

THE HEINOUS CRIME OF CHILD RAPE: WHETHER DEATH PENALTY IS THE ANSWER?

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The recent spate of rapes, especially those of girl child is not only shocking, but it reveals a viciousness also. The number of such rapes is increasing every year, leaving several question marks for the lawmakers, law enforcement agencies and the civil society to answer for. "Anyone", says Samir Parikh, director of the department of mental health and behavioral sciences, Fortis Healthcare, "capable of abducting, drugging, serially raping and brutally killing a child is a perverted, egotistical, sociopathic sadist with no sense of empathy or guilt. There are no other terms to describe a person who brutally rapes and kills children just because he wants to and can. It's not natural for an adult to get aroused or receive sexual gratification from the molestation or assault of pre-pubertal children who have neither biologically developed nor have an understanding of sexual behaviour."¹ He further says that it is not possible, or for that matter ethical, to typecast or profile everyone with socio-pathic traits as potential child rapists because more often than not, they are not rapists.² Child rapist can be a close relative, even father, uncle, close neighbours, near and dear ones and even strangers. At times, it becomes very difficult for anybody to presume that such and such person can be a future rapists. Kailash Satyarthi, the Nobel Peace Prize winner and a child right activist has aptly described the situation: "The rape of our children is a failure of the idea of India. It is the erosion of the nation's moral conscience and raises questions about its integral principles."³ While it is important to enforce the law with regard to rape and sexual assault on children, the matter goes beyond law enforcement or an epidemic of paedophilia. It is vital to recognise the ongoing attacks on women and children as a problem of deficient, flawed democracy, which calls for

¹ Samir Parikh, 'No one can vouch for rapists even after therapy, Hindustan Times, June 1, 2018.

² Ibid.

³ Kailash Satyarthi, India is facing a national child safety emergency Hindustan Times, April 23, 2018.

political commitment and action to reduce the inequality in access to power that makes some emboldened predators, and others, easy prey.⁴

Recently, The Criminal Law (Amendment) Ordinance, 2018, was passed by the Union Cabinet in response to the widespread outrage over the gang-rape and murder of an eight-year-old girl of the nomadic Bakarwal tribe in Jammu & Kashmir's Kathua district. The Ordinance provides for death penalty for rape of minors (below 12 years). This provision has raised a debate all over the country. This paper deals specifically with the efficacy of death penalty for rape of minors and tries to search for other alternatives also.

Present Scenario:

According to National Crime Records Bureau Report, 2016, there is a horrifying spike in child rape incidents by 82.09%, as compared to the figures of 2015 report. The highest rise has been registered in Uttar Pradesh (256%) in the same period after Tamil Nadu and the State ranks third on the list of rape with minors. The NCRB data shows 19,765 cases of rape against children were reported across the country in 2016 while this figure was 10,854 in 2015.

In 2016, the largest number of 2,467 such incidents were reported from Madhya Pradesh followed by 2,292 incidents in Maharashtra, 2,115 cases in Uttar Pradesh, 1,258 incidents in Odisha and 1,169 cases in Tamil Nadu.⁵

"India has the lowest percentage of reporting in rape cases and a large number of rapes go unreported due to social stigma. But the willingness to report such cases has increased in recent year after widespread media attention in several incidents," said woman activist Madhu Garg.⁶

Child rapes are registered under Section 376 of the IPC and under Section 4 and 6 of the Protection of Children against Sexual Offences (POCSO) Act. The POCSO Act was enacted in 2012 to address the growing sexual violence against children and the inability of the Indian Penal Code to deal with this concern. The Act provides a graded classification of sexual offences against children, prescribes higher mandatory minimum sentences for such crimes, mandates several processes and safeguards to ensure a child-friendly trial such as the designation of "special courts", child-friendly process of recording victim testimony, provision of compensation, protection of the identity of the child etc. The Act also contains expensive

⁴ Editorial, Economic Times, April, 17, 2018.

⁵ Rohit K. Singh, Depravity increasing? Spike in Child rapes, Hindustan Times, March 13, 2018.

