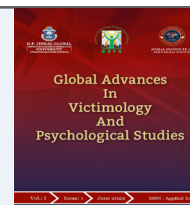


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Ten Years Since Nirbhaya: A Critical Analysis of Retributive Justice in Addressing Sexual Violence

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Abstract

Following the infamous Nirbhaya gang rape incident in December, 2012, a host of rape law reforms were introduced in India, including stringent punishment and death penalty under the Criminal Law Amendment Act and Protection of Children from Sexual Offences Act. This article questions the effectiveness of such punitive measures in dealing with sexual violence. While, the legislative reforms offer tougher sentencing, they place less emphasis on victims' rights and also tend to ignore the social context in which sexual violence occurs. The present paper offers the critique of punitive populism of the legislation through four discourses: Rape as 'loss of honour', Rapists as a 'monster' syndrome, Perspectives of victim-survivors and Retributive justice and marginalised identities. By exploring victim-survivors' participation, restorative and transformational practices and acknowledging the larger socio-cultural context in which sexual violence takes place, this article sheds light on a range of strategies to address sexual violence from the perspectives of victims.

Keywords: Rape Law Reforms, Retributive Justice, Sexual Violence, Victims

1. Background

On December 16, 2012, a 23 year old physiotherapist was brutally gangraped by six males on a private bus in Delhi: the bus driver, four adult passengers, and a 17-year old adolescent male. As the bus drove around the city, the passengers proceeded to take turns raping her and brutalized her with an iron bar and tore through her

intestines (Chamberlain & Bhabani, 2017). The violent assault made national news the next day. Due to legal constraints in India that require survivors of sexual violence to remain anonymous, the woman was given the name "Nirbhaya" which means "fearless" (Barry, 2017). The tragedy served as a spark, eliciting considerable national and international condemnation. On December

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29, 2012, Nirbhaya succumbed to her injuries. In January 2013; police formally charged the five males- Ram Singh, Mukesh Singh, Vinay Sharma, Pawan Gupta and Akshay Thakur under the following sections: murder (IPC 302), gang rape (IPC 376 (2)(G), punishment of criminal conspiracy (IPC 120B), kidnapping or abducting any woman with the intent that she may be compelled or knowing it to be likely that she will be compelled or seduced to illicit intercourse (IPC 366), kidnapping or abducting with intent secretly and wrongfully to confine a person (IPC 265), attempt to murder (IPC 307), causing disappearance of evidence of an offense or giving false information to screen offender (IPC 201), robbery, or dacoity, with the attempt to cause death or grievous hurt (IPC 395 & 397), dishonestly receiving property stolen in the commission of a dacoity (IPC 412). On March 11, 2013, Ram Singh, one of the accused allegedly committed suicide. On March 20, 2020 the four accused were hanged till death. The juvenile was sentenced to three years due to his status as a minor under Juvenile Justice Act, 2015(NPR, 2013).

The Indian government charged the Justice Verma Committee in 2013 with recommending on rape legislation reforms (Verma *et al.*, 2013). As a result, the Criminal Law Amendment Act (CLA) of 2013 was enacted in response to the Justice Verma Committee's recommendations. The act expanded the definition of rape to include a variety of penetrative and non-penetrative sexual assaults without consent, such as penetration of the vagina, anus, and urethra by the penis, objects, or other body parts; penetration of the mouth with the penis; and application of the mouth to the vagina, urethra, or anus without consent (CLA, 2013). Further amendments of Criminal Law Amendment Act, 2018 and the amendment of Protection of Children from Sexual Offences Act, 2012 (POCSO) in 2019 adopted a heavily punitive approach to sexual violence cases in India.

