

Curbing Child Rape: Are we barking up the wrong tree?*

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The ghastly incident of gang rape and murder of an eight-year old child in Kathua has shaken the conscience of the nation. The outpouring of anger – revealed in the spate of protests – from different parts of the country draws parallel to the public outrage witnessed in the 2012 Nirbhaya rape case. However, one noticeable dissimilarity from the previous incident is, this time some lawyers, even politicians along with members of Hindu Ekta Manch took out rallies openly in support of the accused persons. Interestingly, people holding such polar opposite views – either tormented by the news or in support of the act (indeed ‘reasons’ are advanced) – will not find it difficult to justify their positions. But opinions are divided over another fall out of both incidents, namely, amendment to the anti-rape laws. While the Delhi Commission for Women chief, Swati Maliwal, went on fast demanding death penalty for the convicts of child rape; women activists pointed out death penalty to be a poor deterrent with negative consequences (<https://thewire.in/law/death-penalty-for-child-rapists-gets-cabinet-nod>). In midst of this confusion Delhi High Court, while hearing a PIL challenging the stringent punishment provisions introduced in the Criminal Law (Amendment) Act 2013, asked the government an elementary question: ‘Did you carry out any study, any scientific assessment that death penalty is a deterrent to rape?’ (<https://thewire.in/law/does-research-show-death-penalty-deters-rape-delhi-hc-asks-centre>). In what follows, a first attempt is made to understand if higher quantum of punishment alone is sufficient to curb rape?

In light of the most recent changes in anti-rape law we focus our discussion on incidents of child rape. Before the enactment of Protection of Children from Sexual Offences (POCSO) in 2012, the award of punishment in case of child rape was the same as adult rape. According to the provisions of Section 376 of IPC, conviction in rape attracted a sentence of minimum seven years imprisonment (other than aggravated circumstances), with an exception clause, subject to judicial interpretation: ‘that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years’. POCSO deleted the exception clause and dissolved the ability of courts to exercise discretion in certain cases. Therefore, this clearly made punishment for child rape stricter.

Did this put a dent on child rape? Trends in reported child rapes and rape rates per lakh children do not inspire confidence (Table: 1). In fact, both indicators continuously increased since 2010 (except 2015, although these figures are higher than pre-POCSO era). However, one must be cautious about interpreting these numbers, since the definition of rape itself was widened in 2012. POCSO extended the definition of rape in case of children (i.e. below the age of eighteen) to include various forms of penetrative sexual assault in addition to penovaginal sexual assault. Thus, it is difficult to separate out the impact of two changes coming in the same year. For example, it is possible that stricter punishment might have actually reduced incidents of rape but since the definition of rape became more inclusive thus, the reported figures shot up.

To dispel such confusion one has to look at the Criminal Law (Amendment) Act 2013. The 2013 amendment kept the definition of child rape same (although it broadened the definition of rape for adults) but increased the minimum quantum of punishment from seven years imprisonment to ten years for committing ‘rape on a woman when she is under sixteen years of age’, without any exception clause. This legislation came into effect in 2 April 2013, with the provision of stricter punishment for committing rape on children between 0-16 years, keeping the definition of rape unchanged. Thus, if stricter punishments were sufficient to deter rape, then the two variables reported in Table: 1 should have registered a decline from 2013. No such sign is discernible from Table: 1. Therefore, this casts doubt on whether the recent ordinance – including introduction of death penalty for committing rape on children below 12 years – will fulfill its intended objective¹ .

Table: 1 Reported Child Rapes and Rape Rate in India		
Year	Reported Child Rapes	Rape Rate per lakh children
2010	5, 484	1.34
2011	7, 112	1.7
2012	8, 541	1.99
2013	12, 363	2.81
2014	13, 766	3.1
2015	10, 854	2.4
2016	19, 765	4.4
Source: National Crime Records Bureau, various years		

The above finding is indeed puzzling and eludes commonsense. This is precisely the reason why so many well meaning people are in support of stringent punishment – including death penalty – for curbing rape. However, a little consideration should make it clear that what matters to the offender is not the quantum of punishment alone but, whether he will actually be punished. An example should clarify: suppose in a board examination the punishment for adopting unfair means is very stringent, amounting to disqualification for life; but there is a real dearth of invigilators, leading to negligible monitoring. Examinees would soon figure out that the chances of getting caught are insignificant. Thus, raising the quantum of punishment alone without strict invigilation will fail to rein in examination malpractices. Hence, effective deterrence depends upon a combination of quantum of punishment and the possibility of being apprehended; improving one without addressing the other will fail to produce the desired result.

