

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 1

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Analysis of Death Sentence in Nirbhaya Rape Case

ESHITA BAGHEL¹

ABSTRACT

In March 2020, when the accused were executed, it was hailed that justice was done to Nirbhaya. However, the point is whether the justice was actually done in its true sense? The post-Nirbhaya period observed huge amendments in rape laws and more judicial sensitivity to address the issue. With this, a parallel rise in the number of cases could also be seen. Therefore, it is important to analyse the Nirbhaya verdict and the legal modifications. It is also important to see why despite such development, the issue of rape has worsened since 2012. From this, only better solutions can be provided. This work analyses the death penalty in Nirbhaya Rape Case. In this, it covers how the sentence was imposed what post-sentence procedures were adopted before they were finally executed. The death sentence of four convicts is hailed as justice to Nirbhaya. This work analyses whether a public celebrated death sentence is a solution to the problem of rape.

I. INTRODUCTION

Nirbhaya Rape Case was one of the most brutal rape ever happened in rape history. It shocked the conscience of every stratum of society. The Act was so brutal that in the judgement, *Justice Dipak Mishra* remarked that it seems as if we are living in a totally primitive and under-civilised society. The crime took place on December 16 2012. Soon after the incident, massive protests, media coverage, and political pressure led to many significant developments in the law. On March 20, 2020, the four accused were finally executed.² The crime was such a dastard event that it was high time to relook into the sexual offences against women and children. In the light of this, this work focuses on the entire legal battle in Nirbhaya Rape Case, a significant development in Rape laws, and how far have these development helped in tackling sexual offences in the country. From this analysis, the problem is analysed, and solutions are provided.

(A) Statement of Problem

In March 2020, when the accused were executed, it was hailed that justice was done to

¹ Author has pursued B.A.LL.B. from Rajiv Gandhi National University of Law, Punjab, India.

² *Mukesh v. State*, NCT Delhi (2017) 6 SCC 1

Nirbhaya. However, the point is whether the justice was actually done in its true sense? The post-Nirbhaya period observed huge amendments in rape laws and more judicial sensitivity to address the issue. With this, a parallel rise in the number of cases could also be seen. Therefore, it is important to analyse the Nirbhaya verdict and the legal modifications. It is also important to see why despite such development, the issue of rape has worsened since 2012. From this, only better solutions can be provided.

(B) Research Question

This work focuses on analysing the death sentence of four convicts in the Nirbhaya Rape Case. In this, following are the research questions

- What were the main legal issues which arose in the Nirbhaya Rape Case?
- How was the death sentence imposed in this case? What post-sentence procedure was adopted?
- Whether stricter punishment like the death penalty actually sufficient to address the issue?
- What were the legal changes brought by Nirbhaya Rape Case? How far were they effective?
- What is the main problem behind the rising number of rape cases even in the post-Nirbhaya period?
- What further solutions are required?

(C) Research Objective

The objective of this work is to analyse the whole judicial battle in the Nirbhaya Rape case from December 2012 till March 2020. From this, the work aims to analyse whether a death sentence is sufficient to address rape cases in the country. If the answer is no, then what solutions should be adopted to solve this problem.

(D) Research Methodology

This work is analyses the death penalty in Nirbhaya Rape Case. In this, it covers how the sentence was imposed what post-sentence procedures were adopted before they were finally executed. The death sentence of four convicts is hailed as justice to Nirbhaya. This work analyses whether a public celebrated death sentence is a solution to the problem of rape.

In the light of this, this work goes through Primary sources like judgements in Nirbhaya Case, Statutes and Amendments. Further to analyse the ground reality and implications of this law,

secondary sources like research articles, interviews, newspaper reports, etc., are analysed.

(E) Scope of Study

In this research, the issues relating to a death sentence in the Nirbhaya Rape are analysed. Death Sentence covers i. how the death sentence was imposed; this part covers the existing position of death sentence and how it was applied in the present case, and ii. the post-death sentence remedies available to the accused, this part focuses on what remedies are available to a death row convict and how these remedies were utilised in the present case. Further, the work focuses on the impact of the Nirbhaya Rape case and tries to answer whether the death sentence or Amendment in Criminal Law sufficient to prevent rapes in India. In this, various rape incidents post-Nirbhaya are analysed.

(F) Limitation of Research

The present research widely covers the legal implications brought by Criminal Law Amendment Act. In this, important laws and sections are analysed in light of the current analysis. However, the study does not analyse the individual provision relating to sexual offences. Law is studied in a wider aspect, but the individual provision, along with its background and earlier Amendment, is not covered in this work. Further, some statistical data is used in analysing the impact of the *Nirbhaya Rape case*. But empirical analysis is not a prime focus of this work.

