

# DEATH PENALTY FOR CHILD SEXUAL ABUSE; SUSTAINABILITY IN TODAY'S ERA

**Asst. Professor. Sakshi Gupta, Research Scholar, Jagannath University, NCR, Haryana.**

## ABSTRACT:

Child sexual abuse is a common and a serious public health problem in every society. It not only leaves a permanent scar on the mind and the body of the victim, but also puts her entire family into shame and humiliation. The majority of sexual assault cases are never reported to avoid social stigma and the number of reported sexual assault is the only tip of the iceberg. We present a case of a victim who died from smothering after sexual assault, sustained lacerated injury over the posterior wall of the vagina at its lower part including perineum, hymen and labia minora of both sides. There were multiple injuries all over the body. We attempt to highlight a case of rape murder complex, which is of rare occurrence in the semiurban regions of West Bengal, India.

**Keywords:** Child sexual abuse, rape, death penalty.

## INTRODUCTION

There are multiple variations in the definitions of the age of the child, all over the world. Almost in every sphere, age limits formally regulate children's activities, such as age for School admission, age for marriage, age for casting vote, age for adulthood, age for joining services, and age to enter into employment. Generally, the age limits differ from activity to activity and from country to country.<sup>1</sup> The Census of India defines persons below the age of fourteen as children. The age at which a person ceases to be a child also varies under different laws. The word Child has been used in various legislations as a term indicating capacity and as term requiring specific protection. Following are some of the Legislative provisions relating to age of the child under various legislations which shows the dilemma of legal age of the child in India.

## Definition:

Child sexual abuse is not a clinical disorder or diagnosis in itself. It is, rather, a variety of events or experiences to which there may be a wide range of behavioral and emotional responses. In this sense, sexual abuse is best conceptualized as a life stressor rather than as a distinct clinical entity. The legal definition of child sexual abuse varies from state to state, and there is little consensus regarding what acts constitute sexual abuse among mental health-care providers. A common operational definition of sexual abuse is sexual exploitation involving physical contact between a child and another person. Exploitation implies an inequality of power between the child and

<sup>1</sup> The State of Worlds Children, UNICEF, 1997.

the abuser, on the basis of age, physical size, and/or the nature of the emotional relationship. Physical contact includes anal, genital, oral, or breast contact. The definition obviously encompasses a number of different behaviors; sexual abuse is therefore not a unitary phenomenon.

### **Child abuse and Child Right Violation:**

Child welfare has been given considerable importance both nationally and internationally. But it is also true that child abuse and Child Rights violation is rampant at a large scale. According to Black's Law Dictionary,<sup>2</sup> child abuse is defined as any form of cruelty to a child's physical, moral or mental well being. It is also used to describe some forms of sexual attack which may or may not amount to rape. To make it wider, the Black's Law Dictionary defines Abused and Neglected Children, as those children who are suffering serious physical or emotional injury inflicted on them, including malnutrition.

According to David Gil, child abuse is the intentional, non-accidental use of physical force or intentional, non-accidental acts of omission on the part of a parent or other caretaker interacting with a child in his or her care, aimed at hurting, injuring or destroying that child.<sup>3</sup> These definitions do not include all forms of abuses to which children are usually subjected to, by their parents. The term abuse is much wider and will cover all the aspects of neglect as well. Yet, it is necessary to distinguish between abused and neglected children. As Sussman & Cohen maintain:<sup>4</sup>

An abused child shall mean a person under eighteen years of age who is suffering from serious physical harm or sexual exploitation, caused by those responsible for the care or others exercising temporary or permanent control over the child, and the neglected child shall mean the one, whose physical and mental conditions are seriously impaired as a result of the failure on the part of those responsible for his care, or other, exercising temporary or permanent control over the child to provide adequate food, shelter, clothing, physical protection or medical care necessary to sustain the life and health of the child.

