

## EFFICACY OF HARSH PUNISHMENT VIS A VIS CHILD SEXUAL ABUSE IN INDIA: AN ANALYSIS

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Punishing the wrong doer is one of the crucial functions of the criminal justice administration. However, in this civilised age, some people have started questioning the effectiveness of severe punishment. A punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime, or makes no measurable contribution to the acceptable goals of punishment. The issue regarding the efficacy of punishment exist in India lacks structural sentencing policies that have been raised either by the legislature or the judiciary. In the year 2003, a Committee on Reforms of Criminal Justice System popularly known as the Malimath Committee, a body established by the Ministry of Home Affairs, submitted a report with 158 suggestions that emphasized the need to have guidelines to enable the sentencing policy structurally, The Committee advised further that, to bring "predictability in the matter of sentencing," a statutory committee should be established "Further, in 2008, a four members panel on Draft National Policy on Criminal Justice headed by the Madhava Menon Committee, has suggested renovate complete criminal procedure system. While considering the effectiveness of punishment, the sentencing in sexual abuse cases is even more debatable issue before the criminal justice system. Recently several changes have been made to control such heinous crime from the society from being committed. The issue becomes even worse when it relates to an innocent body and its very soul. Child sexual abuse is one of the most complex problems where the victim is usually either unable to know the nature of the crime or to resist it from being committed. Sexual violence against children has drawn a lot of anguish in the country and has been the core area by the legislative initiatives. The Union Cabinet passed the Criminal Law Amendment Act 2018, which prescribed death penalty to the accused in cases of rape of girls under age 12. But, this severe sentencing policy further debatable that, whether the punishment will prevent child rape in-country? Because it will make sure in most of the cases that the rapist will rape as well as prefer to kill the victim because he will be hanged only once. In

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93% of the incidents of sexual abused against children, the rapist is known to the victim or distance relative, teacher, neighbour, etc. In those cases to eliminate the evidence rapist try to kill the innocent minor. In the present paper, the author analyses the efficacy of severe punishment to prevent child sexual abuse from society by analyzing various child protective laws. Finally ,the paper concluded with varous suggestive measures to control.

## **2.The objectives and questions of the research:**

- To understand interplay between sentencing policy for child sexual abuse and the efficacy of sentencing policies control this heinous crime in India;
- To analyze rational behind the imposition of punishment and the sentencing practices in India;
- To understand the dispute on capital punishment especially in the case of child sexual abuse incidents;

**3. Methodology:** This research is descriptive as the results of the research is expected to be obtained or painting of a factual state of an object of study with a view to clarify is hypothesized to help in strengthening the old theory or within the framework of preparing the new theory.

## **4. Introduction**

*"If people are good only because they fear punishment, and hope for reward, then we are a sorry lot indeed."*Albert Einstein

A well drafted legal frame work is required to meet the challenging task of appropriate sentencing. But our judicial system neither develop any legal principles nor there is any legislative frame work in this matter.In this civilized age, people are beginning to question the effectiveness of severe punishment. The issue related to the punishment becomes increasingly important when it relates to an innocent body and its very soul. Sexual abuse amongst children has drawn a lot of distress in the community and has been the focus of many professional and legislative

initiatives. Child sexual abuse is one of the most complex problems where the victim is usually either unable to know the nature of crime or to resist it from being committed. Children who have been sexually mishandled frequently show depressive symptoms, anxiety, fear, concentration problems, anger, sleep difficulties, inappropriate sexual behaviors, social withdrawal and many more. It is a problem that has taken roots in the society and indeed a challenging one to curb. The good news is that there is higher and better reporting of rape incident in India. But the worst part is that a criminal justice system remains at risk and allows many of the accused to go scot free - only one in four cases of rape in India end in conviction.

### 5. Rape statistics in India

In a democratic country like India, a woman is allegedly raped every 15 minutes<sup>2</sup>. In 2011, 24,206 (reported rapes per year in India) in 2012, 24,923, in 2013, 33,707, in 2014, 37,000. The statistics shows how this crime against women is even worse. The conviction rate in rape cases in India is very poor, it shows that 72 out of 100 incidents are going unpunished.”<sup>3</sup> The crime data published by National Crime Records Bureau has for the first time listed sexual crimes against women in various categories like gang rape, stalking, voyeurism, sexual harassment at workplace and molestation in public transport.<sup>4</sup> According to the National Crime Records Bureau (NCRB) 2018 annual report, 33,356 rape cases were reported across India in 2018. Out of these, 31,320 were committed by someone known to the victim (93.9% of the cases).

