

COMPROMISE IN RAPE CASES IN PUNJAB AND HARYANA: GENDERED NARRATIVES ANIMATING JUDICIAL DECISION-MAKING

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Rape in Indian law is a crime that cannot be quashed on the basis of a settlement between the parties. And yet, instances of such settlements, known as 'compromise' are frequent and commonplace in rape cases. High Courts across the country have been using their inherent powers under Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') to quash criminal proceedings in rape cases where there has been an out-of-court compromise between the two parties. In this essay, we analyse all orders delivered by the Punjab and Haryana High Court between 2009-2018 in which it decided to either allow or dismiss petitions under s. 482 CrPC where there was a compromise between parties in a rape case. A reading of these seventy-five orders reveals that there are three broad categories where s. 482 CrPC is invoked. The first category is where the petitioner and complainant were in a relationship at the time of commission of the offence. The second is where the petitioner offers to marry the victim, and the third is where the FIR was filed as a result of a matrimonial dispute. We understand these categories through the lens of three main patriarchal constructs: the marital bond, chastity, and the public-private divide. Drawing on the gendered narratives structuring the High Court's decision-making in these orders, in this paper we argue that the court deploys s. 482 in an effort to maintain hetero-patriarchy. Drawing on orders that are especially illustrative of these issues, we aim at exploring the tussle between agency and coercion, as well as the tension between the domestic sphere and the public sphere.

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I. INTRODUCTION

In 2013, two similar petitions were filed in the High Court of Punjab and Haryana. These petitions were filed under Section 482 of the Code of Criminal Procedure, 1973. Both sought the quashing of First Information Reports ('FIRs') that had been filed against the petitioners for rape on account of a 'compromise' between the petitioner (alleged perpetrator) and the respondent (victim). In both cases, the petitioners were related to the husband of the victim. The first petition was dismissed¹, while the second was allowed², and resulted in the quashing of the FIR. The difference between the two petitions was that the first involved a minor, while the second involved an older woman. Despite their dissimilar outcomes, what connects the orders in the two petitions is that they are dominated by the same gendered constructions of honour and chastity. The preservation of the minor girl's innocence was what persuaded the Court to dismiss the petition in her case, while the claim of chastity was not available to the older woman.

As per Indian law, rape cases cannot be 'compromised'. Ordinarily, after the offence of rape is committed, an FIR is filed by the victim with the police, which propels an investigation. If the accused is found, he (only men can be accused of rape under Section 376(1) of the Indian Penal Code while women can also be accused of participating in gang-rape under s. 376(2)(g) IPC) is apprehended and presented before the magistrate within 24 hours of being arrested. The investigation includes the statement of the accused and the victim before the magistrate, and medical examination of the accused and the victim with their consent. After this, the charge-sheet is filed, and once arguments are made on the framing of charges, the accused is either discharged, or the charges are framed and the trial commences. Within the criminal justice system, there can be no settlement between the parties in a rape case. Even if there is an out-of-court settlement which is brought to the notice of the presiding officer of the court, criminal proceedings against the accused do not cease. The pre-trial/trial proceedings continue. However, High Courts across the country have been using their inherent powers under Section 482 of the Code of Criminal Procedure, 1973 to quash criminal proceedings in rape cases where there has been an out-of-court settlement ('compromise') between the two parties.

In this paper, we focus our discussion on the invocation and use of s. 482 CrPC for the quashing of rape cases between 2009-2018 in the High Court of Punjab and Haryana. We draw on all seventy-five orders which claimed that a compromise had taken place between the parties in a rape case. In fifty-four orders, the petitions were allowed, while the remaining petitions were dismissed. In this essay, we classify the petitions into three broad categories- where the

¹ *Sikander Singh v. State of Punjab*, 2016 SCC OnLine P&H 13014.

² *Balbir Singh v. State of Haryana*, 2016 SCC OnLine P&H 18476.

petitioner and victim were in a relationship, where the petitioner offers to marry the victim, and where the FIR is lodged as a result of a private dispute between the parties. An analysis of these orders reveals that a prevailing patriarchal impulse guided the orders where petitions under s. 482 CrPC were either allowed, as well as where they were dismissed. We observe the interplay of three important dichotomies animating the Court's decision-making. The first dichotomy is between agency and victimhood. The second is between purity and defilement, and the third is the division between the domestic and the public.

