

## A Quest for “Justice” in Capital Punishment: A Socio-Legal Study of the Nirbhaya Gangrape Case

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### Abstract

The December 16, 2012 gang rape case in India’s capital ignited fierce discussion on women’s rights, safety measures as well as the punishment for the rapists. A major question stemming from this case and elaborated in this paper is: is capital punishment for a rapist an effective measure, as a form of “justice” for the victim? The paper concludes that capital punishment should be abolished even for gruesome crimes like rape and it further raises the question whether capital punishment can serve as a reform tool for the existing and oftentimes dysfunctional criminal system in India. Through a thorough analysis of Mukesh & Another Vs State of NCT of Delhi and others (known as the Nirbhaya gang rape case), the paper explores capital punishment for the rapist from a socio-legal and cultural perspective. The case particularly becomes important as, along with other issues, it is concerned with the question of rights of the victim *vis-à-vis* the rights of the offender. In other words, the paper delves deeper into the conflict between the victims’ interests and the right of the offender in the justice system by examining who is responsible for what and to what extent. Taking a human rights approach, the paper examines the human rights jurisprudence in India as well as in international laws. Further, it maps the social and historical perspective revolving around rape victimhood and gender along with arguments that have been predominant for and against capital punishment, particularly for rapists in an Indian context.

*Keywords:* capital punishment, culture, gang rape, gender, India, law, justice, *Nirbahaya*

## Introduction

The case under consideration in the following pages is about a rape victim, the pseudonym used for her is *Nirbhaya* (“The fearless one” in Hindi) as the rape laws in India do not allow to use a victim’s actual name. She was a 23-year-old female student who was brutally assaulted and gang raped by six men, among whom was a juvenile who was a few months away from his 18th birthday. The incident took place on a 2012 December evening in a moving bus in New Delhi, India, in the presence of her male friend, who when trying to intervene, was beaten up and insulted. They both were then thrown out and an attempt was made to run them over with the bus. The woman struggled for her life for over a fortnight but ultimately died due to multiple organ failure. This 2012 December incident received widespread media coverage in India as well as internationally.

One of the accused, Ram Singh, allegedly committed suicide while in custody early on after the incident. The juvenile accused was sent to a correctional home for three years and the remaining four were sentenced to death by the trial court in 2013, a verdict confirmed in 2014 by the High Court of Delhi. The accused then appealed to the Supreme Court of India to reduce their punishment to life imprisonment; however, its judgement, delivered in May 2017, four years later, upheld the High Court’s verdict and confirmed the death penalty. Three of the four accused had then filed a review petition in the Supreme Court of India which was also rejected, in a judgement that came about a year after, in July 2018. In early 2020, the four convicts of the Nirbhaya case were hanged in Delhi’s Tihar Jail.

*Mukesh and Another Vs. the State of NCT of Delhi and others* 2017, known as the Nirbhaya Gang Rape Case in the public consciousness, changed the course of penal laws in India. The incident led to a huge public outcry across the country, with stricter laws demanded, a speedy judicial trial, “justice” for the victims of horrific gang rapes, more vigilant police forces as well as structural changes aiming at ending violence against women and a gender equal society. The protest marches spread beyond the geographical boundaries of Delhi, covering different localities across the nation as the incident was not an isolated one. “Justice” was equated with stricter laws and harsher punishments including death penalty and chemical castration for the rapist.

The Government of India responded to the protestors immediately by setting up a committee under the leadership of Justice J.S. Verma, former Chief Justice of India, to suggest recommendations pertaining to laws concerning violence against women. Following the Committee’s recommendation, the laws were amended in 2013, and expanded the definition of “rape” to include acts in addition to vaginal penetration and, for the first time in the Indian penal system, punishments were introduced and enhanced for crimes such as sexual harassment, voyeurism, and acid attacks. In its report (the Report hereafter), the Verma Committee had not suggested capital punishment for the rapist, though it had recommended enhanced punishment for the same. However, contrary to the Verma Committee’s recommendations, the 2013 law included a provision for increased sentences for rape convicts including a life term and the death sentence, in case the victim dies or is left in “persistent vegetative state”. This inclusion of the death sentence in the law re-ignited the old debate concerning the rights of the victims *vis-à-vis* the perpetrator, especially in light of the death sentence.

