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# **HARSH PUNISHMENT CANNOT CURB THE OFFENCE OF RAPE**

AUTHORED BY - MAHESH KUMAR

## **ABSTRACT**

History of Rape laws in India is filled with changes right after public outrages over some brutal rape incidents which obliged the legislature to intensify the punishments for rape. The first amendment into the punishment for rape was in the year 1983 which was after the public outrage over the Mathura rape case, as a result the punishments were changed for the first time. This paper discusses these changes from the first amendment till the latest law under the Bharatiya Nyaya Sanhita, 2023. The main aim of this work is to study whether these changes are sufficient to curb rape cases in India. The relevant data and argument for or against this motion has been presented. This paper also discusses what can be the correct approach to curb the offence of Rape in India.

## **INTRODUCTION**

Rape violates basic the human fundamental rights, it is a crime against inherent self of a person. “The word “Rape”, is derived from the Latin term ‘*rapio*’, means ‘to seize’. Thus, Rape literally means ‘a forcible seizure’. Rape is violation with violence of the private person of a woman, an outrage by all means”.<sup>1</sup>

In *Bodhisattwa Gautam v. Subhra Chakraborty*,<sup>2</sup> the Supreme Court of India asserted that “Rape is a crime against basic human rights”. In *Railway Board v. Chandrima Das*<sup>3</sup> the Supreme Court observed that “right to life includes right to includes right to live with human dignity and rape violates this right of a woman”.

The International Criminal Tribunal for the Former Yugoslavia *Prosecutor v. Delalic*<sup>4</sup> held that “the core of human dignity and physical integrity of an individual get stuck away, every time Rape is committed”.

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<sup>1</sup> K. D. Gaur, *Textbook on The Indian Penal Code* 1049 (LexisNexis, 7<sup>th</sup> edn., 2021).

<sup>2</sup> (1996) 1 SCC 490.

<sup>3</sup> (2000) 2 SCC 465.

<sup>4</sup> Case No. IT-96-21-T (16-11-1998).

## EVOLUTION OF PUNISHMENT FOR RAPE IN INDIA

### Ancient India

Katyayana Smriti prescribed death penalty for Rape.<sup>5</sup> Kautilya's Arthashastra also prescribed death penalty when the victim dies as a result of rape. In cases of rape offences in prohibited relationships the punishment of mutilation of the man's genital organs, followed by a death sentence was also prescribed.<sup>6</sup> Apart from these the Manusmriti mentions punishments of fines for different forms of rape.<sup>7</sup>

### Pre-independence

The First Law Commission formed in 1834 enacted 'The Indian Penal Code, 1860' wherein Section 376 provided for the punishment of 'transportation for life' and 'imprisonment for either description up to 10 years' and fine.

### Post-independence

Firstly there was omission of transportation for life in 1955 and it was replaced with imprisonment for life. Then after the Mathura case (*Tukaram v. State of Maharashtra*<sup>8</sup>) the Criminal Law (Amendment) Act 1983 set the minimum imprisonment of 7 years. However as per the Proviso, the court may impose sentence below 7 years by providing special reasons.

This amendment also added some aggravated forms of rape punishable with rigorous imprisonment of minimum 10 years extendable upto life.

### Nirbhaya case

The brutal incident of Nirbhaya Gang-Rape reignited the outrage against rape offences. This has led to nation wide protests and hence after the recommendations of Justice Verma Committee, The Criminal Law (Amendment) Act, 2013 was enacted. This amendment made the punishment for rape offences harsher and stringent by introducing death penalty for GangRape. This amendment also set the minimum imprisonment for 10 years.

<sup>5</sup> Katyayana, *Katyayana Smriti*, Verse 830.

<sup>6</sup> Kautilya, *The Arthashastra* 484, (L. N. Rangarajan ed., Penguin Books 1992).

<sup>7</sup> Manu Dharmasastra Verse 8.374 – 78 available at: <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc201307.html> [Last visited on August 1, 2025].

<sup>8</sup> (1979) 2 SCC 143.

### 2018 Amendment

Two brutal incidents of rape in Kathua and Unnao lead to changes in punishments via The Criminal Law (Amendment) Act, 2018. Punishment for rape of a woman below 16 years of age was increased from rigorous imprisonment of minimum 10 years to that of minimum 20 years. Death penalty was introduced for Rape and Gang-Rape a woman below 12 years of age.

