study is to discuss about the application and execution of death penalty in rape cases in India. The study is about the Indian judicial perspective, legislative and judicial trend on execution of death penalty in rape cases in India along with analysis of the international and regional perspective on rape and death penalty in rape cases. It is debatable if death penalty should be awarded as a punishment in cases of rape. With the application of death penalty in cases of rape come with various implications. India follows deterrent and reformative theories of punishment and Indian

[7] Supra note 1.
[8] Constitution of India art 21.
[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

judicial system recognizes death penalty. However, the Indian judiciary has propounded a theory known as “rarest of rare cases” in context of death penalty i.e., death penalty is awarded on the basis of the theory “rarest of rare” cases. If a rape case falls under the purview of “rarest of rare” cases, then it becomes evident that the convict (s) shall be awarded death penalty for the offence of rape. In India, there are so many rape cases wherein the accused gets away with the heinous crime and execution of death penalty is seen less in rape cases. It is pertinent that death penalty is expected to leave a deterrent effect on the society which is why India has a provision of death penalty in its judicial system. Punishment of death penalty is primarily based on the theory “rarest of rare cases”, and secondarily, on the facts of the case. There are two provisions regarding rape on Indian Penal Code which are- “in cases of repeat offenders and causing death or vegetative state”, where death penalty is awarded. Therefore, the relevancy of death penalty in rape cases is seen in the judicial pronouncements of rape cases where various factors are considered. Therefore, the study is to analyse the rape laws in India in context of the enforcement of death penalty in rape cases.

Detailed Literature Review

A review of existing related literature, publications and research work on the subject is given in detail.

Muralidhar[10] (1998) had looked into the arguments about the death penalty and the government's support for using it more often for crimes other than murder, such as rape. The author looked at the court decisions that upheld the death penalty and how the "rarest of rare" standard came to be in the famous Bachan Singh case. The author looked at how the court used the test in the cases that came after. The author went back to the idea that the death penalty is a cruel punishment. This idea comes from two international decisions: In 1995, the South African Constitutional Court made the first decision. It said that the death penalty was against the law and that it was a cruel and inhumane way to punish people. The second choice was made when the International Criminal Court Statute was signed. This said that war crimes, crimes against humanity, and genocide should not be punished with the death penalty. The author came to the conclusion that before the next attack on the constitutionality or justification for

[10] S. Muralidhar, ‘Hang Them Now, Hang Them Not: India’s Travails with The Death Penalty’ (1998) 40 Journal of the Indian Law Institute https://www.jstor.org/stable/43953315 accessed on 30 June 2023.

keeping the death penalty, it is important to know how many people are currently facing death sentences, how many are waiting for decisions on their mercy petitions, and how many are waiting for the hangman to tighten the noose around their necks.

Narrain[11] (2014) had analysed two important judgments on the purview of sexual violence and death penalty. The first judgment is the Delhi rape case which happened on 16 December predicated their decision to execute the defendant on the heinousness of the crime and the demands of "collective conscience of society." Another judgment is the In the Naroda Patiya case, which involved the raping and killing of Muslims in this region of Gujarat, the court decided against the death penalty and instead opted for a system of life imprisonment that was graded according to the level of responsibility of the many defendants. The author stressed that the Delhi rape case fits into the category of exceptional cases in countering the impunity for crimes against women by finding the accused guilty. On the other hand, the author criticised the deep and tragic failure of the justice system in the Mathura rape case, where the supreme court did not recognise the sexual violence done to women's bodies. The author had taken up the least discussed judgment delivered by Justice Jyotsna Yagnik as compared to the Delhi rape case in a case regarding the Gujarat pogrom, which resulted in the murder of 96 Muslims and the rape of Muslim women. In this case, the honourable court decided that the 32 people who were accused of rape and murder should get sentences that ranged from 14 years to life in prison. The author stressed on rethinking punishment for heinous crimes like rape, and rape in context of mass violence. the author concluded that Individual suffering should be taken seriously under the concept of justice.

Das[12] (2017) had discussed about the origin and evolution of rape laws in India along with the legislative and judicial trends and patterns related to the offence of rape in India. All the offences that fall into the category of offence of rape was covered. Various interpretations were made on the Supreme Court decisions. The author also talked about the death penalty as a punishment for rape, as well as how the "rarest of rare" doctrine and the rules set out in the case of Machhi Singh v. State of Punjab apply.[13] The Law

[11] Arvind Narrain, 'Sexual Violence and the Death Penalty: A Tale of Two Judgments' (2014) 49 Economic and Political Weekly https://www.jstor.org/stable/24478981 accessed on 30 June 2023.
[12] P K Das, Anti-Rape Laws in India (2nd Edition, Universal Law Publishing 2017).
[13] Machhi Singh v. State of Punjab, (1983) 3 SCC 470.

Commission reports are also discussed. The author had provided an analysis on the evolving nature of the high court decisions and supreme court decisions.

Kumari and Barn[14] (2017) had traced the evolution of rape laws over time, reflecting changes in social attitudes and the recognition of the seriousness of rape. The history of rape laws in India demonstrates a progression towards greater protection for victims and increased penalties for offenders. The authors had provided an outline on the legislative background regulating rape. The legislative background is explained given the "Criminal Law Amendment Act of 1983" made extensive changes to the rules relating to rape., and later in the "Criminal law amendment act 2013" following the horrific incident of a brutal gang rape of a young woman in 2012. The authors had provided an insight on the sentencing of the convicts in the Nirbhaya case. The convicts were given death penalty and one of them who was a juvenile had been set free. The authors had provided a critical analysis of the sentencing policy in rape cases. The high court decisions and supreme court decisions had been critically analyzed and had been found problematic at various fronts from the sentencing perspective. The authors had recommended from the findings of the study that there is an urgent need for training in sentencing of judges of every level as well as other legal fraternity involved in prosecution of offenders. Further, it had been recommended that the victim of rape requires some amount of compensation for her medical expenses and her rehabilitation.

Rohal and Arora[15] (2020) had described about the concept of imposing capital punishment in rape cases. The authors had started primarily by discussing about the historical evolution of capital punishment in India for various offences. The question of abolition of capital punishment is discussed, and it is categorized in two parts i.e., Article 21 of the Constitution[16] states that no individual shall be deprived of his life except pursuant to procedure prescribed by law, which helps to control crime. The authors had also divided the evolution of death penalty in Hindu law and Muslim law. Focusing on the human rights, the authors had discussed about the international scenario and legal framework. Also, the death penalty and its legal status in India are

---

[14] Ved Kumari And Ravinder Barn, 'Sentencing in Rape Cases' (2017) 59 Journal of The Indian Law Institute Https://Www.Jstor.Org/Stable/26826588 accessed on 30 June 2023.

[15] Sandhya Rohal and Tanu Arora, 'Death Penalty in Rape Cases: Violation of Human Rights vis-à-vis Constitutional Right to Life' (2020) 4/2 CASIHR Journal on Human Rights Practice <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.rgnul.ac.in/PDF/a0c0c6e2-7917-4502-a01c-467ac494dd99.pdf> accessed on 30 June 2023.

[16] Supra note 8.

talked about in depth, as is the use of the "rarest of rare" doctrine in rape cases. The authors had also dealt with the amendments and alterations in Indian criminal laws and rape laws. The authors also came to the conclusion that if the death penalty is carried out correctly and according to the law, it can be shown to be a way to stop and stop horrible crimes against society. In conclusion, it had also been stated that deterrent theory of punishment is an answer to eliminate offenders from the society. The authors had suggested that harsher penalties be applied to crimes like rape, and that these penalties should convey a message. Additionally, it had been suggested that such offences be punished more quickly and that no requests for pity be granted.

Tomar[17] (2020) had analysed transformation with the most recent state amendments, debate about the death penalty amendments has centred on how harsh and arbitrary the mandatory death penalty for sexual offences is. The author gives a critical analysis of the state government's actions, taking into account political, legal, social, and economic factors, as well as the lack of conclusive evidence to support the provision. It is also emphasised that putting people to death for sexual crimes would have a big negative effect on the criminal justice system as a whole. The author provided an overview of capital punishment along with its position in Indian context. The author critically analyses the “Andhra Pradesh Disha Act, 2019 for this act was passed on a response of the rape and murder case of the veterinary doctor in Hyderabad.” Furthermore, the author also critically analysed the death sentence was added under the “Shakti Criminal Laws (Maharashtra Amendment) Bill, 2020” for serious crimes against women and children. These offences include gang rape, rape, and grave harm by acid. The author focused more on the justifications for not carrying out the death punishment for sexual offences. The author came to the conclusion that the law did not try to fix the structural problems in the criminal justice system. He or she suggested making the criminal justice system more focused on the accused and punitive instead of victim-focused, which should put more emphasis on access to justice.

[17] Adv. Devesh Singh Tomar, ‘Navigating Death Penalty for Sexual Offences via Recent State Amendments’ (2020) 1/2 Indraprastha Law Review https://indraprasthalawreview.in/wp-content/uploads/2021/09/GGSIPU_USLLS_ILR_2020_V1-I2-04-Adv.Devesh_Singh_Tomar-1.pdf accessed on 30 June 2023.

Duque[18] (2021) had discussed about the development of rape laws around the world and examined how cultural prejudices and gender stereotypes left over from earlier laws that condoned rape have influenced present laws' obstruction of rape survivors' access to justice. The author had divided the history of rape laws into ancient, medieval and colonial rape laws, and modern. In the 20th and 21st centuries, rape laws changed over time to make sexual violence a more serious crime. The author focused on these changes. The author pointed out that there are international and regional human rights standards for laws that make sexual violence and rape illegal. Further, the author discussed about the rape laws in different countries which includes definitions of rape provided under various legislations in different countries. The author had proposed two recommendations, viz., the first recommendation is that the definition of "consent" needs to be changed, and moreover, the international community must establish a universal law that takes into account common standards for sexual violence and requires nations to take effective measures to deter, prosecute, and punish sexual violence. Secondly, domestic rape laws need to be updated to include a new legal presumption that takes sexual violence survivors' declarations of consent into account in certain situations.

Aim

The aim is to study the rape laws in India and the judicial approach toward the death penalty in cases of rape.

Objectives

These are the following objectives of the study-

1. To study the position of rape laws in the international and regional human rights context.
2. To analyze the provisions of rape laws in India.
3. To discuss the judicial approach towards the death penalty in cases of rape.

[18] Maria Alejandra Gómez Duque, 'Towards a Legal Reform of Rape Laws under International Human Rights Law' (2021) 22/3 The Georgetown Journal of Gender and the Law https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2021/08/towards-a-legal-reform.pdf accessed on 30 June 2023.

Scope and Limitations

Scope of the study

The researcher intends to study the rape culture in India and the legislative and judicial trends toward rape cases. The study contains an analysis of the judiciary in terms of the death penalty in cases of rape. The researcher further intends to study the international and regional instruments governing rape. Additionally, the study includes the international impacts and domestic concerns about the death penalty in rape cases.

Limitations of the study

The study is limited to the study of death penalty in rape cases only.

Research Questions

The research questions of the study are-

1. What are the international and regional human rights instruments relating to rape?
2. What are the national laws relating to rape in India?
3. What is the judicial approach towards death penalty in rape cases in India?
4. Is the death penalty in rape cases justifiable?

Research Methodology

This study only uses doctrinal legal research, descriptive method, analytical legal research, case study, and narratives for its legal research.

Focusing on providing a better understanding of the rape laws in India and scrutinizing the execution of death penalty in rape cases, doctrinal research was conducted.

Descriptive legal research was done to elaborate on the concept of death penalty and rape laws in India. Furthermore, an analysis was done on the judicial decisions on execution of death penalty in rape cases.

Both first-hand and second-hand sources were used to do the research. The constitution of India, laws, case laws, official documents, international conventions, agreements, and reports were all used as primary sources. The researcher has also used things like books, articles, law journals, court decisions, and websites as secondary sources. The research was done by using online databases and sources like JSTOR, SCC Online,

Shodhganga, LiveLaw, and others. These sources helped me learn a lot about the topic at hand, which helped me find answers to my research questions and meet the goals and aims of this research. Doctrinal research has the benefit of giving you a deeper understanding of how legal concepts work and quick answers to questions about the topic at hand. This research paper looks at laws about rape at the international, national, and regional levels. In particular, the death penalty for rape in India has been studied.

Accordingly, the form of citation of this research paper is OSCOLA's fourth edition.

Chapterization

Chapter 1: Introduction

This chapter includes an introduction, a statement of problem, a detailed literature review, aims and objectives, scope and limitations, research questions, research methods and research design.

Chapter 2: International and Regional Protection against Rape and Sexual Violence

This chapter talks about rape-related international and regional laws. The international and regional instruments talk about sexual violence, which includes rape. Even though there isn't a law against rape, there are many international human rights documents that talk about it. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. Moreover, this chapter includes the provisions contained in IHL in context of women and children.

Chapter 3: Rape and Criminal Law in India

This chapter includes Indian standards for rape. The Indian Penal Code has provisions for rape. The given provisions for rape also include gang rape, marital rape, etc., however, there is no definite provision for marital rape in India. Furthermore, the chapter focuses in the legal reforms in rape laws made under the Criminal (Amendment) Act, 2013 and POCSO Act.

Chapter 4: Judicial Approach towards Death Penalty in India

This chapter includes the approach of the judiciary on death penalty in India. It focuses on the constitutionality of death penalty cases in India especially for rape and the main

principle i.e., rarest of rare cases. Furthermore, the chapter analyses about the execution process for death penalty in cases of rape.

Chapter 5: Conclusion and Suggestions

This chapter finally concludes the research work and contains suggestions relevant to the concept of death penalty for rape cases.

CHAPTER 2

INTERNATIONAL AND REGIONAL PROTECTION AGAINST RAPE AND SEXUAL VIOLENCE

Meaning and Concept of Rape under International Law

International law offers definitions of rape and sexual violence, considering them as highly discriminatory acts against women. International law defines sexual violence as any kind of sexual act that is forced or done with violence, no matter how close the victim is to the offender. This includes rape. Sexual violence can happen both when there is peace and when there is a war.[19] "The World Health Organization (WHO) provides a comprehensive definition of sexual violence in its World Report on Violence and Health 2002". According to this definition, "sexual violence encompasses a range of behaviors, including any coerced sexual activity, including any attempt to compel a sexual act, unwanted sexual comments or approaches, or acts of trafficking." Importantly, the definition includes everyone, regardless of their connection to the victim, and can take place anywhere, including at home and at work. It is noteworthy that the WHO definition of sexual violence extends beyond the act of rape, recognizing that it encompasses a broader spectrum of non-consensual sexual behaviors.[20] Additionally, rape can be defined as the act of forcibly or coercively penetrating the vulva or anus, utilizing a penis, other body parts, or an object. Rape is only one kind of sexual violence, and all kinds of sexual violence are bad because they violate human rights. This condemnation is echoed across the globe, emphasizing the gravity and significance of addressing and combating sexual violence in all its manifestations.[21]

Various international laws provide different definitions of sexual violence. The Rome Statute of the International Criminal Court (ICC) includes a comprehensive explanation of sexual violence in its Elements of Crimes. According to this statute, "sexual violence

---

[19] 'Sexual Violence' (Wikipedia. 24 May 2023) https://en.wikipedia.org/wiki/Sexual_violence accessed on 31 May 2023.

