

SUBMISSIONS MADE BY
THE KARNATAKA INDIA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS
TO THE JUSTICE J.S. VERMA COMMITTEE

1. The effectiveness of the criminal justice system in the context of perpetration of sexual offences is currently under the scanner in the backdrop of the events that transpired in New Delhi in December 2012. A macroscopic view of crimes of the nature of sexual assault in India brings to the fore a multitude of failings in the prevailing criminal justice system in India. On the one hand, there is utter disregard for societal values and law and order, which allows for the perpetration of such heinous crimes and on the other hand, the system renders no effective mechanism for speedy justice to the victims or for the imposition of punishment on the perpetrators, which is commensurate with the gravity of the crime.
2. No ubiquitous value education system is in place, which would serve as a deterrent to commit crimes in the first place. Having been failed by the system at the very inception, when the crime is perpetrated, the victims are failed yet again by an unsympathetic system that makes reporting of the crime itself an agonizing endeavor. Thereafter, the victims have to bear the brunt of an inadequate redressal mechanism. If the local police actually file a report, it is followed by a prolonged trial, culminating in conviction or acquittal, which in most cases is dependent solely upon the testimony of the victim. The sentence of imprisonment varies between 2 years and imprisonment for life based on the judge's discretion, there being no set standards for graded punishment. The unfortunate fact is that the prevailing criminal justice system is designed to the detriment of the victim and the society at all levels- from the very commission of the crime all the way until the conviction of the perpetrator. To add to this conundrum, the judiciary in India is overburdened with a backlog of hundreds of other cases such that by the time the perpetrators actually come to justice, victims and their family members have lost faith in the legal mechanism altogether.
3. Poignant here is the fact that the need for reform has come to the fore time and again and efforts towards reformation are constantly being made. Bills are formulated and introduced before the Parliament, and are subsequently lost in the milieu of many such fragmented efforts. Review of the Rape Laws was at center stage, in the 172nd Report of the Law Commission of India¹, which based on the judgment of the Supreme

¹ Commission of India, 172nd Report on Review of Rape Laws, 25th March, 2000, D.O.No.6 (3)(36)/2000_LC (LS) Law

Court of India in *Sakshi v. Union of India*² and the representation made to it by the National Commission of Women in this regard, recommended amendments to the Indian Penal Code, 1860, the Criminal Procedure Code, 1973 and the Evidence Act, 1872. The recommendations *inter alia* included widening the scope of the definition of rape u/s 375 and 376 A of the Penal Code, graded punishment for Rape u/s 375 and 376 B-376E of the Code contingent upon the identity of the perpetrator and the severity of the offence, and the consequential amendment to the First Schedule of the Criminal Procedure Code, 1973. The police forces and the judiciary were to be sensitized to the victims of sexual offences and appropriate changes to the structure of recording the statement of the victim, medical examination of the victim and in adducing evidence during trial were sought to be brought about by amendments to Sections 53, 160 and 164 of the CrPC and Sections 53, 114, 146 and 155 of the Indian Evidence Act. Although certain amendments have been made to the Criminal Procedure Code, amendments to the Indian Penal Code and the Evidence Act are still elusive.

4. Punishment that is meted out in the case of gang rape is stipulated under Section 376 of the Indian Penal Code 1860, wherein the maximum punishment that can be imposed is rigorous imprisonment for a term which shall not be less than ten years but which may be for life with the imposition of a fine. In the present case, keeping in mind the brutality of the crime committed and the public outrage that has rightly followed, there has been much demand for the imposition of the death penalty on the accused. The Supreme Court precedent on the levy of capital punishment is that it can be levied only in the "*rarest of rare cases*." The Indian Penal Code under Sections 121, 124A, 132, 194 etc, provides for capital punishment for crimes such as the waging of war against the Government, sedition and the commission of mutiny, etc. Section 302 of the IPC prescribes the death sentence for the offence of murder, however it gives discretion to the sentencing judge, to prescribe life imprisonment as an alternative punishment, as the death sentence should be sparingly inflicted. The discretion on whether to award the death sentence rests solely with the judge. The award of capital punishment is appealable at every stage to a higher court and every man's last resort is an appeal to the President of the country for a presidential pardon and the commutation of their sentence, a power that is granted to the President under Article 72 of the Indian Constitution.
5. The foremost argument for the levy of the capital punishment for crimes such as rape is that it would act as the ultimate deterrent to the crime. It is more from the