As the majority of countries in the world are moving towards banning the death penalty, the argument pertaining to the rights of perpetrators and that of the victims here investigates the

issue by directing the attention on the right to life and how it is understood in the Indian context. It further raises the question whether the legal system should be left to its own devices while dealing with this question. Capital punishment for rapists is questioned from a socio-legal and cultural perspective and the text discusses the Delhi gang rape case elaborately as it brought to the fore questions related to the rights of victims and perpetrators.

### **Socio-Legal Background**

In the following, the socio-legal background of India will be discussed, in the context of which the case needs to be situated and understood. Although the Constitution of India provides for equal opportunity and status between men and women, however, in customary practice there remains a large gap. India is no exception to the gender inequality that persists in societies around the world, but the high degree of disparity remains worrisome. The various legislative provisions including five-year plans and ratifying various international conventions and human rights instruments like the Convention to Eliminate Discrimination Against Women (CEDAW 1979), were steps to provide for the safeguarding women and their rights. In spite of these conscious efforts taken by both governmental and non-governmental actors, women in India continue to be the subject of systematic discrimination, violence and oppression. From a very young age, women are raised to believe that they are responsible for their “behaviour” and body, especially in public spaces, which is often understood as the way they dress and the way they communicate or interact in their everyday life with men in particular and society at large. Women’s bodies are the prime site for contestation and closely associated with the “honour” of the family and even the community. In other words, the cultural codes governing Indian society are centred upon women, and control over women’s sexuality becomes an important factor for the maintenance of patriarchal power and hierarchy (see Chowdhry, 1997).

It is in this light that we need to understand rape in India. It is one of the fastest growing crimes in India. The National Crimes Records Bureau in India reports an increase of 88% in rape crimes in India from 2007 to 2016 (see Mallapur, 2017). The arrival of a neo-liberal globalised economy, as presumed, has posed a challenge to the traditional position and roles performed by women as it fractured the existing cultural codes. Rape can be seen as a tool to “fix” the broken cultural system and to re-emphasize dominant male power. From a feminist perspective, it can be understood as an expression of power where sexuality is used to maintain dominance and control, thus becoming as much a product of society as an individual’s sexual lust. It violates not only a woman’s right to her body but also her fundamental rights guaranteed by the Constitution of India under Article 21, that is, the right to life and personal liberty. Section 375 and 376 (a to d) of the Indian Penal Code (IPC), 1860, outlines the definition of rape and further lays down the punishment to be imposed. Other Sections including Section 228A protects the identity of the victim.<sup>1</sup> Further, the Code of Criminal Procedure (CrCP) of 1973 provides for the investigation procedures and how statements are to be recorded. These procedures are put in place to preserve the dignity of women.

The nature of the crime is so violent that regardless of the laws and legal statutes to provide protection or compensation to female victims of rape, it is believed that the social and psychological destruction it causes to women is irreparable. This is so because beyond the physical attack, rape is also seen as a moral injury to women by society. Women thus are subjected to shame, humiliation and, as a consequence, live in a constant state of fear. Further,

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<sup>1</sup> See Chapter XVI “Of Offences Affecting the Human Body” and Chapter XI “Of False Evidence and Offences Against Public Justice” of Indian Penal Code (IPC).

the dishonour takes the form of victim blaming, social rejection, forced marriage to the rapist and even honour killing which adds to the anxiety, depression and difficulty for the raped women and their family. The pain, mental and physical, along with the societal stigma that the rape survivor undergoes, makes it an extremely complex crime *vis-à-vis* the punishment it demands. The momentum gathered around the demand for capital punishment for rapists after the Delhi gang rape case thus seems to be just. “The criminal “deserves” nothing less than death” became the loudest among the cries as the rape survivor is seen to be devoid of the dignity and has dishonoured the family/community. The woman thus bears a double burden, one imposed by the violent crime and another from the family/community that stigmatises her. and makes it a taboo for her.

