On Rape and Capital Punishment

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Would capital punishment for rapists help protect India's girls and women? Would a capital trial for these gang rapists help reform the deeply dysfunctional system of criminal justice? The answer to both questions is in the negative.

Our essay advocating a formal end to the death penalty in India was published on the same day that the gang rape in Delhi resulted in the victim's death (“Executing Kasab: A New Beginning or the Beginning of the End of the Death Penalty”, EPW, 29 December 2012). Those horrendous crimes have generated a firestorm of public rage, one by-product of which is a call for capital punishment for rapists. In this article we consider what Delhi and its aftermath can teach us about the death penalty in India. Would “capital punishment for rapists” help protect India's girls and women? Would a capital trial for these gang rapists help reform the deeply dysfunctional system of criminal justice? And could capital punishment for rape be a dangerous diversion of attention from India's real problems?

In our view, a death penalty for rapists in India is a truly terrible idea. With tens of thousands of rapes each year but only two executions in the past 15 years, arbitrary and discriminatory enforcement of the death penalty would be a certainty, not least because inefficient, misogynistic, and corrupt police and prosecutors would be put in charge of this lethal lottery. There is also a practical problem: threatening to hang rapists provides incentive for them to kill victims and witnesses in order to avoid identification.

Two Problems

But there are two deeper problems with a death penalty for rape. The first is that it diverts attention from the attitudes and institutions that make modern India unsafe for half her citizens. Changing the subject to capital punishment puts offenders in the public spotlight while leaving in the shadows those police and prosecutors who turn a blind eye to victims' complaints and those citizens who pass by naked victims without lifting an eyebrow or a finger. In a country where sexual harassment and assault are endemic and where (according to a recent UNICEF report) more than half of young males think wife beating is justified, the belief in capital punishment requires an Olympian leap of faith across the root causes of rape – with eyes wide shut.

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The second deep problem is that a death penalty for rape is a giant step backwards for women’s rights. In the world of 2013 there is a close correlation between executions for rape and women’s rights – and it turns out to be negative. The death penalty for rape persists primarily in enclaves such as Saudi Arabia, Iraq, and Pakistan, where women are treated as property and where “honour killings” reflect the perverse valuation of sexual purity over human life. To appropriate the feminist slogan, Indian women need the protection of capital punishment like a fish needs a bicycle.

But does the Delhi victim’s death make the perpetrators of this atrocity worthy candidates for hanging? Probably not. By Indian law, all of the thugs on that bus are liable for murder because their attack caused the victim’s death, yet it appears that none of the six intended to kill. We will probably never know for certain which of the offenders actually caused the injuries that led to the victim’s death. In the context of this uncertainty, Indian courts would have to cheat on their “rarest of the rare” doctrine to identify even a single candidate for state killing. And if the defendants receive effective assistance of counsel (as the law says they must), then a capital trial will be torture for the victim’s relatives. Conversely, if the defendants do not have good counsel, the trial will further embarrass an Indian justice system that has already received much criticism.

‘Status Competition’
The current circumstances of capital punishment in India make it almost inevitable that the victim’s parents will demand that all of their daughter’s rapists be hanged. As long as there is some prospect that a murderer might be executed, every victim’s family will demand that the gravity of their loss be recognised by the highest penalty the law allows – and in India that penalty is death. In this way, capital punishment becomes the top prize in what scholars call a “status competition”, and anything less means their loss has been devalued. This is a cruel contest, for few defendants are sentenced to death in India, and almost none are executed. The mirage of execution deems the status of all homicide victims who do not receive the grisly prize.

A formal end to executions in India would show mercy not only to prisoners but also to their victims. After capital punishment becomes impossible, lesser punishments no longer feel like an insult to the survivors. The assassination of 77 innocent people in Norway in July 2011 was an act of unimaginable evil – the worst crime in that nation’s long history. But it produced almost no public demand for state killing because Norway abolished death as a criminal sanction many years ago. If India had formally retired its own hangmen, its citizens would no longer experience the vain hope of execution that is compounding the horrors of Delhi.