

**Submission to the Committee headed by Justice J.S. Verma on amendment of laws
relating to Rape and Sexual Assault**

by

Working Group on Human Rights in India and the UN (WGHR)

**Note on Death Penalty and Chemical Castration as possible punishment for crimes of
Rape and Sexual Assault**

1. Since other organisations and experts who form part of WGHR are making detailed submissions on the substantive provisions relating to Rape and Sexual Assault, along with proposals for law reform, the present submission is limited to the question of sentencing in cases of Rape and Sexual Assault.

2. At the outset, WGHR affirms that there should be no amendment to the existing law to provide death penalty and/ or chemical castration for the offence of rape or sexual assault.

3. It is submitted that there is no scientific basis for claiming that death penalty has a deterrent effect on the incidence of crime. On the other hand, studies show that as punishments become stricter, the rate of conviction falls as Judges are reluctant to convict and/or award harsh sentences. An anticipated result of introducing death penalty for rape would be the reduction in convictions and an increase in impunity. Further, death penalty embodies the idea of retribution which is as violent as the offence for which it is being suggested, and is contrary to all civilized ideals of criminology and constitutionalism.

4. It is further submitted that chemical castration as a punishment for rape or sexual assault would be barbaric and also ineffective, in addition to the fact that there is no scientific basis for claiming its deterrent effect. Sexual assault is embedded in a framework of power and has got very little to do with sex. Targeting the sexual organ, therefore, is completely misplaced. We know from past experience, as well as from the recent Delhi case, that sexual assaults are carried out with objects, and penile penetration is not necessary to constitute sexual assault. Finally, chemical castration is an invasive procedure and goes against the right to life and bodily integrity of a person as enshrined in the Constitution of India and numerous international covenants and treaties.

Existing law in India

5. Under the existing law a minimum sentence of 7 years imprisonment has been prescribed for rape, and 10 years in cases of gang rape, rape of minors, custodial rape, etc. The Indian Penal Code also provides that this minimum can be reduced at the discretion of the Judge for adequate and special reasons which are to be recorded in the judgment. The maximum sentence for rape is life imprisonment.

Convenor | Miloon Kothari

Secretariat | A-1 Nizamuddin East, Lower Ground Floor, New Delhi 110 013, INDIA | Tel./ Fax: +91 (0) 11 2435-8492 | Email: wghr.india@gmail.com | www.wghr.org

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6. It may be noted here that the criminal law permits remission of sentences, with different Rules being followed by different States. Further, Judges are vested with the discretion of permitting sentences to be served concurrently or consecutively, and can also, in addition, direct that the sentence shall be served without remission or parole.

Earlier law reform proposals and present context

7. Since the last 2 to 3 decades the law relating to rape has been subject of much debate and discussion. There have been occasions in the past, as today, where particularly brutal instances of rape have led to protests and demands for more stringent punishment for rape, and have called for the most strict punishment of all, namely, capital punishment. The legislators have not given in to such demands, even as the many draft laws relating to rape and sexual assault have remained unaddressed.

8. However, the situation today is different because perhaps for the first time there is intense pressure to also introduce, by way of a stringent punishment, the option of chemical castration for persons convicted of rape or sexual assault.

9. The present document will examine both the suggestions, for introduction of capital punishment and chemical castration, from the perspective of India's commitments to international law and the rights contained in various international covenants and customary law, as well as the Constitution of India.

International law

10. The ICCPR in Article 6 recognises the inherent right to life and provides that:

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant..."

While observing that the death penalty shall not be imposed on persons below eighteen years, it further observes:

"Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment..."

Article 7 of the Covenant, which is important in the present context, states as under:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

11. Similar provisions exist in the Universal Declaration on Human Rights, the Convention on the Rights of the Child, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other international conventions, the provisions of which are not being repeated here in the interest of brevity.