⁶ Ibid.

mandates for procedures to be followed by the police, magistrates and medical personnel handling victims of child sexual abuse. Although more than five years have elapsed since it came into force, the system is replete with failures and shortcomings. Crime in India, 2016 revealed-that 19,920 children more allegedly victim of child rape in 2016 alone. However, the conviction in 2016 for such crimes stood at an abysmal 28.2 percent while a majority of cases are still pending for disposal.⁷

The Criminal Law (Amendment) Ordinance, 2018 enhances the punishment of rape by amending Section 376 (rape laws) of the Indian Penal Code. The minimum punishment for rape has been increased from the existing 7 years to 10 years now. New sub-sections have been introduced to the IPC section to provide for stringent punishment if the victim is a minor girl. The minimum sentence for rape of a girl below age 16 will now be 20 years jail upto life, with a fine, while every convict in a gang-rape case will be sentenced to life with a fine. Those found guilty of raping girls under age 12 will be handed a jail term between 20 years and life imprisonment along with a fine, or death; the minimum penalty for gang-rape in such cases would be life imprisonment with five and the maximum death. The Ordinance approved by the Cabinet amends IPC Section 376, meant for only female survivors/ victims of rape keeping in mind their specific vulnerabilities.⁸

The maximum punishment for rape along with murder of the victim has been death. However, until now, there was no mention of capital punishment under the rape law, but for murder dealt with under Section 302 of IPC. The Justice JS Verma Committee formed in the aftermath of the December 2012 Delhi gang rape and murder ruled that "death penalty would be a regressive step in the field of sentencing and reformation." Reacting to the discontent in the wake of the case, the then UPA government decided to include the death penalty in the rape law in two specific cases. The death penalty was made the maximum punishment for IPC Section 376A (rape causing death or causing the women to be in a persistent vegetative state) and Section 376E (for repeat offenders). This time, the NDA government has responded with the current Ordinance, justifying it as being exemplary punishment considering the brutality of the act.⁹

⁷ Shruthi Ramakrishnan, Death And Deterrence, Plugging gaps in justice system, not death penalty, can curb Child sexual abuse, *The Indian Express*, March 9, 2018.,

⁸ Shalini Nair, Why death penalty for child rape, or why not, *The Indian Express*, April 30, 2018.

⁹ Ibid.

According to the Centre on Death Penalty at National Law University, India has become the 14th country in the world to provide for the death penalty for child rape. The others are Qatar, Bahrain, Jordan, Kuwait, the UAE, China, Cuba, Mauritania, Sudan, Tajikistan, Thailand, Tunisia and Vietnam.¹⁰

Death Penalty as the ultimate Deterrent to Child Rape?

As mentioned earlier, Justice Verma Committee had held in its report that death penalty is a regressive step as far as mitigation of the heinous crime of rape is concerned. The report cited the Working Group on Human Rights to state that the murder rate had declined consistently in India over the last 20 years despite the slowdown in execution of death sentences since 1980. The Justice Verma Panel only recommended enhancing punishment for aggravated forms of rape to life term, stating there is "considerable evidence that the deterrent effect of death penalty on serious crimes is actually a myth."¹¹

In its 'Death Penalty India Report 2016', the National Law University (Delhi) has cited how the U.S. Supreme Court ruled that it would be unconstitutional to extend the death penalty to non-homicide offences like rape, including rape of a minor.¹²

"There is no evidence to prove that stringent punishment is a deterrent," says Flavia Agnes the well-known women's rights lawyer and founder of Majlis, an NGO which provides socio-legal support to rape survivors. She further states that in 1983, when the rape law was amended, there were 6,019 reported cases which increased to 9,099 in 1988 and 9,519 in 1990. From then onwards there has been a steady increase year after year. In 2012, there were 24,023 cases. This was the year when a special law against child sexual abuse, the Protection of Children from Sexual Offenders (POCSO) Act was enacted. The Criminal Law Amendment Act was passed in early 2013. Instead of deterrent, that year saw a sharp increase of 8,500 cases and a further increase of 3,000 cases in 2014, peaking at an all-time high figure of 36,735 cases. A slight drop of 5.7 per cent was seen in 2015 when the numbers came down to 34,651 cases. But again in 2016, this figure increased to 38,947 cases.¹³

¹⁰ Ibid

¹¹ Shalini Nair, Death poor deterrent: 3% convictions, 94% accused know victims, The Indian Express, April 22, 2018.

