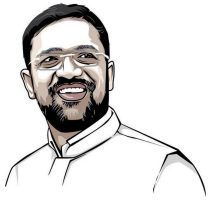


Should those who rape minors get the death penalty?



Faith in the law will be restored only if there is a severe deterrent to those committing heinous acts

The [death penalty is warranted](#) in today's age because I think it acts as a strong deterrent. Let me illustrate this with an example. When we were children, we were told that it was bad karma to drop salt on the ground and that if we did, god would punish us. Now, no one can debate whether god is morally right or wrong in meting out punishment to all those who waste salt. But the moral of the story is that sometimes the pressure of a certain threat is enough to put the fear of god in a child. Back then, people were governed by superstition; today, they are governed by laws, and people should fear violating the rule of law.

If the purpose of laws is to achieve some semblance of justice, we have to bear in mind that it must fulfil two purposes. One, people should have faith in the law which has been enacted. And two, the law should generate fear in the hearts of potential criminals and violators.

If a child below the age of 12 becomes the victim of a traumatic event like rape, we have to deal with the offender or offenders firmly. Anyone who takes advantage of a child's innocence must be dealt with firmly under the law of the land. Only a severe penalty will act as a deterrent to a heinous crime. And only then will people's faith in the law be restored and potential criminals be afraid of breaking the law. Raping a child deserves a very harsh sentence, and that sentence is death.

But just making a law doesn't change anything. It needs to be followed by a stringent justice system. The ordinance will definitely act as a check. There is a reason why rapes are under-reported and registration of cases is not the norm. There is a certain stigma associated with the subject of rape — more so when it happens within the family, by someone known to the child. That's why the number of cases reported are few. But if society gets reassurance that in cases like this there is a law which will come to the aid of the victim, the secrecy surrounding this issue will disappear. Once this is established, reporting will increase. We must remember that in most cases, someone who the victim is familiar with commits the rape. So, this new law is more likely to embolden people to report such cases. Also, the death penalty for raping minors does not mean that all the accused will be hanged. The due process of law will kick in as soon as a complaint is registered.

We also have to bear in mind that there is a consensus on the subject of capital punishment — if anyone rapes a child, a severe punishment is required to be meted out. I think the government has taken this decision after a lot of thought and I fail to understand those who think that the ordinance is a knee-jerk reaction to the problem. To my mind, parliamentarians had initiated a debate on this subject back in 2012-13 when they agreed that we need more stringent laws to address this problem.

Pravin Ghuge is the Chairman of the Maharashtra State Commission for Protection of Child Rights

There is no evidence to show that the death penalty acts as a deterrent

Every time there is a public outcry due to sexual violence, the government quells the same by enacting harsher legislation to portray their concern, instead of identifying solutions to address the cause. It did this after the Nirbhaya rape case by enacting the Juvenile Justice (Care and Protection of Children) Act, 2015, which overturned the well-entrenched philosophy of juvenile justice, and it has done it yet again.

A fallacy has been created by the state that the punishment for rape/gang rape prior to the ordinance was not sufficient for 'justice' to the child. It is necessary to clarify that the punishment for such offences under the Indian Penal Code (IPC) and the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act), extended to life imprisonment, irrespective of the child's age, which met the principle of proportionality. Pursuant to demands of child rights practitioners, the POCSO Act was enacted to create an enabling environment for children — finer calibration of sexual offences; special procedures for children in police stations and in courts; acknowledgement of the fact that children require support while journeying through the criminal justice system; and rehabilitative measures. Their demand was not the death penalty. Though the POCSO Act did positively respond in certain aspects, the enabling provisions have not been implemented, thus denying children the envisaged 'protection'.

Moreover, the IPC/the POCSO Act arises only after the sexual offence is committed. What is the state doing to stop such occurrence? Shouldn't safety of children be the prime concern? How is inclusion of the death penalty going to keep our children secure? The government counters these questions on the ground that the death penalty will deter the commission of sexual offences. There is no evidence to show so, which is noted in Report No. 262 of the Law Commission of India on the death penalty: "After many years of research and debate among statisticians, practitioners, and theorists, a worldwide consensus has now emerged that there is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative — life imprisonment." If death sentence is not a deterrent, what is the purpose for providing such punishment for child rape? Report No. 262 answers this: "In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system."