² (1999) 8 SCC 591

perspective of human psychology that this is seen as a deterrent as there has not been any evidence to show that in countries where the death penalty is allowed, that it is effective in preventing crimes. What perhaps may be more effective is a more efficient and robust criminal justice system with preemptive and preventive measures that could act as a more effective deterrent against rape or sexual violence. In addition, as a punishment itself, the argument that the death penalty is the most effective deterrent is questionable because while it puts an end to the person's life, the value of such an act from the perspective of society is purely retributive rather than preventive. The theory of deterrence is a failure world over, and retribution for a crime is not the *raison d'être* for punishment, reformation is the object. The bottom line is that the view that the death penalty acts as a deterrent is still the product of popular belief rather than evidence. The data and empirical evidence available on the subject is too convoluted and any conclusions that can be drawn are far too fragile for a society to base their decision on, in taking away human life. To quote a study of the Stanford Law Review, *"Aggregating over all estimates, it is entirely unclear even whether the preponderance of evidence suggests that the death penalty causes more or less murder."*³ Capital punishment in addition, takes away from the value of a punishment as a life is lost in one swipe, and the guilt that a person may live with is gone, the lingering suffering or punishment that should be meted out is lost in a moment, surely a society must mete out a better punishment for a crime such as this, and death is the easy way out? There has to be a better and more effective punishment. A life in prison, confiscation of his economic resources, etc, there are a host of other measures that can be taken to ensure a more effective punishment than just hanging which ends all suffering in one moment.

6. A perusal of international opinion on capital punishment reveals that it is in fact very few nations that still practice the same. Since 2007, the United Nations General Assembly has voted on a resolution to impose a global moratorium on the death penalty. While this has no force of law per se, it is an important symbolic gesture of global opinion. Over the years, with an increasing awareness of human rights across the world, it is evident that there is a very deliberate trend toward a wider recognition that capital punishment is abhorrent to human rights. Amnesty International data reveals that when the UN was founded in 1945, only eight states had abolished the death penalty for all crimes, today 136 UN member states have abolished the death penalty in law or practice. The vote that usually takes place at a keynote UN General Assembly human rights meeting occurs every two years, and the latest vote that took place in

³ Uses And Abuses of Empirical Evidence in the Death Penalty Debate- John J. Donohue and Justin Wolfers (58 Stanford Law Review 791 (2005))

December 2012 had a record 111 countries voting in favor of a moratorium on capital punishment, four more than in 2010, while India opposed the moratorium. A host of other International bodies such as Amnesty International, etc., have also initiated efforts to abolish the death penalty world over and worldwide efforts have culminated in the establishment of a World Coalition Against the Death Penalty created in May 2002, as an alliance of NGO's, bar associations, local bodies and unions who all aim to garner international support over the fight against capital punishment and has over 121 member organizations. Very few nations today still retain the death penalty as a punishment.

7. Most nations across Europe do not follow the death penalty any more as the European Union strictly requires the abolition of the death penalty by member states as stipulated in the 13th protocol to the European Convention for the protection of Human Rights and Fundamental Freedoms (3rd May 2002). The USA is the only G8 country to still retain the practice and they are joined by nations such as India, Pakistan, China, Iran, Saudi Arabia, Iraq, Afghanistan, Malaysia etc. in keeping the practice alive. The arguments against the archaic practice are multifold. Firstly, the deliberate, premeditated and ceremonious taking away of human life in the name of the law and the people violates the state's duty against cruel and inhuman treatment/ punishment, according to Article 5 of the Universal Declaration of Human Rights, 1948 and Article 7 of the International Covenant on Civil and Political Rights, 1966. The state cannot give itself the right to take away human life on the one hand, and then retain its status of being the protector of human life and fundamental freedoms on the other, as the imposition of capital punishment is a deliberate denial of civil liberties and is inconsistent with the fundamental values of a democratic state. In addition, the UN Economic and Social Council (ECOSOC) in resolution No. 15 of 1996 (23 July 1996) encouraged member states to abolish capital punishment and recommended that the countries that still retain the practice must ensure an expedited and fair trial.
8. Article 21 of the Constitution of India guarantees every individual the protection of his right to life. Judicial precedent has established that every human being's right to life is inalienable. By this logic, sentencing a person to death and executing them violates that right *a priori assumption*. In *Mithu v State of Punjab*⁴ the Apex Court declared that Section 303 of the Indian Penal Code, (which mandated capital punishment for murder committed by a person imprisoned for life) was unconstitutional as it violated the provisions of Articles 14 and 21 of the Constitution. A different solution must be sought.

⁴ ((1983) 2 SCC 277)

One that does not challenge our legitimacy as a nation that upholds human rights and also reaffirms the state's position as the upholder of human dignity and the protector of fundamental rights. In other words, a solution must be found that is not as futile and extreme as capital punishment but nevertheless is a more effective punishment that can have a positive influence on the rest of society.