(G) Chapterisation Plan

This work first analyses the Case of the Nirbhaya Rape Case. Chapter II deals with the Facts, Procedural History and Decision in Nirbhaya Case. Further, Chapter III discusses the Imposition of Death Sentences in the Nirbhaya Rape Case, and this is followed by the post-Death Sentence procedure in Chapter IV. Then Chapter V deals with Legal Changes brought by Nirbhaya Rape Case. Chapter VI tries to answer were these changes sufficient to tackle the rape problem in India. If not, then what are loopholes in the existing situation. After analysing these, suggestions are made under Chapter VII.

II. BACKGROUND

(A) Facts

On December 16, 2012, the four accused Ram Singh (later he committed suicide), his brother *Mukesh Kumar*, *Vinay Sharma*, *Pawan Gupta*, *Akshay Thakur*, and a *Juvenile Offender* were driving a bus in Delhi. They gave a ride to the victim and her friend. The group brutally raped the victim in the bus while it roamed around in Delhi. The rape was committed in a very

barbaric and shocking manner. Foreign objects were inserted in the victim's private parts. Medical examination showed that several bite marks were found all over her body, including private parts like breasts, vagina, etc. the Act was a totally savage act. Further, the accused did not stop here. After the incident, they threw the ravaged naked body of the victim and her friend in the extremely cold weather at night. They did not stop here and tried to run over the bus over the lying helpless victim and her friend. It was luck that they could not succeed in killing them.

(B) Procedural History

After this case, in January, the then Chief Justice of India, Justice Altamas Kabir, inaugurated the Fast Track Court for speedier disposal of sexual offences cases. The FIR was filed on January 2 2013; the court took cognisance in January and convicted the accused in September. Hence, in only 9 months, the whole criminal trial was completed in this historic case. Death Sentence was awarded, and as per the requirements of Code of Criminal Procedure, 1973, reference was made to Delhi High Court. The court confirmed the Death Sentence of the four accused in March 2014.

Then, the four accused appealed the death sentence in the Supreme Court. From March 2014 to May 2015 and upheld the death sentence. In this, the court deeply analysed the aggravating and mitigating factors in the factual matrix of this case. The court observed that this case falls under "rarest of the rare doctrine" and creates a "*Tsunami of shock.*"

After this, the defence counsel used a bunch of constitutional remedies like review petition, curative petition, mercy plea, etc. Here, the accused created the mockery of the entire legal process by

- Using remedies of different accused at different dates so as to delay the entire process.
- The grounds in appeal, review and curative petition were prima facie baseless.

(C) Decision

Considering the requirement of the Criminal Justice System, the court gave the due opportunity to the accused even though it resulted in delay. The court properly analysed each and every petition and rejected them. Firstly, in the appeal, the entire issue was death penalty was considered. Arguments were heard for about a year, and then the entire jurisprudence of the death penalty was studied. The court again affirmed the death penalty. The 3 different review petitions were decided after considering the existing law. However, in the present case, it was ostensible to reject them all. The curative petition prima facie did not fulfil the requirements of the established principle; hence it was rejected. After this, the mercy plea was also rejected by

the president and the four accused were finally hanged on March 20 2020.³

III. IMPOSITION OF DEATH SENTENCE

The court discussed the existing legal position with respect to a death sentence, and the principles were applied in the present case.

(A) Current Legal Position

Death Sentence as a form of punishment has been a debated topic. Its constitutionality is challenged on the basis of grounds under Articles 14, 19, and 21. It is argued that the death sentence is arbitrary (against Article 14), it challenges a person's right to express himself (Article 19), and is against the right to life (Article 21). The constitutionality of the death sentence came up for the first time in the case of *Jagmohan v. State of UP*.⁴ In this case, the court held that the death penalty is constitutional. As the sentence is imposed by applying judicial discretion, hence it is not arbitrary. In *Rajendra Prasad v. the State of UP*,⁵ the court stood against the idea of the death penalty. It held it unconstitutional for the first time. *Justice Krishna Iyer* observed that

1. Death Sentence should be imposed in extra-ordinary cases only
2. "Special Reasons" must be recorded

Then, in the landmark case of *Bacchan Singh v. the State of Punjab*,⁶ the court, by the majority of four is to one, held the death penalty as constitutional. *Justice P.N Bhagwati* gave the dissenting opinion. The following legal principles were set by this case

1. Crime and not the criminal test in awarding the death penalty
2. Life Imprisonment is the rule, and death is an exception
3. The death penalty should be imposed in "rarest of the rare case" only
4. In this, a balance between the aggravating and mitigating factors should be done
 - a. Aggravating factors are the factors that support the imposition of a death sentence. They are used by the prosecution. The severity of the crime, the degree to which it was committed, prior conviction, etc., all account for aggravating circumstances. Other examples are Seriousness of Offence, Victim, Victim being a public servant

