

# GENDER JUSTICE IN RAPE LAWS: A PRE-JUDICED DECISION OF STATE

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## ABSTRACT

Does applying a retributive theory for punishing the rape accused satisfies the society's cry for Justice? That the answer to this question is an affirmation produced by the society's look towards the crime of rape with their biased eye, determining that all the rape accused must be awarded with the Death Penalty, the highest form of the sentencing. However, the drawback of this reality is that, the society has a little faith on their Indian Criminal Justice system, which lay its emphasis upon "Life Imprisonment is the rule to which the death penalty is the exception". In this paper, the author will scrutinize the tools adopted by the Criminal Justice System in serving justice to the victims of rape after the Criminal Law (Amendment) Ordinance, 2018 came into force and how far they are compatible with the foundations on which the whole system rests.

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## INTRODUCTION:

Women in the society during the pre-Vedic and Vedic periods enjoyed status of being equals. They had the absolute freedom of entering into economic transaction and had hold on important positions like Acharyas in Rig Vedic Society.<sup>1</sup> With the change in time; women started facing discriminations in several spheres like education, vocation and other areas. The later Vedic period acknowledged several brutalities against women's from her insiders, practices such like Sati Pratha, Child Marriages, or Polygamy etc. With the advent of Globalization and Commercialization, the position of women worsened and she became prey to the outsiders. Crimes like Rapes, gang rapes, Acid Attacks, Sexual Harassment at Workplaces, Pornography etc became common and frequent in 21<sup>st</sup> century. The National Crime Records Bureau(NCRB) reports in 1998 show that the growth rate of crimes against women would be higher than the population growth rate by 2010.<sup>2</sup> Even the several changes and amendments in the criminal laws did not bring her respect in the society that she enjoyed in the early period.

In the recent years, the nation has experienced an outrage against the crimes with the women's in society. What was described by experts as 'Gang Rape Epidemic in India'<sup>3</sup> had brought human activists, youth, and politicians in thousands on roads of Capital City who marched and protested for justice with the victim of gang rape? The result of the nationwide protest was that several amendments were made in Criminal laws like Cr.PC, IPC and POCSO Act. With the Amendment, the punishment of Gang rape

increased to rigorous imprisonment for not less than Twenty years, which may extend to Life Imprisonment, which means the remaining life of that person's and with fine.<sup>4</sup>

Even the stringent actions taken against punishing the rape accused did not help the system in creating deterrence in the society. The society was again taken aback by an incident in Kathua, Jammu and Kashmir when an 8-year-old girl fell prey to the lust of a gang and thereby was a victim to sexual assault and was murdered.<sup>5</sup> This horrific incident again brings back to the knowledge of the society that the rape culture has not only failed to wane but also looms large in our society where such crimes are committed with impunity.<sup>6</sup> Yet another incident famously known as Unnao rape, which refers to alleged rape with a minor girl of Seventeen years on June 4, 2017 by the BJP MLA Kuldeep Singh Sengar, jolted the conscience of the society and the massive public outcry and public agitation led the parliament to take a massive step towards rectification of what has been done in the past.

In the wake of these past events, the parliament promulgated The Criminal Law (Amendment) Ordinance, 2018 that received President's assent on April 21, 2018. To fulfill the mandate of the constitutional provisions, The Criminal Law (Amendment) Bill, 2018 was put forth before the legislature to replace the original ordinance.<sup>7</sup> The Bill was first passed from Lower House on July 30, 2018 and from Upper House on August 6, 2018. Thereafter, the President gave his assent on August 11, 2018 and the bill came into force as the Criminal Law (Amendment) Act, 2018.<sup>8</sup>

## **A LOOK THROUGH THE CRIMINAL LAW (AMENDMENT) ACT, 2018:**

The Amendment incorporates three new offences, specified in Section 376AB, 376DA and 376DB. This new amendment came in wake of rising child sexual offences in India. According to the recently released NCRB data, 32,608 cases were reported in 2017 while 39,827 cases were reported in 2018 under the Protection of Children from Sexual Offences Act (POCSO).<sup>9</sup>Hence; these rising numbers forced the government to come out with the new amendment. The law, which scored most highlights, remained the new law wherein the accused who raped a minor below Twelve years of age may be granted Capital Punishment. According to the new section 376AB added in the Code, the minimum punishment prescribed for the offender for raping a woman below Twelve years age is imprisonment for not less than Twenty years, which may extend to life imprisonment and maximum punishment, is death.<sup>10</sup> The sentence of death penalty remained one of the most astonishing features of the 2018 Amendment.

