

Death and deterrence

In the last fortnight, Haryana and Rajasthan joined Madhya Pradesh in introducing the death penalty for rape of a child below the age of 12 years. Maharashtra and Karnataka too are considering it. These amendments provide a judge with the option of imposing the death penalty, and also increase the mandatory minimum sentence from 10 to 14 years.

These amendments are primarily triggered by the concern over increasing incidences of sexual assault against young children, which is undoubtedly significant. However, the response must be thoughtfully curated based on what works. In order to provide an effective response, it is imperative to analyse the present system and understand why it has failed.

The Protection of Children from Sexual Offences Act (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 extensive 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 were allegedly victims of child rape in 2016 alone. However, the conviction in 2016 for such crimes stood at an abysmal 28.2 per cent while a majority of cases (89.6 per cent) are still pending for disposal.

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, National Law School of India University (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 per cent) the rapist is known to offender, result in victims turning hostile.

The studies also find that the likelihood 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. 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.

Further aggravating the situation is the concern that a majority of child sexual abuse goes unreported. A Ministry of Women and Child Development study (2007) surveying 17,220 children from 13 states found that an alarming 53.22 per cent of them had faced some form of sexual abuse amongst which 52.94 per cent constituted boys. The CCL study, however, shows that only 2.5 per cent of the victims in the five states studied were boys. Thus, only a fraction of the incidences of sexual abuse against children enter the criminal justice system, amongst which only a minuscule fraction end in a conviction.

Without effective implementation of the law, a penalty — no matter how severe — will not work in reducing crime. The mandatory minimum sentences for sexual offences was already increased by

the POCSO Act and the Criminal Law Amendment Act, 2013 specifically to address growing sexual crimes. These penalties are rendered meaningless in the face of thousands of crimes that go acquitted, or worse, undetected.

While death penalty is being flaunted as the solution that will scare away future predators, our low rates of conviction do not even have the effect of creating a fear of accountability in the first place. 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 a large number of systemic and operational gaps.

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