The endemic failure of the existing scheme of punishment for sexual offences in acting as a deterrent and the escalation in the rate of incidence of such crimes calls for the following measures:

i. Graded Punishment with mandatory Life Imprisonment for perpetrators of Rape:

At the outset, there ought to be gradation of sexual offences based on the gravity of the offence, the degree of physical violence, the consequences of the violence on the victim, the relationship between the victim and the perpetrator. Each category of crime must be punishable in appropriate measure in keeping with a prescribed graded system of punishment. Life Imprisonment for every perpetrator of Rape must be mandated, the definition purported to Life Imprisonment being imprisonment for the entire duration of the life of the offender.

There ought to be a gradation of sexual crimes and their punishment, which must be immediately enforced in a transparent manner by educating the police forces and courts, of these laws such that they may expeditiously apply the same, in order to prevent atrocities such as these.

ii. Implementation of the recommendations in the 172nd Report of the Law Commission

The Law Commission of India, in its 172nd Report, has recommended widening the scope of actions that would constitute Rape in order to bring within its purview rapes amongst homosexuals. The Report also endeavored to sensitize the criminal justice process set out in the Indian Evidence and the Indian Penal Code to the physical and emotional ramifications of the offence on the victim by prescribing for the reporting of crimes of this nature to woman officers. The Report also recommended the incorporation of propositions in the CrPC for speedy medical examination of the victim and amendment of the Indian Evidence Act to exclude questions pertaining to the victim's past from being raised during trial. It is imperative that these recommendations be brought out of cold storage and be implemented.

iii. Fast Track Courts/ Expedited trial Mechanism:

Fast track Courts must be set up that would expedite the entire legal process that is associated with sexual crimes and crimes against women, such that victims and their families do not have to resort to the run of the mill red tapism and sloth that is associated with the judicial system. Victims should not have to wait for decades to get justice until that justice no longer has any relevance. At the same time, accused must not have to wait for years to acquit themselves in the event of their innocence, this negates the value of the right to life guaranteed in Article 21. Not only must fast track courts be instituted, but sexual offences must be mandatorily fast tracked and these court must be established on a permanent basis only to handle cases of this nature, in addition, the entire judicial process associated with crimes of this nature must be expedited, from the very institution of such cases in fast track courts right up to the Appellate stage, cases of this nature must be given priority such that victims have the opportunity to benefit from judgments in these cases in a timely manner and these cases do not get stuck indefinitely in the lackadaisical process that defines our judiciary. This method has been used the world over to address various large scale issues, such as the establishment of special trials and courts to deal with perpetrators of the Holocaust in Europe after World War II. The frequency of incidents such as these in India leave no room for doubt that the time has now come for us to take this seriously and address this in a grave, expedient manner.

iv. Amendment of Article 72 of the Constitution:

Another essential modification must be made to the auspices of Article 72 of the Constitution; i.e. the power vested in the President to grant pardons and to suspend, remit and commute the sentences of offenders. When an independent judiciary has passed a judgment on the punishment of a sexual offender, whatever that punishment may be, the executive head, being the Governor of a State or the President, must not be able to commute or pardon such a sentence. The policy must be one of no tolerance towards sexual offences. Under no circumstances should the state have any power to interfere with a lawful judgment delivered by a court under the due process of law, in sexual offences. The rationale behind this measure is to assert our position as a nation that in no circumstances will condone the depravity of offences such as Rape and other such sexual offences.

v. Separate Police Cells:

Special cells should be set up amidst the police forces at the state level to deal with sexual crimes and crimes against women such that complaints and FIR's for crimes of this nature are taken up by a separate branch of the local police of every state and the entire mechanism to address crimes of this nature are demarcated from the regular functioning of the police forces. This will ensure efficiency, as a separate branch, which deals only with crimes of this nature, right from filing reports, to gathering evidence, to overseeing the entire process, would ensure expediency and efficiency without overburdening the other branch of the police that deals with other crimes. In keeping with the recommendation of the National Commission for Women to the 172nd Law Commission of India, separate cells must be established in the police with women police officers so that victims of crimes like rape do not have to endure the humiliation of having to approach a police station full of men to file a report. These cells should be instituted with greater density in states where crimes of this nature are in greater abundance such as Haryana and New Delhi and the functioning of these cells and their officers must be made answerable to the highest Police in-Charge in a state. The efficient functioning of cells such as these would ensure the prevention of crime and would act as the greatest deterrent to the commission of sexual crimes. The aim of the state should be to prevent crimes rather than affording the highest conceivable punishment to the offender with the hope that the same would serve to deter others from committing such crimes.