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General Assembly Resolutions on moratorium on death penalty

12. Taking the lead from the numerous resolutions on the question of the death penalty adopted by the UN Commission on Human Rights (now UN Human Rights Council), the last being its resolution 2005/59 of 20 April 2005, the UN General Assembly has adopted 4 resolutions¹ to impose a moratorium on death penalty until such time as death penalty can and is fully abolished.

13. The first such Resolution was passed on 18th December 2007 and expressed its deep concern about the continued application of the death penalty in different parts of the world, and called upon the states which still retain the death penalty to:

“(a) Respect international standards that provide safeguards guaranteeing the protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984;

(b) Provide the Secretary-General with information relating to the use of Capital Punishment and the observance of the safeguards guaranteeing the protection of the rights of those facing the death penalty;

(c) Progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed;

(d) Establish a moratorium on executions with a view to abolishing the death penalty.”

14. On 21st November 2012 a further resolution was passed by the UN General Assembly’s Third Committee (Social, Humanitarian and Cultural) on “Moratorium on the use of the death penalty” by a record 110 votes. It is unfortunate that India was among the small minority of nations which voted against the motion².

Recommendations by Treaty Bodies and Special Rapporteurs

15. The abolition of death penalty, moratorium on actual executions, and reduction of the number of offences on statute books which invite capital punishment are now part of international customary law

¹ On 18 December 2007, the United Nations General Assembly voted 104 to 54 in favour of resolution A/RES/62/149, which proclaims a global moratorium on the death penalty. On 18 December 2008, the General Assembly adopted another resolution (A/RES/63/168) reaffirming its previous call for a global moratorium on capital punishment. Once again on 21 December 2010, the 65th General Assembly adopted a third resolution (A/RES/65/206). The fourth resolution was passed as recently as on 21st November 2012.

² PTI, 21st Nov. 2012, *India votes against UN resolution banning death penalty*. Available at http://articles.timesofindia.indiatimes.com/2012-11-21/india/35257141_1_india-votes-death-penalty-resolution

moving in the direction of eventual abolition of this form of punishment across the globe. In the Concluding Observations³ made by the UN Human Rights Committee on 4th August 1997 with regard to India's report relating to the ICCPR, it was observed:

"20. The Committee expresses concern at the lack of compliance of the Penal Code with article 6, paragraphs 2 and 5 of the covenant. Therefore the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition."

16. The UN Special Rapporteur on extra judicial, summary or arbitrary executions, Mr. Christof Heyns, upon concluding his India mission in 2012⁴, stated:

*"It is a matter of concern that the death penalty may be imposed for a (seemingly growing) number of crimes that cannot be regarded as 'the most serious crimes' referred to in Article 6 of the ICCPR as internationally understood, namely crimes involving intentional killing... The phrase 'rarest of the rare cases (taken from Bachan Singh v. State of Punjab) is often used to describe the Indian approach to the death penalty. However, this may create the wrong impression since the list of crimes for which this sentence may be imposed is still much wider than the one provided for under international law."*⁵

Accordingly, he recommended that India

*"Place a moratorium on the death penalty in accordance with General Assembly resolution 65/206."*⁶

17. More recently, the second inter-governmental peer review of India's human rights (also known as the Universal Periodic Review) recorded by the UN Human Rights Council in May 2012 in Geneva made 169 recommendations to the Government of India, of which 11 recommendations⁷ related to the abolition of death penalty and the adoption of an official moratorium on death penalty. While none of these recommendations have been adopted by the Government of India, they nevertheless represent the growing concern in the international community of the continuation of death penalty in India, both on the statute books and in practice.

³ CCPR/C/79/Add.81 (Concluding Observations/Comments) available at:

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.C.79.Add.81.En?OpenDocument>

⁴ Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions. Press Statement, Country Mission to India, 19-30 March 2012, available at:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>

⁵ Ibid at para B(1)(d).

⁶ Ibid at para D(13).