The states of Punjab and Haryana share a High Court. Haryana was cleaved from Punjab in 1966. Both states have similar political-economic structures as predominantly agricultural economies- contributing significantly to the national granaries.³ Both states have historically had markedly low sex ratios and strong son preference.⁴ The states also distinguish themselves by together accounting for some of the highest rates of crimes against women as per 2018 statistics.⁵ Across India, as per the Crime in India (2017) statistics⁶, the country-wide rate of conviction for crimes against women is 24.6 percent. In Haryana, it is 15.4 percent, and in Punjab it is 23.1 percent, both faring below the national average.⁷

Haryana in particular has gained notoriety more recently for its khap panchayats (caste councils) which often act as 'quasi-judicial bodies'. These caste councils are known for imposing their diktats on communities based on age-old customs, cracking down on inter-caste and intra-*gotra* unions, and have been accused of honour killings.⁸ Khap panchayats have ruled with a degree of impunity and have been difficult to dislodge because they often find political patronage and support from law-makers.⁹ The Supreme Court in 2018 denounced khap panchayats as 'kangaroo courts', stating that they could not take the law into their own hands.¹⁰ Many rape cases that occur in villages are often adjudicated in these panchayats, which as Baxinotes treats them as social disputes, rather than as crimes.¹¹ The cases we examined in this paper were able to reach

³ Ministry of Agriculture and Farmers Welfare, Pocket Book of Agricultural Statistics, 2017.

⁴ NITI Aayog, Sex Ratio (Females/1000 Males), <<https://niti.gov.in/content/sex-ratio-females-1000-males>>.

⁵ Ministry of Home Affairs, National Crime Records Bureau, IPC and SLL Crimes Against Women in India during 2016-18.

⁶ We use 2017 statistics for this purpose, because the state-wise classification of crimes against women is not made in the 2018 Crime in India Report.

⁷ Ministry of Home Affairs, National Crime Records Bureau, IPC and SLL Crimes Against Women in India during 2015-17.

⁸ "What is Khap Panchayat?", *India Today*, October 11, 2012, "Khap Panchayat Orders to Kill Lovers", *India Today*, May 23, 2010, Sahil Makkar, "Panchayats under the Shadow of the 'Khaps'", *Livemint*, May 1, 2013.

⁹ Sahil Makkar, "Panchayats under the Shadow of the 'Khaps'", *Livemint*, May 1, 2013.

¹⁰ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192; 2018 SCC OnLine SC 275.

¹¹ PratikshaBaxi, "Justice is a Secret: Compromise in Rape Trials", Contributions to Indian Sociology (October, 2010); PratikshaBaxi, *Public Secrets of Law: Rape Trials in India* (2014).

the courts, despite, documented evidence of the challenges women and subordinate caste groups face in filing a rape charge.¹² However, the orders themselves do not reveal if the cases were from villages or the town, since the only identifying information often is the police stations where the complaint was lodged. We note the political social structure of Haryana to underscore the contexts within which rape occurs. However, we strongly dispute any essentialist claim about an excess of rape or crimes against women in 'traditional' or 'agricultural' societies than in others.

The context of these agricultural societies governed by structures of caste and community, complicate the story on compromise. One of the most prevailing arguments by police officers and even within courts is that compromise is an outcome of 'false' rape cases. These are cases whereby an illicit affair is made public and a rape charge is filed and the two parties come to a settlement – a compromise – out of court. The close-knit village, community, and caste relationships often compel the victim's family to a settlement through the exchange of money and/or through coercion. The Crime in India Report (2016) interestingly also displays the category of 'false cases'. Haryana claims that out of 11,751 rape cases being investigated in 2016, 3776 were 'false cases', the second-highest percentage in the country. It also claims that 523 of the cases under investigation 'did not have sufficient evidence'.¹³

Feminists have long been wary of the use of compromise in rape and domestic violence cases. Given structural inequalities of gender, caste and class, they fear that the victim may be coerced into accepting the compromise. It is usually the family of the victim who is involved in brokering the compromise, with the panchayat playing the role of mediator, and not the victim herself. Thus, feminists argue that it is not a 'compromise' in a true sense as the perspectives and interests of the victim are not considered. Scholars argue that compromise is often achieved through the deployment of threats of violence by the perpetrator and his community.

In Pratiksha Baxi's ground-breaking ethnographic work on compromise, she traces the trajectory of a rape trial in a district court in Gujarat which ended in compromise. She demonstrates how the 'effacement in law' produces a revelation, and is perceived to perform social justice. She quotes a judge in the court, who views compromise as a mechanism to restore social relations.¹⁴ Baxi argues that it is alliances between families, governed by hetero-patriarchal and casteist constructs, that determine the contours of a compromise.

¹² Human Rights Watch, "Everyone Blames Me": Barriers to Justice and Support Services for Sexual Assault Survivors in India Report (November 2017).

¹³ Ministry of Home Affairs, National Crime Records Bureau, IPC and SLL Crimes Against Women in India during 2015-17.

¹⁴ Pratiksha Baxi, "Justice is a Secret: Compromise in Rape Trials", Contributions to Indian Sociology (October, 2010).