But is there any evidence on meager chances of getting caught once a child rape is reported? For this we turn to Table: 2 to calculate the probability of finally being punished from the stage when a child rape is reported to the police. National Crime Records Bureau (NCRB) data reports the number of cases pending with the police every year. Thus, one can easily find out the share of cases transferred from the police to the courts for trial each year (for example, in 2010, 70 per cent of the cases reported were transferred from the police to the trial stage; see column 2). Therefore, a large proportion of cases never pass the first stage every year. A major reason for this is the low police-civilian ratio in India (incidentally among the lowest in the

world; <http://www.thehansindia.com/posts/index/National/2016-07-29/India-has-lowest-police-population-ratios-in-the-world/245425>).

At the second stage where trials are conducted, the pendency rates at courts are notoriously high (just 17 per cent of the cases transferred from the police were adjudicated in 2010). Thus, only 11.9 per cent (17 per cent of the 70 per cent of cases transferred by the police) of the reported number of cases passed the second stage in 2010.

Column 3 shows a disturbing trend that – despite making stringent punishment rules for child rape in 2012 and 2013 – the proportion of cases tried at courts consistently came down from 2010. This is because of the dismal state of judicial infrastructure – with 25 per cent of the posts sanctioned for judges lying vacant in 2017 (given this, each judge must hear an impossible amount of 1,540 cases to clear all pending cases; <http://www.thehindu.com/news/cities/Delhi/short-on-judges-justice-a-dish-served-cold/article21387363.ece>). This is also the reason why the promise of fast-tracking mentioned in the ordinance should be taken with a pinch of salt.

Now from the cases tried at court in 2010, a mere 30 per cent of cases ended in conviction (column 4). Thus, there was only 3.5 per cent probability of finally getting convicted from the reported number of cases in 2010 (column 5; 30 per cent of 11.9 per cent of reported cases crossing the third stage in 2010). Column 5 exhibits that the probability of finally getting convicted is marginally falling (except 2016 showing a drastic fall) from 2010.

Table: 2 Chances of punishment from the Reported Child Rape Cases				
Year	Rate of case transfers from Police to Court	Court Trial Rate	Conviction Rate	Probability of being punished (in %)
2010	0.70	0.17	0.30	3.5
2011	0.69	0.16	0.32	3.6
2012	0.70	0.15	0.28	3.0
2013	0.70	0.16	0.32	3.4
2014	0.75	0.15	0.31	3.5
2015	0.68	0.13	0.34	3.0
2016	0.69	0.10	0.28	2.0
Source: National Crime Records Bureau, various years				

It may be noted that the probability calculated above is an overestimate and offenders perceive lower punishment threats simply because many child rape incidents (especially incest) go unreported, in addition to the difficulty of registering a complaint with the police in the first place. The analysis shows that the chances of finally getting caught once a child rape is reported are negligible. Thus, it is no wonder that the increase in quantum of punishment in 2012 and 2013 failed to check child rape (Table: 1).

Apart from the problems discussed above death penalty may reduce the number of cases reported for two separate reasons. First, when offenders are mostly known to the victims (94.6 per cent in 2016), with victims often economically dependent on offenders, there is a high possibility of rape going unreported or witnesses turning

hostile. Second, the death threat might motivate offenders to eliminate victims, to avoid identification.

If past trends teach us any lesson then it appears that there are no quick fixes in form of passing amendments. Without allocation of funds for improvement in police-civilian ratio and building judicial infrastructure in the mid-term along with sincere efforts to educating people in the long-term, simply raising the quantum of punishment each time in face of public outrage seems to be an easy way out for the government with futile outcomes.

¹ For other proposed changes see here:

<http://www.prsindia.org/uploads/media/Ordinances/The%20Criminal%20Law%20Amendment%20Ordinance%202018.pdf>

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