⁷ Working Group on Human Rights (WGHR) in India and the UN, *Human Rights in India- Status Report 2012 updated and revised*, at pages 114-116 on Death Penalty, and at pages 117-125 on Women. For more details on the recommendations to India during the Second UPR, see *Report of the Working Group on the Universal Periodic Review: India, 2012, A/HRC/21/10*. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/151/08/PDF/G1215108.pdf?OpenElement>

Developments in other countries

18. Some 150 states in the world have abolished or do not practice death penalty. No doubt these developments in the law have not come easily and without resistance. That several states in the USA retain and implement the death penalty is well known. What is less known is that there is a strong movement in the USA to impose death penalty for rape, and that the US Supreme Court has in no uncertain terms struck down such attempts as contrary to the US Constitution. In *Coker vs. Georgia* (433 U.S. 584 (1977)) the US Supreme Court struck down the sentence of death for a convicted felon who had committed rape, holding that the sentence of death for rape was disproportionate, violative of the Eight and Fourteenth Amendments to the US Constitution, and was also “barbaric and excessive”. It may be noted that this was a case of aggravated sexual assault.

19. More recently, in *Kennedy vs. Louisiana*⁸ the constitutional validity of a Louisiana statute which permitted death penalty for rape of a child under 12 years of age was challenged. While taking note of the fact that the “*Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion of society*”, the US Supreme Court reached a finding that death penalty for rape of a minor is unconstitutional and violative of the Eight Amendment, being in the nature of “cruel and unusual punishment”.

20. Speaking for the majority, Judge Kennedy wrote:

“Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.... As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.... It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”

21. It is submitted that the above observation of the US Supreme Court cogently captures the position of WGHR that not only does death penalty constitute a cruel and barbaric punishment which must be weeded out of a civilized society, but even more so the imposition of death penalty for rape, no matter how aggravated and heinous the crime may be, cannot and must not invite the penalty of death in a country that prides itself on constitutionalism and international best practice.

22. It is submitted that for India to today amend its laws to introduce death penalty for rape, even where such punishment is restricted to the ‘rarest of rare cases’ would be a violation of constitutional principles as well as principles of international human rights law, by which India is bound. There is considerable evidence across the globe that deterrent effect of death penalty on serious crimes such as

⁸ *Patrick Kennedy, Petitioner vs. Louisiana*, United States Supreme Court, Certiorari to the Supreme Court of Louisiana, No. 07-343, June 25, 2008.

murder is a myth. Data generated by the Ministry of Home Affairs in India also supports the argument that death penalty has not been and is not a deterrent for murder. Contrary to popular belief, the murder rate has declined consistently in India over the last 20 years, despite the slow down in the execution of death sentences since 1980.

23. There is no evidence, therefore, to support the argument that introduction of death penalty for rape will have a deterrent effect.

Chemical castration as a cruel and unusual punishment

24. WGHR views with deep and growing concern the demands for introduction of chemical castration as a punishment for rape and sexual assault, and views with even greater concern the completely ill-informed nature of these demands. It is categorically stated that any move in this direction would be contrary to constitutional principles as well as established principles of international human rights law.

25. "Chemical castration", as it is commonly understood, is the injection of sex offenders with drugs, such as DepoProvera⁹, which has the effect of reducing the levels of testosterone, and thereby controlling the libido. It is important to understand that unlike surgical castration, the effects of chemical castration are temporary, and therefore a regimen of repeated monitored doses at regular intervals is a necessary prerequisite.

26. Nine states in the USA have introduced legislation permitted chemical castration of sex offenders, making it discretionary for first time offenders and mandatory for repeat offenders, as a pre-condition for release from imprisonment and/or for release on parole. These laws have been challenged by civil rights organisations, although till date a challenge to the constitutionality of the laws has not been considered by the US Supreme Court.

27. WGHR submits that chemical castration is unconstitutional as it violates the fundamental right to privacy and the right to refuse invasive medical treatment, and it also constitutes a violation of the bar against "cruel and unusual punishment" contained in numerous international covenants, including the ICCPR and the CAT.