vi. Solitary confinement:

The Indian Penal Code u/s 73 vests the Court with the power to sentence an offender to solitary confinement based on a scale prescribed therein and subject to the limitations laid down u/s 74. The existing circumstances elicit a revision of these provisions and widening of the scope of solitary confinement by allowing the Courts to impose Solitary Confinement of up to 1 month at a time, alternating between solitary confinement and non-solitary confinement for the entire duration of imprisonment. It ought to be ensured that the rights afforded to the prisoners in solitary confinement are congruent with the standards for humane treatment that ought to be rendered to prisoners as laid down in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture).

vii. Forfeiture of property and Earnings:

The Indian Penal Code u/s 61 previously provided for a sentence of forfeiture of property prior to the enactment of the Indian Penal Code (Amendment) Act, 1920 which repealed the section. Time is ripe for the reintroduction of the section by incorporating provisions for forfeiture of the entire property of sexual offender to the State, half of which will be paid as compensation to the victim and the remainder may be utilized to constitute a fund for imparting value education in this context. In addition, any earnings of the offender in prison must also be forfeited by him to the State or must be used to support his family if they are rendered destitute on account of his imprisonment.. Provision can also be made in case the offender has dependents, for apportioning the economic resources of the offender into three parts between the dependents, the victim and the State.

viii. Chemical Castration:

While all the other measures of punishment and reform that have been suggested would lead to a reformation of our system, the question that still arises is what levy of punishment or what combination of punishments apart from the death penalty would assuage the pain of the victims and their families and render justice in a heinous crime such as this? While physical castration is out of the question being a barbaric practice, which the state in all legitimacy cannot levy, chemical castration is the obvious alternative. While there is some debate over the human rights aspect of the levy of a punishment such as this, the State has to take some action that would act as a punishment bold enough to deter the repetition of incidences like these. Chemical castration involves the administration of a medication designed to reduce libido or the sexual urges of an individual and is not any form of physical castration or sterilization as the effects of the same are short lived. The drug must be administered on a periodic basis, (depending on the drug used, it may have to be administered at intervals of three months or 3 years) and is considered reversible when treatment is discontinued. While there are debates on the side effects of such drugs, this punishment has been used the world over against child molesters and repeat sex offenders in nations such as the US, Germany, Poland the UK and also South Korea as recently as the 3rd of January 2013 in their first ever landmark sentencing of a 31 year old pedophile to be chemically castrated. This must be used as the ultimate deterrent to the commission of a crime such as this, as in all fairness, the state is bound. On the

one hand there is a need to answer the people and give them justice and deliver an appropriate punishment, and on the other hand there is the need to maintain human rights and answer the demands of international human rights bodies that are strongly lobbying against the death penalty. Chemical castration is the most humane punishment, it is a punishment that will address the problem, and as a reversible method, in the event of a wrongful judgment it can be reversed. Whatever expenses the state has to incur for the levy of such a punishment must be met from the economic resources of the accused or his earnings in prison or in the alternative, the state will bear the cost of the same in the interests of justice.

ix. Conviction for sexual offence must be a ground for divorce:

It is necessary to not neglect the hardships of families of offenders of such heinous crimes, who are subject to much stigma on account of the crime committed. Conviction for a sexual offence must be provided for as a ground for divorce by adequate amendment to the laws governing marriage and divorce. It is paramount that the dependents of the offender are not left without any means. Hence, it should be legally mandated to provide for transfer of such property held in the name of the offender, which is not forfeited to the State, to his dependents entitling them to dispose of the same. The offender must continue to provide for legally mandated maintenance notwithstanding his conviction.

x. Enact a new law to provide mandatory education in schools in view of gender sensitivity and to inculcate the right value system:

Lastly, it is pertinent here to recognize the fact that the problem of high rate of incidence of sexual offences, repeat offenders and such offences of a violent nature are indicative of the systemic failure of societal values, the absence of executive action in curbing these crimes and the failure of the police and the judicial machinery. It is of utmost importance that institutionally, beginning at the level of governmental offices and percolating all the way into education at school levels, value education reinforcing the right set of values, as a part of all modes of formal and informal education, be introduced. Such education must be legislated upon, legally mandated, enforced and more importantly, it must be overseen by a national body instituted specifically for this purpose that is funded by the State, in the interests of the public at large. The national body instituted, must be proactive and have the power to implement programs of this nature, in Private and Government run schools as well as in rural areas through seminars, workshops and special programs, to ensure the message of gender sensitivity reaches the mass population unhindered by any obstacle. A

comprehensive scheme must be drawn up with the aim of sensitizing the populace to gender issues and affirming unequivocally that behavior such as this is asocial and completely intolerable. In simple words, we must become a society that refuses to accept reprehensible behavior such as the kind that the entire nation recently witnessed.

