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REFORMATIVE THEORY AND RAPE CONVICTS- Vaishali Bansal¹**ABSTRACT**

In this paper, there is a description of rape laws and the quantum of punishment to rape convicts. Though there are specified laws in IPC i.e. u/s 376 where punishments are prescribed for rape convicts. But in reality, it is the discretion of judges to give sentences. Due to these discretionary powers even in these heinous crimes, judges give leniency to the accused while awarding sentences and ultimately the right to justice of the victim is violated. Raped women face physical, mental, societal torture and in the paramount interest of society, rape convicts should be punished according to the harshness of their crime.

RAPE AND THE PROVISIONS THEREIN

Rape is a heinous crime, a crime where the victim is subject to mental, emotional, physical torture. It is an act where the rapist has sexual intercourse with a girl/woman without her consent and that act takes away the right to life of the victim which is her constitutional right. Rape is punishable u/s 376 IPC, 1860. It provides punishments of different extents in different clauses. The gravest form of punishment is the death sentence which is used in the rarest of rare cases. Law Commission of India noted that rape was the ultimate violation of self.²

INDIAN REFORMATIVE THEORY OF PUNISHMENT

There are many theories of punishment, India adopted a reformatory theory of punishment. Reformation means “the effort to restore a man to society as a better and wiser man and as a good citizen.” It treats punishment not as an end in itself but as a means to an end. That end is

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² Law Commission of India, 84th Report on Rape and Allied Offences 4 (1980)

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the correction/rehabilitation of the offender. But there are loopholes in this policy as far as the offence of rape is considered-

- Some persons are not worthy of any reformatory programme as they are incurably bad. And rapists are bad persons.
- Any liberal attitude by imposing meagre sentences or taking too sympathetic a view in respect of the offence of rape will be against the interest of society which needs to be cared for by using deterrence in the sentencing system.
- Reformation can work on those people that can be reformed but there are many hardcore criminals, highly educated and professional criminals who cannot be reformed.
- The theory finds no application in the rape case, as no reformation is possible. There are no causative factors, the act is done as a result of lust and nothing more³.

SENTENCING LOOPHOLES

The sentencing decision attracts the attention of both- policymakers as they are inclined towards reformation of an offender- and researchers as they see the factors of a sentence given⁴. The decisions of a judge affect society at large. The judge is not only communicating to the parties their rights and liabilities in the context of the specific dispute being litigated; the judge is also addressing the broader legal community— other lawyers, judges, legal academics, law students—and indeed the public at large.⁵

Judges while inflicting punishments consider the various factors which affect the severity of the sentence and the discretion used by them often led to injustice to the victim. In *Chinnakondur v. the State of A.P.*⁶ accused committed rape on a minor girl and the conviction of accused u/s 376 was held proper but because the accused was an agriculturist having minor children and also aged

³ <https://timesofindia.indiatimes.com/readersblog/ruleoflaw/quantum-of-punishment-in-rape-cases-scope-for-capital-punishment-9846/>

⁴ <https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf>

⁵ Erica Rackley, *The Art and Craft of Writing Judgements* in Hunter, Rosemary and McGlynn, Clare and Rackley, Erika, eds. *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE*, Hart Publishing, Oxford.

⁶ 2004 Cri.L.J. 3901

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parents dependent on him, a sentence of 10 years R.I. was reduced to 5 years R.I. In *State of M.P v. Rameshwar*⁷, the accused kidnapped, seduced and sexually abused a girl of 16 years under the promise of marriage. Sentence of 4 years R.I. was reduced to 1 month and 3 days on the ground that the accused was an uneducated labourer from a rural area of 21 years at the time of the offence was held proper holding that reduced sentence is disproportionate to the crime committed.

Redirection of the sentence- In *Prem Chand v. the State of Haryana*,⁸ Supreme Court said that the crucial stage in every criminal proceeding is the stage of sentencing. The Indian legal system confers ample discretion on the judges to levy the appropriate sentence. However, this discretion is not unfettered rather various factors constitute the yardsticks for judges to decide on the sentence to be imposed.