### Bharatiya Nyaya Sanhita

A separate Chapter V has been introduced for 'Offences against woman and children.' This new law has increased the punishment for gangrape of a woman below 16 years of age and prescribed for death penalty. Apart from this, all other punishments are the same in the new Sanhita.

## EFFICACY OF HARSH PUNISHMENT FOR RAPE

The change above-mentioned depicts a pattern of public outrage over some heinous rape case leading to a major amendment increasing the punishment for rape. From Mathura case to Unnao, from 1983 to 2018, the punishment became much stringent. This pattern of incidents followed by amendments shows that Indian legislature has put considerable effort to curb the offences of Rape. But these efforts have not been proved sufficient to curb the offence. Women's safety is still a major concern as the National Crime Records Bureau (NCRB) report shows "an aggrieved surge of 4% in crime against women throughout 2022.<sup>9</sup> Sadly, 18.7% of cases involve assault with the intention of offending women's modesty, and 7.1% involve rape.<sup>10</sup> The crime rate per lakh women's population increased from 64.5 in 2021 to 66.4 in 2022."<sup>11</sup>

"Just one year since the Nirbhaya outrage and in the year of 2013 when harsh punishments were prescribed for the offence of Rape, there were 33,707 Rape incidents recorded in the country as compared to 24,923 in 2012. This shows that the 2013 amendment has not served the purpose of deterrence with which it was introduced. Delhi has reported the highest crime rate (184.3) as compared to 56.3 at all India level during the year 2015".<sup>12</sup>

<sup>9</sup> Crime against women in India up by 4%: NCRB Report 2023, available at: <https://www.newsclick.in/crime-against-women-india-4-ncrb-report-2023> [Last visited on August 2, 2025].

<sup>10</sup> Mosaic of malevolence, available at: <https://www.millenniumpost.in/sundaypost/in-retrospect/mosaic-of-malevolence-543615> [Last visited on August 2, 2025].

<sup>11</sup> Women Safety in India, available at: <https://forumias.com/blog/women-safety-in-india-significance-and-challenges-explained-pointwise/> [Last visited on August 2, 2025].

<sup>12</sup> 12 years of Nirbhaya case has anything changed, available at: <https://thelawwaywithlawyers.com/12-years-of-nirbhaya-case-has-anything-changed/> [Last visited on August 2, 2025].

This data shows that the considerable increase in the punishments for Rape has not been able to curb the number of offences. Even if benefit of doubt for increase in reporting of Rape cases is given still the above data is immensely troublesome. It at still be concluded that the changes in law is not the real solution to the problem of increasing Rapes in the country. Under reporting of Rape offences has been a problem all around the globe. Despite being underreported, rape is one of the crimes in India that is expanding the fastest, which suggests that the penalties for rape have little to no deterrent effect.<sup>13</sup>

### Theories of Rape

The harsh punishment has not been able to provide required defference to the offence. Here the approach towards the offence & the offenders has to be shifted from deterrent theory to preventive and reformative theory and the real reason behind these offences need to be searched. Some of those reasons can be explained by the following theoris of Rape.

1. Biological Theory - This theory has been given by Randy Thornhill, as per which 'rape is a result of biological urges.'<sup>14</sup>
2. Commodification Theory - This theory suggest Rape as a crime against property where sex is taken as a commodity stolen from a woman. "For some, sex is a commodity, and if sex is a commodity, then taking it is theft".<sup>15</sup>
3. Feminist Theory - This theory suggest that Patriachal Society is the real reason behind increasing number of cases as per such cultures women are viewed as sexual and reproductive properts of men.<sup>16</sup>
4. Social Learning Theory - As per this theory of N. M. Malamuth & M. F. Heilmann<sup>17</sup> a person commits rape because of his learning which he undergoes during childhood and thereafter. This theory considers impact of social and family environment upon the potential offender.

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<sup>13</sup> Ayush Tazi, "Rape, Capital Punishment and Deterrence: An Analysis of India's Penal Approach" 5 *Burnished Law Journal* 5 (2024).