‘Death Penalty’ for the crimes like rape has always been in demand by the public. Reason to this demand lies in a belief that the “Death Penalty” can bring a halt to such heinous crimes. But, are the data’s from government sources in support of the existing belief? India's official crime data show the number of reported rapes of children increased from 8,541 in 2012 to 19,765 in 2016.<sup>11</sup> This brutal reality opens up a question to the policy makers that with the strictest punishment in place, which shows a negligible deterrent effect in the society, why the Death Sentence has been again added in Criminal Law (Amendment) Act, 2018? Is this an outcome of the huge public outcry and the fear of demonstrations or just with the ulterior motive of gaining vote bank?

Is Law just a Means to an End? However, with the laws such as “Death Penalty for crime like Child Rape” in place, does the system even able to realize the end, i.e. “Justice” for the victims of child rape and the ones who are in constant fear of being rape?

## **PROSECUTING THE OFFENDERS OF CHILD RAPE:**

The most common systems in the Contemporary National Legal System are Common Law System and Civil Law (Roman) System. Both of them have a Public Prosecutor System, wherein a person is appointed by the government(s) to take up the proceedings against those offenders who commit an offence against the state. In the case of, Babu vs. State of Kerala<sup>12</sup>, the court explained: The role of the Public Prosecutors is to

help the court in the administration of justice. They are really the ministers of justice. The Public Prosecutor does not belong to one party but their job is to present before the courts all the aspects related to that case. They are not there to use the innocents to go the gallows. They are also not there to see the culprits escape conviction.<sup>13</sup> The Office of the Prosecutor, expects the most transparency, fairness and impartiality in the criminal prosecution.<sup>14</sup>

The recent bill on convicting the accused with capital punishment for raping a girl child less than Twelve years of age under The Criminal Law (Amendment), 2018 was unanimously passed by the State of Madhya Pradesh. With this, Madhya Pradesh becomes the first State where those convicted of such rapes will face the gallows.<sup>15</sup> With the law in place, the state has seen a steady increase in the number of cases where the accused has been sent to Life Imprisonment or Death Penalty. The special court set up under the Protection of Children from Sexual Offences (POCSO) Act has served Twenty One death sentences in 2018 and another Five in 2019.

Additionally, 168 eight rapists were served life imprisonment in 2018.<sup>16</sup> To the contrast, In contrast, only Six had been accorded the death penalty by Sessions courts in MP in 2017<sup>17</sup>. These swift decisions of the Court in declaring the sentences especially after the passing of a new rape law raises one question: Whether the speedy convictions is risking the right to fair trial of the innocent convicts from socio-economic weaker section?

## **INSENTIVINZING PUBLIC PROSECUTORS: A FAULTY TOOL**

In recent times, the government of Madhya Pradesh had been paying special focus on the speedy trial and the disposal of the heinous and sensational crimes, especially the one’s involving the rape with the minor. With the law in line, the responsibility rests upon the Public Prosecutors to ensure that the accused are speedily convicted and to ensure that the punishment be imposed on them.

For motivating and enhancing the performance of the Public Prosecutors, the Madhya Pradesh government devised a new policy, known as “Reward System”, wherein a Prosecutor who secures a Death Penalty for rape accused will get 1000 points, 500 points for a Life Imprisonment and 100-200 points for securing maximum punishment for the convict. These scores are submitted in the Annual General Report (AGR) and the highest scorer is felicitated by the government.<sup>18</sup> Accordingly, the prosecutors securing 2000 points or above identified with

titles such as ‘Pride of Prosecution’, ‘Best Prosecutor’ as well as the Best District every month etc.<sup>19</sup>The warnings are issued to those having less than 100-200 points. It has been reported that the objective of this rewarding system is to motivate the prosecutors and ‘ensure quick convictions’.<sup>20</sup> Along with the system of reward, a new app was launched known as “e-Prosecution MP”(Public Prosecutor Performance Evaluation System), on October 13, 2017. The prosecutors are expected to submit the works (court related or administrative, as the case may be) undertaken by them on a daily basis through this application “so as to enable transparent, rule-based and scientific calculation of the performance score of the prosecutor”.<sup>21</sup>