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<sup>2</sup> <https://asiatimes.com/2020/01/a-rape-in-india-every-15-minutes-govment-data/>

<sup>3</sup> [https://www.washingtonpost.com/world/asia\\_pacific/india-seeks-death-penalty-for-rape-of-girls-under-12/2018/04/21/37aec382-454a-11e8-b2dc-b0a403e4720a\\_story.html?noredirect=on&utm\\_term=.fabdb4ad9b0e](https://www.washingtonpost.com/world/asia_pacific/india-seeks-death-penalty-for-rape-of-girls-under-12/2018/04/21/37aec382-454a-11e8-b2dc-b0a403e4720a_story.html?noredirect=on&utm_term=.fabdb4ad9b0e)

<sup>4</sup> [http://indpaedia.com/ind/index.php/Rapes\\_in\\_India:\\_annual\\_statistics](http://indpaedia.com/ind/index.php/Rapes_in_India:_annual_statistics)

## 6. Discussion:

### A. Causes behind brutal rape incident

#### a. Sociobiological theories of rape

Thornhill and Palmer write that "Rape is viewed as a natural, biological phenomenon that is a product of the human evolutionary heritage". They further state that by categorizing behavior as "natural" and "biological" they do not in any way mean to imply that the behavior is justified or even inevitable. "Biological" means "of or of life," so the word applies to every human feature and behavior. But to infer from that, as many critics assert that Thornhill and Palmer do, that what is biological is somehow right or good, would be to fall into the so-called naturalistic fallacy. They make a comparison to "natural disasters as epidemics, floods, and tornadoes". This shows that what can be found in nature is not always good and that measures should be and are taken against natural phenomena. They further argue that a good knowledge of the causes of rape, including evolutionary ones, is necessary to develop effective preventive measures.<sup>5</sup>

Anthropologist Edward H. Hagen states in his *Evolutionary Psychology* from 2002 that he believes "there is no clear evidence for the hypothesis that rape is adaptive. He believes the adaptive nature of rape is *possible*, but claims there is not enough evidence to be certain one way or the other. However, he encourages such evidence to be obtained: "Whether human males possess psychological adaptations for rape will only be answered by careful studies seeking evidence for such cognitive specializations. To not seek such evidence is like failing to search a suspect for a concealed weapon."

McKibbin et al. (2008) argue that "there may be several different types of rapists or rape strategies". One is rape by disadvantaged men who cannot get sex otherwise. Another is "specialized rapists" who are more sexually aroused from rape than from consensual sex. A third type is opportunistic rapists who switch between forced and consensual sex depending on circumstances. A fourth type is psychopathic rapists. A

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<sup>5</sup> Thornhill, Randy & Palmer, Craig T. Why Men Rape. New York Academy of Sciences. JANUARY-FEBRUARY 2000. <http://iranscope.ghandchi.com/Anthology/Women/rape.htm>

fifth type is partner rape due to sperm competition when the male suspects or knows that the female has had sex with another male. There are varying degrees of empirical support for the existence of each of these types. More generally they mention research finding that at least one-third of males "admit they would rape under specific conditions" and that other surveys find that many estates having coercive sexual fantasies."<sup>6</sup>For these rapists, sex is a weapon to ruin and disgrace the victim, rape constitutes the ultimate expression of their anger. This rapist considers rape the ultimate offense they can commit against the victim.<sup>7</sup>

## **b. Individual factors**

### **i. Known victim**

Data with regard to child sexual abuse show that most direct their acts at individuals whom they already know.<sup>8</sup>

### **ii. Drug facilitated sexual assault**

Drug-facilitated sexual assault (DFSA), which is also known as predator rape, is a sexual assault carried out after the victim has become debilitated having consumed alcohol or other related drugs. Alcohol has been proved to play a vital role in certain types of sexual assault and some other drugs, notably cocaine.<sup>9</sup>

### **iii. Psychological impairment**

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<sup>6</sup>McKibbin, W. F.; Shackelford, T. K.; Goetz, A. T.; Starratt, V. G. (2008). "Why do men rape? An evolutionary psychological perspective". *Review of General Psychology*. **12**: 86–97. DOI:10.1037/1089-2680.12.1.86.

<sup>7</sup>"Center for Sex Offender Management Lecture Content & Teaching Notes Supervision of Sex Offenders in the Community: An Overview". Center for Sex Offender Management.