¹² Ibid

¹³ Flavia Agnes, Draconian and dangerous, The Indian Express, April 30, 2018.

Capital punishment is all about retribution, disregards the reformatory aspect of the criminal justice system, and is said to have little deterrent effect¹⁴. Besides the new law fails to factor in the following facts also which can't be overlooked:

- (i) The primary argument against awarding capital punishment for rape has been that it would drive the accused to kill the victim to get rid of evidence.¹⁵
- (ii) Also, the new law fails to factor in the fact that a majority of sexual assault cases go unreported due to the child's silence or lack of support from family members. As per National Crime Records Bureau statistics on rape of women and children, 94% of the rapists are known to the victim, and almost half the perpetrators include the father, a brother, a grandfather, a close relative, and neighbours. Critics feel the death penalty will, therefore, put undue pressure on the girl child to suppress the matter or in some cases turn hostile at a later stage of the trial.¹⁶
- (iii) In 2016, of the 64,138 child rape cases that came up before the courts under the POCSO Act read with IPC Section 376, 1,869 cases- or less than three per cent- ended in convictions.¹⁷ On May 1, this year, the Supreme Court expressed shock at finding that 1,12,628 cases expressed under POCSO are pending before trial courts across the country. It had earlier noted that "implementation of POCSO is in shambles."¹⁸ The Supreme Court, which had ordered a review of the backlog under POCSO, found that states such as Uttar Pradesh have over 30,000 cases pending despite the child protection law coming into existence as early as 2012.¹⁹ (Alakh Alok Srivastava vs UoI, 2018 SCC On Line SC 212)
- (iv) The five state reports of the Centre for Child and the Law, National Law School of India University, Bangalore (CCL-NLSIU), on the functioning of special courts under the protection of children from sexual offences (POCSO) Act, 2012 have

¹⁴ Shalini Nair, Why death penalty for child rapes or why not, The Indian Express, April 30, 2018.

¹⁵ Ibid

¹⁶ Ibid.

¹⁷ Shalini Nair, Death poor deterrent : 3% convictions, 94% accused know victims, The Indian Express, April 22, 2018.

¹⁸ Deepti Priya Mehrotra, The last Child first, The Indian Express, May 7, 2018.

¹⁹ KrishnaDas RajaGopal, SC Tells HCs to set up panels to monitor POCSO Act trials, The Hindu, May 2, 2018.

demonstrated that one of the main causes for the low rate of conviction under the Act is the appalling lack of infrastructure and manpower in the criminal justice system. Most districts continue to try cases of child sexual abuse in regular sessions court, designated as "special courts" for the sake of compliance, and most such cases are tried by "special" public prosecutors who are simultaneously trying cases under the NDPS Act, or in some cases, anti terror legislation.²⁰

Proposing fast-track court do not help when the number of Judges remain the same or if the prosecutors are not capable of handling such cases. Many states have not yet even set up Special Courts to try POCSO cases as mandated by law.

- (v) CCL-NLSIU's reports have demonstrated that the timelines for completion of the investigation, for recording of evidence, and for completion of trial are never adhered to because functionaries in the system (police, prosecutors and judges) find them impractical given their case load and the facilities they have to work with. In fact, these timelines were found to have been adhered to only in cases where the accused was acquitted because the victim and other witnesses turned hostile. The rate of conviction was highest in cases which took over two years to complete, because, practically, it takes that much time to record the evidence of all the witnesses. In light of this, the fact that the Ordinance reduces the time given to the police to file a charge sheet, and to the court to decide appeals against sentencing, displays a complete lack of understanding about the issues on the ground and a disturbing disregard for whether a law is implementable.²¹
- (vi) One of the reasons for low conviction rates is the vast majority of victims turning hostile. A recent five- state study by the Centre for Child and the Law, CCL-NLSIU on the functioning of the special courts under the POCSO Act in Delhi, Assam, Maharashtra, Karnataka and Andhra Pradesh found that in 59 per cent of cases, Children turned hostile. The complex and sensitive nature of sexual abuse, coupled with the fact that in a large number of cases (94.6 percent) the rapist is known to offender, result in victims turning hostile. The studies also find that the likelihood

²⁰ Shraddha Chaudhary, Tougher isn't better, *The Indian Express*, April 24, 2018.

