

Let's not trivialise rape

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Justice is subverted when it doesn't distinguish between coerced and consensual sex

The Madras high court stunned many last month when it ruled that a convicted rapist of a minor be set free in order that he and the survivor, now an adult and a mother, can come to an amicable settlement. It showed that Nehru's famous observation, "We in India live simultaneously in all the ages and centuries that have preceded this middle of the twentieth century," still holds true in present day India.

That the woman had no desire to even meet her rapist, let alone come to some arrangement with him, seemed not to have occurred to the judge, who suggested relying on arbitration under the Alternate Dispute Resolution (ADR) mechanism. That itself should have been worrisome since ADR, meant to bypass time consuming and expensive litigation, is meant for civil disputes not criminal cases.

Constitutional democracies treat crimes as not just against the individual or family or clan, but against society as a whole. In other words, unlike some traditional communities which allow "compromises" in lieu of "blood money" to the victim of a crime or his or her family, modern democracies are underpinned by the rule of law. Sure, some emphasise rehabilitation as much as or more than punishment, but nevertheless do not permit any kind of "compromise" between perpetrator and victim as a way out of prosecution under the law and its consequences.

What is even worse is that the judge went on to cite as justification the traditions of various religions in "non-belligerent" dispute resolution. That is doubly worrisome, since HC judges are supposed to make their rulings based on the Constitution which they have sworn to uphold, rather than on religious precedents.

Many aspects of judicial reform are vastly overdue. These include the system for appointing judges, currently under SC review after Parliament's passage of the National Judicial Appointments Commission. Also urgently needed are large funding increases in order to dramatically raise the number of judges, along with the necessary infrastructure.

India has an extremely low ratio of judges to population compared to developed countries, a major bottleneck in the delivery of justice. And there is need for matching reforms in policing and other related areas. All of these require either time-consuming consensus building across the political spectrum, or very large increases in funding, or both. But what can happen even without such fundamental changes is streamlining of intra-judiciary guidelines and principles based on SC precedents.

Fortunately the Supreme Court itself, as the last recourse, keeps righting the course of justice from flagrant detours. Just a week after the Madras HC judgment, it overruled a similar Madhya Pradesh HC decision in which the judge had shown leniency to a

convicted rapist, citing that he had almost finalised a compromise settlement with the parents of the victim, a seven year old! The Supreme Court noted, “

We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of.

It is high time that the already overburdened Supreme Court should not be additionally burdened with routinely correcting such obvious miscarriages of justice. In fact, neither should high courts intervene to reconsider convictions unless there are specific circumstances justifying it. In other words, the leeway given to HC benches to intervene in these matters ought to be tightly circumscribed by the highest court.

But let there not be an impression that such wastage of courts' time and resources on already settled principles of justice weighs only against one gender. Cursory googling throws up any number of false rape cases, from the malicious and completely fabricated to the more common type where a jilted woman alleges rape only to make a recalcitrant lover honour his promise to marry her.

In fact, it is in dealing with just such alleged “rapes” resulting from broken promises of marriage that many judges have fallen prey to their kinder instincts in facilitating reconciliations. And they are not alone, since there are at least as many reported instances of the police acting as matchmakers and marriage counsellors.

Although some think there is nothing wrong in such well-meaning indulgence by cops and judges, the reality is that rape is a serious crime which simply must not be trivialised. Just like there must not be any leniency for convicted rapists based on “compromise” with survivors, neither should there be any tolerance for fake allegations of rape, and especially not for perjury before a court.

Lately, some courts have started taking a stricter view, for instance the additional sessions judge in Delhi last year who acquitted an alleged rapist and noted that the complainant and her husband were fit to be put on trial for perjury. Nevertheless, that is far from the norm.

The basic concepts that it is not rape unless there has been coercion or lack of consent, that sex with mutual consent is not rape even if a promise of marriage is subsequently broken, that sex with a minor is statutory rape irrespective of consent, and that rape is not a crime that can be compromised are all well established principles that should no longer require SC intervention to get lower courts to understand.