<sup>8</sup>Heise L. Moore K. Toubia N. Sexual coercion and women's reproductive health: a focus on research. New York, NY, Population Council. 1995.

<sup>9</sup>Grisso, JA; Schwarz, DF; Hirschinger, N; Sammel, M; Brensinger, C; Santanna, J; Lowe, RA; Anderson, E; Shaw, LM (1999). "Violent injuries among women in an urban area". *The New England Journal of Medicine*. **341** (25): 1899–1905. doi:10.1056/NEJM199912163412506. PMID 10601510.

Research shows in recent times on the role of cognitive variables which can lead to rape. A detailed theoretical study shows that objectification might bring about a denial of agency and personhood that leads to rape.<sup>10</sup>

#### iv. Early childhood environments

There is evidence that sexual violence is also a learned activity in some adults, mostly as regards to child sexual abuse. Studies on sexually ill-treated boys have shown that around one in five continues in later life to molest children themselves.<sup>11</sup>

#### v. Poverty

Poverty is linked to both the perpetration of sexual violence and the risk of being a victim of it. Several authors have argued that the relationship between poverty and perpetration of sexual violence is mediated through forms of the crisis of masculine identity.<sup>121314</sup>

#### vi. Legal and social deterrents of victims reporting rape

Women in various countries face serious risks if they report rape. These risks include being subjected to violence including honor killings by their families, being prosecuted for sex outside marriage, or being forced to marry their rapist.<sup>1516</sup>

#### vii. Age of victim

Young women and girls are usually found to be more vulnerable to rape than older women.<sup>17</sup>

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<sup>10</sup>Awasthi B (2017). "From Attire to Assault: Clothing, Objectification, and De-humanization – A Possible Prelude to Sexual Violence?". *Frontiers in Psychology*. **8**: 338. doi:10.3389/fpsyg.2017.00338. PMC 5344900. PMID 28344565.

<sup>11</sup>Watkins B, Bentovim A (1992). "The sexual abuse of male children and adolescents: a review of current research". *Journal of Child Psychology and Psychiatry*. **33** (1): 197–248. doi:10.1111/j.1469-7610.1992.tb00862.x. PMID 1737828.

<sup>12</sup>Morrell R. ed. *Changing men in Southern Africa*. Pietermaritzburg. University of Natal Press. 2001.

<sup>13</sup>Jewkes R (2002). "Intimate partner violence: causes and prevention". *Lancet*. **359** (9315): 1423–1429. doi:10.1016/S0140-6736(02)08357-5. PMID 11978358.

<sup>14</sup>Bourgeois P (1996). "In search of masculinity: violence, respect, and sexuality among Puerto Rican crack dealers in East Harlem". *British Journal of Criminology*. **36** (3): 412–427. doi:10.1093/oxfordjournals.bjc.a014103.

<sup>15</sup>Libya rape victims 'face honor killings' – BBC News. Bbc.co.uk (2011-06-14). Retrieved on 2015-11-30.

<sup>16</sup>Morocco protest after raped Amina Filali kills herself – BBC News. Bbc.co.uk.

<sup>17</sup>Acierio R et al. Risk factors for rape, physical assault, and post-traumatic stress disorder in women: an examination of differential multivariate relationships. *Journal of Anxiety Disorders*, 1999, 13:541–563.

### **viii. Previous victimization**

There is some evidence linking experiences of sexual abuse in childhood or adolescence with patterns of victimization during adulthood.<sup>18</sup>

### **ix. Educational level**

Women are at greater risk of sexual violence, as they are of physical violence by an intimate partner when they become more educated and thus more empowered. Women with low education were found in a national survey in South Africa to be much less likely to experience sexual violence than those with higher levels of education.<sup>19</sup>

### **x. Online pornography**

Easy access to online pornography has caused sexual assaults by young men to almost double in five years, police have warned. Men up to the age of 25 are finding it increasingly difficult to develop respectful relationships and have become violent towards their sexual partners<sup>20</sup>

### **xi. The low conviction rate**

The low conviction rate for rape incidents is also one of the major factors for increasing the same. Figures show that only around 27 percent of convictions are one of the reasons why rapists are not that scared and victims become unwilling to go to court.

## **7. Analysis**

### **Report of the Committee on Amendments to Criminal Law a way forward?**

The Union Cabinet cleared the Criminal Law (Amendment) Ordinance 2018, which allows the death penalty in cases of rape of girls under age 12. The ordinance has

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<sup>18</sup>Crowell NA, Burgess AW, eds. Understanding violence against women. Washington, DC: National Academy Press, 1996.