²¹ Shraddha Chaudhary, Tougher isn't better, *The Indian Express*, April 24, 2018.

of the victim turning hostile is extremely high in cases of abuse within the family due to the pressure to "settle" or compromise the matter, lack of support systems, and other socio-economic factors which hinder the victims from effectively and confidently testifying against the accused. Higher penalties will only lead to aggravating this concern, particularly with regard to cases of incest.²²

- (vii) The study also finds that where children do testify against the accused, several systemic gaps such as lapses in investigation, lack of child friendly procedures, challenges related to age- determination, poor appreciation of the testimony of the child adversely affect the conviction rate.²³
- (viii) The POCSO and the Criminal Law (Amendment) Act, 2013 (CLAA) changed the sentencing regime for sexual offences by introducing mandatory minimum sentences, thresholds a judge did not have discretion to breach even if she felt there were mitigating circumstances that warranted it. As a result an "anchoring effect" is seen, whereby even if there are aggravating circumstances, judges award only the mandatory minimum sentence. Another effect of high mandatory minimum sentences is that judges, in order to avoid awarding what they view to be a disproportionate sentence, prefer to acquit the accused. Therefore enhanced mandatory minimum punishments in the Ordinance are likely to be counterproductive.²⁴
- (ix) (a) The critique of capital punishment for rape stems from a concrete assessment of shoddy police investigations too. It is well known that right from the moment the criminal justice system is supposed to kick in, there is unwarranted delay by the police in filing missing person complaints and registering written complaints of sexual assault survivors. The reason for such police inaction is a debate within itself, but often enough, such inaction is connected to prevailing biases of class, caste, religion and gender. What is important to note is that a delay in police investigation amounts to an obstruction of justice since it allows the perpetrators to

²² Shruthi Ramakrishnan, Death And Deterrence, *The Indian Express*, March 9, 2018.

²³ *Ibid*

²⁴ Shraddha Chaudhary, Tougher isn't better, *The Indian Express*, April 24, 2018.

destroy crucial evidence and cover their tracks by influencing witnesses, and, sometimes, even the survivor.²⁵

(b) The huge difficulty rape survivors face in police stations and hospitals where medical examinations are carried out is another pertinent issue which is continually sidestepped. Such harassment tends to come under the spotlight only in extreme cases, such as the one where a child, after being sexually assaulted and left bleeding, was kept waiting for hours at a civil hospital in Gurugram in March this year.²⁶

(c) Further, insensitive methods of police investigation, tardy filing of charge sheets, delayed forensic reports, insensitive counselling, uneven disbursement of compensation to rape survivors, aggressive cross-examination of the survivor and her witnesses by defence lawyers, inadequate witness protection and cumbersome court proceedings have together disempowered rape complainants. No amount of retributive justice can enable rape survivors, especially children who grapple with understanding their experience of hurt, to move on in life if the day-to-day justice is an uphill and disempowering process in itself.²⁷

(d) The first step in securing convictions in child rape cases begins with improving the working of the police station, the first port of call for the victim. There have been instances in which the police have refused to file FIRs, especially when the victims are from poor families. In the case of child victims, the police must be particularly sensitive and quick when recording complaints. This will be a better way to secure justice for child victims than focusing on the death penalty.²⁸

(e) The problem lies in the neglect of children in our society. Despite the lip service we pay to children in terms of sympathy, we are a country which is extremely cruel to its children. Not by law alone can we end child rape. Rape within the family cannot be policed in every household. It is the mindset of a male family member that he is entitled to rape a child that must change. A child is a living autonomous

²⁵ Maya John, Death penalty is not the answer, *The Hindu*, April 23, 2018.