The drawback witnessed in such a system is that it undermines the basic principle on which the whole criminal justice systems rest i.e. Independent prosecutorial system and the fair trial of the accused. The interest secured through the prosecution such as gaining reward points to be reflected in the AGR (Annual General Report), which might in future escalate to qualifying for Direct Recruitment for the post of Additional District Judge (ADJ), Master trainer of the Department, National and State Award etc creates prejudice. The whole system leads to developing biasness in the mind of Public Prosecutor towards the accused, proving him guilty by all odds, thereby causing miscarriage of justice with the innocent. Senior advocate Rebecca John has quoted, “This scheme is a serious abnegation of all constitutional principles settled over decades by courts of law, and poses a direct threat to the fundamental right to life and liberty.”<sup>22</sup> The accused persons would now be subjected to prosecutorial malevolence, and it would be too late before the injustice caused can be remedied.<sup>23</sup> The policies such as this, has been promoted in the system without the proper research and recommendations. The Law Commission of India in its 14<sup>th</sup> Report of 1958 observed that the “*The Impartiality of the Public Prosecutor’s conduct is vital to the impartiality of the court itself. In order to ensure that he is not regarded as a part of the police department, he should be seen as an independent official, an officer of the court*”.<sup>24</sup> Not only Law Commission but also the highest adjudicating body in its various judgments highlighted the importance of impartial and fair prosecution by Public Prosecutor. In the landmark case of Shiv Kumar v. Hukam Chand & Ors.<sup>25</sup>, the Supreme Court observed that “*The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case.*

*The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused.”*

Yet another fallacy in the Policy is that it lays the importance over quantity rather than quality. The existing backlog of cases before the Session’s court and hastiness in dealing might reduce the quality i.e. the intellect required to be put in by the prosecutor will be compromised. Therefore, the only yardstick to analyze the competence of any prosecuting system cannot be the amount of the cases disposed and the numbers in which convictions and acquittal were confirmed. According to one of the report on ‘Efficiency of the Office & Director of Public Prosecutor (2000) from Auditor General of South Wales, observed that there are Four parameters to assess the effectiveness of Prosecutor’s office, i.e. quality, quantity, timeliness and cost.<sup>26</sup> Therefore, looking forward to this new approach in dealing with the accused might need the revising of the policy on an urgent basis so that it does not become a bad precedent for other states.

## CONCLUSION:

Rape is considered to be a gender-based offence. With the definition given under Section 375 of Indian Penal Code, 1860 for the offence of Rape, it is clear that the victims of rapes are women and the perpetrators are men. The punishment prescribed for the offence of rape under Section 376 varies from minimum imprisonment of seven years to a maximum punishment of Life Imprisonment or Death in the rarest of rare case. The rape laws in India have undergone several amendments but the same patriarchal thought is attached to it i.e. men cannot be a victim of rape. In the case of Sakshi v. Union of India,<sup>27</sup> the Supreme Court referred the issue of gender neutrality of rape laws to Law Commission of India. Thereby, the Law Commission in its 172<sup>nd</sup> report recommended drafting unbiased rape laws and making amendments in IPC, Evidence Act, POCSO Act etc. However, all the recommendations were discarded with the reason that the female cannot commit a rape of a man. While the National Crime Report Bureau (NCRB) in its report in the year 2017 reflected that there were 17,597 girl victims of penetrative sexual assault for boys, the number was 183,<sup>28</sup> still the government does not find any merit in the argument of gender neutral sexual assault laws.

This is by far the most biased and partial law which turns its deaf ears to the male victims of sexual abuse.

With this scenario, a new amendment in the old law wherein the “male” accused is awarded with capital punishment in cases of rape with minors and under the influence of the State’s pressure for Speedy trial and disposal, the prosecutor secures himself a reward point by proving the case of highest punishment, bring an embarrassment to the whole nation. This system ignores the fact that “male” accused can be innocent in certain cases and a victim to false case. Further considering him guilty of death penalty without even a fair and proper trial of the case is not just. Such progressive approach to solve the cases of rape is not an appropriate one in the country where pronouncing of death penalty is constitutionally valid but at the same time the highest courts have limited its scope of application by restricting it to rarest of rare cases<sup>29</sup> since the trial courts more often invoke the punishment either in order to satisfy public sentiments or to gain media attention.

#### SUGGESTIONS/ RECOMMENDATIONS:

- To review the “Reward System” policy of the Madhya Pradesh government before it become bad law. The policy neither serves the ends of justice nor is it in line with the settled legal principles.
- In order to increase the efficiency of the prosecution system, there is an urgent need to fill the existing vacancies, which remains unfilled for years and creates a backlog of cases.
- An urgent requirement in changing the rape laws with respect to the gender biasness. The rape laws must be made gender-neutral keeping in mind the number of cases of male sexual harassment. Hence, the amendments under various laws especially under rape laws given in IPC must be urgently concluded.
- Instead of providing incentives for every conviction, there is a need to train our Public Prosecutors in the field of cases concerning the offences of cyber crimes, forensics etc. Improving the mental ability and relaxation, enhancing productivity, case preparation and presentation in courts etc also needs to be focused upon in the training sessions.<sup>30</sup>

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