<sup>19</sup>Jewkes R, Abrahams N. The epidemiology of rape and sexual coercion in South Africa: an overview. Social Science and Medicine (in press).

<sup>20</sup><https://www.dailytelegraph.com.au/news/nsw/online-pornography-is-leading-to-more-sexual-assaults-by-young-men-in-nsw-police-say/news-story/7cb55d1ab6a12d7970181857b2fe8b3e>

proposed tough punishment in such rape cases: minimum 20 years of jail or life term or death. In case of rape of a girl under 16, minimum punishment has been increased from 10 years to 20 years, extendable to imprisonment for rest of life.<sup>21</sup> American courts to have found the death penalty as "barbaric and excessive" even in cases of aggravated sexual assault, the report had stated: *"We believe that such offenses need to be graded. There are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death."*

There is considerable evidence that the deterrent effect of the death penalty on serious crimes is a myth, the committee had noted and hence had suggested amending life imprisonment to always mean imprisonment for 'the entire natural life of the convict'.

#### **A. Is the punishment must proportionate ?**

A punishment is unconstitutional if it is excessive in comparison to the severity of the offense. A punishment is excessive and unconstitutional because of the following reasons (1) is grossly out of proportion to the severity of the crime, or (2) makes no measurable contribution to the acceptable goals of punishment, and hence is nothing more than the needless imposition of pain and suffering. These two tests determine if punishment is excessive; if either spike is met, the punishment is extreme and therefore unconstitutional. Punishment is excessive and does not serve these goals if it involves the needless imposition of pain and suffering.<sup>22</sup> Second, the type of punishment imposed for a given crime must serve an adequate goal. In a society that requires its citizens not to retaliate, but rather to look to the law to vindicate wrongs done to them, the goal of retribution is critically important. The Supreme Court explained that:

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<sup>21</sup><https://www.bloomberglaw.com/law-and-policy/2018/04/22/2013-committee-had-cautioned-against-death-penalty-for-rape>

<sup>22</sup> *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, CJ., dissenting).

*"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose on criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law."*<sup>23</sup>

### **B. Is death penalty is appropriate for rape?**

Death penalty for a rapist will make sure in most of the cases that the rapist will rape as well as prefer to kill the victim because he will be hanged only once. In the case of minor in a majority of the incidents, rapist is known to the victim or distance relative, teacher, neighbor, etc. In those cases to eliminate the evidence rapist will try to kill the innocent minor. Of sexual abuse cases reported to law enforcement, 93% of juvenile victims knew the perpetrator.<sup>24</sup> A death penalty is only 2-3 minutes of pain to the rapist post which he cannot suffer more. This seems minor compared to the pain he imposed on the victims. They were less empathetic towards the victim and unable to realize how extremely brutal his conduct. They did not debar themselves from committing such an inhuman act when the victim tries to resistor begs to let free, the rapist feels happy for being full control over the situation. Hanging a rapist only glorifies a crime how great it was and the deed. Two minutes of death is easier for the rapist than a whole life inside jail.

### **C. Are the Beneficial legislations are really favorable?**

The Protection of Children from Sexual Offences (Amendment) Bill, 2019

- The Protection of Children from Sexual Offences (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister of Women and Child Development, on July 18, 2019. The key provisions are:
- **Penetrative sexual assault:** Under the Act, a person commits "penetrative sexual assault if he: (i) penetrates his penis into the vagina, mouth, urethra or

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<sup>24</sup> Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sexual Assault of Young Children as Reported to Law Enforcement (2000).

anus of a child, or (ii) makes a child do the same, or (iii) inserts any other object into the child's body, or (iv) applies his mouth to a child's body parts. The punishment for such offense is imprisonment between seven years to life, and a fine. The Bill increases the minimum punishment from seven years to ten years. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine”.