³ (2017) 6 SCC 1

⁴ AIR 1973 SC 947

⁵ (1979) 3 SCR 646

⁶ AIR 1980 SC 898

- b. Mitigating Factors support the defence. It opposed the imposition of punishment. Possibility of reform, infirmity or disease of criminal are examples of mitigating factors

What is the rarest of the rare case depending upon the facts of each case? In *Macchi Singh v. the State of Punjab*,⁷ Justice Thakkar gave five categories of cases that fall under rarest of rare cases. These are

1. Manner of Commission of Crime
2. Motive of Crime
3. Magnitude of Crime
4. Socially abhorrent nature of the crime
5. Personality of Victim

(B) Imposition of Death Sentences in the Present Case

Taking note of the legal position, the Fast Track Court upheld the death sentence. The Delhi High Court confirmed it in reference to the High Court. This point was again raised in the appeal; the Supreme Court gave sufficient hearing and analysis on the matter and confirmed the sentence.

In the present case, the court noted the following facts

- Medical evidence showed the presence of severe bite marks all over the victim's body, including private parts
- Foreign Element was inserted in the most brutal manner that part of her intestine was ruptured
- After the gang rape, the victim and her friend were thrown into the extremely cold weather on a chilling night
- In order to hide the crime, the accused tried to run over the bus and tried to kill the victim and her friend

The court noted these facts as aggravating circumstances. Further, it observed that the rape itself is an aggravating circumstance.

The Counsel of the accused argued the following as mitigating factors

⁷ 1983 SCR (3) 413

- The accused is the sole bread earner of the family
- No prior history of committing a crime
- They being of very young age
- Loopholes in Investigation

The court held that there is no balancing of the aggravating and mitigating factors. Justice Dipak Mishra observed that the crime was committed to show a clear Act of savagery. The commission of such Act makes it appear that our society has not developed since the time human was uncivilised.

(C) Plea of Juvenile

In this case, one of the accused was a juvenile in conflict with the law, and his trial was conducted by Juvenile Justice Board. Another accused, Pawan Kumar Gupta, raised the plea of juvenility. It was contended that on the date of offence, he was 16 years. In this, he relied on School Leaving Certificate. This plea was rejected on merits by Juvenile Justice Board, by Patiala House Court in appeal, by Delhi High Court in revision, and by Supreme Court through SLP. Here, the question of age was a question of fact. For this, the investigation was directed to determine the correctness of age. The Investigation report submitted that the accused was not a juvenile. Since this report was itself not contested; hence all the courts in the hierarchy rejected the petition.⁸

IV. POST-DEATH SENTENCE PROCEDURE

In this case, the remedies in respect of the jurisdiction of the Supreme Court were taken. These remedies are reviewed and curative petition. There are other remedies like remission and commutation, etc. however, these were not utilised in this case. In this chapter, all the post-death sentence remedies are analysed.

(A) Review Petition

This is given under Article 137 r. w. 145 of the Constitution and Supreme Court Rules, 2013. Under this, the final decision of the Supreme Court is reconsidered by the same bench of the court. The review petition must be filed within 30 days from the date of the decision. The object of review is to correct errors appearing on the face of it. It is to rectify gross miscarriage of justice. Review is totally different from the appeal in disguise. In appeal, matter can be appreciated on evidence, re-trial can be ordered. However, in review, the only purpose is to

⁸ Pawan Kumar Gupta v. State NCT, Delhi 2019 SCC Online Del 11870. Appealed to SC 2020 (2) SCC 803

correct a gross violation of principles of justice. Hence, the court does not delve into the aspect of evidence.

According to Supreme Court Rules, Order XLVII, the review is allowed in civil cases when grounds mentioned under Order XLVII; Rule 1 are fulfilled. And in the “*criminal proceeding*,” there must be “*error on the face of the record*.” Thus, it is the discretion of the court to allow or not allow the review petition. Through various judgements of the Supreme Court, the following three grounds are mentioned:

- The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him;
- Mistake or error apparent on the face of the record; or
- Any other sufficient reason that is analogous to the other two grounds.

Here, “*any other sufficient reason*” means other sufficient ground analogous to first to grounds.

Review Petition in Present Case

In three different Review Petitions, *A.K. Singh v. NCT, Delhi*,⁹ *Mukesh v. NCT, Delhi*¹⁰ *Vinay Sharma v. NCT, Delhi*.¹¹ On this grounds, like a disease of accused, accused not residing in Delhi, accused being only bread earner of the family, etc., were made. The Supreme Court observed that these grounds were properly considered in High Court reference and Supreme Court appeal. Hence, the review is not permissible.

