Tougher isn’t better

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Reactionary law reform has always been an easy way for governments to appear tough on crime, and the Criminal Law (Amendment) Ordinance, 2018 is no different. It betrays a lack of thought on the likely impact, and only serves to endanger the lives of future victims.

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 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 courts, 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. Investigations are regularly botched up by an understaffed, poorly trained, overburdened police force which has little to no forensic support, and is often sympathetic towards the accused. Instead of addressing these issues which prevent the proper implementation of the law, as it exists, on the ground, the ordinance has, instead, added to the burden of a dysfunctional system.

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 chargesheet, 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.

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. For instance, minimum sentences were awarded in 54.94 per cent cases in Delhi, in 75 per cent cases in Assam, 72.05 per cent in Maharashtra, and 39.39 per cent in Andhra Pradesh. 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.

Along the same lines, the ordinance has anchored its enhanced mandatory minimum sentences and death penalty on age, without considering the issues that arise with age determination. The reports of CCL-NLSIU have shown that given the unavailability or unreliability of age-related documents in most parts of the country, reliance is placed on ossification tests to prove the age of the victim in cases under the POCSO. Since an ossification test cannot pinpoint an exact age, and operates with a margin of plus/minus two years, a majority of judges add two years to the upper age limit to conclude that the victim is not a minor. For instance, if the ossification test states that the victim was 14-16 years old, judges ordinarily add 2 years to 16, and conclude that the victim was 18 years old at the time of the incident, and therefore acquit the accused. The same issue is

likely to arise when considering whether the victim was below the age of 16 or 12, especially if the judge does not believe the enhanced sentence (or the death penalty) is warranted.

But most importantly, the introduction of the death penalty for the rape of children under the age of 12 is likely to put future victims (and there will be future victims because the death penalty has been shown to be no more a deterrent than a life sentence) at grave risk. Since the punishment for rape and the punishment for murder are now the same, a rapist will have no incentive to spare his victim's life, especially since her testimony would be the most important piece of evidence against him.

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, everyday sexism, misogyny, stereotypes, consent and equality, and by making concerted efforts to change the way society raises its sons and daughters. Unless we, as citizens, can tie these issues to the goals and gains of electoral politics, no political party will invest in these long term, and potentially expensive, efforts.

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