Awarding of different quantum of sentence to different personalities- In the rape case of *Unnao, 2017* which involved the name of a high personality who was an ex- BJP MLA. He was convicted not only for the rape of a minor but also for conspiring to kill her father. However, he was awarded life imprisonment only. Further, the Supreme Court in *Rameshwar Dayal Case* itself observed that there exist similarities between cases but the quantum of sentence awarded to the accused was different in both cases.

ROLE OF COURTS

The main aim of Criminal Courts in India is to impart justice. And the discretion in awarding sentences to rape convicts directly affects the justice system and the victim who suffered distress state after being raped and even then not given complete justice. The role of courts is to be impartial and neutral at every stage of the proceedings where *she is the survivor and she is an aggrieved party*. Even if an accused is favoured indirectly by reducing the sentences then the belief of the victim on the impartiality of the courts can be shaken. The courts regarding fair trial must not only focus on the rights of criminals but also on the rights of the victim while awarding appropriate punishment.

⁷ 2005 Cri.L.J. 912

⁸ 1990 AIR 538, 1989 SCR Supl. (2) 496

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In *Aparna Bhat and Ors. v. State of M.Pand Anr.*⁹, the Attorney General on gender equality and Gender Sensitization argued that to achieve the goal of gender justice, it is imperative that judicial officers, judges and members of the bar are made aware of gender prejudices that hinder justice and the judges have to be trained to exercise their discretion and void the use of gender-based stereotypes while deciding cases about sexual offences.

The Apex Court in *Bhupinder Sharma v. State of Himachal Pradesh*¹⁰ held that sentence can be awarded less than the minimum prescribed for adequate and special reasons. What is adequate and special reason depends upon several factors which are decided by the court.

PUBLIC DEMAND FOR GREATER PUNISHMENT

In Indian society, rape is seen more serious offence than murder.¹¹ Imposition of grossly inadequate sentences and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages and increases criminals. The courts have an obligation while awarding punishment to impose appropriate punishment to respond to society's cry for justice against such criminals. In rape cases there exist a demand for the death penalty. This arises from Nirbhaya (2012 Delhi Gang Rape Case) to Disha (2019 Hyderabad veterinarian gang rape case). People came to roads demanding the death penalty, public lynching and hanging till death.

There are 2 reasons behind this change-

- Harsh penalties in rape cases could deter individuals from committing such offences
- Achievement of retributive justice in rape cases

The measure of punishment in case of rape cannot depend on the social status of the victim/accused. Crimes of violence upon women need to be severely dealt with. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate punishment. Leniency in matters involving sexual offences is not

⁹ 18 March, 2021

¹⁰ 2004 Cri.L.J. 1 (SC) = 2003(4) RCR (Criminal) 960-961 (SC)

¹¹ *Jugendra Singh v. State of U.P.* 29 May, 2012

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only undesirable but also against the public interest. Such types of offences are to be dealt with severity and iron hands. Showing leniency in such matters would be a case of misplaced sympathy.

In *State of M.P. v. Basodi*¹², Supreme Court held that the social impact of the crime, where it relates to offences against women have a great impact on social order, and public interest cannot be lost sight of. Any liberal attitude by imposing a meagre sentence is counterproductive in the long run against societal interest which needs to be cared for.

IS IT RIGHT TO GIVE DISCRETIONARY POWER TO JUDGES?

Judges are the supreme authority in our justice system. The decisions of judges are final and binding. They withhold all the powers to give decisions. The supremacy and purity of the judiciary cannot be doubted but the question arises whether the discretionary powers in the hands of judges are used effectively in every case? Whether judges while awarding sentencing to rape convicts do not use these discretionary powers to reduce the sentence in these heinous crimes which is an offence against society. The answer to this lies in sentencing loopholes. In many cases, judges while awarding punishments used their discretions and reduced the sentences without any reasonable cause. Just because the accused is the sole earning member of the family or a poor person or a reputed person or other causes of like nature, he is not entitled to get leniency in such heinous crimes. But still, judges by using their discretion in sentencing have caused injustice to the victim in past. But at present stringent laws have been formed and directions have been issued to the judges while using their powers in awarding sentences but still there are loopholes in this too which cannot be ignored.