(B) Curative Petition

A curative petition is nothing but a review of the review petition. This is not defined anywhere in the constitution but is judicially evolved. In 2002, in the case of *Rupa Ashok Hurra v. Ashok Hurra*,¹² the court invented this concept. In this case, the question was whether there was any further remedy against the final decision in the review petition. Here the concept of the curative petition was brought forth. According to the court, this concept is derived from Inherent powers under Article 142 of the Constitution. The purpose of a curative petition is to cure abuse of process and gross miscarriage of justice. It is totally curative in nature; hence while exercising this jurisdiction, the court cannot ignore the rights of a party. The court observed that even though enlisting all grounds on which curative petition may be entertained is not possible,

⁹ 2020 (3) SCC 431

¹⁰ 2018 (8) SCC 149

¹¹ 2018 (8) SCC 186

¹² AIR 2002 SC 1771

certain broad parameters can be laid. These parameters are as follows:

- Application is generally rejected unless very strong reasons exist.
- The petitioner has to prove that there was a genuine violation of principles of natural justice.
- The petition should specifically state that the grounds mentioned in the curative petition were taken in the review petition and were dismissed by circulation
- The curative petition must be certified by a senior advocate.
- It must be circulated to 3 three senior-most judges in addition to the judges who passed the impugned judgment. If the majority of the judges agree that the matter needs a hearing, then it would be sent to the same bench.
- Exemplary costs could be imposed by the court on the petitioner if his plea lacks merit.

Apart from this case, Order XLVIII of Supreme Court rules deals with the aspect of curative petition. In this, identical conditions are provided.

Present Case

In this case, three curative petitions were filed on different dates. These were *A.K. Singh v. NCT, Delhi*,¹³ *Mukesh v. NCT, Delhi*,¹⁴ and *Pawan Kumar Gupta v. NCT, Delhi*.¹⁵ It could be prima facie observed from the petition that none of it fulfilled the grounds of the Rupa Ashok Hurra case. Hence, all of these were rejected.

(C) Mercy Petition

After all the remedies of the death row convict are rejected, the only option left is Mercy Petition. This petition means that the accused agrees that he has committed a crime, but because of certain reasons, he should be given “*Mercy*” or “*daya*.” Thus, it is nothing but an act of grace. The object of this is that judicial decisions might be legally sound, but they might be unjust from the perspective of the accused. Hence, he can claim Mercy from the executive, i.e. President and Governor. The President and Governor derive this power from Articles 72 and 161 of the Constitution.

The pardoning power is an act of grace and cannot be claimed as a matter of right.¹⁶ The remedy

¹³ 2020 SCC Online SC 108

¹⁴ 2020 SCC Online SC 230

¹⁵ 2020(4) SCC 54

¹⁶ *Kehar Singh v. Union of India* 1989(1) SCC 204

under 72 and 161 is entirely discretionary, and no reasons need to be provided.¹⁷In *Dhananjay Chatterjee v. State of West Bengal*,¹⁸ the court observed that curative petition powers are exercised by the Central and State governments and not by the President or Governor on their own. Further, these powers are subject to judicial review. This was held in *Maru Ram v. Union of India*¹⁹ and *Kehar Singh v. Union of India*.²⁰

In *Shatrughan Chauhan v. Union of India*,²¹ the court gave various guidelines in respect to a death sentence. As far as mercy petition is concerned, the court laid down the following

- The basic human rights cannot be denied even to death row convict
- He should be communicated about the rejection of the mercy petition.
- Minimum 14 days notice must be provided before his execution. By this, he has a chance to make his grace with god, be mentally prepared, and live his last moments properly.
- The convict must be allowed to meet his family members before his execution.

Mercy Petition in Present Case

Earlier, President Ram Nath Kovind, in an interview, said that rape convicts under POCSO should not be granted Mercy at all. In this case, all the mercy petitions were rejected. Then, *Writ Petitions challenging the rejection of Mercy Plea were filed*. However, the same was rejected as well.

(D) Other Remedies

These remedies are also available to death row convicts. However, these were not utilised in the present case.

Commutation

Under Section 433 Code of Criminal Procedure (Cr.P.C.) and Section 54 of Indian Penal Code, 1860(IPC), the appropriate government may commute the sentence of death into any other form of punishment provided in IPC. When this is done, Life Imprisonment means at least 14 years.²² After this period, he becomes eligible to apply for another sort of remedy.

¹⁷ State vs Jasbir Singh @ Billa And Kuljeet or Ranga Billa Case ILR 1979 Delhi 571

¹⁸ (1994) 2 SCC 220

¹⁹ (1981) 1 SCC 107

²⁰ 1989(1) SCC 204

²¹ (2014) 3 SCC 1

²² The Code of Criminal Procedure, 1973, No. 3, Act of Parliament, 1973, S. 433A.