In India, the deterrence aspect is further diluted due to uncertainty of punishment — perpetrators believe that the chances of the crime being reported or conviction are very low, which is also reflected by data. The 'Study on Child Abuse: India 2007', published by the Ministry of Women and Child Development, shows that 72.1% of child respondents did not report sexual assault of penetrative form to anyone. One of the reasons is that mostly the perpetrator is a 'known accused'. 'Crime in India: 2015' indicates that 94.8% of the accused under Section 4 (penetrative sexual assault) and Section 6 (aggravated penetrative sexual assault) of the POCSO Act were 'known accused'. It is apprehended that the death penalty will increase pressure on the child to not report the crime. The conviction rate reflected in 'Crime in India: 2016' is low — 28.2% under Sections 4 and 6 of the POCSO Act. Instead of attempting to instil fear in the minds of potential rapists of minors, the state should concentrate on winning the confidence of children through skilled investigation, modern forensic gathering, and establishing structures/appointing human resources under the POCSO Act.

To ensure 'justice', the state should provide the child certainty of healing/rehabilitation; certainty that sexual violence will be condemned by state actors; certainty of support to the child within and outside the criminal justice system; certainty that the due process of law will be followed in all cases of sexual offences.

Maharukh Adenwalla is a lawyer in Mumbai working on child rights



The certainty and uniformity of the punishment and not the severity of it will reduce crime

Statistics have not been able to prove or disprove the efficacy of capital punishment as a deterrent. While the U.K. has seen an increase in murders since 1965 when capital punishment for murder was removed from the statute book, Canada has not seen any such impact since it abolished the death penalty in 1976. The underlying socio-economic conditions in a society that cause crimes seem to have as much of an impact on the increase or decrease of crimes as the law does. The number of reported cases of rapes of children increased in India by 82% in 2016 compared to 2015. A climate of violence, social and economic insecurity, alienation, and a progressive undermining of the status of women and children seem to have given an impetus to carry out crimes against women and children. Therefore, I do agree with the proponents of capital punishment when they say that the legal system must give a clear signal that we as a nation consider the rape of children below the age of 12 as among the most heinous of offences. Making such crimes punishable by capital punishment certainly gives such a signal.

Both the crimes that a society suffers and the punishments that it considers appropriate for such crimes are a reflection of the standards of decency and propriety within that society. In the five years that I served as a defence counsel in the Delhi High Court Legal Services Authority, I recall the strong disapproval of the rape of children among the convict population in Tihar jail. Even ruthless gangsters who were in prison for multiple murders abhorred those who raped minors, and the jail staff had to often provide protection to those convicted for the rape of children. The recent public defence of the rape accused in Kathua seems to indicate a dilution of social abhorrence for the rape of a child. Given the growing polarisation in society and that both the police and the judiciary are products of society, it seems unclear whether the state will be able to ensure a free and fair trial.

Undoubtedly, it is not the severity of the punishment but the certainty and uniformity of it which will reduce crime. Even for capital punishment to work as a deterrent, the fairness of the investigation, the certainty of conviction, and the speed of the trial are vital. With the police and judicial independence being under a cloud, especially after the incidents in Kathua and Unnao, the deterrent value of capital punishment seems diminished unless police reforms and fast-track courts are a part of the package.

Of equal significance is the concern raised by those opposing capital punishment, which is that by equalising the punishment for rape and murder, it is likely that most child victims of rape will be harmed so that the best witness is eliminated. Also, can the law alone bring about social change or do we need other strong measures such as scientific investigations, better policing and gender sensitisation of youth to grapple with this issue?

What I can say with certainty is that introducing capital punishment by way of the ordinance route without a thorough debate was a dishonest decision. We have been deprived of the parliamentary procedure of legislation, which is both democratic and constitutional and would have offered an opportunity to discuss all the pros and cons, study international experience and hear all the stakeholders to ascertain the impact of capital punishment. It is a welcome development that the Delhi High Court has issued notice on a petition challenging this hasty ordinance.

Nandita Rao is an advocate practising in the Delhi High Court

As told to Sonam Saigal

YES | Syed Ata Hasnain India risks its national security with low allocations to defence spending
Syed Ata Hasnain For a developing country that is

END

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