The CLA, 2018 and POCSO, 2019 increased the mandatory punishment for rape to ten years and introduced death penalty for rape below 12 years of age. The amended legislation includes establishing One Stop Centres (OSCs), women helplines, fast-track courts. The final legislation rejected the Verma committee's recommendation against capital punishment and retained marital rape immunity (Walia, 2014). Instead

of incentivizing guilty pleas, Indian legislators adopt punitive approach of dealing with sexual violence marred by amendments from Mathura to Nirbhaya. For example, in response to the outrage following a brutal gang-rape and death of a 26- year veterinary college student in Hyderabad, the Andhra Pradesh State Legislative Assembly introduced amendments to the Indian Penal Code (IPC) introducing death penalty for rape. By enhancing sentences in this way, the rape law reforms have reduced the access to justice. There continues to be a gross discrepancy in the reported cases of sexual violence and the conviction rates for these cases, referred to as the 'justice gap' (Temkin & Krahé, 2008). The justice gap potentially suggests that stronger punitive measures within the criminal justice system did not have the intended consequences. This is in contradiction to the populist opinions and demands for harsher punishments as the appropriate response to deal with increasing cases of sexual violence.

This article questions the effectiveness of punitive measures such as castration, longer imprisonment and death penalty in dealing with sexual violence. By exploring victim-survivors' participation, restorative and transformational practices and acknowledging the larger socio-cultural context in which sexual violence takes place, the present paper sheds light on a range of strategies of addressing sexual violence from the perspectives of victim-survivors.

2. Retributive Measures of Rape Law Reforms

Marc Groenhuijsen and Michael O' Connell argued against death penalty from victimological perspective as representatives of World Society of Victimology. They highlighted that there is no concrete evidence that death penalty acts as a deterrent and serves as a closure for the victims (Groenhuijsen, 2016).

The unprecedented moment of mobilisation and protests followed by Nirbhaya rape case remains the most critical chapter in the history of the political movements in India. The common consensus in the protests was the emergence of retributive justice measures calling for death penalty or castration of rapists. We offer four critiques to

punitive measures of addressing sexual violence against women and children.

2.1 Rape and a 'chaste woman'

"We all agree that rape is an evil act. But it is important to understand why rape is bad?" Shreena Thakore, posed this important question in the Tedx talk called, 'It matters why you think rape is wrong' (Thakore, Shreena, TEDx Talks, 2015).

In 2014, Ghosal Pasi, the community head in Jharkhand's Bokaro district in Jharkhand was in session to resolve an issue between the two parties in their village. The man involved in the dispute was allegedly accused of molesting a neighbour's wife. Pasi decided that the family of the woman who was molested could regain its lost honour only by dishonouring the boy's family. In order to balance the boy's alleged harassment with the wife of the neighbour, Ghosal Pasi ordered a man in the community to rape the minor sister of the alleged accused (Sahay, 2014).

Ghosal Pasi clearly condemns the molestation of a woman. However, he and the entire community viewed molestation as the violation of the 'honour' of the woman and her family. In order to satisfy the 'honour' of the husband of the woman molested, the village chief decided to carry out the retaliatory rape. The ironic revenge rape case is a classic example of flawed reasoning behind why rape is wrong. In this case, rape is considered wrong because it violates the honour, dignity and respect of the girl/woman as well as of the family (Brown & Horvath, 2009). Feminist advocates and criminologists acknowledge that rape is bad because it takes away the autonomy over sexual consent, bodily integrity and independence of a woman.

The demand for death penalty rests on the idea that rape reduces victim-survivors to living corpses. By insisting on death penalty, we argue that rape leaves a victim-survivor with no choice but to lead a life of shame and stigma (Baxi, 2013). The People's Union for Civil Liberties, the Tami Fish Workers Forum, the citizen's collective against Sexual Assault and Jagori issued a joint statement against death penalty stating:

"The logic of awarding the death penalty to rapists is based on the belief that rape is worse than death. Patriarchal notions of 'honour' lead us to believe that rape

is the worst thing that can happen to a woman. There is a need to strongly challenge this stereotype of the 'destroyed' woman who loses her honour, who has no place in society after she was sexually assaulted. We believe that rape is a tool of patriarchy, an act of violence." (Menon, 2012).

Further, the introduction of severe punishments and death penalty will lead to fall in the conviction rates as the victims will be unwilling to report the crime when their own family and relatives are the perpetrators of rape. Furthermore, the patriarchal view of rape as 'loss of honour' or 'fate worse than death' has also retained the impunity of marital rape in India. India remains one in only 36 countries where marital rape is not criminalised. Criminologists and victimologists have distanced themselves from linking rape with honour as it takes away the agency and voice of the victim.