[20] 'Sexual Violence- World health organization and legal definitions' (*New Zealand Family Violence Clearinghouse,* September 2012) https://nzfvc.org.nz/sexual-violence-world-health-organization-legal-definitions#:~:text=The%20World%20Health%20Organization%20%28Krug%20et%20al%2C%202002%29,including%20but%20not%20limited%20to%20home%20and%20work%E2%80%9D accessed on 31 May 2023.

[21] Supra note 11.

entails engaging in or forcing individuals to engage in sexual acts against their will, either through physical force, threats, coercion, or psychological manipulation. It encompasses situations where individuals are compelled due to fear, duress, psychological pressure, abuse of power, or taking advantage of their vulnerability or inability to provide true consent. The Rome Statute's definition aims to encompass a wide range of non-consensual sexual acts that violate the rights and well-being of individuals."

In a 1998 report, "the Special Rapporteur on Systemic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict" presented an inclusive definition of sexual violence. According to the report, "sexual violence encompasses any type of violence, whether physical or psychological, that is carried out using sexual methods and specifically aims at targeting an individual's sexuality. This definition encompasses both the physical and psychological aspects of sexual violence."[22]

Rape as an International Crime

Rape is a form of sexual assault wherein one or more individuals initiate sexual activity without obtaining the victim's consent. This act may involve the use of physical force, coercion, deception, impersonation, or taking advantage of a person who is incapable of giving informed consent.[23]

Different countries have implemented varying anti-rape laws. In certain jurisdictions such as Canada, select US states, and certain Australian regions, the traditional common law definition of rape that necessitates sexual penetration is no longer recognized. Instead, these jurisdictions have introduced statutory offenses like criminal sexual behavior and sexual assault. These laws criminalize non-consensual sexual contact without the requirement of actual sexual intercourse.[24]

Rape in English Law

The introduction of the Sexual Offences (Amendment) Act in 1976 provided rape with a legal definition, as it had previously been classified as a common law offense with statutory penalties established under the Offenses against the Person Act of 1861.

[22] Supra note 11.
[23] Laws Regarding Rape, Wikipedia https://en.wikipedia.org/wiki/Laws_regarding_rape accessed on 24 June 2023.
[24] Supra note 20.

However, the Sexual Offences Act of 2003 has since replaced this legislation. According to the current act, consent plays a crucial role in determining whether a sexual act is consensual or non-consensual. In section 1 of the act, rape is defined as follows in English law: "A person commits an offense if a) he intentionally penetrates the vagina, anus, or mouth of another person with his penis, b) the other person, referred to as B, does not consent to the penetration, and c) A does not reasonably believe that B consents."

Moreover, the Sexual Offences Act of 2003 also defines the offense of assault by penetration. According to the act, assault by penetration is described as follows: "A person commits an offense if a) he intentionally penetrates the vagina or anus of another person with a part of his body or any object, b) the nature of the penetration is sexual, c) the other person, referred to as B, does not consent to the penetration, and d) the person initiating the act, referred to as A, does not reasonably believe that B consents."[25]

United States

In the United States, certain provisions of the Violence Against Women Act of 1994 were invalidated by the United States v. Morrison[26] decision. Consequently, there is no comprehensive federal legislation specifically addressing rape. However, each state has its own set of laws concerning rape. It is important to note that historically, some state laws from the establishment of the country and the 1950s exhibited racial discrimination by classifying consensual sexual relations between a black man and a white woman as rape. These laws did not apply to cases involving black women as victims.[27]

In some states within the United States, there are laws that define rape as penetrative sexual activity without the consent of the victim, even if force is not used by the perpetrator. These laws emphasize that consent must be freely and willingly given by all parties involved. They recognize that individuals may be unable to provide consent due to various factors such as age, intoxication, incapacity, or being asleep or unconscious. Therefore, any sexual activity without the explicit consent of the individual in such circumstances may be considered as rape. However, it's important to

[25] Supra note 13.
[26] United States v. Morrison 529 U.S. 598 (2000).
[27] Supra note 13.

note that there are other states where the laws differ. In these states, the criteria for a crime to be classified as rape may require the presence of force or coercion by the offender. This may encompass instances of physical violence that cause visible physical harm, threats directed at the victim or others, or any other form of coercion. In these states, consensual penetrative sex without explicit consent may not be considered a crime unless force or coercion was involved according to the specific legal definitions.[28]

Canada

Sexual assault, as defined by the Criminal Code of Canada, encompasses any sexual act that is carried out without the consent or voluntary agreement of one person by another. It includes any unwanted sexual activity imposed upon an individual without their consent.[29]

The laws prior to 1983 with the passing of Bill C52, rape was defined at the time in Section 143 of the Criminal Code[30] as: "Rape occurs when a male person engages in sexual intercourse with a female person who is not his spouse without her voluntary consent. It is also considered rape if the individual obtains consent through the use of threats or instilling fear of bodily harm, by impersonating her husband, or by using false and deceptive representations regarding the nature and characteristics of the act."

Rape in European countries

Out of the 31 European nations, only 16 of them, including "Belgium, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Spain, Slovenia, Sweden, Switzerland, and the UK", have rape laws that specifically define rape as sexual intercourse without consent. Most of the time, these laws include things like coercion, the use of force or threats of force, or the victim not being able to defend themselves.

Denmark recently achieved a significant milestone in women's rights when their parliament passed legislation acknowledging that sex without consent constitutes rape. This development marked a historic victory after years of advocacy.

[28] 'Rape Laws in the United States' (*Wikipedia*) https://en.wikipedia.org/wiki/Rape_laws_in_the_United_States accessed on 24 June 2023.
[29] Criminal Code, RSC 1985, c C-46 (Can), s 271.
[30] Criminal Code, RSC 1985, c C-46 (Can), s 143, as amended by Bill C-52 (1983).

Three young men in Sweden were accused of raping a 15-year-old girl and hurting her with a wine bottle. This was a very public case. Shockingly, the court found them not guilty, leading to widespread public outrage. This incident sparked a nationwide movement for legal reform, prompting the creation of new rape laws that criminalize engaging in sexual activity without voluntary participation. Because of this, there have been more convictions and, to a lesser extent, prosecutions in cases that were not considered rape by the law just two years ago.

In 2019, Greece joined the ranks of the nine European countries that formally acknowledged non-consensual sex as rape. The Ministry of Justice made amendments to the penal code, introducing a precise definition of rape. However, the initial changes were found to be inconsistent with international human rights standards. Consequently, the Ministry of Justice made additional revisions to the proposed reform, leading to the enactment of new legislation in July 2019.

Similar to many other European countries, widespread protests erupted following incidents of gang rape. Eventually, this led to changes in the law that made sex without consent a crime. These protests served as a catalyst for legal reforms that aimed to address the issue and ensure that non-consensual sexual acts are unequivocally categorized as rape. In the case of La Manada[31], initially, a first-instance court in Spain reached a verdict where five men accused of rape were convicted for the lesser crime of sexual abuse due to the absence of evidence of violence or intimidation. However, the subsequent rape convictions handed down by a higher court resulted in widespread demonstrations and shed light on the deficiencies of Spanish legislation, which did not classify non-consensual intercourse as rape unless there was physical violence or intimidation. In response to these concerns, the Spanish government introduced a new comprehensive law on remedies for sexual violence at the beginning of 2020. This legislation placed a strong emphasis on the concept of consent and included a legal definition of rape to align with international human rights standards. After a period of deliberation, the law was finally approved by the parliament in August 2022.

According to present Dutch law, an act is not classified as rape unless there is evidence of coercion. However, in October 2022, a measure was presented to the Dutch House of Representatives to address this issue. The proposed law aims to broaden the

[31] La Manada Case [2018] Tribunal Supremo STS 136/2018, para. 123.

definition of rape by encompassing all forms of coerced sexual acts. Under this proposed law, criminalization would extend beyond cases where a verbal refusal is expressed. In cases where the absence of consent is evident based on the surrounding facts and circumstances, the act would be regarded as rape and subject to appropriate legal repercussions. The objective of the proposed legislation is to establish a more comprehensive framework for the prosecution and punishment of sexual offenses.[32]

International Human Rights Instruments Criminalizing Rape and Sexual Violence

When women experience violence, their rights and fundamental freedoms are violated, impeding progress towards peace, development, and equality. The DEVAW adopted by the United Nations General Assembly, recognizes that such violence is rooted in long-standing power imbalances between men and women. These historical inequalities have allowed men to exert dominance over women, leading to discrimination and hindering women from realizing their full potential.[33]

While there is no singular convention exclusively dedicated to rape, international human rights instruments encompass provisions addressing rape and sexual violence. These instruments establish the framework for criminalizing rape and provide standards within the realm of international human rights law. They have done a lot to help change rape laws around the world, making sure that victims of rape and sexual violence have access to effective remedies and justice. These international standards have served as a valuable tool in shaping and improving legal frameworks to combat and prevent rape and sexual violence. International human rights instruments which include UDHR[34] (1948), ICCPR[35] (1966), ICESCR[36] (1966), CEDAW[37] (1979).

---

[32] 'Let's talk about "yes": Consent laws in Europe' (*Amnesty International*, 17 December 2020) https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/#:~:text=In%20a%20great%20number%20of,jumping%20out%20of%20the%20bushes'. accessed on 24 June 2023.

[33] Declaration on the Elimination of Violence against Women, G.A. Res. 48/104 (20 December 1993), UN GAOR, 48th Session, Supp. No. 49, vol, I, p. 217.

[34] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[35] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 march 1976) 999 UNTS 171 (ICCPR).

[36] International Covenant on Social, Economic and Cultural Rights (adopted on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 171 (ICESCR).

[37] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), 1249 UNTS 13, Official Records of the General Assembly, Thirty-Fourth Session, Supplement No. 46, vol. I, p. 11.

"Universal Declaration of Human Rights" (UDHR)

The UDHR was adopted by the UNGA in 1948, marking a significant milestone in the development of human rights. While the provisions of the UDHR have influenced and been incorporated into subsequent international treaties, regional human rights agreements, national constitutions, and legal codes, it is important to note that the UDHR itself is not legally binding. However, its principles and values have been widely recognized and utilized as a foundation for shaping human rights standards and legal frameworks at various levels.[38] 193 countries that are part of the UN have signed on to the UDHR. While the UDHR does not explicitly address rape and sexual violence, it is a comprehensive document intended to protect the rights and dignity of all individuals, regardless of gender. Although there are no specific provisions for rape, it is understood that the principles and values enshrined in the UDHR, particularly Articles 3 and 5, encompass the safety and security of women, as well as their fundamental human rights. Accordingly, Article 3 of the UDHR[39] states that "Everyone has the right to life, liberty and security of person" and Article 5 of the UDHR[40] states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The ICCPR protects these rights, including the right to life (Article 6) and the right to freedom and safety (Article 9).

"International Covenant on Civil and Political Rights" (ICCPR)

The ICCPR took place on December 16, 1966, and it went into effect on March 23, 1976. It is a treaty between many countries that requires them to protect the civil and political rights of people. Among these rights are the right to life, freedom of religion, freedom of speech, and freedom to gather with other people. The ICCPR is considered a significant document and is part of the international bill of rights, alongside the ICESCR and the UDHR. Together, these instruments form a comprehensive framework for the protection and promotion of human rights worldwide. The ICCPR contains provisions related to sexual violence which are as follows-

[38] 'Universal Declaration of Human Rights' (Wikipedia, 28 May 2023). https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights accessed on 31 May 2023.

[39] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 3.

[40] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5.

Article 7 – "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[41]

Article 9- "Everyone has the right to liberty and security of person."[42]

Article 10- "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[43]

"International Covenant on Economic, Social and Cultural Rights" (ICESCR)

The ICESCR was also adopted by the UN General Assembly on 16 December 1966 and became effective from 3 January 1976. This multilateral treaty obligates nations to uphold and protect economic, social, and cultural rights. The ICESCR knows how important it is to protect basic socioeconomic rights like the right to work, the right to education, the right to a decent standard of living, and other basic rights. It serves as a significant international instrument that promotes the realization and protection of these essential rights for individuals worldwide. The ICESCR contains a provision which is related to sexual violence-

Article 12- "The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[44]

"Convention on Elimination of all forms of Discrimination against Women" (CEDAW)

The CEDAW is the only international law that is all about women's rights. With 189 out of 207 countries having ratified the CEDAW, it has a lot of support around the world. It does not, however, talk about violence against women in a direct way. The CEDAW Committee has agreed that violence against women based on their gender is a form of discrimination against women, which is against the law according to the Convention. As a result, the DEVAW was passed in December 1993.

---

[41] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 march 1976) 999 UNTS 171 (ICCPR) art 7.

[42] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 march 1976) 999 UNTS 171 (ICCPR) art 9.

[43] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 march 1976) 999 UNTS 171 (ICCPR) art 10.

[44] International Covenant on Social, Economic and Cultural Rights (adopted on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 171 (ICESCR) art 12.

The DEVAW provides for the definition of "violence against women" as “any act of gender-based violence that causes or is likely to cause physical, sexual, or psychological harm or suffering to women.” This definition encompasses a wide range of violent acts, including threats, coercion, and the unjustified deprivation of personal freedom, occurring in both public and private contexts. By establishing this framework, the DEVAW aims to address and combat violence against women as a human rights violation on a global scale.[45]

The DEVAW has a broad definition of violence against women that includes rape, marital rape, sexual abuse, sexual harassment, and other forms of sexual violence. Both CEDAW and DEVAW call upon nations to undertake legislative and practical measures to prevent, make illegal, investigate, bring to trial, and penalize all forms of violence directed towards women. In accordance with these requirements, victims of sexual assault and other kinds of violence against women have the right to pursue proper legal remedies that are successful in resolving their cases. This entitlement extends to all forms of violence against women. This includes the right to access the criminal justice system on an equal basis, which ensures that justice is accessible and responsive to the needs of the individuals involved. The CEDAW and DEVAW emphasize the importance of providing support and protection to victims and holding perpetrators accountable for their actions.

Article 3 of the DEVAW reaffirms and reiterates the principles found in the UDHR, ICCPR, and ICESCR. It highlights essential rights including the “right to life, the right to equality, the right to personal liberty and security, the right to the best possible physical and mental health, and the right to be free from torture or any form of cruel, inhuman, or degrading treatment or punishment.” This article underscores the critical importance of upholding and protecting these rights for women, with the aim of eliminating violence against them.[46]

Rome Statute of the ICC and Sexual Violence

Individuals who are accused of committing major crimes that have significant impact on the global society can be investigated and brought to trial before the International

[45] Declaration on the Elimination of Violence against Women, G.A. Res. 48/104 (20 December 1993), UN GAOR, 48th Session, Supp. No. 49, vol, I, p. 217.
[46] Declaration on the Elimination of Violence against Women, G.A. Res. 48/104 (20 December 1993), UN GAOR, 48th Session, Supp. No. 49, vol, I, p. 217. Art 3.

Criminal Court (ICC), which is a permanent international court that was formed to do so. These crimes include genocide, crimes against humanity, war crimes, and acts of aggression. The ICC plays a crucial role in holding accountable those responsible for such serious offenses and ensuring justice for victims on an international scale.[47]

The ICC was established in the 20th century, a period that was characterised by the widespread commission of severe crimes around the globe. Despite the existence of these crimes, many perpetrators went unpunished. Following the conclusion of World War II, the Nuremberg and Tokyo trials were founded with the intention of investigating the horrible crimes that were perpetrated during that time period and bringing those responsible for such crimes to justice. The adoption of the "Convention on the Prevention and Punishment of the Crime of Genocide" in 1948 further highlighted the necessity for a permanent ICC to address and bring justice to such acts of atrocity. The International Criminal Court (ICC) was established as a result of this need being recognised, and its primary mission is to investigate and bring to justice those individuals who are responsible for serious crimes that have been perpetrated on a global scale.