## **THE CRIMINAL LAW (AMENDMENT) ACT, 2018**

### **Highlights of the ACT**

- The ACT amends the IPC, 1860 to increase the minimum punishment for rape of women from seven years to ten years.
- Rape and gang rape of girls below the age of 12 years will carry minimum imprisonment of twenty years and is extendable to life imprisonment or death.
- Rape of girls below the age of 16 years is punishable with imprisonment of twenty years or life imprisonment.

<sup>2</sup> Gil, David G. Violence Against Children-Physical Child Abuse in the United States, Harvard University Press (1st Edn., 1970); (revised Edn., 1970).

<sup>3</sup> Gil, David G. Violence Against Children-Physical Child Abuse in the United States, Harvard University Press (1st Edn., 1970); (revised Edn., 1970).

<sup>4</sup>Sussman, Alan and Cohen, Stephen J., Reporting Child Abuse and Neglect: Guideline for Legislation, Cambridge, Mass Ballinger, (1975).

## Key Issues and Analysis

- The ACT amends the IPC, 1860 to increase the punishment for rape of girls. However, punishment for rape of boys has remained unchanged. This has resulted in greater difference in the quantum of punishment for rape of minor boys and girls.
- The ACT imposes death penalty for rape of girls below the age of 12 years. There are differing views on death penalty for rape. Some argue that death penalty has a deterrence effect on the crime and therefore helps prevent it. Others argue that death penalty would be disproportionate punishment for rape.

## PART A: HIGHLIGHTS OF THE ACT

**Context:** Rape of women and minor children is an offence under the Indian Penal Code (IPC), 1860, and the Protection of Children from Sexual Offences (POCSO) Act, 2012. In 2016, 21% of the total 39,068 cases of rape were against minor girls below the age of 16 years.<sup>5</sup> Over the last year, several states have introduced or passed ACTs to allow death penalty for rape of girls below the age of 12 years.<sup>6</sup> On April 21, 2018, the government promulgated the Criminal Law (Amendment) Ordinance, 2018.

**Key Features:** The Ordinance amends the IPC, 1860, POCSO Act, 2012 and other laws related to rape of women. The POCSO, Act states that the punishment which is higher between the POCSO Act and the IPC will apply to rape of minors.

**Table 1: Major changes proposed in Criminal Law (Amendment) ACT, 2018**

Age of woman	Offence	Punishment under IPC, 1860	Criminal Law (Amendment) ACT, 2018
Below 12 years	Rape	<ul style="list-style-type: none"> <li>• Minimum: 10 years</li> <li>• Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum: 20 years</li> <li>• Maximum: life imprisonment or death</li> </ul>
	Gang Rape	<ul style="list-style-type: none"> <li>• Minimum: 20 years</li> <li>• Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum: life imprisonment</li> <li>• Maximum: life imprisonment or death</li> </ul>
Below 16 years	Rape	<ul style="list-style-type: none"> <li>• Minimum: 10 years</li> <li>• Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum: 20 years</li> <li>• Maximum: no change</li> </ul>

<sup>5</sup>Crime in India – 2016, The National Crime Records Bureau, <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf>.

<sup>6</sup>These states include Haryana, Madhya Pradesh, Rajasthan, and Arunachal Pradesh, <https://www.thehindu.com/news/national/arunachal-prescribes-death-for-raping-girls-under-12/article23274886.ece>.

	Gang Rape	<ul style="list-style-type: none"> <li>• Minimum: 20 years</li> <li>• Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum: life imprisonment</li> <li>• Maximum: no provision</li> </ul>
16 years and above	Rape	<ul style="list-style-type: none"> <li>• Minimum: 7 years</li> <li>• Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum: 10 years</li> <li>• Maximum: no change</li> </ul>

Sources: Indian Penal Code, 1860; The Criminal Law (Amendment) Ordinance, 2018; PRS

- Under the Code of Criminal Procedure, 1973 investigation into the rape of a child must be completed within three months. The Ordinance reduces this time period to two months for all rape cases.
- The Ordinance bars anticipatory bail in cases of rape of minor girls below 16 years of age. Further, any appeal against a sentence for rape cases must be disposed of within six months.