In this paper, we argue that the reality of compromise is complex. Compromise may be affected as a result of coercion in many situations. It may be used to preserve social relations structured by patriarchy and endogamy. However, compromise may at times serve as an enabler of transgression.

In what follows, we unpack some of these narratives by discussing the different categories of cases coming up before the Court. There are three main sections in which we classify the orders:

II. THE LAW ON COMPROMISE IN RAPE CASES AND SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE

An offence under Section 376 of the Indian Penal Code, 1860 (rape), is non-compoundable, which means that criminal proceedings against the accused cannot be terminated on account of a compromise between the complainant and the accused¹⁵. Compounding of an offence refers to ‘forbearance from the prosecution as a result of amicable settlement between the parties’¹⁶. One of the reasons for the existence of this provision is to relieve the courts of their burden. According to the Law Commission of India, the ‘nature, magnitude and consequences’ of the offence determine whether it is compoundable.¹⁷

Plea bargaining, where the accused agrees to plead guilty in exchange for concessions from the prosecution, such as a reduced sentence, was introduced by the Criminal Law Amendment Act, 2005.¹⁸ However, the amendment made clear that plea bargaining cannot be used for serious offences where imprisonment is above seven years, offences which affect socio-economic conditions, crimes against women and girls below fourteen years, and serious crimes such as rape and murder¹⁹. And yet there is documented evidence to show widespread use of plea bargaining in rape cases.²⁰

While compromises between parties in rape cases cannot result in compounding of the offence or in plea bargaining, another provision of the CrPC indirectly facilitates compromise in rape cases. Section 482 of the Code of Criminal Procedure, 1973, states that the High Court has the inherent power: a)

¹⁵ *Shimbbu v. State of Haryana*, (2014) 13 SCC 318.

¹⁶ Law Commission of India, Compounding of (IPC) Offences, Report No. 237, 6 (December 2011), available at <<http://lawcommissionofindia.nic.in/reports/report237.pdf>> (Last visited on January 10, 2020).

¹⁷ Law Commission of India, Compounding of (IPC) Offences, Report No. 237, 6 (December 2011), available at <<http://lawcommissionofindia.nic.in/reports/report237.pdf>> (Last visited on January 10, 2020).

¹⁸ The Code of Criminal Procedure, 1973, Chapter XXI(A), *inserted vide* The Criminal Law (Amendment) Act, 2005 (w.e.f. July 5, 2006).

¹⁹ The Code of Criminal Procedure, 1973, S. 265-L.

²⁰ Alope Tikku, “Crime Records Show Widespread Abuse of Plea Bargain Law”, *Hindustan Times*, November 24, 2015.

To give effect to an order under the Code, b) To prevent abuse of process of the court and c) To otherwise secure the ends of justice.

High Courts, including to a great extent the High Court of Punjab and Haryana, have been exercising their inherent power under s. 482 CrPC to quash criminal proceedings in rape cases where there has been a compromise between the complainant and the accused. The seventy-five cases we examined in the Punjab and Haryana High Court, all dealt with the use of s. 482 to quash proceedings involving non-compoundable offences. In particular, they relied on the precedents set by two cases, *Gian Singh v. State of Punjab*²¹ from the Supreme Court of India and *Kulwinder Singh v. State of Punjab*²² from the High Court of Punjab and Haryana.

In 2007, the Punjab and Haryana High Court in *Kulwinder Singh*, emphasized that under s. 482 CrPC, there could be no 'hard and fast category' restricting the scope of the High Court's power. The High Court thus has the power to quash FIRs disclosing the commission of non-compoundable offences. What marks *Kulwinder Singh* as significant is its repeated invocation by the Punjab and Haryana High Court in cases where an offence under s. 376 IPC is sought to be compromised.

In *Gian Singh*, the Supreme Court, in 2012, placed a prohibition on the quashing of rape cases by exercise of inherent powers of the High Court. It stated that while s. 482 CrPC could be used to quash criminal proceedings in cases involving non-compoundable offences, it could not be used in cases involving serious offences such as murder, rape and dacoity. However, this power could be used to quash cases involving offences which 'overwhelmingly and predominantly bear civil flavour', including 'offences arising out of matrimony, particularly relating to dowry etc. or the family dispute, where the wrong is basically to the complainant'. The Supreme Court in *Gian Singh* details the considerations that High Courts must take into account while deciding whether to exercise its powers under s. 482 CrPC, with the primary considerations being the possibility of conviction as well as the continuation of criminal proceedings resulting in injustice to the accused.

In the following section, we discuss the cases through three broad categories. In each category we demonstrate the manner in which different patriarchal values were preserved such as: the marital bond, honour and chastity, and the public/private dichotomy.

²¹ *Gian Singh v. State of Punjab*, (2012) 10 SCC 303.

²² *Kulwinder Singh v. State of Punjab*, 2007 SCC OnLine P&H 792.