In the aftermath of World War II, the establishment of a permanent international criminal court was being discussed, coinciding with the occurrence of grave crimes in the former Yugoslavia and Rwanda. These events prompted the UNSC to establish temporary tribunals to address each specific situation. These developments significantly influenced the subsequent conference that led to the adoption of ICC in Rome during the summer of 1998.

"On July 17, 1998, a conference consisting of 160 states established the first treaty-based permanent international criminal court, known as the Rome Statute of the International Criminal Court". This treaty defines the crimes falling under the jurisdiction of the ICC, establishes procedural norms, and outlines ways in which states can cooperate with the ICC. State parties are the nations that have ratified these regulations.

In contrast to the ICJ, the ICC brings criminal charges against individuals. The International Criminal Court (ICC) has the power to bring criminal charges against

[47] Rome Statute of the International Criminal Court (1998), 2187 UNTS 90, UN Doc A/CONF.183/9*, 17 July 1998 art 5.

individuals who are accused of committing serious crimes inside its territory. Such offenses encompass “acts of genocide, crimes against humanity, war crimes, and the crime of aggression.” The ICC also addresses cases of rape, which falls under crimes against humanity. The ICC demonstrates a high level of gender awareness and addresses various forms of sexual offenses, which represents a significant development in international criminal law.[48]

Prior to the establishment of the ad hoc tribunals, sexual and gender-based violence were largely neglected within international criminal law. The Nuremberg International Military Tribunal, which is considered a foundational event for international criminal law, did not specifically address rape in its judgments. Even the Nuremberg Charter, which is often referred to as the "birth certificate" of international criminal law, did not explicitly mention sexual crimes. Instead, it classified them as falling under broader provisions such as the war crime of ill-treatment and the crime against humanity or other brutal conduct.[49]

The first case tried by the ICC was The Prosecutor v. Thomas Lubanga Dyilo[50]. Thomas was found guilty of committing war crimes on March 14, 2012, connected to the recruiting and conscription of children under the age of 15 and their active involvement in hostilities. The offences occurred during the Iraq and Afghanistan wars. Despite the fact that the primary concentration of this case was not on sexual offences, it did recognise sexual violence as a serious breach of international humanitarian law as well as a war crime. The case specifically addressed the issue of recruiting and utilizing child soldiers.

When it comes to addressing offences that are based on sexuality or gender within the context of international criminal law, the founding of the ICC was a watershed moment. It was the first time that the statute had specifically acknowledged sexual offences like rape, forced prostitution, and other related felonies. By combining specific features of crimes, rules of procedure, and evidence, the law of the International Criminal Court

---

[48] ‘Understanding the International Criminal Court’ (International Criminal Court, 2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf accessed on 30 June 2023.

[49] Tanja Altunjan, ‘The International Criminal Court And Sexual Violence:Between Aspirations And Reality’ 2021 22/5 Gernan Law Journal https://www.cambridge.org/core/journals/german-law-journal/article/international-criminal-court-and-sexual-violence-between-aspirations-and-reality/6B37A67C8196A6159237A893D2A5722A#article accessed on 30 June 2023.

[50] The Prosecutor v. Thomas Lubanga Dyilo [2006] ICC-01/04-01/06, Trial Judgment.

(ICC) provided a gender-sensitive approach. These provisions are instrumental in addressing sexual crimes and fostering an effective and gender-sensitive approach throughout the court's proceedings.

The Elements of Crimes provide a definition of rape that does not specifically limit it to women and girls. It clarifies that rape and sexual violence fall within the scope of "causing significant bodily or mental injury" as part of the definition of genocide under Article 6(b) of the ICC Statute.[51]

Investigations into sexual violence have not been given priority within the ICC. Cases involving allegations of sexual violence have faced challenges at various stages of the process, resulting in setbacks. The Germain Katanga trial marked the first instance in which sexual offenses were specifically addressed. Charges related to the raid on the village of Bogoro included rape and sexual slavery. Katanga was found guilty of the most of the allegations, however he was exonerated of all sexual offence charges. This case highlighted a distinction made by the judges between sexual crimes and other offenses like pillaging, indicating a potential inclination towards a more rigorous standard of proof for sexual crimes. In 2016, Jean-Pierre Bemba Gombo became the first individual convicted of sexual offenses by the ICC. In addition to the other counts, he was found guilty of rape, which is both a crime against humanity and a war crime. However, the Appeals Chamber later overturned this judgment, resulting in Bemba being cleared of all counts.[52]

The ICC has recently expanded its definition of sexual offenses, challenging historical assumptions that gender-based violence primarily targets women. Two significant cases, involving Bemba and Ntaganda, have challenged this notion. In these cases, both individuals were convicted for raping male victims, emphasizing that rape is considered a crime irrespective of gender under the ICC Statute. The Trial Chambers in both cases explicitly clarified that sexual violence encompasses victims of all genders within the ICC's jurisdiction. The Bemba[53] and Ntaganda[54] trials are likely to serve as significant precedents. There are incidents of incorrect categorising of male genital mutilations in

[51] Elements of Crimes, ICC-ASP/1/3 (ICC).
[52] The Prosecutor v Germain Katanga [2014] ICC-01/04-01/07.
[53] The Prosecutor v Dominic Ongwen [2021] ICC-02/04-01/15
[54] The Prosecutor v Jean-Pierre Bemba Gombo [2016] ICC-01/05-01/08.

the Kenyatta case as well as the omission of evidence on male sexual assault in the Ongwen[55] trial.

Rape in International Humanitarian Law

Both in international and non-international armed conflicts, the protections afforded by international humanitarian law to civilians, prisoners of war, and other non-combatants are intended to prevent unnecessary suffering. However, it became evident that women required specific protections due to their distinct vulnerabilities. Provisions in international humanitarian law, such as the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, offered specific safeguards for women who were injured or wounded. Although women had initially received general legal protection similar to that afforded to men under international humanitarian law, this was not always the case. These provisions aimed to address the unique needs and vulnerabilities of women in armed conflicts.[56] Moreover, if they were taken as prisoners of war, they enjoyed the protections outlined in the "Hague Conventions on the Laws and Customs of War on Land" of 1899[57] and 1907.[58]

During both international and non-international armed conflicts, civilians, prisoners of war, and other non-combatants are afforded safeguards under international humanitarian law. However, recognizing the distinct vulnerabilities of women, it became evident that specific safeguards were necessary. While women initially received general legal protection similar to men under international humanitarian law, additional provisions were introduced to address their unique needs. For instance, the "1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field" included specific provisions aimed at offering protection to women who were injured or wounded. These provisions were designed to address the specific vulnerabilities and challenges faced by women in the context of armed conflicts.

The recognition of rape as a crime under international humanitarian law can be traced back to the Lieber Code. Throughout history, laws of war have prohibited troops from engaging in acts of rape, and national military laws have imposed severe penalties,

[55] Prosecutor v Dominic Ongwen [2021] ICC-02/04-01/15.
[56] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864 (TS 2).
[57] Hague Conventions on the Laws and Customs of War on Land of 1899 (TS 1).
[58] Ibid 1907.

including death sentences, for such offenses. However, there have been instances where rape was encouraged or utilized as a tool by certain military forces, such as the widespread forced prostitution and rape practiced by the Nazis and the Japanese during the Holocaust.

Before World War II, there were limited mechanisms for enforcement. For example, the Lieber Code prohibited and punished rape, along with other atrocities, and military commanders were empowered to execute soldiers immediately for committing these prohibited acts. Similarly, the Hague Convention is recognized to contain provisions related to rape, as Article 46 states the importance of respecting family honors, individual lives, private property, religious convictions, and liberty, explicitly forbidding the confiscation of private property.[59]

Following the conclusion of World War II, the Nuremberg Tribunal and the Tokyo Tribunal were both founded as international criminal tribunals. Rape was not officially listed in the Nuremberg Charter, and it was not tried as a war crime under international customary law during the trials that took place at Nuremberg. This is an important point to note. However, instances of rape were acknowledged as part of the atrocities that occurred during the war. The focus of the tribunals was primarily on prosecuting crimes they considered to be more severe, such as murder, mass deportation, and mass enslavement.

In contrast, the Tokyo Tribunal did prosecute cases involving rape, but it was treated as part of the broader atrocities committed by the top military commanders.

Another significant development occurred through Control Council Law No. 10, which was accepted by the four occupying countries in Germany as a framework for prosecuting war crimes in their respective courts. As a result of the passage of this law, rape was added to the Nuremberg Charter's list of crimes against humanity, which broadened the range of offences that may result in criminal prosecution.

In accordance with the Geneva Conventions, "violence against life and person," including cruel treatment and torture, as well as "outrages upon human dignity," are both prohibited under Article 3 of the Common Articles. This article applies to any and

[59] Theodor Meron, 'Rape as a crime under International Humanitarian Law' (1993) 87/3 The American Journal of International Law https://www.jstor.org/stable/2203650 accessed on 2 July 2023.

all parties involved in an armed conflict that is taking place within the country, including any armed resistance groups. However, it does not explicitly mention rape or other forms of sexual violence. Prisoners of war, on the other hand, are guaranteed by the Third Geneva Convention the right to be treated with dignity at all times and to have both their bodily and moral well-being protected. This right applies regardless of the conditions in which the prisoners are held. This clause places an emphasis on the significance of honouring the personal integrity and honour of prisoners of war and places a primary priority on the protection of those individuals.[60]

Prisoners of war are required to be afforded "respect for their persons and their honour" under all circumstances, as stipulated by the Third Geneva Convention. This obligation cannot be waived. This provision highlights the importance of safeguarding the physical well-being and dignity of prisoners of war. Likewise, Article 27 of the Fourth Geneva Convention explicitly addresses the safeguarding of women, emphasizing the need for their special protection against any acts that may undermine their honor. This includes specific mention of acts such as rape, enforced prostitution, or any form of indecent assault. The provision emphasizes the need to prevent and condemn such acts that undermine the dignity and well-being of women.[61]

Additional Protocols I and II of the Geneva Conventions reinforce the prohibition of "outrages upon personal dignity." This restriction extends to "treatment that is humiliating and degrading, enforced prostitution, and any form of indecent assault," according to Article 75 of Additional Protocol I, which provides more clarification by describing the scope of the ban. In addition, Additional Protocol II includes the act of "rape" in the list of forbidden behaviours that are considered to be an affront to a person's personal dignity. In addition, the need to protect women and children from actions such as rape, forced prostitution, and any other kind of indecent assault is emphasised in both the Fourth Geneva Convention and the Additional Protocol I. Both of these conventions were written in Geneva. Within the context of armed conflicts, these rules highlight how critical it is to protect the health and dignity of those who are most vulnerable.[62]

---

[60] Geneva Conventions, Common Article 3.
[61] Geneva Convention for the Protection of Civilian Persons in Time of War, 1949 (TS 75) art 27.
[62] Protocol Additional to the Geneva Conventions Of 12 August 1949, And Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art 75.

Article 4 of Additional Protocol II explicitly prohibits various forms of violence and violations of personal dignity. It specifically forbids "violence to life, health, and physical or mental well-being of persons." Additionally, it condemns "outrages upon personal dignity," particularly emphasizing the prohibition of acts such as "humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault." The article also extends the prohibition to cover "slavery and the slave trade in all their forms."[63]

Regional Human Rights Instruments against Rape and Sexual Violence

The historical significance of legal justifications by regional human rights courts in addressing rape and sexual assault cases highlights the significance of taking regional factors into account when addressing human rights issues. The rights protected under the American Convention on Human Rights[64] are governed by the Inter-American Commission on Human Rights.[65]

The adoption of the European Convention on Human Rights in 1950 marked the beginning of the process that would eventually result in regional norms that were progressively more comprehensive. This pattern carried on with the ratification of the American Convention on Human Rights in 1967, which was then followed by the adoption of the African Charter on Human and Peoples' Rights in 1981. Both of these events occurred after the beginning of the 20th century. These regional human rights instruments include provisions aimed at safeguarding women from various forms of violence, encompassing rape as well.[66]

In the case of Raquel Marti de Mejia v. Peru,[67] the interpretation was made that the American Convention, while not providing an explicit definition of rape, acknowledges the right to be free from it. It has been construed that the ban against torture that is expressed in Article 5 of the American Convention can potentially include rape as one of the forms of torture that it forbids. Accordingly, it has been established that rape

[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art 4.
[64] American Convention on Human Rights, 1969 (OASTS No. 36).
[65] Inter-American Commission on Human Rights, Annual Report 2019.
[66] European Convention on Human Rights, 1950 (TS 71).
[67] Raquel Marti de Mejia v. Peru, Case No. 11.627 (Inter-American Commission on Human Rights, 2001).

meets the criteria of an intentional act causing physical and mental anguish or distress, thereby fulfilling the criteria for an act of torture.

All questions concerning the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms are brought before the European Court of Human Rights (ECHR), which is the court that has jurisdiction over those questions. In accordance with the European Convention on Human Rights (ECHR), states are held accountable for rape offences in situations in which the crime was perpetrated by agents of the state or where the state fails to offer an effective domestic remedy. Even though the European treaty does not specifically state the right to be free from sexual violence, the European Court of Human Rights (ECHR) at first considered rape to be a violation of the right to privacy. This was the case despite the fact that the right to be free from sexual violence was not explicitly stated. However, over time, rape has come to be recognized as a grave form of brutal abuse and even as a manifestation of torture.

In the case of Aydin v. Turkey[68] ,the ECHR stated that Article 3 of the European convention[69], which forbids torture, can also be broken by rape.

Regional human rights jurisprudence has addressed various human rights violations, including torture, cruel treatment, privacy infringements, and substantiated instances of rape. Regional human rights instruments encompass provisions that aim to protect women from rape and sexual violence. The relevant provisions in different regional human rights instruments regarding the safeguarding of women from rape and sexual violence are summarized as follows.

"American Convention on Human Rights" (ACHR)

Under Article 1 of the ACHR, "the States Parties to the Convention undertake to uphold the rights and freedoms outlined in the document. They also pledge to guarantee that all individuals within their jurisdiction can freely and completely exercise those rights and freedoms, without any discriminatory treatment based on factors such as race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social circumstance."[70]

[68] Aydin v. Turkey 23178/94 (European Court of Human Rights, 1997).
[69] European Convention on Human Rights, 1950 (TS 71) art 3.
[70] American Convention on Human Rights, 1969 (OASTS No. 36) Art 1.

Article 8 of the ACHR asserts that “every person has the entitlement to a just and prompt hearing by a competent, independent, and impartial tribunal. This right extends to the examination of any criminal charges against them or the resolution of their rights and obligations in civil, labor, fiscal, or other relevant matters, as determined by law. The hearing must be conducted with sufficient safeguards to ensure a fair procedure.”[71]

“Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women”

Article 3 affirms that "Every woman possesses the entitlement to live without experiencing violence, encompassing both public and private domains."[72]

Article 5 declares that "Every woman has the right to freely and completely enjoy her civil, political, economic, ocial, and cultural rights, and can rely on the comprehensive safeguarding of those rights as enshrined in regional and international human rights instruments. The States Parties acknowledge that violence against women hinders and undermines the exercise of these rights."[73]

Article 6 declares that "The entitlement of every woman to live without violence encompasses various aspects, such as: a) The right of women to be exempt from any kind of discrimination; and b) The right of women to be respected, educated, and liberated from societal norms, cultural practices, and behavioural patterns that are rooted in notions of inferiority or subordination."[74]

“European Convention for The Protection of Human Rights and Fundamental Freedoms” (ECHR)

Article 1 of the European Convention on Human Rights (ECHR) declares that "The High Contracting Parties shall ensure that all individuals within their jurisdiction enjoy the rights and freedoms delineated in Section I of this Convention."[75]

---

[71] American Convention on Human Rights, 1969 (OASTS No. 36) Art 8.
[72] Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women, 1994 (OASTS No. 66) art 3.
[73] Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women, 1994 (OASTS No. 66) art 5.
[74] Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women, 1994 (OASTS No. 66) art 6.
[75] European Convention on Human Rights, 1950 (TS 71) art 1.