## PART B:

### KEY ISSUES AND ANALYSIS:

#### **Gender-based differences in the definition of rape and punishment**

##### **Definition of rape is not gender neutral**

In the case of rape of minors, according to the POCSO Act, the victim may either be male or female (and the offender could also be of either gender). However, in cases of adults under the IPC, rape is as an offence only if the offender is male and the victim is female. The Law Commission of India (2000) and the Justice Verma Committee (2013) had recommended that this definition of rape should be made gender neutral and should apply equally to both male and female victims.<sup>7</sup> The Ordinance does not address this issue.

##### **Widening difference in punishment between rape of girls and boys**

The POCSO Act states that the higher punishment specified in it or in the IPC will apply for rape of minors. The POCSO Act has the same penalty for rape when the victim is a boy or a girl. However, the IPC provisions which apply only to rape of female victims carry a higher punishment. The Ordinance further widens this difference. Table 2 summarises the differences in punishment for rape of minor boys and girls.

<sup>7</sup>Report No. 172: Review of Rape Laws, Law Commission of India, March 2000.

**Table 2: Differences in punishment for rape between minor boys and girls**

Age (in years)	Boys	Girls (Before 2018 Ordinance)	Girls (After 2018 Ordinance)
Below 12	10 years to life imprisonment	10 years to life imprisonment	20 years to life imprisonment/death
12-16	7 years to life imprisonment	10 years to life imprisonment	20 years to life imprisonment
16-18	7 years to life imprisonment	7 years to life imprisonment	10 years to life imprisonment

Sources: POCSO, 2012; Indian Penal Code, 1860; The Criminal Law (Amendment) Ordinance, 2018; PRS.

### **Differing views on death penalty as punishment for rape**

The Ordinance amends the IPC to allow for death penalty as punishment for rape of girls below the age of 12 years. While there is a larger question on allowing capital punishment, we discuss here the narrow question of introducing death penalty for the offence of rape.

While examining punishment for the offence of rape, the Justice Verma Committee (2013) deliberated on whether death penalty should be awarded.<sup>4</sup> The Committee acknowledged that though rape was a violent crime, the punishment should be proportionate, as it was possible to rehabilitate the survivor. The Committee supported enhanced punishment extending up to life imprisonment for rape, but not death penalty.<sup>4</sup> The Law Commission (2015) observed that in cases related to rape and murder of minor boys and girls, courts have differed in awarding death sentence.<sup>8</sup> In March 2013, Parliament passed the Criminal Law (Amendment) Act, 2013 to amend the IPC to allow death penalty only in rape cases where the accompanying brutality leads to death or leaves the victim in a persistent vegetative state, and in cases of repeat offenders.

On the other hand, it has been argued that imposing death penalty for rape crimes could deter individuals from committing the offence and therefore help reduce its incidence. Further, awarding death penalty allows for retributive justice for the victims.<sup>9</sup> Over the years, various court judgments have narrowed the application of death penalty to the 'rarest of rare' doctrine in the cases and issued criteria to determine whether the accused deserves a death sentence.<sup>10</sup> This implies that courts can award death sentence for rape only in exceptional circumstances, which include where the reformation and rehabilitation of the convict is not possible.

### **THE CRIMINAL LAW (AMENDMENT) ACT, 2019**

- The Protection of Children from Sexual Offences (Amendment) ACT, 2019 was introduced in Rajya Sabha by the Minister of Women and Child Development, Ms. Smriti Zubin Irani on July 18, 2019. The

<sup>8</sup> Report No. 262: The Death Penalty, Law Commission of India, August 2015.

<sup>9</sup> Report No. 35: Capital Punishment, Law Commission of India, September 1967.

<sup>10</sup> Bachan Singh vs. State of Punjab (1980) 2 SCC 684; Macchi Singh vs State of Punjab (1983) 3 SCC 470.

ACT amends the Protection of Children from Sexual Offences Act, 2012. The Act seeks to protect children from offences such as sexual assault, sexual harassment, and pornography.