III. CASES COMING UP BEFORE THE COURT

A. WHERE THE PETITIONER AND THE COMPLAINANT WERE IN A RELATIONSHIP

Where petitions under s. 482 CrPC, were filed, seventeen were 'elopement cases'. The general pattern is that the complainant and the petitioners elope, and are then traced by the police. In most cases, the parents of the complainant force her to file a FIR, where she states that she has been kidnapped/abducted and raped by the petitioner. Later, a compromise may be reached between the family of the complainant and the petitioner. These include cases where minors eloped with their lovers as well as cases where women above the age of eighteen eloped. A few of these cases feature inter-caste/inter-community relationships.

What makes 'elopement cases' where petitions have been allowed remarkable is that they do not begin with the presumption that the woman is a passive agent. Rather, they acknowledge that the woman has asserted her agency in choosing to be with her partner. Her act of choice itself is defiant, destabilizing gender and often caste hierarchies.

In some instances of compromise, the family of the complainant permits the 'victim' to marry the petitioner, or to continue her relationship with the petitioner, or to part amicably from the petitioner. In other cases, the complainant and the petitioner are married even before the FIR is filed. In all cases where the complainant and petitioners solemnized their marriage during the elopement, the Court allowed the petitions. In some of these cases, when the petition under s. 482 CrPC was filed, the complainant and the petitioner already had a child. The Court was reluctant to dismiss such petitions.

There are also a few orders detailing circumstances where the petitioner and the complainant were in a relationship, but due to a misunderstanding, the complainant later chose to file an FIR alleging rape against the petitioner. The parties then came to a compromise, and the petition to have the FIR quashed was filed.

Out of the twenty-two orders surveyed, where the petitioner and the complainant were previously in a consensual relationship, including where they had eloped, only two petitions were dismissed between 2009-2018. Both of these petitions involved minors who were below the age of sixteen. All other petitions, involving major women as well as girls above the age of sixteen, were allowed. The cut off of sixteen years adopted in the two cases appears to be artificial, as the incidents detailed in many of the petitions that were allowed took place after the coming into force of the Criminal Law (Amendment) Act, 2013, where the

age of consent was raised to eighteen.²³ Where the petitions were dismissed, the respective incidents in question took place prior to the passage of the Act.

The underlying theme in the two petitions that were dismissed is the impossibility of the petitioner to compensate the complainant for her loss of honour and dignity. While the High Court raises concerns about the complainant's inability to consent, they are overshadowed by references made to the despoiled virginity of the complainant.

In *Vikram Singh v. State of Haryana*²⁴, the fifteen-year-old complainant was in a consensual relationship with the petitioner. She asked him to marry her, but he refused, stating that she was not old enough to be married. She was beaten by the petitioner and his parents, who told her that she did not belong to their 'brotherhood' or have the same financial status as the petitioner. After she was turned out of their house, she filed a FIR against the petitioner. Later, the parties came to a compromise with the '*intervention of respectables (sic) and family members*' and a petition under s. 482 CrPC was filed, with the complainant saying that she no longer wished to pursue the case. The order correctly cites *Gian Singh* as well as case law pertaining to rape of a minor. It dwells very briefly on the capacity of a minor to give consent and her competence to enter into a settlement. However, it concludes by adverting to the inability of the petitioner to compensate the complainant for the loss of '*precious possessions such as virginity, honour and dignity*'.

In other cases, of particular note was how caste was central in the crafting of the orders. In *Gurlal Singh v. State of Punjab*²⁵, the petitioner and complainant were in an inter-caste relationship for two years. The families of the parties did not allow them to get married as they belonged to different castes. The complainant then lodged a FIR alleging offences under s. 376 and s. 313 (causing a pregnant woman to miscarry without her consent) IPC against the petitioner. Later, both families agreed to the marriage, and the parties solemnized their marriage. The High Court allowed the petition, quashing the FIR. While the quashing of the FIR itself preserves an insurgent romance, enabling the inter-caste couple to defy the caste and gender hierarchy, a reading of the order reveals the deployment of symbols of patriarchal oppression. The order states that the investigating officer provided 'counselling' to the parties. The marriage certificate of the parties was attached as evidence of blissful matrimony. The counsel for the petitioner argued that the parties were 'residing together as husband and wife and are happy in their matrimonial life'. The Court does not comment on the correctness or legality of the investigating officer counselling the couple where the complainant has alleged rape. The attachment of the marriage certificate underscores two

²³ The Indian Penal Code, 1860, S. 375, substituted *vide* the Criminal Law (Amendment) Act, 2013 (w.e.f. 3 April, 2013).

²⁴ *Vikram Singh v. State of Haryana*, 2013 SCC OnLine P&H 15117.