Article 3 declares that "No individual shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[76]

Article 6 asserts that "When deciding upon one's civil rights and obligations, every person has the right to a fair and public hearing within a reasonable timeframe, conducted by an independent and unbiased tribunal established according to the law."[77]

Therefore, it can be concluded that rape is recognized as an international crime that involves non-consensual sexual acts committed against an individual. It is prohibited under various international legal frameworks. In the context of international law, rape is recognised not only as a form of gender-based violence but also as a war crime, a crime against humanity, and in certain circumstances, as an act of genocide. Rape is condemned globally for its severe physical, psychological, and emotional impact on the survivors.

As mentioned above, international human rights instruments have provisions which address the crime of rape. Moreover, international instruments such as the Rome Statute of international criminal court and the Geneva conventions provide legal frameworks for prosecuting and addressing rape as a serious crime. These instruments emphasize the importance of accountability and ensuring justice for the survivors.

Efforts have been made to strengthen international legal frameworks, promote gender equality and provide support to the survivors.

Furthermore, as mentioned above, there are regional instruments that provides legal framework for prosecuting and addressing rape as a serious crime.

However, the efforts that are being made have been inadequate to deal with the current scenario. Many scholars proposed for a universal law that specifically deals with sexual violence and rape at the international sphere.

[76] European Convention on Human Rights, 1950 (TS 71) art 3.
[77] European Convention on Human Rights, 1950 (TS 71) art 6.

CHAPTER 3

RAPE AND CRIMINAL LAW IN INDIA

"A murderer kills the body but a rapist kills the soul."

– Justice Krishna Iyer.

Meaning of Rape

In a country like India, where many goddesses are worshiped every day, one or other woman is being raped in some corner of the country. It is so terrifying to imagine a woman go through such an event and live in the same society. Rape extends beyond being solely a crime against an individual, it is a crime against the entire society. It is a stigma that has long persisted in society. This crime is very traumatizing for a woman. It leaves a scar in her heart, mind and soul. It is called as a "beginning of a nightmare".[78] It has after effects of depression, anxiety, suicidal tendencies and a woman finds it challenging to recover from the trauma. She only manages to rehabilitate herself to live in society with sheer willpower, but when people learn that she was the victim of a rape, they treat her with contempt. A fear is built inside her for every next person she meets. Rape is a heinous crime and, is the most hatred. It is a gross violation of human rights and the basic fundamental right under Article 21 of the Constitution of India.[79]

There are numerous literatures about kidnappings and abductions and mass rapes which happened at the time of partition related riots. Because rape was used to "dishonour" the entire nation, men would counsel their female relatives to take their own lives rather than fall into the clutches of the enemy. Rape is still a weapon used in riots between groups of people. Rape has a terrible past that cannot be erased or disregarded.

The Latin word rapio, which literally translates to "to seize," is where we get our English word "rape." It denotes an induced seizure. Rape, then, is defined as the violent violation of a woman's private person.

[78] Payal Rana, The Capital Punishment in Context of Rape: A Study of Nirbhaya case, (LL.M, Swami Vivekananda Subharti University, 2019).
[79] P K Das, Anti-Rape Laws in India, 2nd Edition, Universal Law Publishing 2017.

A man is guilty of the crime of rape if he engages in sexual behaviour with a female victim in any of the six circumstances outlined in the following paragraphs.

Firstly, “against her will.”

Second, “without her consent.”

Thirdly, “the consent is obtained by inducing fear of harm or death in the individual or anyone she has shown interest in.”

Fourthly, the woman willingly gives her consent under the belief that the man is someone other than her husband, while the man is fully aware of his true identity and understands that she is consenting due to her mistaken belief of being legally married to him.

Fifthly, if a woman gives consent but is unable to comprehend the nature and outcomes of her decision due to mental incapacity, intoxication, or the deliberate administration of stupefying or harmful substances by the person seeking consent or someone acting on their behalf.

Sixthly- “when she is under sixteen years of age.”

Explanation- “penetration is sufficient to qualify as the sexual contact required for the crime of rape.”

Explanation- “It is not rape when a guy engages in sexual activity with his own wife and she is over the age of 15.”[80]

Kinds of rape

The most common forms of rape are as follows:

“Acquaintance Rape”:

It is also known as date rape and defined as the “unlawful sexual intercourse accompanied by force or fear with a person known to the victim who is not related by blood or marriage.”[81] Acquaintance rape refers to sexual assault or rape committed by a person who knows the victim. For example- someone the victim is dating, a classmate, co-worker, employer, etc. Diana Russell, a feminist writer and activist, coined the term

[80] Supra note 35.
[81] Ibid.

"acquaintance rape" in 1982, referring to a broad category of sexual assaults that occur between individuals who have some level of familiarity with each other.

Acquaintance rape is often characterized by the breach of trust and violation of boundaries within relationships. It is pertinent that consent is a crucial element in any sexual encounter, regardless of the relationship between the individuals involved.[82]

“Marital Rape”:

The phrase "marital rape" refers to sexual practises that take place within a marriage that are carried out by either one of the partners without their consent, where consent is absent or coerced through force, threats, intimidation, or when the individual is unable to provide consent. Around 10 to 14 percent of married women in the United States are believed to encounter rape by their spouses. Marital rape accounts for approximately a quarter of reported rape cases, but it remains the least reported type of sexual assault.[83]

Marital rape is considered a kind of domestic and sexual abuse. In accordance with the previous order of things, having sex during a marriage was seen as a right of the couple. Nowadays, however, many countries around the world see this as rape, and it has become more illegal. Marital rape often takes place in abusive relationships, especially experienced by women. The resistance to criminalize and prosecute non-consensual sex within the context of marriage is believed to arise from traditional views on marriage, religious interpretations, perceptions of male and female sexuality, and societal expectations of a wife's subservience to her husband.[84]

The need of recognising and responding to rape within marriage is being emphasised more and more by IHR standards. The CEDAW has called upon states to criminalize marital rape and ensured that victims have access to justice and support services. Moreover, the Istanbul Convention, also known as the Council of Europe's “Convention on Preventing and Combating Violence Against Women and Domestic Violence”, is a comprehensive framework aimed at addressing various forms of violence against women.[85] Article 36 of the convention requires nations to explicitly outlaw marital rape

---

[82] Acquaintance rape, Wikipedia https://en.wikipedia.org/wiki/Acquaintance_rape#cite_note-Finley_2018-10 accessed on 02 June 2023.
[83] Supra note 35
[84] ‘Marital Rape’ (Wikipedia, 2021) https://en.wikipedia.org/wiki/Marital_rape accessed on 30 June 2023.
[85] Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011 (OASTS No. 210).

and take efforts to prevent, prosecute, and help survivors of this kind of abuse. The article also compels governments to report cases of marital rape to the convention.[86]

The criminalization of marital rape differs across countries. In the United Kingdom, Canada, and Sweden, laws have been enacted to make marital rape a crime. However, in the USA, the laws regarding marital rape vary from state to state. In India, explicit criminalization of marital rape is absent, as the Indian penal code lacks specific provisions addressing sexual violence within marriages. As a direct consequence of this, non-consensual sexual activities carried out by a husband toward his wife are not considered to constitute rape under the legal framework of Indian law.[87]

Statutory rape:

The term "statutory rape" refers to the criminal offence that takes place when an adult engages in sexual activity with a person who is not of legal age to consent to such activity. Even if the juvenile was a willing participant, the adult may still be found guilty of statutory rape in a court of law.[88] A non-forced sexual act in which one of the participants is not of legal age to agree is known as a statutory rape. While the term "statutory rape" may appear in some legal statutes, its common usage typically pertains to situations where adults engage in sexual activity with minors who are below the age of consent.

Statutory rape also refers to rape if the person is above the age of consent and the other person is in an authority position such as a doctor, teacher or a parent.

The specific age of consent and the legal consequences for engaging in sexual acts with a minor vary from country to country. In many jurisdictions, there are also additional laws that address specific circumstances, such as the age difference between the individuals involved or situations involving positions of authority or trust.

The idea of statutory rape being a crime is currently widely supported in the US. The Irish Supreme Court, however, determined in May 2006 that the current statutory rape rules were unconstitutional since they forbade the defendant from raising a defence. As a result, many who were detained under the statutory rape law were released, and the

[86] Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011 (OASTS No. 210) art 36.
[87] Supra note 81.
[88] Supra note 1.

public demanded that the law be amended through the enactment of emergency legislation.

The purpose of such laws is to protect minors from potential exploitation, abuse or manipulation by older individuals who may take advantage of their vulnerability or lack of understanding.[89]

Gang Rape:

Gang rape occurs when the victim is attacked by several people. This kind of rape typically involves the use of drugs and alcohol, has fewer weapons, occurs more frequently at night, and has weaker victim resistance. They happen in places where there are already established male bonds amongst men.[90] Gang rape is a heinous crime that has severe physical, psychological and emotional consequences for the victim. It is an act of extreme violence and a gross violation of the victim's bodily autonomy and human rights. The presence of multiple perpetrators can exacerbate the trauma for the victim.

Laws in different countries vary regarding the definition, punishment, and prosecution of gang rape. In India, a horrific incident of gang rape happened on 6 December 2012 in Delhi. While travelling with her male friend, a physiotherapy intern was beaten, raped, and tortured by six men on a moving bus, including the driver. "Mukesh Singh, Vinay Sharma, Akshay Thakur, and Pawan Gupta were executed by hanging at Tihar jail using specially designed gallows for four individuals." Among the six individuals involved in the case, one was identified as a juvenile. After examining Afroz's birth certificate and academic records, the Juvenile Justice Board (JJB) determined that he was 17 years and 6 months old at the time of the offense. As a result, "the JJB determined that Afroz would not face trial as an adult and instead ordered his rehabilitation under the management committees established by the Juvenile Justice Act of 2000."

The case sparked widespread public outcry and sparked extensive discussions regarding the safety and security of women in India, as well as societal attitudes towards sexual violence. "It also resulted in significant changes to laws related to sexual violence." The

[89] 'Statutory Rape' (Wikipedia, 2023) https://en.wikipedia.org/wiki/Statutory_rape accessed on 30 June 2023.
[90] Supra note 35.

“Criminal Law Amendment Act 2013 was enacted as a response, which not only enhanced the penalties for sexual offenses but also introduced new offenses such as acid attacks, stalking, and voyeurism.”[91]

In the infamous Qatif rape case, during the mid-2006, a young Shia woman and her male partner were abducted by seven Saudi males from Qatif, who proceeded to gang rape both victims. As a result, a Saudi Sharia court sentenced four of the perpetrators to prison terms ranging up to ten years, along with a punishment of 100 to 1000 lashes.[92]

In the US, the Richmond high school gang rape case received national attention. A female student in the city of Richmond in California, US was repeatedly gang raped in the school's courtyard by a group of young men while a homecoming dance was going on in the gym. One man was freed following a preliminary hearing out of the seven guys who were charged with rape. Four of the six remaining defendants ultimately entered guilty pleas, while two were found guilty after a trial.[93]

Prison rape:

Prison rape is a widespread problem globally and it affects both male and female inmates. It refers to rape of people while they are incarcerated.[94]

The term "prison rape" refers to the rape of inmates by convicts or prison guards. Prison is a weapon used to exert control over prisoners. Prison rape can happen to both men and women; it is not just a problem for men. Prison rape is incorrectly linked to homosexuality, but it is actually just sex and a power play. Survivors of prison rape may find it challenging because they may not have access to resources while incarcerated. Those who have survived this kind of rape may have a difficult time getting their stories believed, particularly if the perpetrator was a corrections officer.[95] It can occur due to various factors such as the power dynamics within prisons, inadequate security measures, overcrowding, lack of proper supervision and the presence of a culture of violence.

---

[91] Mukesh and Anr v State of NCT Delhi and Ors [2017] 1SCC 1 (SC).
[92] ‘Qatif rape case’ (Wikipedia) https://en.wikipedia.org/wiki/Qatif_rape_case accessed on 2 July 2023.
[93] ‘Richmond High School’ (Wikipedia) https://en.wikipedia.org/wiki/Richmond_High_School_(Richmond,_California) accessed on 2 July 2023.
[94] Prison rape, (wikipedia) https://en.wikipedia.org/wiki/Prison_rape accessed on 2 June 2023.
[95] Supra note 35.

The IHR standards such as the UN Standard Minimum Rules for the Treatment of Prisoners[96] (also known as the Nelson Mandela Rules) emphasizes the importance of preventing and addressing sexual violence in detention settings. These standards highlight the need for proper training of staff, mechanisms for reporting and investigating incidents, access to support services for victims and efforts to change the person culture to promote safety and respect.

Drug-facilitated sexual assault/Rape (DFSA):

When a perpetrator takes a substance to make the victim less capable of resisting a sexual attack, it is known as drug-facilitated sexual assault or rape. It also refers to a sexual attack that occurs on a victim who has been inebriated from consuming alcohol or being purposefully given another drug meant to cause date rape, or from being under the influence of any other mind-altering substance. Predator rape is another name for this type of rape. Alcohol is the most often used substance. The perpetrators offer the victim copious amounts of alcohol until the victim is rendered unconscious and unable to agree. Ecstasy, marijuana, or acid are examples of recreational drugs that could be used to impair the survivor's ability to give consent.[97]

A subset of DFSA is psychedelic-facilitated sexual assault (PFSA). This type of sexual assault is frequently committed by the person who gave the "journeyer" the psychedelics. In cases of PFSA, the act of sexual penetration is accompanied by claims that the perpetrator is assuming the role of a shaman, resulting in its colloquial reference as "shamanic rape."

Legal systems around the world recognize drug facilitated rape as a criminal offense. Laws differ among countries regarding the specific elements and penalties associated with this crime. Efforts to combat drug facilitated rape include raising awareness about the issue, promoting consent education, providing resources for survivors, improving drug testing capabilities and strengthening legal frameworks to hold perpetrators accountable.[98]

---

[96] United Nations Standard Minimum Rules for the Treatment of Prisoners [2016] UNTS A/RES/70/175.
[97] Supra note 35.
[98] 'Drug-facilitated sexual assault' (Wikipedia) https://en.wikipedia.org/wiki/Drug-facilitated_sexual_assault accessed on 30 June 2023.

Rape Laws in India in context of reforms under the Criminal (Amendment) Act, 2013

Rape laws have undergone modifications over the years to adapt to evolving societal norms worldwide. In the Indian legal system, there has been a consistent emphasis on reinforcing rape laws, considering the personal and social impact of such crimes on the victims. The rulings that have been handed down by Indian courts are a reflection of this devotion. According to a statement made by the Law Commission of India, "rape represents the most severe infringement against the dignity and well-being of an individual."[99]

Before 1983, IPC prescribed a punishment of imprisonment for rape that could range from up to seven years, including life imprisonment or a maximum of 10 years. The need for change in the laws relating to rape gained momentum after the 'Open Letter to the Chief Justice' which had brought to the fore the judicial bias against rape victim in Tukaram and Another v. State of Maharashtra[100] which is commonly known as the Mathura rape case. In this particular instance, the Supreme Court referred to the incident as a "peaceful affair" due to the absence of physical injuries on the girl involved. As a result of this case, the "Criminal Law (Amendment) Act of 1983" was enacted, bringing about substantial changes to the legal framework.