- **Penetrative sexual assault:** Under the Act, a person commits “penetrative sexual assault” if he: (i) penetrates his penis into the vagina, mouth, urethra or anus of a child, or (ii) makes a child do the same, or (iii) inserts any other object into the child’s body, or (iv) applies his mouth to a child’s body parts. The punishment for such offence is imprisonment between seven years to life, and a fine. The ACT increases the minimum punishment from seven years to ten years. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine.
- **Aggravated penetrative sexual assault:** The Act defines certain actions as “aggravated penetrative sexual assault”. These include cases when a police officer, a member of the armed forces, or a public servant commits penetrative sexual assault on a child. It also covers cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child or the child becomes pregnant, among others. The ACT adds two more grounds to the definition of aggravated penetrative sexual assault. These include: (i) assault resulting in death of child, and (ii) assault committed during a natural calamity, or in any similar situations of violence. Currently, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and a fine. The ACT increases the minimum punishment from ten years to 20 years, and the maximum punishment to death penalty.
- **Aggravated sexual assault:** Under the Act, “sexual assault” includes actions where a person touches the vagina, penis, anus or breast of a child with sexual intent without penetration. “Aggravated sexual assault” includes cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child, among others. The ACT adds two more offences to the definition of aggravated sexual assault. These include: (i) assault committed during a natural calamity, and (ii) administering or help in administering any hormone or any chemical substance, to a child for the purpose of attaining early sexual maturity.
- **Pornographic purposes:** Under the Act, a person is guilty of using a child for pornographic purposes if he uses a child in any form of media for the purpose of sexual gratification. The Act also penalises persons who use children for pornographic purposes resulting in sexual assault. The ACT defines child pornography as any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer generated image indistinguishable from an actual child. In addition, the ACT enhances the punishments for certain offences as shown in Table 1.

**Table 1: Punishment for offences for using child for pornographic purposes**

Offence	POCSO Act, 2012	2019 ACT
Use of child for pornographic purposes	<ul style="list-style-type: none"> <li>Maximum: 5 years</li> </ul>	<ul style="list-style-type: none"> <li>Minimum: 5 years</li> </ul>
Use of child for pornographic purposes resulting in penetrative sexual assault	<ul style="list-style-type: none"> <li>Minimum: 10 years</li> <li>Maximum: life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>Minimum: 10 years (in case of child below 16 years: 20 years)</li> <li>Maximum: life imprisonment</li> </ul>
Use of child for pornographic purposes resulting in aggravated penetrative sexual assault	<ul style="list-style-type: none"> <li>Life imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>Minimum: 20 years</li> <li>Maximum: life imprisonment, <i>or</i> death.</li> </ul>
Use of child for pornographic purposes resulting in sexual assault	<ul style="list-style-type: none"> <li>Minimum: Six years</li> <li>Maximum: Eight years</li> </ul>	<ul style="list-style-type: none"> <li>Minimum: Three years</li> <li>Maximum: Five years</li> </ul>
Use of child for pornographic purposes resulting in aggravated sexual assault	<ul style="list-style-type: none"> <li>Minimum: Eight years</li> <li>Maximum: 10 years</li> </ul>	<ul style="list-style-type: none"> <li>Minimum: Five years</li> <li>Maximum: Seven years</li> </ul>

Note: Punishment for using child for pornographic purposes resulting in any form of sexual assault is in addition to minimum five years for use of child for pornographic purposes.

Sources: Protection of Children from Sexual Offences (Amendment) ACT, 2019; Protection of Children from Sexual Offences Act, 2012; PRS.

- Storage of pornographic material:** The Act penalises storage of pornographic material for commercial purposes with a punishment of up to three years, or a fine, or both. The ACT amends this to provide that the punishment can be imprisonment between three to five years, or a fine, or both. In addition, the ACT adds two other offences for storage of pornographic material involving children. These include: (i)



failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except for the purpose of reporting it.