²⁵ *Gurlal Singh v. State of Punjab*, 2016 SCC OnLine P&H 4294.

duties of the Court. The first, is its duty to aid the couple in transgressing the casteist institutions that structure the community, and the second, is its duty as custodian of moral values of the community in perpetuating the institution of marriage. The Court does not refer to *Kulwinder Singh* or *Gian Singh*. Rather, its emphasis is on the preservation of marital bonds. The Court simultaneously both challenges and affirms societal constructions of gender and caste.

In a few orders²⁶, the similar caste status of the complainant and petitioner is used to signal parental approval. These innocuous references to caste, in fact, serve to reify existing hierarchies. By making similar caste status an indication of familial approval, the Court both acknowledges the importance of the family's role in decision-making as well the pervasiveness of endogamous unions.

In 'elopement cases', the only way the couple is able to stay together after compromise between the families is by filing a petition under s. 482 CrPC to quash the FIR. As these are situations where the complainant and petitioner were in a consensual relationship, continuation of criminal proceedings would be purposeless. The complainant would refuse to testify against the petitioner, resulting in acquittal. In the Court's view, this would not only waste the time of the prosecution and the Court, but would also interfere with the future of the couple. An analysis of these cases reveals an uneasy tension between the Supreme Court's decision in *Gian Singh*, and the High Court's willingness to quash FIRs in these cases, particularly if the couples are married or intend to marry. What is noteworthy is that in nearly all of these petitions, evidence of the consent of the parties' parents to the quashing of the petition is presented. These include cases where the parties are not minors. The involvement of the family tempers down the transgressive nature of the couple's romance, and firmly roots the Court's decision within the patriarchal institution of the family.

The High Court has deviated considerably from the Supreme Court's judgment in *Gian Singh* (2012) governing the use of s. 482 CrPC. However, it is only by deviating from *Gian Singh* that the High Court is able to address what to do with rape charges filed in cases of elopement. The possibility of conviction of the accused in these cases would be greatly reduced, and he would be subjected to severe injustice if criminal proceedings were to continue. The ends of s. 482 CrPC would thus be frustrated. The Supreme Court did not envision a situation where an FIR detailing a grave and serious offence such as rape would need to be quashed in the interest of justice. The precedence of *Gian Singh* generates a complication in dealing with cases of elopement. However, the High Court often deviates from *Gian Singh*, particularly in elopement cases, relying not on case law but on the unwritten gender and caste laws that structure community. While orders dismissing petitions do cite *Gian Singh*, they still base their decision-making on these unwritten gender and caste laws.

²⁶ *Shakuntla v. State of Haryana*, 2013 SCC OnLine P&H 1605; *Sheru v. State of Punjab*, 2013 SCC Online P&H 13656.

B. PETITIONER OFFERS TO MARRY THE COMPLAINANT

In the orders we examined, one of the other reasons parties may reach a compromise and file a petition under s. 482 CrPC is because the petitioner offers to marry the complainant. This category also included offences in which the petitioner made a false promise to marry the victim. Contrary to what may have been expected, the High Court in fact does not usually allow petitions under s. 482 CrPC in cases where the accused offers to marry the victim. This is primarily because in cases of this nature, most victims are minors.

A reading of orders in this category shows that these compromises are usually facilitated by the panchayat or 'respectable members of the community,' who mediate on behalf of the parties. Caste, gender, and familial hierarchies are invoked and enforced. The panchayat, which upholds the caste and gender propriety, sanctifies the settlement. The woman's body in this transaction is articulated through the collective imagination of the community. The violation of her body is not an act of violence but of trespass. It is difficult to situate the victim's agency in entering into a compromise, because while the physical violation that is enacted on her body is described in the order, her subjective decision-making is not elaborated upon. The woman may as well have been absent, but for her violation and its 'redress' that form the subject of the order. These orders are peppered with multiple references to the families of the victims. However, in cases involving minors, the High Court refuses to re-sanctify the settlement arrived at by the parties. This signifies to an extent, the High Court's reluctance to privilege the unwritten laws of gender that dictate societal relations over the laws of the state.

The only case in which the Court allowed the petition after the petitioner married the victim, was in *Navdeep Singh v. State of Punjab* where the petitioner and complainant were not previously in a relationship.²⁷ In *Navdeep Singh*, the petitioner and the complainant 'performed marriage...they have been blessed with a child out of the said wedlock'. The High Court in this case cites *Kulwinder Singh* as well as *Gian Singh*. However, the Court does not elaborate on its interpretation of these two cases. It merely concludes by saying that as the couple is residing together and married, there is no point in continuing with the criminal proceedings. The Court could be referring to the latter part of its extract from *Gian Singh*, which speaks of the possibility of conviction being bleak. The reference to the child of the couple firmly roots their position in that of heteronormative domesticity. There are two observations that emerge from examining this order. The first observation is that the Court is reluctant to disturb family bonds, sanctified by the birth of a child. The second observation is the Court, in deciding these petitions takes into consideration its ability to establish guilt and secure a conviction in future.