2.2 Rapists as 'Monsters' and the 'Ideal Victim' Stereotype

Punitive measures within the criminal justice system tend to focus on cases of violence against women as '*individual acts*' of crimes against the State, while completely masking the fact that these acts of violence are a result of systemic oppression and other structural inequalities (Chapman, 2014; Menon, 2012). Consequently, these measures portray individual perpetrators as committing '*monstrous acts*', blaming them for the crime and further justifying the punitiveness of the measures, while failing to address the role of the larger social structures such as patriarchy and misogyny. Smart and Sevenhuijsen (1989) have shown that in the judicial discourse, the rapist is described as a perverted man who needs immediate medical attention, blinded by sexual passion and possessed by the biological needs.

Feminists and victimologists have argued that rape is an act of political violence against women, and power dominance rather than a crime of lust or sex deprivation (Henderson, 2007). Introducing stringent laws and death penalty in the rape case are justified because rape is seen as a heinous and monstrous act. National Crime Records Bureau (NCRB) data suggest that in 95.6 percent of the total rape cases reported, the offender were known to the survivors (NCRB, 2020). By perpetuating rapist as '*monsters*,' we reinforce the belief that strangers commit

most rapes. Jaclyn Friedman and Jessica Valenti argued that instead of adapting a more victim - centric approach, we reaffirm *ideal rapist* stereotypes which result in suspicion of the victim when the character of ‘monster’ doesn’t match up to an accused (Friedman & Valenti, 2008). As a result, we reaffirm and normalise the rape culture which propagates victim blaming where victims are afraid to speak up.

Harsher measures have the potential for the victim-survivors to turn hostile or withdraw their cases, either out of fear of speaking out or hesitancy due to the impact of the stringent punishment on their relatives and acquaintances. Furthermore, the response of the criminal justice system towards acquaintance rape cases reflects the prevalence of sexist norms, stereotypes about ‘chastity ideals’, ‘ideal rape victim’, over simplification of the complex process of consent which reinforces the reality of not addressing the fundamental cause rooted in complex societal structures of women’s lived experiences (Gurnham, 2016; Satish, 2016). Consequently, such assumptions and myths about ‘real rape’ cases and ‘genuine victims’ builds a narrative of ‘false rape accusations or claims’ as being more widespread and common than they really are, advancing the existing disbelief about the credibility of victim-survivors in the vast majority of cases (Gruber, 2009). Additionally, when these beliefs intersect with different aspects of the identities of victim-survivors, such as caste, religion, class it leads to increased skepticism, especially among the minoritised victim-survivors about being believed by the institutions of the justice system and gives rise to low reporting (Orenstein, 2007). These aspects highlight the harmful inadvertent effects that retributive measures of the system have on the victim-survivors, instead of facilitating their journey of justice.

2.3 Victim-Survivors’ Perspective on Retributive Justice

The ‘common sense’ notion viewed victim-survivors of crime as more punitive than non- victims (Pemberton, 2011). The crime victimization surveys refute this ‘common-sense’ notion and have shown that retributive measures of dealing with crime in order to fulfil the victim-survivors’ need are misguided and Machiavellian

(Maruna, 2004; van Dijk & Groenhuijsen, 2007). Stringent punishment and death penalty are often regarded as a policy intended to serve the victim-survivors to help them achieve closure. However, death penalty and punitive measures serving as drivers of achieving closure for the victim-survivors are non- existent (Pemberton & Reynaers, 2011). In the backdrop of Priyanka Reddy’s rape case in Hyderabad and Unnao rape case in Uttar Pradesh; the Union Minister of Ministry of Women and Child Development, Smriti Irani said,

“There are talks for enacting a provision of stricter punishment for rapists. However, the government has already come out with the provision of death penalty. Therefore, nothing can be more severe than handing capital punishment (for rapists),” (TOI, 2019).