"The Criminal Law (Amendment) Act of 1983" brought about notable modifications to the substantive, procedural, and evidential aspects of rape-related laws. Within the IPC, it introduced the concept of aggravated rape, encompassing instances such as rape in custody, rape of a pregnant woman, rape of a child below the age of 12 years, and gang rape. Contrary to the opinion of the Law Commission of India[101], mandatory minimum sentences were introduced in the IPC for the offence of rape. Mandatory minimum imprisonment of seven years which could extend to life or 10 years and fine was provided for rape. For aggravated rape, the mandatory minimum sentence of ten years or life and fine was provided. Less than the mandatory minimum could be given for adequate and sufficient reasons to be recorded in the judgment in either case. No lower

---

[99] Ved Kumari and Ravinder Barn, 'Sentencing in Rape Cases' 59 Journal of the Indian Law Institute https://www.jstor.org/stable/26826588 accessed on 31 May 2023.

[100] Tukaram and Another v. State of Maharashtra [1979] 2 SCC 143.

[101] Law Commission of India, 84th Report on Rape and Allied Offences (Law Com No 84, 1980).

limit was provided if the judge chose to give less than the mandatory minimum prescribed for the offence.

Later in the year 2012 there occurred a horrifying incident that shook the whole country and led to a new legislative reform on rape laws. On December 16, 2012, India witnessed a brutal gang rape of a young woman named Nirbhaya by the media, in a moving bus in Delhi. She died due to the injuries caused by rape. The Indian government constituted a committee due to the outraging situation under the chairmanship of J.S Verma to suggest amendments to criminal laws. It submitted a report within the period of 30 days suggesting the widening of the definition of rape, making the offence gender neutral. "The Criminal Law (Amendment) Act of 2013 was influenced by multiple Supreme Court judgments, which emphasized the importance of ensuring punishment commensurate with the severity of offenses. As a result, the Act was enacted, introducing significant changes. Notably, it introduced the possibility of imposing the death penalty in specific cases of rape that resulted in the victim's death or left them in a persistent vegetative state."[102]

Definition of Rape under the Indian Penal Code

The Criminal Law (Amendment) Act of 1983 was not an independent legislation but rather an amendment made to the IPC. It broadened scope of Section 375 of the IPC, encompassing acts beyond penile-vaginal penetration. In order for an act to be considered a kind of rape, there must have been some sort of sexual encounter between a man and a woman. There are, however, two notable exemptions to this rule: first, it is possible to establish the sexual conduct essential to proving the crime of rape solely through the act of penetration; and second, sexual activity between a man and his wife is not considered to be rape unless it involves a minor who is younger than fifteen years old.[103]

Later, the "Criminal Law (Amendment) Act 2013", broadens the definition of "rape" in order to impose heavier penalties for the more heinous offences. It recognized a broader range of non-consensual sexual acts as rape, including acts such as oral sex and

[102] Supra note 96.
[103] Indian Penal Code s 375.

penetration with objects. “It provides that the offence of rape consists of four types of sexual acts defined under the section 375 of the IPC” which are as follows-

Firstly, there must be “penetration of the penis into the vagina, mouth, urethra, or anus”,

Secondly, “inserting any object or any part of the body into the vagina, urethra or anus”,

Thirdly, “manipulation of any part of the body of a woman to cause such woman penetration into the vagina, urethra, anus or any part of the body of such woman”, and

Lastly, “application of male’s mouth to the vagina, anus, urethra of the woman.”[104]

The major changes in the definition of rape by the criminal law amendment act 2013 includes the following elements:

Firstly, for an act to be categorized as rape according to the Criminal Law (Amendment) Act of 1983, it must involve sexual intercourse or any form of sexual penetration. This definition includes not only penile-vaginal penetration but also other non-consensual sexual acts like oral sex and penetration with objects.

Secondly, in cases of rape, the victim's consent is not obtained prior to the act being perpetrated. To engage in any specific sexual act, an individual must clearly communicate their willingness through verbal or nonverbal means, such as using words, gestures, or any other form of communication.

Thirdly, “the act is regarded as rape if it is carried out under certain conditions, such as when she or any other person she cares about is placed in fear of death or harm, when she gives her consent but believes the man to be her husband, when she gives her consent because she is mentally unsound, or when she gives her consent while under the influence of intoxicants or other unwholesome drugs.”

Fourthly, “if the woman is under eighteen with or without consent.”

Fifthly, “when woman is unable to communicate consent.”[105]

---

[104] Swati Mishra, ‘Comparison of rape laws before and after the Criminal Amendment Act 2013’ (iPleaders, 28 February, 2021) https://blog.ipleaders.in/comparison-rape-laws-criminal-amendment-act-2013/ accessed on 15 June 2023.

[105] Biswaranjan Panda, ‘New Definition of rape after the criminal law amendment act, 2013’ (*Lawyersclubindia*, 03 May 2018) https://www.lawyersclubindia.com/articles/new-definition-of-rape-after-the-criminal-law-amendment-act-2013-9000.asp accessed on 30 June 2023.

As per interpretation advocated by a Delhi-based NGO Sakshi in its Public Interest Litigation (PIL), the requirement of "penetration" was addressed. The PIL argued that "penetration" is essential for establishing the crime of rape, and the manner and depth of penetration are not relevant. This viewpoint found recognition. In the case of Tarkeshwar Sahu v. State of Bihar, it was ruled that the depth of penetration holds no significance. Even the slightest entry of the male private parts into the female is considered sufficient to qualify as "sexual intercourse."[106]

Definition of rape has faced criticism for its inclusion of section 375(c), which outlaws the act of manipulation. Some argue that attempted rape, being a distinct offense, should only be punished under section 511 of the IPC in conjunction with section 376, rather than being categorized as rape itself. This situation raises challenges in distinguishing between the offenses of "rape" and "attempted murder," making it increasingly difficult to differentiate between the two. Additionally, the phrase "any part of such women's body." It is very difficult to think that there is still any place of the body besides the vagina, urethra, mouth, and genital area where a penetration might conceivably be done for a sexual purpose.[107]

According to IPC, a man can be held liable under this section if he coerces a woman to engage in the aforementioned acts with a third party. Additionally, threats to commit rape have now been deemed illegal by the law.[108]

"Consent of the victim as an essential for the offence of rape"

According to the Amendment Act of 2013, "consent" is defined as an unambiguous and overt agreement to take part in a certain sexual act. The lack of consent does not in and of itself mean that permission was not given. Consent is an essential component that must be present in order for an act to be regarded as consensual, and the giving of consent is required in order to demonstrate that rape has been committed. Consent that was coerced, gained by deception or mistake, or based on a misunderstanding of the facts might result in criminal culpability. The terms "Against her will" and "Without her consent" are interpreted differently by the court. Both the expressions have different meanings. "Against her will" refers to having sex despite her objections and implies

[106] Tarkeshwar Sahu v. State of Bihar [2006] 1 SCC 584.
[107] Supra note 102.
[108] Supra note 47.

that there was some sort of coercion or force involved. The expression 'against her will' has a wide connotation compared to the expression 'without her consent'. For example, if a woman is intoxicated or under mistake of fact agrees to sexual intercourse does not mean she was willing for it but will be said to have consented.[109]

"In the case of State of Uttar Pradesh v. Chotey Lal"[110], the apex court explained the phrase "against her will" means that a male had sex with a lady notwithstanding her protests and objections.

Section 90 of the IPC outlines the circumstances where consent would be voidable. The circumstances include the offender's fear or misperception of the truth, the consenting party's insanity, and the child's agreement. Prior to Criminal Law (Amendment) Act 2013 provided a positive definition, mainly it stresses on the "communication of consent" to a "specific sexual act." According to this provision, a woman is legally allowed to express her consent to engage in sexual activity through various means, including gestures, verbal communication.[111]

In the Indian Evidence Act (IEA), in cases of aggravated rape, it was stated that if the sexual activity was proven and the woman denied consent when asked if she gave consent, it would be presumed that she did not.[112]

Marital Rape

The "Criminal law (Amendment Act) 1983" provided that if the wife is older than fifteen when the husband engages in sexual behaviour with her, her consent is not necessary. The addition of Section 376A imposed a potential two-year sentence on a man who, although they were legally divorced, had sex with his wife. The conduct was viewed as discriminatory against women in society and had a less considerate attitude toward them. Additionally, it ignored the equality rights guaranteed by Article 14 of our Indian Constitution.[113] However, while recommendations for the "Criminal Law Amendment Act 2013" that helped to reform rape laws in India, some of the recommendations on the marital rape were not acted upon.

[109] Supra note 101.
[110] State of Uttar Pradesh v Chotey Lal [1982] 2 SCR 101.
[111] Indian Penal Code s. 90.
[112] Supra Note 43.
[113] Supra note 47.

By the year 2018, 150 countries criminalized marital rape, but according to the Indian penal code, "non-consensual intercourse with a wife who is aged between 12 and 15 years" constitutes marital rape. Accordingly, it is provided under section 375 of the IPC states that “sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”[114]

The Supreme Court declared that the provision of Exception 2 to Section 375, which previously exempted marital rape of minors aged 15 to 18 from being considered a criminal offense, was unconstitutional in “Independent Thought v. Union of India”[115] in 2017 and the High Court in “RIT Foundation v. Union of India”[116] in 2022, so the term 15 years in the exception now needs to be read as 18 years. When a wife is older than 18, there are no legal repercussions for committing marital rape.

This issue is examined by the judiciary on the ancient old traditions which signifies that a wife who marries her husband grants her husband permission to have sex with her at any time for the rest of her life.

“Protection of Children against Sexual Offences Act” (POCSO)

“In 2012, a new piece of legislation known as the Protection of Children Against Sexual Offenses Act[117] was adopted (POCSO Act).” It concentrated on five types of crimes against children: penetration-based sexual assault, penetration-based sexual assault with aggravation, sexual assault, sexual assault with aggravation, and use of minors in pornography.
Under this act, the term "rape" is replaced with "penetrative sexual assault," and the act of penetrating “a child's vagina, urethra, anus, or mouth with a penis, body parts, or objects is deemed punishable.” This legislation is gender-neutral, meaning it applies to both men and women. When committed by men or against children below the age of 18 years, it carries mandatory minimum imprisonment ranging from three to ten years. “Another important change introduced by POCSO act is that it raised the age of consent for sexual intercourse from 16 years to 18 years for girls, bringing consensual sexual

[114] Indian Penal Code s. 375.
[115] Independent Thought v. Union of India [2017] 10 SCC 800
[116] RIT Foundation v. Union of India [2016] 2SCC 310.
[117] Protection of Children Against Sexual Offenses Act, 2012.

intercourse with a girl below the age of 18 years within the ambit of penetrative sexual assault."[118]

Juvenile Justice Act (JJ Act)

The Juvenile Justice (Care and Protection of Children) Act[119] was introduced in 2015. The JJ Act provides for the selective transfer of 16-18 years old children committing offences punishable with minimum imprisonment of seven years to be tried as adults and to be punished with adult punishment. Rape is included among one of such offences.[120]

In the Nirbhaya case[121], one of the accused was a juvenile. He was equally criminally responsible for the same act. However, he was released because he was a juvenile while he committed the crime. Certain amendments took place in the juvenile justice act 2015 which are as follows-

Firstly, the Juvenile Justice Act divided crimes into three categories such as petty offences, serious offences and heinous offences.

Secondly, a person who commits a serious crime at age 16 is considered as an adult.

Thirdly, "anyone who forces or provides alcohol, drugs, or other intoxicants to a minor faces a maximum sentence of seven years in prison and a fine of one lakh, among other penalties."[122]

Landmark Rape Cases in India

Both the Indian government and the police in India are becoming increasingly concerned about the rising number of rape incidents in the country. In recent years, the city of Delhi in particular has been the location that has reported the highest number of rape cases. According to several sources, the number of rapes that were brought to public attention increased steadily between the years 1990 and 2008. Only in 2011, there were 24,206 cases of rape that were reported in India, and this information comes from the National Crime Records Bureau. Shockingly, sources suggest that a new instance of rape is reported every 20 minutes in the country. Unfortunately, there are

[118] Supra note 43.
[119] Juvenile Justice (Care and Protection of Children) Act, 2015.
[120] Supra note 43.
[121] Mukesh and Anr v State of NCT Delhi and Ors (2017) 6 SCC 1 (SC).
[122] Supra note 106.

many cases where girls and women are subjected to molestation and rape, but only a small percentage of these cases receive justice.

"Aruna Shanbaug Case"[123]

The sexual assault of a 16-year-old female nurse at a Hospital in 1973 caused widespread shock and astonishment across the country. On November 27 of that year, KEM Hospital nurse Aruna Shanbaug was the victim of an assault that included both sexual and physical violence.

It was determined that the accused, Sohanlal Bhartha Walmiki, had been motivated to commit the awful deed because he resented being ordered around by Aruna and called up for his misdeeds. This had been the driving force behind the accused's decision to commit the horrific deed. After her shift, as she was getting ready to leave, he put a dog collar around her neck and proceeded to rape and sexually assault her. And it got to the point where Aruna was completely rendered speechless.

She was unable to talk when Walmiki suffocated her because the oxygen flow to some portions of her brain was interrupted. In addition, she developed cortical blindness, lost the capacity to regulate her muscles and her limbs, and experienced an emotional handicap that showed itself as inappropriate fits of laughing or yelling. She had lost most of her mental abilities, including her memory. Aruna is being tenderly cared for by nurses and physicians at KEM Hospital while she remained in a state of semi-conscious limbo. She was confined to a bed all the time, curled up like an ungainly foetus. She has since vanished.

Mathura Rape Case[124]

On March 26, 1972, two police officers named Tukaram and Ganpat worked at the Chandrapur police station in the Indian state of Maharashtra. They sexually assaulted a young tribal lady named Mathura, who was approximately 16 years old at the time. After recording statements from all involved parties, the accused detained Mathura for further "inquiries." However, they took her into the bathroom and raped her under the threat of her life and the lives of her family. Ganpat committed the crime of rape on her when Tukaram was too intoxicated to do it himself while he was fondling her privates.

---

[123] Common Cause (A Regd. Society) v Union of India, (2011) 4 SCC 1.
[124] Supra note 97.

Her brother started shouting at the police station when Mathura did not return from the station after they had waited for her there. This caused a mob to gather around the station. When Mathura was finally allowed to leave the police station, she reported that she had been sexually assaulted there. Her family members and other witnesses raised the alarm, and a formal report was submitted. Semen was found on Mathura's clothing and her hymen was ruptured, it was a simple matter to prove that she was not a virgin according to the two-finger rule, which was prevalent at that time period. The doctor who examined Mathura put her age somewhere between 14 and 16 years old based on her physical examination. When the case was finally brought before the session court, the judge found in favour of the defendant and noted that the "claimed intercourse was a peaceful affair" on June 1, 1974. This caused the case to be dismissed.[125]

During Mathura's testimony, she stated that she screamed when Ganpat touched her hand. However, the judge disputed her claims, asserting that her cries and alarms were fabricated. The Chief Justice further argued that if Mathura was indeed accompanied by her brother, she should have resisted Ganpat's advances. These verdicts exemplify the prevailing attitudes of the time, which unfairly categorized women who engaged in premarital sex as morally loose and consequently deemed them incapable of being victims of sexual assault.