²⁷ *Navdeep Singh v. State of Punjab*, 2013 SCC Online P&H 7566.

In some cases, the accused makes a false promise of marriage to the complainant and enters into a physical relationship with her. He can be convicted under s. 376 of the IPC if it is found that at the time he made the promise, he had no intention to honour it. Mrinal Satish in an extensive study examines the impact of gendered stereotypes on sentencing in rape cases, arguing that factors such as the past sexual history of the victim as well as whether the victim was acquainted with the accused previously affect the sentence given to the accused by courts.²⁸ Our analysis reveals similar findings in the context of s. 482 CrPC petitions. Orders which were delivered in circumstances where the petitioner was accused of making a false promise of marriage tells us that the character, age, and sexual history of the complainant determine her credibility in the eyes of the Court, and affect whether a petition will be allowed or dismissed.

Two examples that stand out are *Harvinder Singh v. State of Punjab*²⁹ and *Arjinder Singh v. State of Punjab*³⁰. In the first case, the petitioner, Harvinder Singh, filed a petition under s. 482 CrPC before the Punjab and Haryana High Court, asking for the petition to be quashed on the basis of a compromise with the complainant. The High Court allowed the petition, invoking the marital history and sexual maturity of the complainant, claiming to make an ‘inference’, but in fact explicitly stating that the woman was a consenting party. It said “It cannot be disputed that the complainant is a woman with two kids and has undergone two divorces”, and therefore could not possibly have believed the accused when he promised to marry her. Further, the decision mentions that the complainant came into contact with the petitioner ‘during her second marriage with a handicapped person’. Thus, the order intends to evoke two emotions to cement the character of the woman as ‘loose’- the primary emotion is disbelief, while the second is sympathy. Disbelief is evoked at the possibility of a woman who has been divorced twice, in believing the accused who has promised to marry her. The claim of innocence is not available to her. It is assumed that a woman with a varied sexual history would automatically consent to any sexual intercourse. The second emotion that is evoked is that of sympathy for the plight of the ‘handicapped’ husband. Her decision to leave her disabled husband reinforces her poor character. While the Court is careful to point out that these observations are a result of a ‘bare perusal’, and that the reason for the quashing of the petition is the desire of the complainant not to pursue the matter, a significant portion of the judgment is in fact devoted to these observations. This order was delivered prior to the Supreme Court’s decision in *Gian Singh*, and it cites *Kulwinder Singh*.

In contrast to *Harvinder Singh*, in *Arjinder Singh v. State of Punjab*, the petitioner and complainant entered into a compromise ‘with the intervention of

²⁸ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (2016).

²⁹ *Harvinder Singh v. State of Punjab*, 2010 SCC OnLine P&H 7658.

³⁰ *Arjinder Singh v. State of Punjab*, 2016 SCC OnLine P&H 8606.

family members'. In this case, where the petitioner developed physical relations with the complainant on the pretext of marriage, the Court invokes the consequences of rape, which 'not only casts stigma on the reputation of a girl but spoils future prospects as well', dismissing the petition. The Court in *Arjinder Singh* cited *Deepak Gulati v. State of Haryana*³¹, where it reproduced that part of the judgment which stated that "...While a murderer destroys the physical frame of the complainant, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life...rape tantamounts(*sic*) to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity...leaving upon her indelible marks". Further, in *Arjinder Singh*, the Court refers to the youth of the complainant (who was not a minor), saying that she was not 'capable of understanding the complications and issues surrounding her marriage'. Thus, while in *Harvinder Singh*, the complainant, because of her age and sexual maturity was not allowed the privilege of innocence, in *Arjinder Singh*, the complainant's young age and inexperience make her the 'ideal victim'. The order concludes with the judge saying that the complainant was 'persuaded to enter a compromise'. In the initial part of the order, the Court mentions that the compromise was effected with the intervention of family members, and entertains the possibility that she could have been coerced. However, in *Harvinder Singh*, it is assumed that an older, more experienced woman would have voluntarily entered into a compromise. Similar narratives, which stigmatize sexual maturity and privilege youth and inexperience, run as an undercurrent through both the orders. Thus, there is a dichotomy that emerges from an analysis of these orders- between the 'ideal victim', who is young and chaste, and the 'loose woman', who is older and more sexually experienced.