### **These 8 Recent Rape Cases Show India Has Learnt Nothing From The Nirbhaya Verdict**

In May 5, the Supreme Court of India upheld the death penalty for all four convicts of the December 16 rape and murder case that had outraged Indian society.

The verdict was meant to be a deterrent to the possible criminals. However, days after the verdict, a 20-year old woman was gangraped and killed in Haryana's Rohtak allegedly by her jilted lover and a friend. Yesterday, a 22-year-old woman from Sikkim was gangraped in Gurgaon by three men, who later threw her out of the car, leaving her to die in the middle of highway.

Here are some heinous rape cases that occurred within days of the Nirbhaya verdict, which shows that rapists have very little regard for deterrents.

#### **May 15, 2017**

A 22-year-old Sikkim woman was gang-raped in a moving car in Gurgaon and was later thrown out of the car. The woman was returning home when 3 men dragged her into the car and took turns to rape her while driving to Najafgarh, about 20 kms from where they picked her.

#### **May 14, 2017**

A 20-year old woman was gang-raped and killed in Haryana's Rohtak allegedly by her jilted lover and a friend. The men later smashed her face with a brick and killed her. An autopsy conducted on her body showed that her food pipe was missing and that several sharp objects had been inserted in her private parts.

The men who later dumped her body in a farm, was recovered in a mutilated state after dogs had bitten off lower region of her body.

#### **May 13, 2017**

A 10-year-old girl was found pregnant after being repeatedly raped by her stepfather in Haryana. The girl's pregnancy was confirmed by the doctors who also added that the man had threatened the girl of talking about it and has repeatedly assaulted her.

The girl is currently in a critical condition and the medical board of PGIMS, Rohtak will decide on her condition today.

#### **May 11, 2017**

A 45-year-old school owner was arrested for sexually exploiting his own daughter for the last 7 years in Ghaziabad. The man had also filmed the acts where he would force himself upon her and would beat the daughter brutally if she resisted him.

**The man had also threatened her with dire consequences if she ever told anybody about their sexual relationship. The mother of the girl is also known to have been complicit with her husband in the crime.**



**May 10, 2017**

A 21-month-old baby girl was raped by a 40-year-old man from her neighborhood in Delhi's Gandhi Nagar area. The man, a known to the girl's father often allowed him to play with his baby. However, on this particular day, finding the baby alone, the man raped her for a hours until her father came home.

The baby was rushed to a nearby hospital where the doctors claimed she was in a critical state.

**May 10, 2017**

A 5-year-old girl deaf and dumb girl was raped by a 24-year-old man in Varanasi. The man, who was strolling at night, first tried to kidnap his neighbour (another minor) who was sleeping with her mother. Unable to sneak her out, he started his hunt for another target.

On finding this 5-year-old asleep with her family in a hut, he grabbed her and took her to a farm where he raped her until morning. The hapless girl who could not raise an alarm was found in the morning in a pool of blood in the field. The girl is currently admitted in a hospital.

**May 8, 2017**

A woman in Ludhiana drugged her 16-year-old daughter so that her two other friends could take turns in raping her. While the duo raped the girl for the last 5 months, they even got her 3-month foetus aborted at a private hospital few weeks back.

he girl in her complaint said that her mother did this as a revenge from her husband and her father who opposed her extra marital affair with a villager.

**May 6, 2017**

A 3-year-old girl was allegedly raped by her neighbor in Delhi's Anand Parbat area. Her 22-year-old neighbor sneaked her into his house and raped her brutally. The girl's parents caught him red-handed during the act while the girl was bleeding profusely from her private parts. She was later rushed to Lady Harding hospital for a surgery.

**Death penalty is still needed, despite its inhumanity:**

As inhumane and morbid as it may sound, the death penalty is something that should remain in the United States. There are some crimes that are, frankly, so terrible that there is no other suitable form of punishment.

Aside from my own moral beliefs on the death penalty, it is not fair that taxpayers should have to pay for a murderer to live the rest of their life out in prison. A 2016 report by the Federal Register shows that the average cost of incarceration per inmate is more than \$30,000 a year. There is no argument to be made that this money

could not go to something that improves our society, such as education and health care, instead of prolonging the lives of those who have decided their own fate.