V. LEGAL CHANGES THROUGH NIRBHAYA RAPE CASE

After the Nirbhaya Rape case, many significant changes were made in the law. Justice Verma Commission was set up to analyse the existing laws. It recommended the enhancement of punishment for committing rape and for causing death in rape. It was extended to 20 years maximum imprisonment in the former case and Life Imprisonment in the latter. On the basis of the recommendation of the commission, the *Criminal Law Amendment Act, 2013* or *Nirbhaya Rape*, was brought to force.

(A) Nirbhaya Act or Criminal Law Amendment Act, 2013²³

This Act brought various changes in the Indian Penal Code(IPC), Code of Criminal Procedure(CrPC), Indian Evidence Act(IEA) and Protection of Children from Sexual Offences Act(POCSO). The following are the important changes in the respective law.

- i. Redefined Rape:* The Amendment widened the definition of rape. Now, acts additional to penile-vaginal penetration or sexual intercourse also come under the ambit of rape.
- ii. Punishment of Rape:* The punishment of rape was increased to a minimum imprisonment of 20 years. Aggravated forms of rape with more stringent punishment were added, such as Gang Rape, Rape of Minor, etc. Even a death sentence could be imposed in case of rape of a girl below 16 or 12 years.
- iii. Age of Consent increased from 16 to 18 years:* Thus, statutory fiction, consent my girl below 18 is not considered as consent at all.
- iv. Insertion of New Offences:* Certain acts were not as serious as rape but were important factors behind the increase in rape. These acts include stalking, voyeurism, acid attack, trafficking, etc. The Nirbhaya Act not only worked on rape but also on these ancillary factors which contribute towards rape. The Amendment made all these separate acts offences so that the basic factors behind the sexual offences are subverted.
- v. Medical Help and Justice were made easier:* New Sections 166A and 166B cast a duty on the hospital and the police to assist the victim. The hospitals have a duty to treat the victim, and the police have a duty to register FIR. Failure or neglect would attract penal consequences.
- vi. Speedier Investigation:* The investigation in rape cases must be completed within a deadline of 2 months.

²³ The Criminal Law(Amendment) Act, 2013, No. 13, Act of Parliament (2013).

- vii. Medical Examination:** In this, the two-finger test made the victim uncomfortable filing the case. This test was removed.
- viii. Evidence:** The provisions of the evidence act were amended. Now, it is mandatory for the court to presume that victim did not consent in rape cases falling under S. 376(2)(a) to (n).²⁴ Now it is for the defence to prove that the victim consented. The victim need not prove the absence of consent in such cases. Further, to prove consent, the defence cannot produce evidence or cross-examine the rape victim in respect of her immoral character or previous sexual experiences. It was felt that such questions made the victim uncomfortable, and this was one of the reasons why the victim was reluctant to file a complaint.

(B) Fast Track Courts

Chief Justice inaugurated the fast track court to speedily try the Nirbhaya Rape Case. The court did a commendable job, and it completed the whole trial 6 months and sentenced the accused to death after 3 months.

(C) Nirbhaya Fund

Nirbhaya Fund was created by the government to financially assist the states in taking measures relating to women's safety and security, helpline number, etc. However, in reality, this fund is often criticised for being under-utilised. Data shows that 89% of the fund is not utilised by the state. No state has utilised such funds beyond 50%.²⁵

(D) Criminal Law Amendment Act, 2018

In 2018, the Criminal Law Amendment Ordinance was promulgated. Later, it took the form of the Act. This Act was not a direct consequence of the Nirbhaya Rape Case. But nevertheless, it is important to discuss in analysis. This Act brought more aggravated forms of offences under rape and also made some alterations in procedural laws. The following modifications were made by the Act:

- i. Insertion of Aggravated Forms of Rape:** Rape of Minor under 16 years and Child under 12 years was inserted aggravated form of rape. Further, 2 offences dealing with aggravated forms of Gang Rape were also included.

²⁴ The Indian Evidence Act, 1860, No. 1, Act of Parliament, 1860, S. 114A.

²⁵ TOI Correspondent, *How Nirbhaya case changed rape laws in India*, TIMES OF INDIA, (Sept. 28 2020 7:50 PM), <https://timesofindia.indiatimes.com/india/how-nirbhaya-case-changed-rape-laws-in-india/articleshow/72868366.cms#:~:text=On%20March%2021%2C%202013%2C%20the,death%20for%20rape%20offenders.&text=She%20died%20earlier%20at%20a%20hospital%20in%20New%20Delhi>.