Veena Das has theorized about the intersection between sexuality and alliance, where it is implicit in the 'rules of alliance', that men may only treat those women who are not 'integrated into the structure of alliance' as sexually available.³² If a woman is not chaste, she is seen as someone who is available for 'sexual experimentation'. Das writes about this in the context of rape trials involving women who are not chaste, or who are not a part of the structure of alliance. Judicial reasoning, by defining 'the mode of being female', automatically interprets sexual relations with these women as consensual. Veena Das work helps us make sense of the contrast between *Harvinder Singh* and *Arjinder Singh*. The complainant in *Harvinder Singh*, who is not integrated into the structure of alliance, or rather, has wilfully defied it by getting divorced twice, is seen as sexually available. Thus, the Court assumes consent.

Further, in deciding whether to allow or dismiss the petitions, the Court devotes considerable effort in determining the innocence or guilt of the accused. In cases where the petition is dismissed and the trial is yet to begin, there is

³¹ *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 :(2013) 3 RCR (Criminal) 96.

³² Veena Das, "Sexual Violence, Discursive Formations and the State", 31 *Economic and Political Weekly* 2416 (September 1996).

already a presumption of guilt, which may further stigmatize the accused and affect the fairness of the impending trial.

C. WHERE THE FIR IS LODGED AS A RESULT OF A PRIVATE DISPUTE BETWEEN FAMILIES OR THERE IS MARITAL RAPE

There have been a few cases where the complainant has filed an FIR against a close relative of the husband. There are others where the complainant has filed an FIR against her husband.

Even where the petitioner is a relative of the husband, the Court refers to these cases as ‘matrimonial disputes’, presumably because they take place within the matrimonial home. What is noteworthy is that as in the previous categories of orders, these too lay emphasis on the sanctity of the family bond. The seriousness of the criminal offence is mitigated by its location within the family structure, and the offence is imbued with a civil character. The offence thus migrates from the realm of the ‘public’ to the ‘private’. Rape, which is a crime against society, is located within the public realm. However, these orders show that its occurrence within the familial home situates it firmly in the private realm. The dichotomization of the public and the private spheres, a hallmark of liberal theory, has been criticized by feminists on account of the gendered ‘fault line’ that considers the private sphere to fall outside the realm of state intervention, limiting the area of legal regulation to the public. However, it is generally within the private sphere that most atrocities against women take place³³. These orders end up reifying the oppressive public-private divide, where the High Court refuses to intervene in matters concerning the family. The terming of these FIRs as having arisen out of ‘matrimonial disputes’ itself obfuscates the gravity of the crime, and firmly situates the violation as being a ‘family matter’. It must not be subjected to public scrutiny and the censure of the state. Out of the cases where the petitioner was a relative of the complainant, only one petition was dismissed, while the others were allowed.

In *Jaswant Singh v. State of Punjab*³⁴, which was the sole petition of this category that was dismissed, the petitioner was the brother-in-law of the complainant. The counsel for the petitioner claimed that the FIR was lodged as a result of a matrimonial dispute between the parties. The counsel argued that the petition must be allowed in order to ‘create harmony in the marital relations of the complainant with her husband and his family members’. As per the details in the FIR, the husband of the complainant was unwilling to believe her initially, and it was only her natal family that ‘set the criminal law in motion’. The High Court in its order correctly interprets *Gian Singh* and dismisses the petition,

³³ Ursula A. O'Hare, “Realizing Human Rights for Women”, 21 Human Rights Quarterly 364 (1999).

³⁴ *Jaswant Singh v. State of Punjab*, 2014 SCC OnLine P&H 14407.

also adding that there was no evidence to prove that there was any matrimonial dispute between the parties.

In *Fateh Singh v. State of Punjab*³⁵, the FIR disclosed a nearly identical situation as in *Jaswant Singh*. However, despite deciding the petition in 2016, after the Supreme Court's decision in *Gian Singh*, the High Court in *Fateh Singh* neglects to mention the Supreme Court judgment, while referring to *Kulwinder Singh alone*. Here too, the Court refers to the filing of the FIR as arising from a 'matrimonial dispute', and allows the petition.

In *Gurjit Singh*³⁶, where a FIR was filed against the petitioner, who was the husband of the complainant, alleging rape and domestic violence, the Court allowed the petition, deeming the matter as a 'dispute between husband and wife'. The Court cites *Gian Singh*, and interprets it to suit its ends. The Court, in these cases finds itself in an interesting situation, where the wife accuses her husband of rape. Rape of a wife by her husband is not a crime in India³⁷ unless she is below the age of eighteen³⁸. The petition should have been allowed on this ground and not on the ground of compromise. In cases belonging to this category, the Court instead invokes the sacredness of the matrimonial bond and the need to preserve the couple's marital bliss. It either invokes *Kulwinder Singh* alone, or misinterprets *Gian Singh* in order to reach its decision.

IV. CONCLUSION

The question of why *Gian Singh* was not followed by so many post-2012 judgments of the Punjab and Haryana High Court cannot be easily answered. Interestingly, while some decisions of the High Court mention *Gian Singh*, others neglect to mention it. These decisions may be even delivered in the same year by different judges.