<sup>14</sup> Randy Thornhill, "The Biology of Human Rape" 39 *American Bar Association Jurimetrics* 243 (1999).

<sup>15</sup> Katharine K. Baker, "Once a Rapist? Motivational Evidence and Relevancy in Rape Law" 110 *Harvard Law Review* 594 (1997).

<sup>16</sup> Larry Baron and Murray A. Straus, "Four Theories of Rape: A Macrosociological Analysis" 34 *Oxford Journals* 467-489 (1987).

<sup>17</sup> N. M. Malamuth & M. F. Heilmann, "Evolutionary Psychology and Sexual Aggression", in C. B. Crawford & D. L. Krebs (Eds.), *Handbook of Evolutionary Psychology: Ideas, Issues, and Applications* 515-542 (Lawrence Erlbaum Associates Publishers, 1998).

### *Other factors*

Rape is a crime not of passion but a crime where the sole aim of the perpetrator is to inflict humiliation on the victim. It is an act of unrestrained hostility and it's unique in the degradation that it inflicts.<sup>18</sup> Rape is not just a sexual assault but is a social phenomenon.<sup>19</sup>

Since the problem of Rape is not just a legal one but a social and psychological one, the solution to such problem also cannot be achieved by legal or legislative change rather social and psychological transformation is required.

In 1977, Nicholas Groth, Ann Burgess, and Lynda Holmstrom published an influential psychological analysis of rapist motivation. Their thesis, in short, was:

“In all cases of forcible Rape three components are present: Power, Anger and Sexuality... .. (But) power or anger dominates and Rape, rather *than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express issues of power and anger*”.<sup>20</sup>

Psychologist Dr Nicholas Groth says that “... in all Rapes, three components are present: power, anger and sexuality. The hierarchy and interrelationships among these three factors, together with the relative intensity with which each is experienced and the variety of ways in which each is expressed, vary from one offender to another”.<sup>21</sup>

### **Attaching honour to the offence**

In *Nipun Saxena v. UOI*<sup>22</sup> the Supreme Court took judicial notice of false notion of “honour” which results into under reporting of cases and when it is reported, multiple institutions meant to provide succour to victims end up further victimizing the woman.

In *Rafiq vs State of Uttar Pradesh*,<sup>23</sup> Justice V.R. Krishna Iyer remarked that “When a woman is ravished,<sup>24</sup> what is inflicted is not merely physical injury, but the deepest sense of some

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<sup>18</sup> Beas Bhowmik, *Rape And Power In India: A Sociological Study 5* (School of Social Sciences Jawaharlal Nehru University, 2024).

<sup>19</sup> *Supra*.

<sup>20</sup> Nicholas Groth, Ann Wolbert Burgess & Lynda Lytle Holmstrom, “Rape: Power, Anger, and Sexuality” *American Journal of Psychiatry* 1239 (1977).

<sup>21</sup> Groth, A. Nicholas and Birnbaum, H. Jean, *Men Who Rape: The Psychology of the Offender* (Springer Publishing, Berlin, 1979).

<sup>22</sup> (2019) 13 SCC 715.

<sup>23</sup> AIR 1981 SC 559.

<sup>24</sup> It was suggested in the Supreme Court handbook on gender stereotypes that word ‘ravished’ should not be used. Supreme Court handbook on gender stereotypes, available at: <https://www.scobserver.in/journal/supreme-court-handbook-on-gender-stereotypes-progressive-but-will-the-law-catch-up/> [Last Visited on August 3, 2025].

deathless shame...The court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often than not, treated as a sinner and shunned. It must, therefore, be realized that a woman who is subjected to sexual violence would always be slow and hesitant about disclosing her plight. The court must, therefore, evaluate her evidence in the above background.....She would feel extremely embarrassed in narrating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo”.

A question has been put forward by IPS Kiran Bedi that what is the use of such stringent laws when the victim herself does not want to take any action, she doesn't want any question to be asked, gives no information only due to the social stigma attached with the offence.<sup>25</sup>

### **Erroneous Judicial Pronouncements**

In a shocking case of *Vikas Garg v. State of Haryana*<sup>26</sup> the Punjab and Haryana High Court granted bail in gang Rape case, by asserting that victim had “promiscuous attitude and voyeuristic mind”.