However, a thorough analysis demonstrates the problems associated with the above view. Demand for capital punishment for the rapist lures one to fall into the same trap which presumes the women to maintain the family “honour” by protecting one’s body by way of maintaining “sexual purity.” It latently also points towards the stigma and social taboo that is attached to the raped women and victimises her even more. The idea that pushes for the death sentence for the rapist rests on the patriarchal belief system that positions death over having to live as a raped survivor, who is subjected to shame, blame and robbed of her dignity. Moreover, the real issue pertaining to the attitudes and structural bias against women remains un-addressed. It is argued that, to end violence against women, the certainty of punishment is much more important than the severity of it. The lack of implementation of laws and attitudes towards women as secondary citizens adds much to the problem. Hence, the following section discusses the complexity of the death penalty in light of right to life.

### **In Search of the Right to Life in Death Penalty**

It is essential to understand the death penalty as a violation of a fundamental right, the right to life, that is enshrined in human rights law, as it not only denies a person life, but along with it all other rights which the person is entitled to. Moreover, the procedure leading to the death penalty results in torture which strips an individual of his/her dignity and any possible, but typical delay in execution adds to the mental trauma of the individual. Further, the inconsistent manner of application of the death penalty to some individuals and not to others violates the principle of non-discrimination.

The right to life is intrinsic in both the international and Indian human rights statutes. Article 3 of the Universal Declaration of Human Rights, 1948 (UDHR) states that “everyone has the right to life, liberty and security of person” (UDHR, 1948). With the imposition of capital punishment, the State has the power to deny access to all other rights that the Declaration pledges as the right to life is at the centre of and a foundation upon which all other rights are based. Further, Article 6 of the International Covenant on Civil and Political Rights, 1976 (ICCPR) states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (ICCPR, 1976). A further explanation from the General Comment No. 36 on Article 6 of the ICCPR elaborates that this article cannot be understood in a narrow sense. It states that this right is guaranteed to all the individuals including those who are convicted for most serious offence (UNHRC General Comment No. 36, 2018, p. 1). It further puts the onus on the State to ensure, protect, and respect the right to life of individuals through legislative and other measures. Capital punishment, when read in light of Article 6 of ICCPR is in direct violation of this, as it is in fact state-supported murder of an individual. The sub-clause of Article 6 further regulates the imposition of the death penalty by the States. It declares that “the term ‘the most serious crimes’ are to be read

in restricted sense” (p. 13) and “crimes not resulting directly or intentionally in death, ..., although serious in nature, can never justify, within the framework of Article 6, the imposition of the death penalty” (p. 13).

The Constitution of India 1949 through Article 21 guarantees the right to life and personal liberty. The right to life and personal liberty form the bedrock for all the other rights that the individual enjoys as all the other rights add quality to the “life” in question and depend on the pre-existence of life itself for their operation. This right is to be enjoyed by both the citizens as well as the non-citizens of India since the Article uses “person” instead of “citizen”. According to the straightforward understanding of Article 21 of the Constitution, by establishing a procedure in accordance with the law, the State could infringe on an individual’s right to life. However, the scope of Article 21 of the Constitution was expanded after the ruling of the Supreme Court of India in *Maneka Gandhi vs. Union of India*, 1978 (as cited in Kumar, 2017). It stated that “the procedure established by the law for depriving a person of life must be right, just, fair and reasonable” (p. 99). With a wider interpretation, the right to life included the right to live with human dignity, the right to livelihood, the right to health, the right to privacy and also the right to speedy trial and freedom from police atrocities. The delay in execution of capital punishment too would be a violation of Article 21 of the Constitution as an extended delay before the sentence is unfair and the uncertainty of life results in a severe traumatic condition for an individual. Article 21 of the Constitution, thus, is the only article that has received the widest possible interpretation because the right to life is fundamental to our very existence and includes all aspects of life which makes life meaningful and complete.

