Hasty and ill-conceived

The new rape ordinance projects lack of judgment by the State and a hasty desire to play to the political gallery, say Mitakshara Goyal and Armin Rosencranz.

Mitakshara Goyal and Armin Rosencranz | May 10, 2018 1:43 am
The 2018 ordinance has impacted penal provisions under the Indian Penal Code, the Evidence Act, the Code of Criminal Procedure and the POCSO Act. The new ordinance enhances the stringency of punishments and further mandates the speedy disposal of rape cases.

What triggered it?

This impulsive State attempt seems a strategic political reaction in the wake of the public outcry caused by the recent cases of sexual assault and murder of minors in Kathua in Jammu and Kashmir and Surat in Gujarat, and the rape of a girl in Unnao in Uttar Pradesh.

Recognising the impulsive attempt by the State, the Court reprimanded the State for overlooking the root causes and the lack of awareness amongst offenders which could not be cured by imposing stringent punishments.

High Court’s take

While adjudicating an old PIL challenging the Criminal Law (Amendment) Act of 2013, the Delhi High Court questioned the State on the recently promulgated ordinance on April 23.

The Court demanded the scientific and statistical premises and analysis causing the promulgation of the ordinance and permitting the death penalty when girls under age 12 are raped.

The undertone of the Bench highlights the obsession of the Indian criminal justice system with penalising the offender without considering its impact on the corresponding victim.

Deterrence by death a myth?

Deriving from the observations by the High Court, there seem to be three fundamentally problematic elements of the Ordinance which we seek to address in this article. First, the presumption that capital punishment deters potential rapists.

Capital punishment has been a controversial regime over decades and has gained significant attention from legal researchers, judges and legislators. Several statistical and research studies have concluded that capital punishment does not deter crime.

The stringency of punishments can only further reporting and consequently lower convictions. This inference is drawn from the National Crime Reports Bureau (NCRB) Report, which observed a lower conviction rate of 29.6 per cent in 2016 under the POCSO Act, after stringent punishments were mandated under POCSO and Rape laws under Section 376 IPC.

The certainty of stringent punishment would only increase the number of unreported rape cases, where the offenders are members of the victim's family. It could also affect the security and survival of the victim. As per a research study conducted by Majlis, a Mumbai based NGO, in 91 per cent of cases, the accused was a known person and only in 9 per cent cases was he a stranger.

This statistical data justifies the common retractions and unreported instances of rape cases, which are due to the social stigma and family pressure in cases of known offenders.

This is bound to increase, since the families emotionally pressure the victim to drop the charges against a known member, considering the severity and stringency of charges extending up to the death penalty or 20 years of imprisonment. The proximity of the abuser to the victim makes the task of reporting the crime gruelling and distressing for the victim.

Further, in cases where the girl has been raped, the offender could go to any extent to dissolve any liability of rape, even if it amounts to forever silencing the rape victim. To escape capital punishment, the offender could ensure the death of the victim, to do away with the forensic evidences and any possibility of witness testimony.

Faux age categorisation

Secondly, the faux compartmentalisation of rape victims into ‘below 12 years’, ‘12 to 16 years’ and ‘above 16 years’ are based on patriarchal presuppositions. This categorisation as has been popularly discussed, stems from the prejudicial view that children above 12 are likely to file false cases.

There is no existing study to prove lesser physical injury, mental trauma or social stigma in cases of rape of girls above 12 years of age as compared to those below. This differentiation gives air to the fundamental patriarchal mindset of the police, prosecutors, judges, media and the general public: Adolescent girls are imagined to be promiscuous and, when discovered, falsely claiming sex to be rape.

The only apparent justification for imposing such an abrupt age threshold is that it is a political move. Several academicians have argued it to be a political attempt of the State to appease the outraged public in the wake of the rapes of young girls all over India. However, this political response lacks any strong research or understanding of the problem of rape in India.

Speedy trial: Lip service?

Another inherent flaw in the ordinance pertains to the mandate of speedy trial within two months, which seems extraordinarily ambitious. POCSO already provides for special courts and special public prosecutors. The 2018 ordinance mandating additional fast track courts, without providing institutions or support, seems like mere lip service. There is already a backlog of 3,487 cases in the fast-track courts in New Delhi alone, where sexual assault cases have been languishing for years.

Fundamentally, criminal proceedings are time-consuming due to the investigative techniques, discovery, forensic evidence, police reports and repeated adjournments. Witnesses may turn hostile and refuse to testify because they have settled the matter with the family of a suspect. Today’s courts, including fast track courts, are overburdened with daily matters and are unable to manage their daily boards.

Victims are made to suffer repeated court hearings and cross-examinations where child victims are often subjected to irrelevant questioning to confuse and tire them. In such a scenario, if the two-month deadline is imposed, the defence lawyers are likely to while away the trial time period and tire the victims, keeping them from making their case in court.

Considering the severity of charges and punishment, unless there is a prima facie strong case, the accused would be set free. Thus, it is impractical to mandate a speedy trial, which would likely render the trial incomplete.

We believe that the new rape ordinance, including the death penalty, projects the lack of judgement, research, analysis and commitment of the State to understand the root causes of the escalating rape crimes and to curb them.

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