Two main theories that explain this phenomenon emerge. The first explanation is that in some decisions, the High Court has misinterpreted the language and intent of *Gian Singh*. The second, is that some of the circumstances that the Court is presented with are so peculiar that it is left with no option but to quash the FIR while citing *Kulwinder Singh*, despite the prevailing precedent set by the Supreme Court. We believe that the more plausible explanation is the latter.

Remarkable circumstances such as elopement precipitated by an inter-community romance, or where a wife has filed a FIR alleging rape against her husband, were perhaps not envisioned by the Supreme Court when it delivered its decision in *Gian Singh*. While these circumstances may appear to be unique,

³⁵ *Fateh Singh v. State of Punjab*, 2016 SCC OnLine P&H 18599.

³⁶ *Gurjit Singh v. State of Punjab*, 2015 SCC OnLine P&H 18730.

³⁷ The Indian Penal Code, 1860, S. 375.

³⁸ *Independent Thought v. Union of India*, (2017) 10 SCC 800 :2017 SCC Online SC 1222.

they in fact form a significant percentage of cases coming up before the Court. In barring the quashing of rape proceedings, the Supreme Court has inadvertently created the problem of remedilessness. The Punjab and Haryana High Court is thus forced to diverge from precedent to secure what it perceives as the interests of the parties, and to deliver a form of justice that may not feature in the imagination of the Supreme Court. These are not the only considerations determining the decisions of the Court. Pratiksha Baxi's characterization of compromise as a tool to restore social relations is useful in understanding the Punjab and Haryana High Court's repeated and often misplaced invocation of *Kulwinder Singh*. The High Court seeks to 'perform' social justice, rather than strictly adhere to precedent. In its self-perception, it is an enforcer of a kind of justice that is not necessarily articulated in the law.

The common perception that a large number of rape cases are false may be the result of the miscategorization of false promise to marry cases as cases of false rape. This perception is strengthened by instances of elopement resulting in the filing of FIRs detailing rape. Compromise thus serves, in the eyes of the Court and society, as a means of righting wrongs.

An interesting fact is that many orders refer to the role of the *Illaga* Magistrate in attesting the compromise deed. The *Illaga* Magistrate thus lends a stamp of legality to the informal proceedings between the parties. A reading of these cases reveals that the Court views compromise as a kind of contract between parties, where parties contract to restore social relations. The orders mention the involvement of the *Illaga* Magistrate in a nonchalant manner. Thus, the High Court tacitly accepts the role of these officials in lending sanctity to this contract. While this is a sexual contract³⁹ between parties, predicated on the systematic subordination of women, the Court does not seem to recognize this. When these contracts, or compromises, end in marriage or 'resolve' marital difference, violence is invisibilized. Violence, once relegated to the home, will not easily find utterance again in the public realm. Thus, the woman 'contracts away' the right to claim redress for violence. The doctrine of coverture, by which a married woman has no legal status of her own and is dependent on her husband, does not largely find favour in modern legal thought. According to Sir Matthew Hale, who wrote a deeply influential treatise on marital rape, a woman once married, gives her non-revocable consent to sexual intercourse.⁴⁰ However, the Indian legal system's anachronistic reliance on these ideas might explain both the reluctance to criminalize marital rape, as well as the High Courts' willingness to allow compromise in cases where marriage has taken place or marriage is the end goal. This reluctance to admit culpabilities within the institution of marriage, or even within certain marriages, also finds reflection in statements made by Indian

³⁹ Carole Pateman, *The Sexual Contract* (1988).

⁴⁰ Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape", 88 *California Law Review* 1376 (2000).

lawmakers, who argue that that criminalizing marital rape would destroy the institution of marriage.⁴¹

Compromise is a complex phenomenon. In these orders, there is an uneasy tension between agency and coercion. It becomes difficult to assess whether compromises are an expression of a woman's agency, defying structures such as endogamy, or whether in fact the woman's consent is manufactured. Most of the orders, whether allowing or dismissing petitions, themselves take a phallogocentric approach. They invoke gendered constructions of honour, chastity and preservation of the marital bond, while also firmly entrenching the public-private divide. However, some of these orders enable transgressive relationships. Love, which is a radical act, has the power to upend, reimagine, and redraw relationships. The foundations of firmly entrenched institutions such as patriarchy and caste purity are shaken when the Court enables such transgression. While marriage is born out of violence in many situations, it can also be a revolutionary act in others. Sometimes, the boundaries between the two may be unclear.

The Court is at once both the custodian of moral values, enforcing gender and caste hierarchies, and an enabler of transgression and disruption.

⁴¹ Sumedha Choudhury, "Why Criminalization of Marital Rape is Still a Distant Dream in India", *BusinessStandard*, March 30, 2019.