Under the current legal system in India, the trial is fought between the state and the accused. The victim-survivor is merely the witness to the crime and does not have equal participation in the criminal proceedings. The retributive process makes trials lengthy and cumbersome, prolonging the victim-survivors’ suffering (Maruna, 2004). There are numerable studies which highlight the reason why rape victim-survivors report crime to the police. In their interviews with 60 women who have reported sexual assault in Australia, Taylor and Norma (2012) found that victim-survivors drive to hold the perpetrator accountable for their acts rather than seeking punishment or retribution. Brooks-Hay (2020) studied accounts of 24 women in Scotland who reported rape or sexual assault. The reasons for reporting were grounded in ensuring their own safety, avoiding re-victimization and seeking validation of the harm done. Relatively few participants seek retribution for the offenders. The findings highlight the pertinent issue of lack of agency and voice while participating in the criminal justice process. Brooks-Hay (2020) also brings our attention to the ‘aspiration- reality gap’ due to the stark difference between the reasons and expectations attached to reporting the crime and the reality in participating in the criminal justice system and its outcomes. Feminists advocates have stressed on understanding justice beyond the binary of conviction and non- conviction of retributive process. Victim-survivor centric justice is fluid and includes voice, recognition, dignity, prevention, communion,

agency, participation, validation, forgiveness, acceptance and compensation (McGlynn & Westmarland, 2019; Pemberton *et al.*, 2017)

3. Retributive Justice and Intersectional Identities

Another significant limitation of the punitive measures is their inordinate impact on the lives and families of people from marginalised communities (Bernstein, 2012). By taking a 'one-size-fits-all' approach to justice, retributive measures not only undermine the different needs and experiences of victim-survivors, they also fail to take into account the larger intersecting systems of oppression (Deer & Barefoot, 2018) such as minoritised caste, religion, socio-economic status and the like in 'othering' both victim-survivors and offenders from minoritised communities (Bumiller, 1987). The Indian criminal justice system is already rife with evidence of excluding marginalised communities from accessing justice, while simultaneously disproportionately representing them in convictions and behind the bars (Samya--Centre for Equity Studies, New Delhi & Rosa-Luxemburg-Stiftung, 2017). This puts the lives of marginalised victim-survivors in jeopardy, giving rise to considerable social and economic impoverishment, loss of agency and autonomy and increased risk of violence from within the system, thereby rendering the inadequacy of the punitive measures in dealing with violence against women.

Finally, we argue that the reliance on punitive and harsher measures overlooks the whole spectrum of violence meted out by those in power, such as custodial rapes. Evidence suggests that women from marginalised communities are more vulnerable to aggressive policing, increased force and brutality, and sexual offences (Jacobs, 2017; Manian, 2022). Increasing the severity of punishments in such cases can possibly lead to under or no reporting by the survivors due to fear of authority figures, dismissal by those in power when reported or a likely decrease in conviction rates due to poor practices in implementing such measures (Tromadore, 2016). This indicates the need to contextualise the experiences of sexual violence of survivors in light of

their unique challenges and intersecting identities, thereby underscoring the importance of an intersectional approach to address crimes against women, instead of the present generalised and de-contextualised nature of the harsher and punitive measures.

We have argued why stringent punishments and punitive measures rooted in the retributive framework of justice are limited in their approach in addressing violence against women. On the other hand, they have, in practice, several unintended and damaging consequences for the very people they were trying to protect, i.e., victim-survivors. In addition to it, they fail to serve the purpose they set out to, which is acting as a deterrent for future crimes; instead they act as a deterrent to reporting of crimes and also have the potential to increase the likelihood of further crimes. Additionally, more stringent punishment and mass imprisonment do not seem likely to reduce re-offending, rather have the opposite effect of increasing the likelihood of offenders in engaging in more crimes (Armatta, 2018; Petrich *et al.*, 2021).

These limitations suggest that it is important to acknowledge the present inadequacies and realities of the criminal justice system in the country and rethink its approach to dealing with sexual violence against women while also highlighting the need to go beyond the state and seek alternative approaches in addressing this crucial issue of sexual violence.

3.1 Strategies to Address Sexual Violence: The Way Forward

While it is understandable that we cannot completely do away with the criminal justice system, it is important to re-examine and re-evaluate its current approach in dealing with sexual violence. One of the major changes that the State needs to consider is to take a more responsive and active victim-centred approach by moving beyond merely treating victim-survivors as witnesses to the crime (White & McMillan, 2021). The shift from the present punitiveness and incarceration focus of the Indian criminal justice system to a more victim-survivor centred institution will not only improve the experience for the victim-survivors as they try to navigate the different institutions such as police or judiciary, but also provide them with the confidence in the system as a space

for realisation of justice (Carroll, 2022)” This change in perspective towards a victim-survivor lens would go a long way in addressing the issue of sexual violence from within the system.