28. Apart from that, it is also unconstitutional and contrary to basic human rights principles for the state to expose a citizen, without their consent, to potentially dangerous medical side effects. Studies have noted that the side-effects of DepoProvera may include diabetes, gallstones, osteoporosis, hypertension, fatigue, weight gain, cold sweats, nightmares and muscle weakness, apart from the fact that long term effects are as yet unknown. The fact that its side-effects have been found to be far too serious by the Government of India to promote it as part of its family planning programmes, should be a sufficient argument for immediate rejection of such interventions in cases of sexual assault.

⁹ It is important to point out that DepoProvera is marketed as a long-lasting women's hormonal contraceptive. It has been, along with another similar contraceptive drug called NorPlant, the subject matter of sustained opposition from the women's movement in the country since the 1980s, and in Jan 2002 was dropped by the Indian Government. For more information see <www.cwpe.org>

29. However, it is important to also state that unlike other conditions of parole or probation, which are time bound, chemical castration would have to be ordered in perpetuity once a convicted person is released from imprisonment. To ensure that convicted sex offenders present themselves for their three-monthly injections would be a logistical nightmare in a country like India.

30. Further, chemical castration fails to treat the psycho-social roots of rape, which is essentially about power, or of other sexually deviant behavior. Determined sex offenders could, arguably, reverse the effects of the drug with other drugs. Therefore, the treatment or punishment of sex offenders with chemical castration is more likely to prove ineffective, both in the individual and the larger social context.

31. The American Civil Liberties Union, in a scathing critique of the 1997 Florida law permitting chemical castration, observed¹⁰ as under:

“We cannot base a horrific new punishment on a faulty premise, and we cannot allow our disgust to cloud our judgment. These sexual offenders are sick and their actions are reprehensible, but we cannot start down a dangerous path of reactionary punishment that serves no purpose.”

32. The provision of informed consent, provided in some of the state laws in the US, has also been called into question, with commentators in the Journal of the American Academy of Psychiatry and the Law noting that “when the promise of freedom is predicated on mandated treatment, the clinician must carefully assess the validity of informed consent”.¹¹

33. For all these reasons, it is the considered view of the WGHR that chemical castration as a punishment for rape or sexual assault must be abandoned as completely violative of our Constitution and also for the reason that to implement such an intervention in a manner that is effective and secure is next to impossible.

Concluding remarks

34. WGHR submits, therefore, as have many organisations committed to the rule of law and human rights, that the present Committee while making recommendations to the Government of India for reform of laws relating to rape and sexual assault, should focus on substantive issues of definition, procedure, evidence, and implementation, in order to address the abysmal rates of conviction in cases of rape and sexual assault (currently standing at 26% of reported cases) to ensure that the present state of impunity is replaced by a zero-tolerance approach. The most significant deterrent to potential rapists would be the replacement of the current state of impunity with a zero-tolerance approach, including the certainty of arrest, prosecution and conviction. This cannot be achieved with the mere introduction of death penalty and/or chemical castration as a possible sentence.

¹⁰ Larry Helm Spalding, *Chemical Castration: A Return to the Dark Ages*, American Civil Liberties Union. Available at: <http://www.acluf.org/about/newsletters/1997/chem.cfm>

¹¹ Charles L. Scott, MD and Trent Holmberg, MD *Castration of Sex Offenders: Prisoners' Rights versus Public Safety*, J Am Acad Psychiatry Law 31:502-9, 2003.

35. In conclusion, however, there is one final aspect upon which WGHR would like to make a submission. We have noted with concern that the majority of proposals being discussed and debated have invisibilized the problems faced by women and girls who are the poorest of the poor, in particular in urban spaces. Women in the city who are homeless have no access to shelters. In the city of Delhi, for example, of the 150 shelters available for the homeless only 2 are for women. Homeless women, therefore, find themselves at an increased risk of sexual abuse, assault and violence, including rape. It is imperative that while designing laws and interventions which address the pervasive insecurity generated by the culture of rape, we do not lose sight of these women who are also entitled to protection.

Sincerely,



Miloon Kothari

Convenor, WGHR

Convenor | Miloon Kothari

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