Ineffective and arbitrary

The amendments to the Indian Penal Code passed by Rajasthan and Madhya Pradesh introducing the death penalty as a possible punishment for the rape of a girl below the age of 12 years is a perfect example of lawmaking that is as thick on rhetoric as it is thin on empirical evidence. Though child sexual violence is one of the relatively better documented areas in criminal justice, little of that research is reflected in the imagination and passing of these amendments.

What is the purpose of these amendments? Statements from politicians in the two States will reveal the three interests that drive this move: first, there is the belief that harsher punishments will deter people from committing child rape; second, justice for child survivors demands that the law provide for the death penalty; and third, our abhorrence for the crime makes the perpetrator 'deserving' of the death penalty.

The various justifications

The deterrence argument is attractive because it appeals to our intuition that fear of the harshest punishment will prevent individuals from committing child rape. But social, economic, cultural, psychological and other factors in each of our lives interact in far more complex ways than just that simple equation. In 2012, the National Research Council of the National Academy of Sciences in the U.S. published a comprehensive analysis of deterrence studies and came to the conclusion that it is impossible to determine whether the death penalty is a deterrent or not. The response might well be: if we are uncertain about deterrence, what is the harm in trying it? The specific counter in the context of child rape is that there is an extensive body of work that documents many preventive measures and policies that have a definitive impact on preventing child rape. By diverting resources to the death penalty, we are taking away from developing strategies like risk assessment and management, cognitive behavioural treatment and community protection measures that have proven to have far greater preventive potential.

Death penalty as justice to the child survivor is a disingenuous argument because it seeks to cover-up the real reasons that prevent justice to survivors. Child rights groups have often expressed grave concerns over the manner in which investigations and criminal prosecutions take place under the Protection of Children from Sexual Offences Act, 2012, and low conviction rates. The lack of specialised investigators, prosecutors, judges, mental health professionals, doctors, forensic experts and social workers working on cases of child rape specifically has been repeatedly cited as the need of the hour. Further, our efforts to ensure justice for child survivors have suffered from grossly inadequate child protection and rehabilitation services, lack of compliance with child-friendly legal procedures, and no real system of positive measures to reduce vulnerabilities of children in this context.

Research on child sexual violence in India shows that a large proportion of perpetrators are family members or those close to or known to the family. This results in massive underreporting of such crimes. This concern will only intensify with the death penalty because we are effectively asking the child's family to risk sending a family member or a known person to the gallows.

The third reason perhaps lies at the core of these amendments and everything else appears to be dressing around it. The abhorrence associated with the crime and perpetrators of such crimes drives the sentiment that such individuals 'deserve' the death penalty. In the words of Madhya Pradesh Chief Minister Shivraj Singh Chouhan: "We believe that human rights are meant for humans and not devils who are involved in heinous crimes." This line of thinking raises a conundrum. Under our Constitution, a legislation has to always give a sentencing judge the option of choosing between life imprisonment and the death penalty; death penalty cannot be declared as

the only punishment for any crime. The sentencing judges will have to make this choice in the context of child rape too. If our abhorrence is a valid constitutional consideration, how is a judge to choose which child rapist deserves or which one doesn't deserve to die? Are we then to signal that the rape of a certain child matters more than the rape of another? This will inevitably become a judge-centric exercise where the individual predilections of a judge will take precedence over any rule of law. In essence, this would be a 'lethal lottery' that will express our abhorrence for some perpetrators but will do very little for the survivors or those at risk of such violence.

Arbitrariness in imposing death sentences has been explicitly discussed in judgments of the Supreme Court and also led the Law Commission to recommend the gradual abolition of the death penalty in its 262nd report. This concern about arbitrariness is only bound to worsen when judges are asked to pick instances of child rape where the death sentence is to be imposed based on the 'rarest of rare' standard. It is mind-boggling to imagine the manner in which judges will attempt to apply the requirements of that standard to balance aggravating and mitigating circumstances. In essence, we will be asking judges to decide why certain instances of child rape are worse than others.

Targets the poor

The arbitrariness of the death penalty in India also arises from the discriminatory impact of the choice of what constitutes 'rarest of rare'. The Death Penalty India Report of 2016 found that a very large proportion of death row prisoners (over 75%) are extremely poor and belong to marginalised groups with barely any meaningful access to legal representation. Thus the weakest sections of society bear the burden of the death penalty. It is important to understand the implication of this for the discussion on child rape. While there is widespread agreement that child rape is a concern across all sections of society, by choosing the death penalty as a response we are focussing on a punishment that structurally targets the poor.

The death penalty for child rape is a counterproductive diversion that helps the government present the illusion that it is serious about child rape. Governments are looking for the easy way out on an issue that requires sustained planning, engagement, and investment of resources. The measures required for protecting children from sexual violence and providing survivors with justice require governments to take steps that are very different from steps meant to convey our abhorrence. We are dangerously close to hate colouring our judgment on what is required to protect our children.

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Do secularist parties deal better with religious violence?

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