Here, it is important to understand why, or rather how, the punishment of death and the procedure leading up to it are violent. Capital punishment is an exceptional form of punishment as it is an expression of absolute repudiation of what constitutes humanity. It denies an individual the possibility of rehabilitation and reform. Further, the irrevocable nature of the punishment posits a challenge to erroneous human nature. Moreover, it takes place away from the public’s view and therefore only an abstract imagination of the execution is present in our mind which distances us from the actuality of it. The constant uncertainty with which death row prisoners live is also a violation of their right to life. The rampant use of torture at every stage and the inhuman treatment strips the perpetrators of his/her dignity as they are subjected to immense humiliation. Article 21 of the Indian Constitution along with other rights are violated in practice though they exist in principle.

All kinds of punishments are based on the proposition that they discourage and create fear in others from committing the same crime and also that they are fair as a penalty. However, the death penalty is the worst of punitive reactions to a crime as it does not cure, deter or impede a crime. There has been much discussion concerning the legitimacy and legality of death penalty in India and, as we shall see, it often goes beyond the cultural, social, historical and political arenas. The following section will partially address this discussion as the *Mukesh and others vs. the NCT of Delhi* and another 2012 case brought to light the debate surrounding the legality of capital punishment in India.

### **Constitutionality of the Death Penalty in India**

The first landmark judgement in this regard is *Jagmohan Singh vs State of UP* (1973) where the constitutionality of capital punishment was challenged before the Apex Court. The amendment of the Code of Criminal Procedure in 1973 (referred to as CrPC hereafter) made capital punishment a subject of discretion of the Court by removing the compulsory sentence

for murder. It was argued that since there were no standard guidelines available, the discretion was too wide which in turn violated Article 14 (Right to Equality), Article 19 (Freedom of speech and expression) and Article 21 (Right to life and personal liberty) of the Constitution of India. The Supreme Court of India rejected this contention and held that the death penalty does not violate any Article, including Article 21. The Supreme Court was of the opinion that following the procedures laid down in the CrPC and the requisites of trial, the death penalty cannot be seen as unconstitutional. Further, it mentioned that the right to life was not part of Article 19 and that death as punishment was not arbitrary. With regard to the matter of discretion of the court, it stated that this discretion would depend on the circumstances and evidences of each case. A balance had to be reached between aggravating and mitigating factors and thus it cannot be called unreasonable. It is significant to mention here that Justice Krishnaiyer in *Rajendra Prasad vs State of UP* (1979) had noted that the death penalty was precisely a violation of all the articles mentioned above except if the murder was intentional and horrific and there were no mitigating factors, making the case extraordinary, and the death penalty could then be imposed as a measure of social defence.

The question was again considered in *Bachhan Singh vs. State of Punjab* (1980), where a majority of 4 to 1 in the five-judge bench affirmed the decision in Jagmohan with few changes. Writ petitions were filed in the Supreme Court to challenge the constitutional validity of the death penalty as an alternative punishment for murder. The major change from Jagmohan was that through *Maneka Gandhi vs Union of India* (1978), the interpretation of Article 19 and 21 were expanded. However, since the right to life is not part of Article 19 and the death penalty indirectly affects the freedoms mentioned under the Article 19, it cannot be called unconstitutional. In 1979 India had also become a signatory to the International Covenant on Civil and Political Rights (ICCPR), however, this did not have any impact on the constitutionality of the death penalty as the ICCPR (1976) did not outlaw it. Further clarifying Jagmohan, the Court held that CrPC made it necessary to consider the circumstances of both the crime and the criminal, thereby making life imprisonment a rule and death penalty an exception. For the first time, the court enunciated that the death penalty would be awarded only in the “*rarest of the rare cases*.” The Supreme Court further explained the phrase “*rarest of the rare case*” in *Machhi Singh vs. State of Punjab* (1983). The Apex Court further laid down guidelines to determine the *rarest of the rare cases* and the factors to be considered. Agarwal (2008) states the following as the five factors involved in this decision making process: “the manner of commission of murder, motive, anti-social or socially abhorrent nature of the crime, magnitude of the crime, personality of the victim of murder” (pp.281). However, the intention of *Bachhan Singh vs. State of Punjab* (1980) was much wider with an aim to provide for a landscape within which the Indian legal system to work. It cautioned the judges not to be “bloodthirsty” (para 207) and emphasised that the death penalty to be exercised only when the state proves that there exists no possibility for rehabilitation or reform. The inconsistent application of the “*rarest of the rare*”, solely depending on the discretion of the judges, makes it a questionable, if not broken system. From time to time, the constitutional validity of the death penalty has been challenged, invoking Article 21 of the Constitution and also highlighting the fact that the death penalty does not serve any purpose of deterrence and seems to be in vain. The death penalty continued to be regarded as constitutional and much used in India, making the crime and not the criminal as axis for judgement, as ruled in *Rajvi Amar Singh vs State of Rajasthan*, (1955). In the post-Bachhan Singh era, amongst judicial confusion, the Supreme Court has been following the principles laid down in the Bachhan Singh case, as can be seen with *Mukesh and others vs the NCT of Delhi and another case*.