An argument can be made that death row inmates cost more taxpayer money during their time on death row, considering that criminal cases involving the death penalty cost taxpayers about \$90,000 more per year than the average prison inmate, according to [deathpenaltyinfo.org](http://deathpenaltyinfo.org). This cost could be balanced out, or at least lessened, by limiting the amount of time inmates spend on death row. In some cases, death row inmates can spend decades in prison before they are finally put to death.

While this does serve to ensure that the chances of executing an innocent person are minimized, there is no reason this process needs to be drawn out over a period of decades. There should be a span of three years after the initial sentencing during which the inmate on death row has to appeal the death penalty, with either one or two appeals in a front of jury or a court with several judges each year, which will give the inmate more than enough time to come to terms with their fate. If each appeal is a unanimous decision then the execution would follow.

Another solution to help lower the amount of taxpayer money being devoted to death row inmates would be to integrate them with the rest of the high-security prison population. One of the largest expenses in regards to death row inmates is the fact that they are kept in separate facilities which require additional upkeep and security, according to [criminaljusticedegreehub.com](http://criminaljusticedegreehub.com). They should be subject to the same rules as other inmates, and if they became too dangerous, they could be placed in solitary confinement.

I have heard opponents of the death penalty argue that, rather than being sentenced to death, it would be better to put those guilty of murder into solitary confinement. While the death penalty may be cruel and barbaric in some ways, it is much less cruel than putting someone into solitary confinement. Although death isn't nice, I would prefer it over spending the rest of my life in solitary confinement, if I was ever were to be put in that situation.

Many will argue that the death penalty is not a deterrent for crime, and I actually agree. Many of the infamous school shootings in recent years have ended with the shooter committing suicide. The people who commit these acts often do not expect to live or already have it planned to take their own life.

The death penalty, however, is not a social experiment to see whether it will stop people from committing crime. It needs to be reserved for those who choose to commit crimes against humanity as a form of punishment, not a deterrent for future crimes.

Although I am in favor of the death penalty, I do not think it should not be decision taken lightly or thrown around liberally. It needs to be reserved for those who have, undeniably, committed acts that break all moral

codes. There needs to be absolutely no doubt in the mind of the jury or judge that the convicted person has committed the crime they have been accused of before being sentenced to death.

With that being said, for those who are willing to commit such atrocities, I would almost consider them to not be human. They could have robbed parents of their children, children of their parents and even robbed society of someone who could have gone on to do great things for the world. As far as I'm concerned, the death penalty is not about revenge or closure for the family, it's about taking out the trash in our society; the people, who out of their own selfishness and malice, have cut short the life of another individual and scarred that person's family and friends for life.

## CONCLUSION

Child sexual abuse is a widespread public health problem that has the potential to severely undermine the healthy psychosocial development of children and adolescents. In recent years, however, interventions have been developed to address the therapeutic needs of youth and their families in the aftermath of child sexual abuse. This chapter reviewed clinical interventions that have demonstrated efficacy in at least one randomized controlled trial, highlighting in greater detail the intervention that has garnered the most empirical support for its efficacy with this population: Trauma-Focused Cognitive Behavioral Therapy (TF-CBT; Cohen, Mannarino, & Deblinger, 2006; Deblinger & Heflin, 1996). Several rigorous reviews of the scientific literature have led to TF-CBT receiving the highest ratings for its efficacy and practicality with respect to its clinical implementation and dissemination. Thus, this chapter outlines the PRACTICE components of TF-CBT, and the utilization of this approach is described in the context of a case history. In sum, early effective intervention appears critical to disrupting the highly negative trajectory often associated with child sexual abuse (i.e., chronic PTSD, depression, interpersonal and substance abuse difficulties). The available evidence suggests that children and their non-offending caregivers can greatly benefit from participation in an evidence-based intervention designed to specifically address the common negative psychosocial sequelae of child sexual abuse.

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