Following the dismissal of Mathura's case and the acquittal of the two individuals by the Supreme Court, a group of lawyers, namely Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar, and Lotika Sarkar, voiced their opposition. On September 16, 1979, they jointly composed a letter directed to the CJI, with the intention of bringing judicial focus and initiating public discussion on the Court's ruling in the “Tukaram v State of Maharashtra.”[126]

The advocates strongly disagreed with the learned Judge's assertion that the semen on victims’s clothing could have originated from Ganpat, the individual with whom she had sexual contact. The judge framed the encounter as consensual, implying that it was a willing relationship. Additionally, the judge suggested that the semen discovered on Ganpat's clothing could have resulted from him having sex with other individuals besides Mathura. The open letter criticized this judgment, condemning it as an

[125] Supra note 1.
[126] Tukaram and Another v. State of Maharashtra [1979] 2 SCC 143.

extraordinary action that neglected the rights and dignity of women as enshrined in the Constitution of India. Despite having given her statement and with permission granted for her friends and family to leave, Mathura was instructed to remain in the police station.[127]

The Court revised the Criminal Law to incorporate new rights in situations of rape committed while a person was in custody in 1983. Women in India are protected from jail rape because to the historic Mathura Case. Both Tukaram and Ganpat were found guilty in this case. It's noteworthy to notice how movements and large-scale protests enabled change in the 1980s. In addition, feminist organisations were only starting to take off at the time. The Mathura case had a direct impact on the forum against rape. The movement was responsible for drawing media attention to the reality of jurisdiction.[128]

“Imrana Rape Case”[129]

A Muslim woman in Muzaffarnagar suffered sexual abuse at the hands of her father-in-law on June 6, 2005. As a result of the Sharia's prohibition on or opposition to father and son sexual relationships, the local elders subsequently pronounced Imrana and her husband's marriage to be null and void. This caused a national uproar since several people claimed that the case should have been handled as rape rather than adultery. A rape and intimidation case were reported to the police under sections 376 and 506. He received a penalty of 3000 rupees in fines and ten years in prison.

India has made every effort to deal with the offence of rape and its after effects. The different types of rape proves that the offence of rape is growing in different spheres. It is quite pertinent that the word ‘consent’ is not understood. The study of a few cases has showed that laws have been proved inadequate. However, the inadequacy could be seen in the anti-rape laws before the “Criminal Law Amendment Act 2013”. “The Amendment Act 2013 has brought drastic changes to enhance the protection of victims and ensure their access to justice.” The amendments recognized various aspects related to rape, including the age of consent, marital rape, and the evidentiary burden. In recent

[127] Payal Rana, ‘The Capital Punishment in Context of Rape: A Study of Nirbhaya case’ (LL.M, Swami Vivekananda Subharti University 2019).
[128] Ibid.
[129] ‘Imrana rape case’ (Wikipedia) https://en.wikipedia.org/wiki/Imrana_rape_case accessed on 2 July 2023.

years, India has witnessed a great emphasis on the prevention of rape through awareness campaigns, education programs, and social initiatives. Additionally, the judiciary has taken steps to expedite rape trials and ensure swifter justice for victims.

It can be concluded with the observations that despite these developments in the recent years, challenges still persist in effectively addressing and preventing rape in India.

CHAPTER 4

JUDICIAL APPROACH TOWARDS DEATH PENALTY FOR RAPE IN INDIA

Meaning and Concept of Death Penalty

India, as a rapidly developing nation, often receives recognition for its high incidence of crime and increasing crime rates. Capital punishment, also known as the death penalty, refers to the act of executing an individual who has been convicted of a criminal offense and sentenced to death by a court of law.[130] In legal, criminological, and psychological contexts, a capital sentence denotes a death sentence, representing the legal process by which the state carries out the punishment for a wrongdoing.[131] It is worth noting that not all imposed death penalties result in actual execution, as there is the possibility of a commutation to life imprisonment. The terms "death sentence" and "capital punishment" are sometimes used interchangeably due to this potential for commutation. The most severe and abhorrent crimes, such as murder, rape, and offenses against the state or nation, are among those that can carry the death penalty.[132]

Every punishment is typically founded on two guiding principles: first, that the offender should suffer as a result of their actions, and second, that the punishment for a crime inspires fear in both the offender and the public. Capital punishment is said to have a deterrent effect. Like any other penalties, capital punishment is intended to deter future crime. The death penalty is awarded for egregious crimes against humanity.[133] In India, death penalty is recognized as a punishment under the Indian legal system. The Indian Penal Code (IPC) has a provision for types of punishments wherein death sentence is one of them.

However, capital punishment is also regarded to be a breach of the rights that India's Constitution guarantees in article 21. "No one shall be deprived of his or her personal liberty unless in conformity with stipulated by law," states article 21.[134] As a result, the

---

[130] Shreya Gautam, 'Death Penalty for rape- Does it actually deter?' 2 2 Indian Journal of Integrated Research in Law chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ijirl.com/wp-content/uploads/2022/03/DEATH-PENALTY-FOR-RAPE-%E2%80%93-DOES-IT-ACTUALLY-DETER.pdf date accessed on 14 May 2023.
[131] Supra note 1.
[132] Supra note 56
[133] Supra note 56
[134] Constitution of India, art 21.

UN has also looked at the topic of "Abolition of the Death Penalty," which it regards as a violation of human rights. The UN places more emphasis on the reformative than the deterrent theories of punishment.[135]

J. V. R. Krishna Iyer said in a case that the "special reason" had to be related to the criminal rather than the crime. Even though the crime was horrible, the criminal might not have deserved to die. If the court decides that life in prison is not enough punishment for the crime, it may impose a death sentence based on the facts of the case.[136]

Evolution of Death Penalty in India

From a historical perspective, King Hammurabi of Babylon was the first to formally implement the death penalty into criminal legislation in the 18th century. The Hammurabi lists 25 crimes that carry the death sentence, including theft. The death sentence is mentioned as a punishment in the “Hittite code from the 14th century B.C.,” but only for the most heinous crimes. The only authorised punishment under the Draconian Code of Athens era in the seventh century B.C. was almost always the death penalty. Officials of the Virginia government recorded the first execution of a death sentence during the colonial era in the United States in 1608 for a rumoured conspiracy to betray the Spanish with the British. Additionally, only violent offences like treason, murder, larceny, rape, and arson carried the death sentence in England circa 1500. The death penalty was used similarly by the Greeks and Romans for a number of crimes.[137]

In India, the need for death sentence has been mentioned in Ramayana and Mahabharata. The death penalty has been an accepted punishment since the ancient times. Over the centuries, kings of different kingdoms have always used it to deliver justice in India. Death penalty is not utilized to deliver justice in India, but also in the majority of modern countries. The Mauryan dynasty adopted the "eye for an eye, a hand for a hand," and similar retributive theories of retribution. According to Kautilya- “Punishment was the universal means of ensuring public security.” In different kingdoms during ancient India, Various punishments, including the death penalty, were meted out by the monarchs, including head-chopping and dragging the victim's body behind a horse till death.

[135] Supra note 131.
[136] Ibid.
[137] Ibid.

The idea of the death penalty is also present in Islamic law. According to Islamic law, the primary goal of the death penalty is to dissuade society from engaging in specific behaviours that are prohibited by Prophet Mohammad.[138]

The penal code of 1861 was implemented by India when it gained its independence in 1947. This code featured the use of the death penalty for those found guilty of murder. Several members of the Constituent Assembly pushed for the elimination of the death sentence throughout the period of time between 1947 and 1949, when the Constitution was being written up. On the other hand, this particular provision was not included in the final draught of the constitution. In the succeeding twenty years, a bill that would have done away with the death penalty was brought before both houses of parliament, but it was ultimately unsuccessful in gaining passage. According to available records, between 1950 and 1980, there were approximately 3,000 to 4,000 executions carried out in India.[139] In the Bachhan Singh case, the apex court of India established the principle that the capital punishment should be reserved for the "rarest of rare" cases. However, there remains ambiguity regarding the precise definition of what qualifies as a "rarest of rare" case.[140]

Constitutionality of the Death Penalty in India

The Constitution of India incorporates elements from various sources, including the American, British, and Japanese constitutions. The fundamental clause in the Indian constitution that upholds the “right to life” draws inspiration from both the American and Japanese constitutions. Within the Indian constitution, “the right to life is recognized as an inherent and fundamental right that cannot be taken away.”[141] Article 21 of the Indian Constitution guarantees the fundamental right to life, prohibiting the state from depriving individuals of their life or restricting their liberty without just cause. This constitutional provision has often been invoked to challenge the imposition of the capital punishment in India. The IPC includes several offenses for which the death sentence can be imposed, such as murder, murder with coercion, aiding a rebellion against the state, and waging war against the government. Additionally, the

[138] Payal Rana, ‘The Capital Punishment in Context of Rape: A Study of Nirbhaya case’ (LL.M, Swami Vivekananda Subharti University 2019).
[139] Supra note 1.
[140] Bachan Singh v. State of Punjab, AIR 1980 SC 898
[141] Supra note 122.

NDPS Act, POCSO Act, and anti-terror statutes also provide for the possibility of the death penalty as a punishment.

Since it was initially incorporated into the Indian Penal Code, the idea of the death sentence as a punishment has remained a discretionary one. Until 1955 the Cr.P.C. required reasons to be recorded if a capital crime was not dealt a death sentence. However, upon the adoption of the new Code of Criminal Procedure in 1973, the courts were required to specify "special reasons" as to why they are imposing the death penalty. This too was not able to wipe away the doubts that a subjective element exists in awarding the sentence of death, leading to several cases challenging the constitutional validity of the death sentence.

The concept of the capital punishment has long faced challenges, and the Jagmohan Singh case marked the first instance of questioning its constitutionality in India. In this case, the appellant put forth three primary arguments against the application of S 302 of the IPC, which mandates the death penalty. In the first place, it was contended that putting a person to death in violation of the fundamental rights that are granted to all Indian citizens under Articles 19 and 21 makes the death penalty an irrational form of punishment that does not advance the public interest. Additionally, it was highlighted that there exists significant judicial discretion that lacks guidance and may rely solely on a judge's personal inclination towards punishment in a particular case. In addition, it was highlighted that there are no general standards for applying the death penalty to each particular offence, which was a major point of contention. However, the appellant's claims were rejected by the Hon'ble Court, and the Constitutionality of the Death Penalty was affirmed. The Court stated that the death penalty is constitutional since it is subject to reasonable constraints, and it does not infringe upon any basic rights.[142] Following that, in a different case, it was emphasised that the death sentence is in violation of Articles 14, 19, and 21 of the Indian Constitution, and that its implementation needs to be rigorously studied. It was also emphasised that there needs to be a crystal-clear and extraordinary basis for imposing the death penalty in a particular case, and that this logic needs to be properly documented.[143]

[142] Supra Note 13.

[143] Ashwathi Shyam, 'Does Death Deter? A Critical Analysis of the need for Capital Punishment in India' (LL.M dissertation, The National university of Advanced Legal Studies 2021).

The case that was discussed before was the one that initiated the initial challenge to the validity of India's use of the death sentence. In addition, the topic of the use of the death penalty in India has been the subject of exhaustive investigation and analysis by the Law Commission of India. In its report, the commission admitted that there is no definitive argument for or against the death penalty that can definitively end the discussion. This was one of the points that was acknowledged by the commission. As a result, the commission was unable to zero in on a particular point and consider it separately. However, it took into consideration various factors, including the diversity of opinions, societal dynamics in India, public sentiment, and the prevailing law and order situation. Following extensive debate, the commission reached the conclusion that, at that point in time, India cannot afford to take the risk of experimenting with abolition of the death sentence and recommended that it be maintained. The 262nd Law Commission Report,[144] issued in 2015, addressed various concerns related to the death penalty. The analysis underlined the fact that the death penalty does not successfully function as a deterrence, which runs counter to the widespread notion that it does. In addition, the commission underlined that putting an excessive emphasis on the death sentence as a measure of revenge for the victim weakens the rehabilitative parts of the criminal justice system. This was one of the main points that was brought up by the commission.[145]

The principal cases on when the death penalty should be imposed are Bachan Singh v. State of Punjab[146] and Machhi Singh v. State of Punjab[147] . In Bachhan Singh case,[148] "the Supreme Court of India, reversed its earlier decision and determined that the death penalty is not an unreasonable alternative punishment for murder, thereby upholding its constitutionality under Articles 14, 19, and 21 of the Indian Constitution." This case aimed to establish a framework to guide judicial discretion in capital sentencing. It marked the first attempt to provide guidance for the exercise of such discretion. The concept of "rarest of rare cases" was formulated, where the capital punishment would only be imposed under exceptional conditions. The court identified two criteria to identify these "rarest of rare cases": 1) when the offender carries a disproportionate

[144] Law Commission of India, Death Penalty (Law Com No. 262, 2015).
[145] Ashwathi Shyam, 'Does Death Deter? A Critical Analysis of the need for Capital Punishment in India' (LL.M dissertation, The National university of Advanced Legal Studies 2021).
[146] Bachan Singh v. State of Punjab, AIR 1980 SC 898.
[147] Machhi Singh v. State of Punjab, (1983) 3 SCC 470.
[148] Supra note 135.

share of blame for the committed murder, and 2) when the murder exhibits extreme depravity and brutality. When deciding whether or not to impose the death penalty, the court took into account the circumstances that were regarded to be either aggravating or mitigating. A defendant's mental or emotional state, their age (whether they were young or old), the possibility that they could change their ways, and the amount of pressure they were under were all considered mitigating considerations. Aggravating factors included premeditated and cold-blooded murder, the vulnerability of the victim, the gruesome nature of the crime, and the shock it caused.[149]

The Supreme Court made a significant ruling in the case of "Mithu v. State of Punjab"[150] on the imposition of the capital punishment. The ruling in this case holds significant importance as it declared Section 303 of the IPC, which mandated the death penalty for repeat offenders who have already been sentenced to imprisonment, as unconstitutional and nullified it. In addition, the court came to the conclusion that Articles 14 and 21 of the Indian Constitution were breached due to the mandatory character of the death punishment as outlined in Section 303.

The "Machhi Singh v. State of Punjab"[151] summarized the case of "Bachhan Singh v. State of Punjab."[152] The Supreme Court of India, in the aforementioned case, elaborated on the doctrine of the "rarest of rare" cases and provided broad guidelines for determining the exceptional circumstances in which the death penalty should be imposed. This was done in order to expand upon the doctrine of the "rarest of rare" cases. The court considered various factors, including the nature of the offense, the specific circumstances of the criminal, and both aggravating and mitigating factors. These guidelines were aimed at ensuring a comprehensive assessment of the case and enabling a balanced decision regarding the imposition of the death sentence.[153]

In his judgement, Justice M.P. Thakkar highlighted five elements that had to be taken into consideration while determining whether or not to apply the death penalty as a form of punishment for the person who is being accused.

---

[149] Jagriti Sanghi, 'Landmark cases on death penalty in India' (iPleaders, 14 January 2022) https://blog.ipleaders.in/landmark-cases-on-death-penalty-in-india/#Shabnam_v_Union_of_India_2015 accessed on 2 July 2023.
[150] Mithu v. State of Punjab (1983) 2 SCC 277.
[151] Supra note 136.
[152] Supra note 135.
[153] Supra note 13.