## The *Nirbhaya* Gang Rape Case: Beyond the Legal Lens

After providing the larger framework above, I now shift the focus to the *Nirbhaya* gang rape case in order to point out the imbalance in the judgement. As S. Muralidhar (1998) noted, the case of Macchi Singh required the “court to draw up a balance sheet of the aggravating and mitigating circumstances and opt for maximum penalty only if, even after giving maximum weightage to the mitigating circumstances, there is no alternative but to impose death sentence” (p. 147). However, upon carefully analysing the gang rape case of *Nirbhaya* on 16 December 2012, it is revealed that both the trial court and the high court had failed to hear out the accused as per the requirement under Section 235 (2) of CrPC and mitigating factors were not considered before reaching the conclusion of awarding the death penalty. Thus, the Supreme Court, became accountable for considering both of these factors and to strike a balance between the two.

Accordingly, the report submitted by the appellants highlighted the social strata to which the accused belong, aged parents and other dependent family members who were completely devastated and, as a result, had contracted serious medical conditions like depression (a family member of one of the accused had committed suicide upon hearing about the death verdict), the behaviour of the accused while in custody and the possibility of their reform. The report, as depicted in the court judgement, also laid stress on the young age of the accused and their possible rehabilitation. Another strong contention made by the appellants was that the incident that had taken place was not pre-meditated and the accused did not have any previous criminal convictions. Reading the case from the perspective that is sketched by these mitigating factors projected the accused as young men, who, under the influence of alcohol and due to their harsh background of extreme poverty, felt temporarily empowered through their crime. While claiming to draw a balance between the aggravating and mitigating factors, the Supreme Court had failed to consider the background and the possibility of reform, instead, the attention was more on the *nature* of the crime. It can be speculated that the possible reason for this could be that the Supreme Court had not been successfully presented with the full picture of the perpetrators due to reasons such as the lack of time, effort or will of the lawyer and keeping in mind that all perpetrators came from economically weaker sections of society. Other possible reasons could have been the discretion of the judges based on their own socio-economic status or the variable decisions in previous verdicts. The Courts in India adopt a victim-centric approach, as Justice R. Banumati (*Mukesh v State for NCT of Delhi*, 2017) asserted in her judgement, the reason being high obligation of the court towards society. As this incident “shocked the collective conscience” (para 144) of society, the punishment thus needed to be in accordance with it and “should act as a soothing balm” (para 137). The young age as well as the level of involvement of each of the accused persons individually were overlooked due to the brutality of the crime and public sentiments. Quoting the High Court judges, Rajgopal Saikumar (2016) emphasised that the “collective consciousness” adds up “as an aggravating factor in the balance sheet” (p. 89). In the three-bench judgement on the *Nirbhaya* case, Justice R. Banumati (*supra*, 2017) stated “the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim’s family, are to be weighed against the mitigating circumstances” (para 138).