xi. Elected representatives charge-sheeted with sexual crimes must be suspended pending judgment:

A new horror has befallen our society when we are forced not only to deal with crimes against women from inhuman, fellow citizens, but it is a new low when the perpetrators of these crimes are our very own elected representatives who take office to protect the populace and be responsible leaders. One can name countless elected representatives who are accused of rape and charge-sheeted for the same, from John Fernandes, accused of raping a Russian woman in Goa in 2009, to Bikram Singh Bramha, a leading member of the Congress party in Assam accused of raping a woman on the 3rd of January 2013 right in the heat of the furor that has arisen over the gang rape in Delhi. Strict actions must be taken against politicians when they are accused of sexual offences and those that are convicted or charge-sheeted for the same must be disentitled from contesting in elections. When a charge sheet is filed against an elected representative in office, he must be deprived of the right to attend and vote in the proceedings of the elected body. At the end of the trial, if he is convicted, it should be provided that his elective office gets vacated automatically.

A reformation of our society is in order; right from the education we impart in our schools, up to a change in the way our police force functions and an acceptance of preventive action as the norm. As a state that should pride itself on upholding human rights, it would be a travesty for capital punishment to be awarded here, in contravention to the views of human rights bodies across the world. Instead this should act as a wake up call that the problem lies at the root of the matter, and that prevention is the key, not punishment. Capital punishment may calm the fury that is wrought in our nation today but it will only serve to stem the tide that has followed this incident and it would be only too easy for our institutions and our law enforcement agencies to slip back into the complacency that allowed this to materialize in the first place. We should take this instead as an everlasting example of all that is wrong in our society, and make an earnest endeavor towards reconstruction of our systems. Where better to begin than to display basic respect toward human rights as a nation and give an appropriate punishment that does not disrespect the very chastity of human life.

In light of the above, a summary of the recommendations we make is given below:

- a)** Death penalty for the offender is not appropriate.
- b)** Life imprisonment meaning, imprisonment for the remainder of his life, should be mandatory when the offence is committed by two or more persons in one incident when it is coupled with grievous hurt, physical abuse and bodily injury to the victim. Half the period of sentence shall be rigorous imprisonment and the remaining half shall be in solitary confinement.
- c)** If the offence is not coupled with physical violence, rigorous imprisonment for a period of not less than 30 years should be mandatory.
- d)** In addition to the sentence of imprisonment, the entire assets and properties of the offender must be confiscated and 50% in value should be paid to the victim/victims. From the remaining 50%, one portion should be used to provide financial assistance for sustenance of the wife, children and mother of the offender, if they are unable to look after themselves and the remaining balance ought to be kept apart in a separate fund to be used exclusively for the welfare of women and for education on aspects relating to gender sensitivity. The fund shall be administered by the National and State Commission for Women, in accordance with rules to be framed by the Central Government.
- e)** Chemical castration of the offender shall be made mandatory.
- f)** The provisions of the Criminal Procedure Code and Evidence Act to be amended to simplify the process of trial and to provide that the victims conduct prior to the incident shall be inadmissible in evidence.
- g)** Fast track courts to be set up to deal with sexual offenders with a time limit for completion of the case within six months from the date of the offence and a fast track appeal procedure with a six-month limit in the High Court and Supreme Court. A special prosecution service with women prosecutors and special women's police stations to be set up to deal with sexual offenders at every district level in the country.

- h)** Article 72 of the Constitution should be amended to take away the power of the President to grant pardons, remission, suspension or commutation to a convicted sexual offender.
- i)** The marriage laws to be amended to provide for a new ground for securing divorce by the wife of a convicted sexual offender.
- j)** Gender sensitive and value-based education should be made compulsory in all schools and an examination for the subject shall be compulsory from Standard 4.
- k)** In addition to the introduction of such education in the formal curriculum of schools, a concerted widespread sensitization by use of media, film, outdoor advertising, internet, radio, television, and other means will be adopted by the Central Government to highlight the need to improve society's response to sexual offences and to inculcate family values across all sections of the society to show respect to women.
- l)** Amendment to the Representation of Peoples Act to provide that immediately upon the filing of a charge-sheet alleging a sexual offence by an elected representative, the automatic suspension of the said member from all privileges of membership and the immediate vacation of his office upon his conviction by the trial court and non-restoration during appeal until his acquittal by a superior court.