Delhi High Court in *Mahmood Farooqui v. State (NCT of Delhi)*<sup>27</sup> went far to affirm that in Rape cases “sometimes a feeble no, means yes”. In another case of *State of Madhya Pradesh v. Munna Chaubey*<sup>28</sup>, the High Court lowered the sentence on the ground that “the accused belonged to rural areas”.

In another case of *State of Maharashtra v. M.N. Mardikar*<sup>29</sup> the High Court observed that “since the prosecutrix is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person”. The Supreme Court while overruling the High Court's judgement held that “merely because she is a woman of easy

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<sup>25</sup> Kiran Bedi, “What use is the law if the victim herself does not want any action taken?” *The Times of India*, Nov. 25, 2002.

<sup>26</sup>2017 SCC OnLine P&H 2806.

<sup>27</sup> (2017) 243 DLT 310.

<sup>28</sup> AIR 2005 SC 682.

<sup>29</sup> AIR 1991 SC 207.

virtue, her evidence cannot be thrown overboard”. Similarly the Supreme Court while reversing the High Court’s decision in *State (NCT of Delhi) v. Pankaj Chaudhary*<sup>30</sup> observed that “Promiscuity/Habituations to sexual intercourse of prosecutrix cannot be a ground to justify Rape. Prosecutrix has equal right to privacy and protection of law. No presumption of her being a woman of loose moral character can be drawn merely on basis of some material showing she was habituated to sexual intercourse. Her evidence cannot also be discarded solely on ground of her unchastity”.

### THE REAL SOLUTION

“Rape occurs once every 29 minutes, sexual harassment occurs once every 53 minutes, molestation occurs once every 15 minutes, cruelty by a spouse or family member occurs every 9 minutes, and dowry deaths occur every 77 minutes, all of which make this clear”.<sup>31</sup>

Legal reforms must be accompanied by wider efforts to promote awareness of women's rights to autonomy and bodily integrity, regardless of whether they are married or in any other intimate relationship. This point was strongly emphasized in the case of *Vertido v. Philippines*<sup>32</sup>, it was highlighted that the “critical need for proper training of judges, lawyers, law enforcement officials, and medical professionals to ensure they approach cases of rape and other sexual offences with a gender-sensitive understanding”.

### The impact of Death Penalty

The Law Commission, for the first time, in its 35th report,<sup>33</sup> recommended “the retention of the death penalty in India. In *Bishnu Deo Shaw v. State of W.B.*<sup>34</sup> Justice Chinnappa Reddy noted: “While considering the deterrent theory what is important is not whether the penalty of death has deterrent effect but whether it deters more effectively than other penalties... all studies made on the subject appear to have led to the conclusions that the death penalty is inconsequential as a deterrent. Its efficacy as a deterrent is unproven”.

Justice J. S. Verma Committee stated that “there is considerable evidence that the deterrent effect of death penalty on serious crimes is actually a myth”. The committee states that “this

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<sup>30</sup> (2019) 11 SCC 575.

<sup>31</sup> K D Gaur, *Textbook on Indian Penal Code* 1042 (LexisNexis, 7<sup>th</sup> edn. 2021)

<sup>32</sup> *Vertido v. Philippines*, Communication No. 18 of 2008, Committee on the Elimination of Discrimination Against Women (CEDAW), July 2010.

<sup>33</sup> Law Commission of India, “35th Report on Capital Punishment” (September, 1967).

<sup>34</sup> (1979) 3 SCC 714.

committee has rejected the argument pushing for the death penalty for the offence of Rape. It is also stated that there is considerable evidence that the deterrent effect of death penalty on serious crimes is actually a myth. According to the Working Group on Human Rights, the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980. Hence, we do take note of the argument that introduction of death penalty for Rape may not have a deterrent effect".<sup>35</sup>

Even the countries like USA do not punish rape with Capital Punishment (*Ehrlich Anthony Coker v. State of Georgia*)<sup>36</sup> but still the statistics shows a low rate of rapes in USA, as of 2022, there were 41.8 rapes per one lakh population in the country.<sup>37</sup>

### Appropriate Penal Theory

In the case of *Dhananjay Chatterjee v. State of W.B.*<sup>38</sup>, the Supreme Court observed that "shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment *befitting the crime so that the Courts reflect public abhorrence of the crime*. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment". In the case of *Ravji v. State of Rajasthan*<sup>39</sup> the apex court held that "it is the *nature and gravity of the crime and not the criminal*, which are germane of consideration of appropriate punishment in a criminal trial".