The extreme public outrage conceived the act as “barbaric and diabolic” (para 356) and sent a “tsunami of shock” (para 356) over the country which led the Court to be swayed by the motion. But what marked this incident as a special or rather “a rarest of the rare case”? Multiple rape cases were brought to the court from all around the country, before and after this incident which were equivalent in brutality and violence. But not all had received the uniform public outrage

and hence not the same punishment. A deeper analysis of the case revealed that the case wasn't as exceptional as the verdict indicated. It is through a different representation, through the media discourse, that a larger-than-life image of *Nirbhaya*, was constructed; she became a symbol for the upper-caste, urban, middle-class Hindu woman with which many women of this standing sympathised (see Krupa, 2015). Location and identity of the rape victim, too, became crucial factors for affecting the public consciousness of the people from Delhi in particular as well as the country and world at large. As Krupa (2015) argued, the reason for such unified public outrage was that, "*Nirbhaya*" represented, "everywoman"; even before her identity was made public, all sorts of names were given to her, identifying her with the majority of women in India. Krupa (2015) further suggested that the "everywoman" is a "signifier of a particular class and social identity" (p. 469). The media representation, along with the political scenario, allowed for this resemblance to take hold and it became apparent that this case was not different from the incidents of rape of women belonging to lower castes, classes and minority religions that were less emphasised by the media.

Further, what added to the public outrage was the identity of the perpetrators, synchronising well with the uncertainties and insecurities of the urban middle class in general and urban woman in particular. As the media announced loud and clear, the accused persons were migrants, having come from rural-poor family conditions to make a living and find economic-opportunities in the capital, Delhi. They lived in informal settlements adjacent to the posh and authorised localities. The male, working class-migrant identity of the convicts resonated strongly with the urban middle-class fears of the "other". During the years before the 2012 gang rape incident, a narrative correlating a rise in crime with the coming of migrants to the metropolitan cities, especially Delhi, Mumbai and Bengaluru, had already been established. Migrants belonging to the villages of Uttar Pradesh and Bihar, the northern-plain belt of the sub-continent, were viewed with suspicion and were prejudiced against as those who engage in unacceptable activities and behaviours. All perpetrators exhibiting these criteria were immediately viewed as criminals, deserving the harshest punishment and robbed of their rights to dignity and equality. This became evident also in the case at hand when the accused were even denied the right to a fair trial and to be defended when they first appeared in the trial court. Throughout the case hearing, the accused were further considered as a "unit" of criminals and denied the right to be individually represented.

Though in principle, the cases of extreme culpability are recognised as the "rarest of rare" by the Court, based on the Court's verdicts in the past, it is however difficult to interpret what really constitutes "rarest of the rare". The decisions of the Courts without any fixed guidelines often depend upon the value systems and ideologies, which often also include the larger public sentiment and subjective notions of the judges, and the unpredictability of such special reasons which might violate the right to equality and also the right to life and personal liberty. Moreover, it adds to the probability of judicial error which is irrevocable, as has been proven in past cases and especially so in cases of capital punishment.

Another factor which became apparent through a thorough analysis of the case *Mukesh and others vs. NCT of Delhi and another* (2017) was that although measures were taken to protect the identity of the victim under Section 228 A of the Indian Penal Code, the identity of the perpetrators (except for the juvenile) including their name and faces were publicly circulated through different media to shame the culprits and indicate brutality and their devilish personality, before they could be tried before the court. Even during the trial, the Apex Court maintained to refer to the victim and informant (the victim's friend) as such, but the accused were referred to by their full name. The names of all six accused (except for the juvenile)

appeared repeatedly throughout the case which might have also added in constructing the public image much earlier and before the case had concluded. It is important to mention this as the politics surrounding the names goes much deeper, “placing” the individuals on a vertical ladder of the social hierarchy that governs Indian society. The law thus provides for the protection of the identity of the victim, but not that of the perpetrator, which risks the possibility of bias or prejudice.