"Manner of commission of murder"

It refers to situations where the offender conducts murder in a way that is particularly gruesome, evil, and wicked in order to arouse the wrath of a particular community. Examples of such situations include when the accused sets a house on fire in order to roast several people alive, when the victim was exposed to cruel and barbaric torture before passing away, when the victim's body is sliced up and disposed of, etc.

Motive for commission

The offender may be sentenced to death if the court decides that the murder was committed for egregiously evil and inhumane reasons, which is one of the requirements for the death penalty. Murder committed by a hired murderer for money, for inheriting a parent's estate, or for betraying the country are examples of such situations.

"Anti-social nature of crime"

This pertains to cases where marginalized communities, specifically Scheduled Castes and Scheduled Tribes, are targeted in the act of murder. The motive behind such murders is to victimize these communities as a whole, rather than for personal reasons. Another aspect is targeting individuals based on their gender, with the intention of exerting dominance. Such instances can be observed in cases of dowry deaths, sati, or when sexual offenses against women are committed with the aim of asserting control over them.

Magnitude of crime

It can be said that a crime is of big magnitude if it targets an area or community, several victims, all family members, or multiple victims. Multiple fatalities from a single terrorist act are regarded as crimes of high gravity.

"Personality of victim of murder"

When determining the appropriate sentence, the court is required to take into account these mitigating factors pertaining to the victim's personality. These factors must be taken into consideration regardless of whether the victim was a vulnerable woman, an innocent child, a person who is physically or mentally disabled, an elderly person, the victim's guardian, or a social or political figure who was murdered for political reasons.

Doctrine of “rarest of rare” cases

The Gandhian theory, "hate the crime not the criminal," is the foundation of the notion of "rarest of rare" cases, and this quotation defines the relevance and scope of the teaching quite well. According to the court's interpretation, the death sentence is only used in extremely rare circumstances; the alternative punishment of life in prison is given in most murder cases. The majority of people on death row are either convicted of rape, murder, or acts of terrorism.[154]

An analysis of the cases that have been adjudicated highlights a notable aspect of the death penalty, namely its tendency to exhibit a class bias or a bias towards a particular socioeconomic group. It becomes evident that the imposition of the death sentence disproportionately impacts individuals from impoverished and marginalized backgrounds.

As a direct consequence of this, the "rarest of rare" theory came into being. This doctrine now functions as a standard for determining when the death penalty should be applied. The Supreme Court acknowledged, in the case of Bachan Singh, that every case is different and that cases should be determined based on their own particular set of facts and circumstances. As a direct consequence of this, the Court abstained from classifying the particular kinds of cases that could legitimately result in the imposition of the death penalty. Instead, the courts have been instructed to consider legal principles that are derived from a comprehensive analysis of precedents in order to determine whether or not a case meets the criteria for being considered "the rarest of the rare." Particular attention should be paid to the presence of aggravating and mitigating factors. Thus, Bachan Singh[155] endorsed the two components of sentence that should be both unique and moral. At the heart of this doctrine lies the irreversible nature of the death penalty, prompting the courts to establish it as one of the most stringent and compelling standards within criminal law. The introduction of the "rarest of rare" principle marked the beginning of constitutional limitations on the application of the death penalty in India.[156]

---

[154] Supra note 1.
[155] Ibid.
[156] Ashwathi Shyam, ‘Does Death Deter? A Critical Analysis of the need for Capital Punishment in India’ (LL.M dissertation, The National university of Advanced Legal Studies 2021).

Application of doctrine of “rarest of rare” in rape cases

The doctrine of the "rarest of rare" has found application in several rape cases, showcasing its evolving nature. Over time, the category of cases considered as the "rarest of rare" has expanded. Certain cases are identified and classified as falling within this category through careful examination. It is important to note that the doctrine itself does not possess a precise definition but rather relies on the collective sense of outrage and violation experienced by society.

Priyadarshini Mattoo Rape Case[157]

“Though I know he is the man who committed the crime, I acquit him, giving the benefit of doubt.”

While acquitting the suspects in the Priyadarshini Mattoo case, Additional Sessions Judge G.P. Thareja made this shocking statement, which is indicative of the appalling status of our criminal justice system. Santosh Kumar Singh, the son of former senior IPS officer J.P. Singh, was the reason of a miscarriage of justice in this case. As political influence and judicial corruption have grown increasingly pervasive over time, the entire Indian judicial system has been distorted.

Priyadarshini Mattoo, a law student who was 25 years old at the time of her death, was located in her home in New Delhi, India, on the 23rd of January, 1996, with no sign of life. Tragically, she had been a victim of both murder and rape. After completing her education in Srinagar, Priyadarshini moved with her family to Jammu. Subsequently, she enrolled in the LL.B. program at Delhi University, having previously obtained a B. Com degree from Jammu. Prior to the heinous incident, she had filed multiple complaints against Santosh Kumar Singh, who was also a student at the Faculty of Law, University of Delhi. Priyadarshini accused Singh of harassment, intimidation, and stalking.[158]

In spite of the fact that the dead made numerous accusations against the accused, the deceased's efforts to stop the accused's harassment turned out to be completely fruitless. The accused continued to harass the deceased at the Campus Law Centre on November

---

[157] State of Delhi v Santosh Kumar Singh (2010) 7 SCC 263.
[158] Supra note 1.

6, 1995, despite having made two previous promises in response to complaints lodged by the deceased at R.K. Puram and Vasant Kunj Police Stations on February 25 and August 16, 1995, respectively. The complaints were lodged on February 25 and August 16, 1995, respectively. After that, a First Information Report (FIR) was lodged against him at the Maurice Nagar Police Station, invoking section 354 of the Indian Penal Code (IPC), 1860. This resulted in his detention, and he was later released on a personal bail. In addition, on October 27, 1995, the dead person had filed a complaint about the continued harassment with the Dean of the Faculty of Law and Campus Law Centre. The complaint included specific details about the behaviour in question. The offender was counselled to refrain from acting in this manner. Because of the gravity of the situation, the deceased was summoned to a meeting with the Deputy Commissioner of Police for the South West, to whom she reported the behaviour of the accused. This meeting took place after the accused had been arrested. As a direct consequence of this, a Personal Security Officer has been assigned to her for the purpose of ensuring her safety.

Because of these, on October 30, 1995, the distressed accused made baseless accusations to the Delhi University administration about the dead alleging that she was concurrently enrolled in two courses. As a result, the university delayed the deceased's results and sent her a show cause notice, to which she was required to respond as soon as possible. The deceased person presented her reason, indicating that the allegations made against her were untrue because she had already finished her Master of Commerce in 1991. She further asserted that the accused, Vasant Kunj, had been harassing her for the past 1.5 years. On the fateful day of the murder, accused visited the deceased's residence located in Vasant Kunj while she was alone. The body of Priyadarshini Mattoo, who had been dead for some time, was found by Rajinder Singh, the security guard, when he came at the residence of the deceased person and looked underneath the double bed. The Vasant Kunj Police Station responded to his request and filed a first information report (FIR) in accordance with Section 302 of the Indian Penal Code (IPC). Rajeshwari Mattoo, the mother of the dead, gave a statement that was recorded in accordance with Section 161 of the Criminal Procedure Code. In the statement, she

indicated concerns regarding the accused, which led to the inclusion of the accused in the investigation.[159]

In the Trial Court

The body of Priyadarshini Mattoo, who had been dead for some time, was found by Rajinder Singh, the security guard, when he came at the residence of the deceased person and looked underneath the double bed. The Vasant Kunj Police Station responded to his request and filed a first information report (FIR) in accordance with Section 302 of the Indian Penal Code (IPC). Rajeshwari Mattoo, the mother of the dead, gave a statement that was recorded in accordance with Section 161 of the Criminal Procedure Code. In the statement, she indicated concerns regarding the accused, which led to the inclusion of the accused in the investigation. As per legal requirements, the accused contested the charges. The case was presented before S.C. Mittal, the then-additional sessions judge, who decided to proceed with the charges. The accused entered a not-guilty plea, and the proceedings of the trial began on August 11, 1997. Approximately fifty witnesses were called to the stand during the course of the trial, which began on January 3, 1998. The court procedures took place on that day. In the end, on December 3, 1999, the judge who presided over the case decided to give the accused the benefit of the doubt and acquit him. Taking into account all of the circumstantial and documentary evidence that was supplied by the prosecution, the judge stated that the CBI had behaved in an unfair manner and had failed to present the case in an appropriate manner. Due to the fact that it was discovered to be fabricated, the DNA report that was given by the CBI was ruled inadmissible in court in accordance with Section 45 of the Indian Evidence Act of 1872. This was one of the observations that was made.[160]

In the High Court

Everyone was taken aback by the ruling of the lower court, particularly because the court appeared to be convinced that the evidence presented by the prosecution was indisputable. In point of fact, the trial court made it very clear that the DNA fingerprinting data unequivocally demonstrated the accused person's culpability in the

[159] Payal Rana, 'The Capital Punishment in Context of Rape: A Study of Nirbhaya case' (LL.M, Swami Vivekananda Subharti University 2019).
[160] Ibid.

crime. This blatant contradiction made the verdict inherently flawed. Consequently, on February 29, 2000, the CBI filed an appeal with the Delhi High Court, highlighting the erroneous judgment and the subsequent public outrage it had sparked. However, it took six long years for the High Court to commence regular hearings on the case.

The High Court expressed its deep disappointment with the verdict delivered by G.P. Thareja, asserting that the trial court had severely undermined the principles of justice by acquitting the accused, despite being convinced that there was no reasonable doubt regarding the prosecution's case.

Justice R.S. Sodhi and P.K. Bhasin, in their commendation, praised the Central Bureau of Investigation (CBI) for its presentation of compelling and irrefutable evidence, which conclusively established Santosh Kumar Singh's guilt. This commendation came after the Delhi High Court overturned the trial court's judgment on October 17, 2006. The High Court, having found the accused guilty of offenses covered by Sections 302 and 376 of the IPC, subsequently sentenced him to death on October 30, 2006.[161]

In the Supreme Court

Santosh Kumar Singh, the defendant, lodged an appeal with the Supreme Court on February 19, 2007, seeking to overturn the Delhi High Court's order for his execution. In the 14-year-old case of the rape and murder of Priyadarshini Mattoo, a bench comprising Justices H.S. Bedi and C.K. Prasad pronounced Santosh Kumar Singh guilty on October 6, 2010. However, because of a number of mitigating factors in the appellant's case, the death sentence was converted to a sentence of life in prison rather than being carried out. The judge and the other members of the panel came to the conclusion that Santosh Kumar Singh should be given a life sentence rather than the death punishment because they believed that the weight of the evidence pointed in Singh's favour.

The Supreme Court emphasised that when confronted with the difficult decision of selecting a sentence between the death penalty and life imprisonment, it is necessary to explore the possibility of imposing a less severe punishment. In situations like these, it is important to give serious consideration to both the aggravating and mitigating factors. An impressionable junior college LLB student was the victim of the horrible acts of

---

[161] Payal Rana, 'The Capital Punishment in Context of Rape: A Study of Nirbhaya case' (LL.M, Swami Vivekananda Subharti University 2019).

rape and murder in this particular case, which the appellant was responsible for committing. These acts were motivated by his inability to accept her rejection of his sexual advances, which he had persistently harassed her with. Additionally, after subjecting her to rape, he inflicted 19 injuries upon her. The Delhi High Court, recognizing the gravity of the crimes, overturned the trial court's acquittal and sentenced the appellant to death.[162]

“The Nirbhaya Case”[163]

The accused in this case treated a woman who they referred to as "Nirbhaya" as if she were an item and frequently crossed the line into inhumane behaviour against her. On December 16, 2012, a woman who was 23 years old was brutally raped in a bus when it was travelling through Delhi. The incident took place in the vehicle. Following the viewing of a movie, she and her buddy boarded an unscheduled bus at the bus stop. Along with them on the bus were six other male passengers, in addition to the driver. However, after some time had passed, Nirbhaya's companion realised that the bus was going in the wrong direction. Her friend began to suspect something was wrong and pleaded with the bus driver to pull over, but he did not comply with their request. There were six men who were accused of committing the crime: “Ram Singh, the main accused bus driver (age 35), his brother Mukesh Singh (age 29), Vinay Sharma, an assistant at a gym (age 18), Pawan Gupta, a fruit vendor (age 19), Akshay Thakur, an unemployed man (age 28), and Mohammed Afroz, a juvenile at the time of the crime who was called "Raju" for anonymity.” Nirbhaya was sexually molested and brutally beaten by her attackers. Nirbhaya's male friend, who was trying to protect her, was also severely beaten by the individuals who attacked Nirbhaya.[164]

After three hours had passed, a PCR car located Nirbhaya's body along with that of her friend, who had been injured, buried beneath a flyover. The vehicle then took both victims directly to the hospital. Three suspects, including the primary suspect Ram Singh, were taken into custody on December 17, while Nirbhaya and her friend were receiving medical treatment. On the 18th, there was yet another arrest made. However,

[162] Payal Rana, ‘The Capital Punishment in Context of Rape: A Study of Nirbhaya case’ (LL.M, Swami Vivekananda Subharti University 2019).
[163] Mukesh and Anr v State of NCT Delhi and Ors (2017) 6 SCC 1 (SC).
[164] Supra note 1.

it took three additional days, until December 21, 2012, to locate and apprehend the remaining suspect, who was a young individual involved in the crime.

It was revealed that the same young man was the one who had convinced Nirbhaya to board the bus. In addition to this, he was the one who proposed to the other passengers on the bus that they toss the body down onto the road and then drive over it. Nirbhaya underwent an emergency operation after being raped and having her intestines ripped out of her body. During this time, the male companion also needed medical assistance. She was placed on a ventilator, and her health was described as serious but stable at the time of the diagnosis. Nirbhaya's condition, on the other hand, deteriorated very quickly; she had an intestinal haemorrhage and a cardiac arrest, which required her to be airlifted to Mount Elizabeth Hospital in Singapore on December 26. The specialists have confirmed the failure of multiple organs as well as additional abdominal haemorrhage. Nirbhaya passed suddenly in the early hours of December 29 due to multiple organ failure, which ultimately led to her passing.

As soon as the gang rape became public knowledge, protests broke out in Delhi and around the nation. The incident had such an impact on Delhi's population that authorities had to use tear gas to disperse the throng. The Indian media's loud cry in the early weeks was "Hang the rapists." The public's combined horror and rage could only be soothed by the death penalty. Within a few days, the episode was a worldwide phenomenon. Celebrities were forced to condemn the incident on social media sites like Facebook and Twitter and launch independent campaigns to stop crimes against women.[165]

Following the shocking rape incident and the widespread public outrage it generated, two notable commissions were established in the political sphere: “the Justice Verma Committee and the Usha Mehra Committee.” These commissions were tasked with assessing public sentiment regarding potential changes to the existing anti-rape legislation. The Criminal Law (Amendment) Act 2013 was passed into law as a direct result of the Verma Committee Report, which was published three months after the rape. This all-encompassing legislation resulted in changes to a number of other laws, including the Indian Evidence Act and the Code of Criminal Procedure, amongst others.

[165] Payal Rana, ‘The Capital Punishment in Context of Rape: A Study of Nirbhaya case’ (LL.M, Swami Vivekananda Subharti University 2019).