- ii. **Timeline for disposal in appeal:** S. 374 and 377 of Code of Criminal Procedure, 1973 were amended. Now, appeal in rape cases needs to be disposed of within a time period of 2 months.
- iii. **Bail Provisions:** In order to ensure that the accused is not set free by bail, the bail provisions were made strict in rape cases. Now, bail in such cases requires 15 days' notice from Public Prosecutor. Further, at the hearing of bail application, the presence of information or an authorised person is necessary. Hence, the victim has an opportunity to oppose the bail to the accused.²⁶

Further, while passing this ordinance, the government made a policy change in respect of rape cases. It has decided to come up with more fast track courts to try rape cases. According to government officials, till now, there are around 524 fast track courts that try cases in respect to women, Scheduled Caste and Scheduled Tribes, marginalised and senior citizens.²⁷ Now, the aim is to establish 1023 more fast track courts to deal with offences of rape and POCSO. This new scheme provides for improving infrastructure and prosecution machinery, the number of judicial officers, the additional post of public prosecutors, investigators, special forensic kits, etc.²⁸

VI. ANALYSIS OF THE IMPACT OF THE NIRBHAYA RAPE CASE

Nirbhaya Rape Case and the follow-up amendments did bring certain positive changes. Although rape cases are increasing, the prosecution and trial of such cases cannot be ignored. Nirbhaya Rape Case and supplemental Amendment gave women the voice to fight against injustice. In an interview, Sunita Menon, Director of an NGO working against sexual discrimination, observed that after the Nirbhaya Rape case, a dramatic shift in social attitude took place. Today, people do not hesitate to raise their voices against crime against women. This could be seen in the press, social media, campaigns, etc.²⁹ Due to this change in opinion, victims no longer hesitate to approach the police. Hence, what was silently suffered earlier is publicly criticised today. More and more women come forward to report the crime. All these happened mainly because of the mass campaign and fight against the injustice to Nirbhaya.

(A) How far were the amendments effective?

²⁶ The Criminal Law (Amendment) Act, 2018, No. 22, Act of Parliament, 2018.

²⁷ PTI, *India needs 1023 special courts to try cases of rape and child rape: Law Ministry*, THE HINDU (Oct. 4 2020 6: 10 PM), <https://www.thehindu.com/news/national/india-needs-1023-special-courts-to-try-cases-of-rape-and-child-rape-law-ministry/article24546440.ece>.

²⁸ *ibid*

²⁹ Sameera Khan, *Five years after Nirbhaya what has changed for women in public places*, THE HINDU (Sept. 26 2020 8:00 PM), <https://www.thehindu.com/society/five-years-after-nirbhaya/article21933310.ece>.

The increased reporting of rape crimes is celebrated. However, there are many loopholes in the system which requires attention—delayed justice results in the victim giving up before the case is actually decided. Implementation mechanisms have made the post-Nirbhaya amendments futile. Statistical analysis of NCRB data along with the newspaper report highlights that the number and severity of rape have worsened in this decade.

Several instances of rape cases, some even more brutal than Nirbhaya, were observed. In 2017, in *Unnao*, a woman was gang-raped, and some of her family members were arrested and threatened. Then, the two accused involved in gang rape were out on bail, and they put the victim on fire so as to kill her. Later, this incident was tried by Delhi Court. A similar incident happened in *Kathua* in which a minor was brutally raped. Another horrific incident came to light when a 27 years old veterinary doctor was gang-raped in Hyderabad. Her body was burnt by the accused—this followed a lot of criticism and social media demonstrations. The police were criticised for not registering FIR. Later, all the accused were killed in an encounter. This action was widely hailed because of the speedy justice to the victim.³⁰ From a legal point of view, even though encounters are appreciated for fast action, however, it is not justice in the true sense. The reason is conviction and sentence of the accused is the domain of the judiciary. Principles of natural justice, the principle of a fair trial, appreciation of evidence, the presumption of innocence and the requirement of proof beyond a reasonable doubt are necessary for the administration of criminal justice. Moreover, the encounter might seem like a better solution in the short run; however, in the long run, it marks the shift in the power of the court to police. Even though, in highly publicised cases, where the guilt of the accused is apparent, then encounter seem like a good solution than long judicial trial. However, if encounter becomes a thing in a country, there it is highly probable that power may be arbitrarily exercised. Encounters reflect the failure of the judicial system and the failure of people's trust in the judicial system. From the aspect of rape cases, *encounters reflect how the law and judicial system has failed that resort to the executive is taken then the judiciary.*³¹

There are other instances of rapes as serious as *Nirbhaya* throughout the country. *Kathua, Gudia, Mandsaur, etc.*, are not just names and places, but it reflects how rape is becoming a reality in the country. It is not a state problem but a nationwide problem. After Amendment in the *Nirbhaya Rape case*, even the penalty of death sentence was prescribed under IPC and POCSO. Following this, various High Courts, being very sensitive of crimes against women

³⁰ Sahil Sood, *India: Nirbhaya Case: Do We Continue To Fail?*, MONDAQ (Sept. 27 2020 7:40 PM), <https://www.mondaq.com/india/crime/928712/nirbhaya-case-do-we-continue-to-fail>

³¹ *ibid*

and children, have actually started imposing death sentences on the accused. However, statistics conclusion of an increase in rape cases concludes that death sentence is not serving any deterrent purpose.³² The rising rape cases reflect how the purpose of the post-Nirbhaya laws is frustrated.