Furthermore, with respect to the justice needs of the victim-survivors, Sered (2017) demonstrates the commonly expressed ones include,

- having their voices heard,
- forming a coherent narrative about their experience,
- regaining a sense of control in their healing journey
- and a sense of safety from future hurt or harm.

In addition, Daly (2017) has suggested participation, voice, validation, vindication and ‘offender accountability-taking responsibility’ as the core justice interests of victim-survivors. Through interviews with victim-survivors, McGlynn & Westmarland (2019) discovered that for the participants, justice was never directly associated with increasing punishments and punitive measures, which is in stark contrast to populist demands and notions advocated post heinous crimes such as Nirbhaya, Unnao and the like. Instead, they suggested justice to be ‘kaleidoscopic,’ implying that it is a continuous process with a complex, nuanced, and ever-evolving experience for the victim-survivors. These several lines of evidence indicate the need for the present criminal justice system to be more victim-survivor centric in its approach by increasing their participation and voice in the process with increased sensitivity. It further highlights that by being trauma-informed, the justice system can enhance the victim-survivors’ sense of safety and accountability, while also ensuring the prevention of future harm for them.

As we highlighted earlier, addressing sexual violence as an ‘individual’ problem, while ignoring the socio-cultural and community context it is embedded in does not seek to serve the larger systemic and structural issues. The active role of grassroots organisations, women’s rights groups and feminist movement in India in confronting and tackling such issues and influencing and informing legislation about the role of the criminal justice system has always been of fundamental importance (Dash, 2021) It is high time to recognise this invaluable

contribution therefore and work in tandem to strengthen the partnership between the grassroots movement, civil society, the third sector, State and the institutions of the criminal justice system to be able to address the larger structural issues while also dealing with cases of sexual violence in a more holistic and promising way.

This brings us to the significance of community-based responses and approaches as alternative forms of justice in sexual violence. As noted earlier, relying exclusively on the criminal justice system to deal with violence against women and girls is not the most efficient and adequate practical response. In some cases it has the opposite effects than what is desired, including exclusion of marginalised communities and increasing risks of re-offending. Therefore, alternative systems rooted in the restorative and transformational justice frameworks and practices need to be developed to provide more humane, safe and just choices to victim-survivors, including the most marginalised survivors (Armatta, 2018; Kim, 2018). Furthermore, these approaches have the potential to reform, transform and be people-changing, therefore reducing the risk of reoffending by perpetrators (Petrich *et al.*, 2021). For example, the effectiveness of *Nari-Adalats* (informal courts for women) as an alternative community-centred, approachable and accountable venue for women seeking justice has been documented in a few states of India (Kethineni *et al.*, 2016). This implies that there is a necessity to go beyond the criminal justice system and strengthen community-centred approaches embedded in transformative ideals as alternative choices, not only as justice and healing for victim-survivors but also for its potential to change beliefs, norms and behaviours of the offender and the larger socio-cultural community and structures in which sexual violence is located.

4. Conclusion

The present paper has highlighted the inadequacies of increasing punitiveness of the present criminal justice approach response to sexual violence in India. It has further provided recommendations for future trajectories in dealing with sexual violence in the country, including reforms in the existing justice system to be more centred on the victim-survivors as well as suggestions for

promising alternative justice mechanisms for addressing the issue of sexual violence holistically. We are aware that there will be additional considerations to take into account while implementing these suggestions and hence do not intend this to be the last word on this crucial issue. Instead, we acknowledge that there is a long way to go and hope that a balance between reforming the existing system and developing the alternative measures embedded in transformative responses would have a lasting legacy of social justice and change and is worth trying!

5. Statements and Declarations

All the authors were equally involved in the conception, design, writing (initial draft, review, editing) of the manuscript and have seen and approved the final version of the manuscript being submitted. They warrant that the article is the authors' original work, hasn't received prior publication and isn't under consideration for publication elsewhere.

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