In addition, the government started the Nirbhaya Fund project with the goal of making it safer for women to use public transit. This was done in an effort to prevent sexual assaults. The purpose of this effort is to equip significant cities across the country with emergency buttons, GPS technology, and CCTV systems.

Because it violated the communal conscience, the Nirbhaya case falls under the category of crimes that are among the "rarest of the rare." The conclusion that the case meets the criteria for the "rarest of the rare" results in the death penalty being applied as an unusual punishment.[166]

"Nirmal Singh & others v State of Haryana"[167]

In this case, accused Dharampal and Nirmal were found guilty of killing five people based on the testimony of two eyewitnesses. In the initial case against the accused, he was found guilty of raping Poonam, which resulted in a ten-year prison sentence. However, he wanted to appeal, and while doing so, he gave gifts to all of Poonam's family members, whose testimony was used to support Dharampal's conviction. But even then, he murdered all five members of Poonam's family from Khulhari, and the honourable court gave him the death penalty because such a ruthless and violent murder fits the "rarest of rare case" doctrine.[168]

"Sushil Murmu v State of Jharkhand"[169]

The Supreme Court reaffirmed the "rarest and rare case" doctrine in this instance and declared that "death sentence must be awarded" when the "collective conscience of the community is shocked and it will allow the holders of the judicial power centre to inflict death penalty regardless of their personal opinion as regards desirability or otherwise of retaining death penalty."[170]

Based on the cases that have come before, it is possible to deduce that the doctrine of the rarest of rare cases has been applied to cases that are considered to be in the same category. This has occurred depending on the various aspects of the case, including the facts, the circumstances, and the aggravating and mitigating factors.

[166] Payal Rana, 'The Capital Punishment in Context of Rape: A Study of Nirbhaya case' (LL.M, Swami Vivekananda Subharti University 2019).
[167].Nirmal Singh and Ors v State of Haryana (2013) A SCC 484 (SC).
[168] Supra note 1.
[169] Sushil Murmu v State of Jharkhand (2020) 2 SSC 739 (SC).
[170] Ibid.

CHAPTER 5

CONCLUSION AND SUGGESTIONS

Conclusion and Findings of the Study

The study on death penalty for rape in India has explored the legal framework and its implications for addressing rape. The rape laws in India have undergone significant changes and amendments over time, reflecting the country's commitment towards addressing the severity of the offence of rape. The amendments that have been brought to the rape laws introduced stricter penalties, including longer prison sentences and in some cases, death penalty for certain aggravated rape offences. Along with the penalties, it has introduced an expanded definition of rape. The phrase "any part of the body of such women" might be interpreted to mean anything other than the vagina, urethra, mouth, or anus, which are the only parts of the body that can potentially be penetrated for sexual purposes. Moreover, fast track courts were established to expedite rape trials and ensure smooth justice. It aimed to address the issue of lengthy court proceedings. The Nirbhaya case was dealt in a fast-track court and all the POCSO cases are dealt in fast-track courts. However, there are still challenges such as the availability of adequate resources and the backlog of cases which need to be addressed.

The Nirbhaya case which shook the entire country brought changes in the criminal justice in India. It shown that the ineffectiveness of the current legal framework non addressing the issue of escalating crimes against women. The main causes of this are that the criminal code does not specifically address many activities that constitute crimes, the penalties are insufficient to undo the harm done, and there are severe flaws in how the law is put into practise. The current situation was not justified by the penal code's antiquated provisions for rape and outraged modesty. However, the judgments show that punishments are typically still set at 7 years, and in some cases, even reduced given the "peculiar facts and circumstances of the case." The 1983 Amendment Act is supposed to address the increasing levels of violence that unquestionably do not meet the requirements for the introduction of life sentence for aggravated rape.

The introduction of the mandatory death penalty for rape in India has been an issue that has been contentious and contested, garnering both support and criticism from various

individuals and groups. Those who are in favour of the capital punishment say that it provides victims with justice and serves as a deterrence to would-be offenders. However, it is worth noting that historically, the death penalty has been prescribed for rape and sexual offenses, indicating its early establishment in legal systems. In India, the Indian Penal Code includes death sentence as one of the possible punishments for certain crimes.

Nevertheless, it has been observed that the call for mandatory death sentence for rape is often driven by the misguided notion that rape is akin to the societal death of women. This justification reflects a preconceived belief that a woman's life and honor are intrinsically tied to her sexuality and virginity. Such reasoning contradicts feminist legal theory, which emphasizes that a woman's worth and rights extend beyond her sexual identity. This perspective highlights the oppression faced by women in patriarchal societies and is firmly rejected by feminist organizations worldwide.
Advocating for the death sentence in cases of non-homicidal rape can be seen as reinforcing patriarchal norms that reduce women to societal constructs, perpetuating an act of patriarchal aggression against them.

The introduction of the death sentence for sexual offences served only to prevent future offences by making them punishable by death. However, no study or analysis has been able to demonstrate beyond a reasonable doubt whether the death penalty serves as a deterrence in criminal instances. The rules that recommend or compel the death penalty for any offence are subject to many issues and criticism due to the absence of conclusive data. There is no evidence that can be relied on to support it.

In its 21st report, the Law Commission underscored the fact that the application of the death penalty is highly subjective and prone to arbitrary decision-making. According to the findings of the investigation, the judges who sit on the bench have the ability to exercise their own discretion over whether or not to impose the death penalty or to commute it. The courts' implementation of the "rarest of rare cases" theory, which was established in the Bachhan Singh case, in diverse and inconsistent fashions is the source of this contradiction. This doctrine was established in the case.

Those who support maintaining the death penalty say that it should be done so because it acts as a kind of prevention or deterrence. According to the 35th Report of the Law Commission of India, the major reason for the use of the death sentence is in the fact

that it serves as a deterrence to potential offenders. This viewpoint asserts that the enforcement of capital punishment acts as a deterrent by dissuading potential offenders from committing the crime.

The criminal justice system in India has a relatively low likelihood of punishing any offence, which causes the complainant to feel that they are being severely victimised, leading to the withdrawal of cases, hostile witnesses, and problems with underreporting. If this situation persists, the death sentence provision would be ineffective as a deterrent.

The Justice Verma Committee made a deliberate decision not to recommend the death penalty as a punishment for sexual offenses, including rape and gang rape. The committee concluded that such a penalty would not effectively serve as a deterrent to society. The committee's report emphasized that applying the severe measure of the death sentence in non-homicide cases would not be a progressive step. However, the legislation does provide for the death penalty in cases involving repeat offenders and serious instances of rape, such as those resulting in the victim's death or leaving them in a vegetative state.

The implementation of the death penalty has a long and storied history of being subject to arbitrary interpretation. It is a common argument that giving the death penalty for sexual offences that do not involve homicide is not a data-driven legal answer but rather a reaction to populist popular opinion, which might result in unanticipated legal issues. In the instance of the death penalty, the sentencing framework relies on wide parameters that were established by the Honorable Supreme Court in the Bachan Singh case. This framework is highly imprecise and inconsistent. According to the dissenting opinion written by Justice Bhagwati, the imposition of the death penalty for sexual offences has the potential to further muddy the waters of law. He voiced his worries over the fact that the implementation of the death penalty through judicial discretion lacks structure and leaves room for arbitrary decision-making, both of which are in violation of Article 14 of the Constitution. Numerous reports on the death penalty in India support Justice Bhagwati's viewpoint, highlighting the need for caution in its application.

Suggestions

Based on the findings of the study, below are the suggestions to be taken into account to further enhance the effectiveness of rape laws in India and when discussing the death penalty for rape in India.

1. Strengthening legal frameworks and enforcement

Loopholes still exist in the amendments brought to the legal framework related to rape. Loopholes or shortcomings in the legal framework must be addressed and all kinds of sexual violence are to be adequately covered. It can be primarily fixed by ensuring comprehensive legislation, effective investigation procedures and expediate trials. Enhancing the capacity and training of law enforcement agencies to handle rape cases sensitively and efficiently will also help to ensure effectiveness of the legal framework.

2. Alternatives to capital punishment for rape

Choosing an alternative to the death penalty is often justified by the potential for reform. Life imprisonment, specifically in the form of imprisonment until natural death without the possibility of parole, can serve as an effective substitute. The guy who had been sentenced to death for the rape and murder of a child who was seven years old had his sentence recently commuted to life in prison by the Supreme Court. Similarly, life imprisonment with the possibility of release may be imposed in certain cases.

Advocates of life imprisonment as the highest penalty put forth several arguments, including deterrence, retribution, restoration, and incapacitation to prevent further offenses and safeguard public welfare. Additionally, some countries, such as Brazil, Croatia, El Salvador, Nicaragua, Norway, Portugal, and Venezuela, have abolished the death penalty. However, inmates in these countries may still receive lengthy prison sentences that exceed the minimum terms imposed on individuals sentenced to life imprisonment in other jurisdictions.

Another variation of life imprisonment is long-term imprisonment, where the convict is incarcerated for a fixed number of years, such as 40 years in Croatia, before being released either with or without additional restrictions.

3. Reformation and rehabilitation of offenders

Reformation and rehabilitation are rarely considered as effective corrective procedures and are generally rejected. Currently, inmates and offenders have access to open prisons, probation, parole, and other options as remedial methods. For a variety of reasons, reformation and rehabilitation must be viewed as useful and efficient tactics for criminals.

a) Many criminals are not equipped with the social skills necessary to make a positive contribution to society once they are released from jail. It can be challenging and troublesome for them. Employment opportunities also become difficult for them.
b) Oftentimes, after being set free, they are abandoned and given minimal assistance.
c) In contrast to what should be the case, offenders often show increased anger and violence after being released.

BIBLIOGRAPHY

'Acquaintance rape', Wikipedia https://en.wikipedia.org/wiki/Acquaintance_rape#cite_note-Finley_2018-10 accessed on 02 June 2023.

Altunjan Tanja, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' 2021 22/5 German Law Journal https://www.cambridge.org/core/journals/german-law-journal/article/international-criminal-court-and-sexual-violence-between-aspirations-and-reality/6B37A67C8196A6159237A893D2A5722A#article accessed on 30 June 2023.

Das P K, Anti-Rape Laws in India, 2nd Edition, Universal Law Publishing 2017.

'Drug-facilitated sexual assault' (Wikipedia) https://en.wikipedia.org/wiki/Drug-facilitated_sexual_assault accessed on 30 June 2023.

Duque Maria Alejandra Gómez, 'Towards a Legal Reform of Rape Laws under International Human Rights Law' (2021) 22/3 The Georgetown Journal of Gender and the Law https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2021/08/towards-a-legal-reform.pdf accessed on 31 May 2023.

Gautam Shreya, 'Death Penalty for rape- Does it actually deter?' 2 2 Indian Journal of Integrated Research in Law chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ijirl.com/wpcontent/uploads/2022/03/DEATH-PENALTY-FOR-RAPE-%E2%80%93-DOES-IT-ACTUALLY-DETER.pdf date accessed on 14 May 2023.

'International Framework of Sexual Violence'(Wikipedia) https://en.wikipedia.org/wiki/International_framework_of_sexual_violence accessed on 31 May 2023

Kalra Harsimran, 'Report of the Justice Verma Committee on Amendments to Criminal Law, 2013' (PRS Legislative Research, 25 January 2013) https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary accessed on 21 April 2023.

Kumari Ved And Barn Ravinder, 'Sentencing in Rape Cases' 2017 59 Journal of The Indian Law Institute Https://Www.Jstor.Org/Stable/26826588Accessed On 30 June 2023.

Law Commission of India, Death Penalty (Law Com No. 262, 2015).

Law Commission of India, Rape and Allied Offences (Law Com No 84, 1980).

Laws Regarding Rape, Wikipedia https://en.wikipedia.org/wiki/Laws_regarding_rape accessed on 24 June 2023.

Let's talk about "yes": Consent laws in Europe, Amnesty International 17 December 2020 https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/#:~:text=In%20a%20great%20number%20of,jumping%20out%20of%20the%20bushes'. Accessed on 24 June 2023.

'Marital Rape' (Wikipedia, 2021) https://en.wikipedia.org/wiki/Marital_rape accessed on 30 June 2023.

Mishra Swati, 'Comparison of rape laws before and after the Criminal Amendment Act 2013' (*iPleaders,* 28 February, 2021) https://blog.ipleaders.in/comparison-rape-laws-criminal-amendment-act-2013/ accessed on 15 June 2023.

Muralidhar S, 'Hang Them Now, Hang Them Not: India's Travails with The Death Penalty'1998 40 Journal of the Indian Law Institute https://www.jstor.org/stable/43953315 accessed on 30 June 2023.

Narrain Arvind 'Sexual Violence and the Death Penalty: A Tale of Two Judgments' 2014 49 Economic and Political Weekly https://www.jstor.org/stable/24478981 accessed on 30 June 2023.

'Prison rape', (Wikipedia) https://en.wikipedia.org/wiki/Prison_rape accessed on 2 June 2023.

Panda Biswaranjan, 'New Definition of rape after the criminal law amendment act, 2013' (Lawyersclubindia, 03 May 2018) https://www.lawyersclubindia.com/articles/new-definition-of-rape-after-the-criminal-law-amendment-act-2013-9000.asp accessed on 30 June 2023.

Rana Payal, The Capital Punishment in Context of Rape: A Study of Nirbhaya case, (LL.M, Swami Vivekananda Subharti University, 2019).

'Rape Laws in the United States', Wikipedia https://en.wikipedia.org/wiki/Rape_laws_in_the_United_States accessed on 24 June 2023.

Rohal Sandhya and Arora Tanu, 'Death Penalty in Rape Cases: Violation of Human Rights vis-à-vis Constitutional Right to Life' 2020 4 2 CASIHR Journal on Human Rights Practice chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.rgnul.ac.in/PDF/a0c0c6e2-7917-4502-a01c-467ac494dd99.pdf accessed on 30 June 2023.

Sanghi Jagriti, 'Landmark cases on death penalty in India' (*iPleaders,* 14 January 2022) https://blog.ipleaders.in/landmark-cases-on-death-penalty-in-india/#Shabnam_v_Union_of_India_2015 accessed on 2July 2023.

'Sexual Violence- World health organization and legal definitions' (New Zealand Family Violence Clearinghouse, September 2012) https://nzfvc.org.nz/sexual-violence-world-health-organization-legal definitions#:~:text=The%20World%20Health%20Organization%20%28Krug%20et%20al%2C%202002%29,including%20but%20not%20limited%20to%20home%20and%20work%E2%80%9D. accessed on 31 May 2023.

'Sexual Violence' (Wikipedia. 24 May 2023) https://en.wikipedia.org/wiki/Sexual_violence accessed on 31 May 2023.

Shyam Ashwathi, 'Does Death Deter? A Critical Analysis of the need for Capital Punishment in India' (LL.M dissertation, The National university of Advanced Legal Studies 2021).

'Statutory Rape' (Wikipedia, 2023) https://en.wikipedia.org/wiki/Statutory_rape accessed on 30 June 2023.

Tomar Adv. Devesh Singh, 'Navigating Death Penalty for Sexual Offences via Recent State Amendments' 2020 1 2 Indraprastha Law Review https://indraprasthalawreview.in/wp-

content/uploads/2021/09/GGSIPU_USLLS_ILR_2020_V1-I2-04-Adv.Devesh_Singh_Tomar-1.pdf accessed on 30 June 2023.

'Understanding the International Criminal Court' (International Criminal Court, 2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf accessed on 30 June 2023.

'Universal Declaration of Human Rights' (Wikipedia, 28 May 2023) https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights accessed on 31 May 2023.