(B) Deterrence as a Solution

One of the major changes brought by the Nirbhaya Rape Case was an increase in the punishment of rapes. Again the statics reveals that there is the failure of deterrence theory. Many Legal experts opine that it is not increased punishment that deters a criminal but the certainty of punishment. Practically, many criminals opine that they can be absolved from liability as the case is going to take many years. Even in the Nirbhaya Rape case, a lot of delaying tactics were used by the accused, and it took seven years till the persons were executed. Hence, all this puts a question mark on *whether stricter punishment or better enforcement is a solution?*

(C) Fast Track Courts

Fast Track Courts was one of the very significant changes brought by the Nirbhaya Rape Case. It took just 9 months to convict and sentence the accused. This had been a milestone in the rape history of India. The reason why this case took seven years was in the stage of post-sentence remedy. Several appeals and petitions combined with a lot of delaying tactics resulted in the delay.³³ From this, a lesson to be learnt is how to address such tactical issues so that their resort is prevented in future cases.

(D) Problems in Current Law

In the views of Advocate Rebecca John,³⁴ stringent punishment is not a solution. Measures like time-framed prosecution and trial, non-humiliation of the victim, etc., are the solution. Even after modification in Evidence Act, victims are still humiliated and characterised. Still, the patriarchal notion exists, and it is the victim who is judged. Not just rape, but crimes that further patriarchal notions are not at all taken seriously. These crimes, although they are not directly related to rape but indirectly result in the same ground reality. For instance, crimes such as

³² NCRB, Crimes in India Report 2018

³³ All four convicts delayed their individual review petitions and filed them on different dates. Three of them were filed in 2017 - November 6, November 11 and December 12, 2017. The fourth one filed on December 9, 2019 also one and a half years after the Supreme Court dismissed the review petitions of the other convicts on July 9, 2018. After the rejection of all the four review petitions, the convicts used the same delaying tactic for the mercy pleas.

³⁴ PTI, *Post-Nirbhaya changes in laws not yielded results due to poor implementation, says experts* OUTLOOK INDIA (Sept. 26 2020 9:30 AM), <https://www.outlookindia.com/newscroll/postnirbhaya-changes-in-laws-not-yielded-results-due-to-poor-implementation-say-experts/1773895>

sexual harassment, eve-teasing, outraging the modesty of women etc., are not at all taken seriously. Further, even in rape, many times, it is the victim who is blamed. For example, in the *Shakti Mills Gang rape case*, it was alleged that why she went to such a lonely place. In an *Uber Cab Rape Case*, the woman was blamed for falling asleep in the cab. Similarly, in Chandigarh, a woman was raped after she took a shared-autorickshaw. A Member of Parliament criticised the victim for taking shared rikshaws and said that she should have been “alert and aware”.

There is a lot of problem with the implementation mechanism. This is particularly in respect of cases that do not get as much publicised as Nirbhaya. For example, in POCSO, there is an important provision dealing with the immediate arrest of the accused without the option of bail. However, a study conducted by an NGO reflects that in-ground reality, the police do not register the case itself.³⁵ This is particularly true in rural areas. In Uma’s case, a minor girl was repeatedly raped, got pregnant and gave birth, but even after this, no FIR was registered by the police.³⁶ This reflects how the implementation mechanism has failed even at the pre-investigation stage. Further, there is a lack of outreach and sensitisation amongst investigation agencies. Due to this, many times, they do not respond in a proper manner.

Further, preventive action helps in preventing the crime itself. An example would be the preventive procedure adopted by police so that they reach the victim on time and rapes do not take place at all. However, the current legislation has no provisions for preventive remedy. There is no statistical analysis of how much time the police take to reach the victim in different cases.

Analysing these issues, in a reference case, *Re-Assessment of the Criminal Justice System in Response to Sexual Offences*,³⁷ the Chief Justice of India Justice Bobde remarked that what needs to be done is to collect information at the ground level from various duty holders such as investigation agency, prosecution, medico-forensic agencies, rehabilitation, legal aid agency, etc.

VII. SUGGESTIVE MEASURES

(A) Preventive Action

Effective preventive mechanism plays a significant role in the reduction of crime. It helps to

³⁵ Diti Bajpai, *Post Nirbhaya rape case, the laws have changed, but has the mindset? No it hasn't* Gaon Connection, (Sept. 26 2020 9:45 AM), <https://en.gaonconnection.com/post-nirbhaya-the-laws-have-changed-but-has-the-mindset/>

³⁶ *ibid*

³⁷ SMW 4 of 2019.

prevent crime in the future. The following are suggested

- Sensitivity towards Crimes against women-not just rape, but also aspects like outraging modesty, eve-teasing, sexual harassment, molestation, etc. A better implementation mechanism is required in not just rape but also in these crimes.
- Police patrolling and tolerance towards such activities
- Police must reach the victim on time. There should be regular reporting of data when the police help in the preventive mechanism.