SOLUTION TO THIS PROBLEM

Practically, the discretionary powers in the hands of judges cannot be taken away as it is a necessity in some cases to use discretion and award fewer sentences. But this discretion should not be used in cases like rape, murder, dacoity which are heinous crime and affects society at large. These offences bring fear to the common citizen and they are not able to live peacefully in

¹² (2010) 4 Cri. L.J. 4284 (S.C.).

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society. This is evident from the Nirbhaya Rape case, after rape the whole community of girls/women were affected. The fear of being raped arise and so did the demand for justice. In these cases, society's hue and cry for the demand of justice should be noticed and discretion shall not be used in awarding sentences. The death penalty is not a necessity as the Supreme Court gave its ruling that the death penalty is imposed in rarest of rare cases but the punishment imposed should be proportional to the crime.

In *Rameshbhai Chandubhai Rathod vs the State Of Gujarat*,¹³ the court highlighted that as dealing with sentencing, courts have applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test." Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, diabolically committing a crime, the accused should be shown no remorse and the death penalty should be awarded.

IS REFORMATIVE THEORY SUCCESSFUL IN REFORMING RAPISTS?

There are many cases happened in past where rapist who had once been convicted repeated the same offence. So if this happens what's the usefulness of reformation theory? The important question lies- Is this theory successful for rapists? What is the record of our reformation? Can we trust the judiciary in their policy of reformation vis-a-vis the reformation of rapists? Is it a strict record that rapists who have once been convicted never rape again? If there is the belief of reformation even on rapists then it has to be expected that they will never rape again. YES RIGHT?

But the problem is if this is right then we have to face the dilemma between reformation and retribution theory.

Following the Nirbhaya case, a stringent provision was added by act 13 of 2013 i.e. **Section 376 (e)** where a repeat rape offender will have to be imprisoned for the rest of his life or sentenced to death. Section 376 (e) is based on recidivism. The reason behind enacting this provision was that if reformation is not possible in the rape convicts they can be a danger to society and so are liable for different punishments. So it can be said that the reformation theory

¹³ (2011) 2 SCC 764

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gives a chance to the rapist of reformation and if they commit rape again, it is presumed that they cannot be reformed. According to a study conducted on sex offenders, the majority of the offenders had committed a sex crime earlier and escaped the notice of the police authorities and were roaming freely.¹⁴ Research has demonstrated that repeat offenders account for a disproportionate amount of crime and that offenders released from prison are arrested at rates 30 to 45 times higher than the general population.¹⁵ The more sexual crimes an offender has committed, the more likely that offender will continue to do so. There is a landmark case that proves that rapists are not always reformed and by taking advantage of reformation theory they commit the same offence again.

In *Vijay Jhadav v State of Maharashtra and Anr.* Commonly known as the *Shakti Mills Gang Rape case 2013*, the accused were convicted u/s 376 (e) even if they were convicted for a prior offence on the same day as for the second offence.

CONCLUSION

Rapists deserve the maximum amount of punishment that is already prescribed. But as the problem highlighted in the paper, judges should impose the sentences according to the severity of the crime and as stated earlier rape is a heinous crime so no leniency should be afforded to the offender. The discretionary powers to impose sentences should be used appropriately. Where there is a chance for offenders to reform, sentences can be reduced but not in the case of rape offenders where the intensity of the crime demands severe punishment. If a rapist is wandering freely after some minimum years of imprisonment, there are the highest chances that he will rape again as in this particular aspect deterrent punishment is needed so that he cannot even think of raping again. The punishment should have the effect of bringing fear into society as the rapist is also born from society. For stopping or minimizing the offence of rape, punishment has to be severe so that that rapist or persons who have the rapist mind do not commit rape. Our society wants this, our society needs this and our society won't stop until they have this.

¹⁴ Parliamentary committee report

¹⁵ <https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism>

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