### Reformation in Institutions

In the landmark case of *Delhi Domestic Working Women's v. Union of India*<sup>40</sup> the Court discussed various defects of the existing system. The recommendations made by the supreme court in this decisions should be considered by the lawmakers and the executive wings of the country.

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<sup>35</sup> Justice Verma Committee, "Report of the Committee on Amendments to Criminal Law" 80 (2013).

<sup>36</sup> 433 US 584 (1977).

<sup>37</sup> Rape Statistics by Country 2025, available at: <https://worldpopulationreview.com/country-rankings/Rape-statistics-by-country> [Last visited on August 3, 2025]

<sup>38</sup> 1994 (2) SCC 220.

<sup>39</sup> (1996) 2 SCC 175.

<sup>40</sup> (1995) 1 SCC 14.

Various reports find that there is a gender disparity in police officials of the country India lacks women police force personnels hence the requirement of disclosing sexual of ancient information to female police officer cannot be fully unless such police officers are appointed. In addition to the above, there is a need for significant institutional reforms and improvements, including the establishment of women's cells, deployment of well-trained personnel, dedicated helplines for crimes against women, proper forensic laboratory facilities for investigating rape cases, and the installation of CCTV surveillance and panic buttons in public spaces.

### **Reformation of the offenders**

In *T.K. Gopal alias Gopi. v. State of Karnataka*,<sup>41</sup> “the court advocated for reformation in jails while discussing that some US states place a strong emphasis on providing the criminal with psychotherapy during custody. The American laws treat the sex offenders as neurotic persons and psychotherapeutic treatment is given to them during the period of their detention. However, reformist activities are regularly held in many locations with the aim of treating the criminal psychologically so that he may not repeat the crime and may feel remorseful for committing a heinous crime. In India, there is no statutory provision for psychotherapeutic treatment during the jail period”.

### **CONCLUSION**

The offence of rape in India has been a problem since time immemorial. Text of ancient India suggest such problem and provided stringent punishments for this offence. The modern India as well witnessed various heinous instances of rape which led to ponder upon ways to stop such instances. As a result the lawmakers have time and again followed the deterrent policy and considerably enhanced the punishment for the offence of rape however it has been observed that these endeavours have not been able to produce the required result.

Hence it can be concluded that the problem of rape in India cannot be solved by a legislative action rather a societal overhauling, executive will, moral regeneration, ethical renewal, or moral uplift, etc. is required. This approach is a preventive one it does not look at the offence of rape just from penology view rather this approach tries to get into the root cause of the offence.

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<sup>41</sup> (2000) 6 SCC 168.

The data presented indicates that the imposition of severe punishments has not resulted in a substantial reduction in incidences of rape. On the contrary, the prevalence of such crimes appears to be increasing. These findings suggest that the approach grounded in deterrent theory, centered on inflicting harsh punitive measures has not yielded the desired outcomes. Rape is not merely a matter of criminal justice policy rather it represents a deep-rooted societal issue, intricately linked to patriarchal structures, prevailing mindsets, and the continued stigmatization of women.

This study posits that the core issue lies not in the severity of punishment but in the failure to prevent the occurrence of such offences in the first place. An effective response must therefore prioritize the principles of preventive theory over punitive deterrence. Prevention requires a multidimensional approach that includes comprehensive sex education, public awareness about legal provisions concerning sexual offences, and community-based education aimed at reshaping attitudes towards gender and consent across all age groups.

Furthermore, it is imperative to cultivate intolerance towards even minor acts of sexual misconduct such as eve-teasing or verbal harassment, as such behaviors often serve as precursors to more serious offences. Normalizing such actions contributes to a broader culture of impunity. Therefore, consistent public condemnation and institutional redress of even seemingly minor infractions are crucial to disrupting the social conditions that enable sexual violence.

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