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ Editorial, *Hindustan Times*, April 16, 2018.

being, not the property of a parent in a custodial situation available for sexual abuse. Until our attitude to children changes, child rape will continue.²⁹

Alternative measure vis-a-vis death penalty:

Deterrence of the crime and the victim's access to justice require both better implementation of existing laws and systemic changes. Without effective implementation of the law, a penalty-no matter how severe will not work in reducing crime. The following alternative measures can be adopted in this regard:

- (a) Instead of pursuing drastic remedies, we need to urgently devise ways to bolster the existing criminal justice and child protection systems and ensure higher convictions, higher reporting of offences put in place preventive strategies, and address the large number of systemic and operational gaps.³⁰
- (b) Death sentences are rarely executed in India. The punishment is therefore unlikely to achieve deterrence. The approach has to be prophylactic. If we can't change the mindset of grown men, we can catch them young. Ideally that must begin at home. Boys must be sensitized against sexism and taught to stand up against others who harm or harass women. Girl must be taught self-defence in school-it is as important to their survival as a midday meal. We can take a few lessons from Kenya that has brought rapes down by teaching "positive masculinity" and self-defence in schools.³¹
- (c) Society, too, has a role to play. There needs to be zero tolerance towards aggression of all kinds, be it physical or sexual or both. It may not help in completely wiping out crime, but fear of the consequence may rein in many potential perpetrators of child rape. At the individual level, parents and families have to explain to their children what good touch and bad touch are and encourage them to seek help whenever they are uncomfortable with an adult's behaviour.³²

²⁹ Indira Jaising, High Pendency points to lack of sensitivity, Hindustan Times, May 31, 2018.

³⁰ Shruthi Ramakrishnan, Death And Deterrence, The Indian Express, March 9, 2018.

³¹ Madhavi Goradia Diwan, A quick fix that is unlikely to deter child rapists, Hindustan Times, May 4, 2018.

³² Samir Parikh, No one can vouch for rapists even after therapy, Hindustan Times, June 1, 2018.

- (d) What is needed is an environment which encourages children to report sexual abuse. Adults need to learn how to respond to children in distress. Make body safety and sexual health part of school curriculum. Shift the shame from the victim to the abuser, so that children feel more comfortable disclosing abuse.³³
- (e) We require nothing short of the following: greater allocation of state resources towards the setting up of fast track courts; more one- stop crisis centre; proper witness protection; more expansive compensation for rape survivors; and an overhaul of existing child protection services. Until these issues are addressed, little will change on the ground.³⁴
- (f) India will have a database of sex offenders for the first time. The sex offenders registry will have profile and personal details, including residential address, fingerprints, DNA sample and PAN number, of not only convicted offenders but also of those accused of such offences. The database will not be open to public. Only law enforcement agencies will be able to access it. This will help check a spurt in crime against women and children.³⁵

Conclusion:

The recent Criminal Law (Amendment) Ordinance, 2018, passed by the Union Cabinet, which stipulates death penalty in case of rape of girl child below 18 years, has raised a nationwide debate. Although Haryana and Rajasthan joined Madhya Pradesh in introducing death penalty for rape of a child below the age of 12 years, yet giving it a national texture has caused concern in some quarters. For them, this symbolizes retributive justice and it will hardly prove to be a deterrent. Here, it is pertinent to note that a majority of child sexual abuse goes unreported. Even then the situation is quite grim. While there are clearly visible loopholes in the criminal justice system on one hand, the civil society's needs effective intervention is urgently needed at this stage. The government needs to invest in combating the rape culture that condones and encourages rape by age- appropriate sex education at all levels, by aggressive advertisement campaigns to increase awareness and stimulate conversations about gender bias,

³³ Ishita Manek, Hindustan Times, April 26, 2018.

³⁴ Maya John, Death Penalty is not the answer, The Hindu April 23,2018.

³⁵ Moushumi Das Gupta, Govt. to start sex offender registry, Hindustan Times, April 22,2018.

every day sexism, misogyny, stereotypes, consent and equality, and by making concerted efforts to change the way society raises its sons and daughters. Also, the police, doctors, judges, lawyers and prosecutors be educated to understand, and deliver justice to, child survivors. Survivors require justice and rehabilitation.

Therefore, the government is required to take a holistic view of the problem and accordingly go for solutions. Through death penalty for rape of a girl child may satisfy the whims of a certain segment of the people, yet it seems to be a knee-jerk reaction. Past experiences have shown that death penalty can't be a deterrent to any crime. So, time is ripe to make a proper law to prevent child sex abuse with the help of civil society and the other stakeholders. The societal changes in age-old norms and behaviours towards the opposite sex is already due for big change. The sooner it is done, it will be better for achieving the goal of gender justice.

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