The Court had also conveniently disregarded the fact that one of the accused in the case, while being in the custody of the police in the central jail, had allegedly committed suicide. The reason as reported by the media was a high degree of torture by the police and abuse by other prisoners. Despite the fact that India is signatory to the United Nation Convention Against Torture, 1984 (CAT), at times the police resort to torturous means to dehumanise the accused. Such deaths in police custody also suggests a much wider violation of the human rights of the perpetrators. These acts violate Article 21 of the Constitution of India in letter and spirit. The ambit of “divine retribution” and the presumption that a culprit of such a gruesome crime has no right to live and deserves nothing less than death pushed away the fact that he died in police custody. The nature and location of death becomes insignificant when seen only through a victim-centric approach to justice as the perpetrator ceases to exist as human.

Further, it is crucial to note that the judgement of the Apex Court came in 2017, four years after the High Court judgement. By then, the Juvenile had already completed his tenure in the correction home, having become skilled in cooking and tailoring and today is known to be working in the southern part of the country as per the information provided to media by a non-government organisation who helped to place him in his current job. The remaining four convicts, however, were only executed in 2020. The long delay in the execution of the verdict, as has been argued earlier, is a violation of Article 21 of the Constitution of India. Many have argued that a long delay in the execution of the death penalty is sufficient to demand life-imprisonment as its substitute, as to live with constant uncertainty and the persistent experience to live and die every day on the death row denies multiple rights of the perpetrator as an individual.<sup>2</sup> However, the Court in its judgement has discounted time already spent since the incident and confirmed the death penalty for the perpetrators yet again.

## Conclusion

It becomes apparent from the previous sections that the judgement in the *Nirbhaya* gang rape case needs to be understood relating to and read with other socio-cultural attributes like public pressure, media intensity, political and cultural milieu as well as the victim-oriented jurisprudence in India, and not solely through a legal lens. It is indispensable to do so in order to provide a mechanism of checks and balances to the legal system, which tends to capitulate to its own ideological proclivities. The shifting positions of the judges themselves over a period of time, along with the social-political and cultural contexts, highlights this dilemma. Providing a dissenting judgement in *Bachhan Singh Vs. State of Punjab* (1980), Justice Bhagwati, stated that the death penalty is unconstitutional and violates Article 14, 19 and 21 of the Constitution of India. It is often acknowledged that the death penalty is the cruellest form of punishment and does not work towards advancement of any constitutional value and in fact is contrary to the most fundamental principle of human rights. It is murder legalised by the state in the name of justice, deterrence and even retribution. The supposedly unique deterrent that it claimed to be is clearly challenged by the statistics available from the crime records bureau.

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<sup>2</sup> See judgement of T.V. Vatheeswaran v. State of Tamil Nadu, 1983 AIR 361.

In the context of India, particularly with respect to this case, the proposition “death penalty for rapists” demands to move beyond the binary that surrounds the discussion of death penalty, that is, being for or against it. It is necessary to understand the death penalty by analysing it comprehensively through focusing on who receives it and why. The death penalty is often awarded to individuals who belong to the most vulnerable parts of society - migrants, *dalits*, lower caste-class, rural, illiterate men – minorities who are also often unable to hire a competent lawyer. Historically, in western capitalist society, capital punishment has been designed to punish racial minorities, especially people of colour.

The debate on the death penalty has failed to reach any conclusion and the same arguments in favour or against it are still making the rounds. Succumbing to public pressure, in the recent past the Indian Government has passed an Ordinance of death penalty for child rape.<sup>3</sup> Immediately after the *Nirbhaya* gang rape case, amendments were made in the Criminal Law which provided for the death sentence to rapists in case of the death of the victim or if the offender is a repeat offender. Deepak Kumar (2018) writes that, “there are now 59 sections across 18 central legislations in India that allow for the death penalty as punishment, of which 12 sections are under the Indian Penal Code, 1860” (Kumar, 2018). In the name of a victim-centric approach of the justice system, the rights of the perpetrators have been neglected. Not many voices have been raised in defence of the offenders as that might label one as a miscreant. It is, however, vital to mention that from a human rights perspective, the rights of perpetrators are as important as those of the victim. An intensified human rights discourse, thus, would provide fresh arguments for the abolishment of the death penalty in India.

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<sup>3</sup> See Chapter II of The Criminal Law (Amendment) Act, 2018, no. 22 of 2018 dated 11 August 2018.

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