Another important preventive measure is changing the ground reality. In this, patriarchal notions must be addressed properly. In India, people grow in a male-dominated environment. Due to this, many men do not get the idea of consent of women, why it should be respected, etc. Better sensitisation and awareness is required. Here, it is important to mention the example of Africa where sex education helped in the reduction of sexual violence against women.³⁸ This presents a good example to India. Sex education should be made a part of the curriculum. Ideas like respecting women treating women with certain standards of dignity and modesty should be part of learning. Just passing a death sentence has become a futile exercise. Now is the time to work on the basic and the root cause.

(B) Enforcement Mechanism

Better enforcement actions mean better availing of remedies. Today, women do not fear to come forward and reporting the crime. But, even today, the trial takes a very long time. Fast Track Courts address the issue of faster trials in rape cases. Hence, the government's measure of increasing the infrastructure and number of fast-track courts, particularly to address sexual offences, is appreciated. Further, the Nirbhaya Act also provides for deadlines in investigation and trial in rape cases. This is a very good step. From *the Nirbhaya Rape* case, it was observed that the trial and investigation were actually on time. *What resulted in delay was the stage of appeal, review, etc.* Hence, a better mechanism should be made so that *even at the appellate stage and post-death sentence procedures, the delays are avoided. Otherwise, the role of Fast Track Court would be futile if appeals, review and curative petitions take time.* Furthermore, even a timeline for rejection or acceptance of mercy petition should be provided. It is true that a mercy petition is the discretion of the executive. But this discretionary power should be exercised within a reasonable time period.

³⁸ Margi Vyas, *Revisiting the effectiveness of the post-Nirbhaya Amendments*, BAR AND BENCH (Sept. 26 2020 9:30 AM), <https://www.barandbench.com/columns/revisiting-the-effectiveness-of-post-nirbhaya-amendments>

Furthermore, digitisation is another important measure for a faster mechanism. The COVID-19 period has opened a new era of the virtual environment. Today, a lot of work can be easily done without physical presence. Even the Supreme Court created a record of hearing around 1000 cases till August. Hence, a shift towards digitisation will help in curbing judicial delays.

VIII. CONCLUSION

Nirbhaya Rape Case gathered media focus and political pressure. Hence, trial and sentencing were fast and strict in it. Many people highlighted that it was also a case of delayed justice. However, the idea is the procedure was misused and manipulated by the defence lawyer. There was no substantial question in review and curative petition. Still, it was filed. On the one hand, it is right to say that death row convict has the liberty to utilise all the remedy. However, here these remedies were utilised on a groundless point. It was ostensible and apparent that review petition and curative petition had no ground. It did not even fulfil the minimum criterion of these petitions. After the appeal, it was not a legal battle but only manipulation and misuse of existing provisions. Due to this, it is important that analysis of post-sentence remedies be done so as to avoid the use of such tactics. Further, when more than one convict is sentenced to death, and the remedies of one co-convict is exhausted. Does it mean that he will still not be hanged till the remedy of the other convicts is also exhausted? This position needs to be analysed and settled.

The horrific gang rape of Nirbhaya brought the focus towards tackling the rape situation in India. Due to this, many amendments were made. However, the reality is today, the condition of rapes has worsened. Today, every woman gets raped in 15 minutes. Even minor and infirm persons are brutally raped. Sexual Offences against infant is increasing day by day. In 2012-2013, when new amendments were brought, they were widely appreciated. However, after 7 years, it is the right time to check how far these amendments were effective. Today, reality shows it has not changed much. The condition is worsening every day. A positive aspect of looking at it is that more women are coming forward to fight against rape. Public opinion and the press is sensitive to bringing forward the crimes against women and children. However, another way of looking at it is the brutality of more offences brings a clear picture of how rape is becoming today's reality. Further, things like encounters are appreciated in public opinion. From a legal point of view, encounters might seem plausible today, but they should not be made a regular affair. Appreciation of encounter itself reflects the trust of people in the judicial system of the country. Due to this, the amendments need to be studied further, and the problem and solution analysis of rape laws in India is required.

Imposing a death sentence seems right from a retributive angle. But from a deterrence perspective, the death sentence had a negligible impact in reducing the crime against women and children. Hence, a better solution apart from stringent punishment is the need of the hour. Although this work has highlighted some of the problems and solutions in the current rape law, however, more analysis and empirical research are also required. More deliberation needs to be made, and policymaking is required. It is when these crimes are reduced *then only true justice to not only Nirbhaya but also Unnao, Gudia, Kathua, and many more can be done.*