- **Aggravated penetrative sexual assault:** The Act defines certain actions as "aggravated penetrative sexual assault". These include cases “when a police officer, a member of the armed forces, or a public servant commits penetrative sexual assault on a child. It also covers cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child or the child becomes pregnant, among others. The Bill adds two more grounds to the definition of aggravated penetrative sexual assault. These include: (i) assault resulting in the death of the child, and (ii) assault committed during a natural calamity, or in any similar situations of violence. Currently, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and a fine. The Bill increases the minimum punishment from ten years to 20 years, and the maximum punishment to the death penalty”.
- **Aggravated sexual assault:** Under the Act, sexual assault includes “actions where a person touches the vagina, penis, anus or breast of a child with sexual intent without penetration. "Aggravated sexual assault" includes cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child, among others. The Bill adds two more offenses to the definition of aggravated sexual assault. These include (i) assault committed during a natural calamity, and (ii) administering or help in administering any hormone or any chemical substance, to a child for the purpose of attaining early sexual maturity”.
- **Pornographic purposes:** Under the Act, a person is guilty of using a child for pornographic purposes if “he uses a child in any form of media for sexual gratification. The Act also penalizes persons who use children for pornographic purposes resulting in sexual assault. The Bill defines child

pornography as any visual depiction of sexually explicit conduct involving a child including photographs, video, digital or computer-generated image indistinguishable from an actual child”.

- **Storage of pornographic material:** The Act penalizes storage of pornographic material for commercial purposes with a punishment of up to three years, or a fine, or both. The Bill amends this to provide that the punishment can be imprisonment between three to five years, or a fine, or both. Besides, the Bill adds two other offenses for storage of pornographic material involving children. These include: (i) failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except to report it.<sup>25</sup> Recently, the Centre has prescribed a set of new rules to facilitate the implementation of the recent amendments to the POCSO Act under which provisions of punishment for child abuse have been made more stringent. Some significant addition in the rules include provision of “mandatory police verification of school and care home staff, procedures to report sexual abuse material such as pornography and imparting age-appropriate child rights education”. Regarding crackdown on child pornography, the rules state that "any person who has received any pornographic material involving a child or any information regarding such pornographic material being stored, possessed, distributed, circulated, transmitted, facilitated, propagated or displayed, or is likely to be distributed, facilitated or transmitted in any manner shall report the contents to the special juvenile police unit (SJPU) or police, or the cybercrime portal". "The report shall include details of the device in which such pornographic content was noticed and the suspected device from which such content was received including the platform on which the content was displayed," the rules state. Under the Protection of Children from Sexual Offences (POCSO) Rules, 2020, state governments have been asked to formulate a child protection policy based on the principle of "zero-tolerance" to violence against children. The police shall be adopted by all institutions, organisations, or any

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[https://www.prsindia.org/sites/default/files/bill\\_files/Protection%20of%20Children%20from%20Sexual%20Offences%20%28Amendment%29%20Act%2C%202019.pdf](https://www.prsindia.org/sites/default/files/bill_files/Protection%20of%20Children%20from%20Sexual%20Offences%20%28Amendment%29%20Act%2C%202019.pdf)

other agency working with, or coming in contact with children, the rules state.<sup>26</sup>

As per the provision of POCSO Act, a case related to child sexual abuse must be concluded within a year but rarely it has been implemented. The lack of awareness on the provisions of the Act is the root cause of its non-implementation.

## 8. Concluding remarks

Mathura, Nirbhaya and now Asifa, the rape law in India have been changing rapidly but unfortunately, failed to change the problem so far. A victim of rape may forget the part, but in India, the life after victimized of rape is rather more tough to live and this has nothing to do with "hang the rapist" campaign. The Government rather must focus on better rehabilitation programs for the victims, and better policing system to make sure the criminal gets sentenced for years. Last but not least, we should come forward to develop a society, which encourages men to be respectful of women then can gradually initiate to revolve the situation around. There are two main components in crime-combating campaigns all over the world. Apart from punishment, the policy must contain civic education as the principal method of keeping the crime rate low. Civic education is clearly far more efficient for maintaining a low crime rate. Moral education enlightens the general public's sense of justice. Implanting positive values in youngsters is the best way to prevent crimes: it has an edifying effect, alerting people to stay away from various temptations.

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<sup>26</sup> <https://www.outlookindia.com/newscroll/new-pocso-rules-notified-law-for-sexual-offences-against-children-made-more-stringent/1760873>

## 9. Suggestive measures to combat child rape

- The government must ensure the prevention and control of drugs, alcohols, pornography internet sites.
- A new wing in the police should be established to counter rape cases.
- Teachers in schools should collect feedback and parents at home should discuss with children about any misconduct regularly.
- Sexual harassment panels should be established in schools to evaluate cases of minor victims privately and keep the victim anonymous.
- Media should play its role in educating the importance of women empowerment which can help some people mellow down their regular approach towards women.
- Need to enforce strong morals and value systems in school children. Schools should make that effort, along with families.
- Educational programs for parents with proper information relating to pedophiles also will prevent child molestation to some extent.