"RECOGNISING MARITAL RAPE: LEGISLATURE'S ALBATROSS"

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MISCONSTRUED PROVISION

Exception II under Sec 375 IPC provides a blanket immunity to husband to outstrip her wife's right to sexual autonomy, bodily integrity and the established right to reproductive choice with him. In S*iraj Mohmadkhan v. Hafizunnisa*[1] and *Vinita Saxena v. Pankaj Pandit*,[2] Hon'ble Supreme Court reiterated the outlook laid by Justice Sachar of the Hon'ble Delhi High Court defining marriage without *"sexual intercourse to be an anathema and without which the very root purpose of the relation gets frustrated. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity, it would be impossible for any marriage to continue for long."* It is clarified that there is no dispute with the point reiterated above, however the issue raised is precisely on the issue of 'Right of married women to exercise consent for an act of sexual intercourse with their husband' and may not be misread to be against the very act of sexual intercourse between a lawfully wedded husband and wife. It is the pre-stage of consent before the sexual intercourse in a marriage which is assumed to be renounced when consenting for marriage and it is against this misconception of 'implied consent' the writer has tried to zoom-in through this research paper.

TOUCHSTONE OF CONSTITUTIONAL MORALITY

If the supreme power is deemed to be vested in any one organ of the state be it legislature, executive or judiciary, it would undoubtedly lead to chaos. If the judiciary were to be completely unbound by any form of adherence to the letter and spirit of the Constitution and discover its true charter with reference to laws made by the legislature, it could well be held to be in breach. Hence to maintain faith in the organs of the state, acts of restorative character must be undertaken to assure constitutional morality is sufficiently ingrained and constitutionalism is no longer at stake because of caprice, whims and excessive power concentrated in certain individuals. An important aspect of Constitutional Morality is the nature and perception of fundamental rights in our country. A simplistic approach to Constitutional Morality would be to assume that principles of fundamental rights such as the right to life and liberty, the right against discrimination and the freedom of speech are just some examples of Constitutional Morality that had been drafted into the Constitution. However, Constitutional morality is not a natural sentiment and needs to be cultivated. 'Diffusion of Constitutional Morality' is a necessary precondition for working of the Constitution. This is more so because written constitutions

[1] Siraj Mohmadkhan v. Hafizunnisa (1981) 4 SCC 250
[2] Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778

often require persistent and unspoken efforts to ensure continued adherence to the principle. The enunciation of the Doctrine of Basic Structure is a manifestation of one of the ways in which the judiciary has protected the Constitution. The Doctrine, it appears, was evolved to implement 'Constitutionalism' and to protect the Constitution from what Dr. Ambedkar termed as efforts to 'pervert' the Constitution.[3] Constitutional morality involves not merely the observance of restraint but requires a greater participation in plainly self- democratisation which means to a considerable degree, self-negation and yielding to concepts of social good and public trust. The fact that we have to keep in mind is vigilance, Constitutional Morality demands continuous vigilance, against oneself, against all organs of government and against the arbitrary use of power. In the case of *Dr. D.C. Wadhwa & Ors. v. State of Bihar & Ors.*,[4] it had been held that any challenge to the constitutional validity of a law could be tested on the touchstone of the 'core of our constitutional scheme'.[5] Laws needed to be tested on a value that was outside the black and white text of the Constitution. There could not be promulgation laws that would not adhere to the very core values that the Constitution stood for. This exemplifies the judicial discovery of 'constitutional morality', although without specific regard to it. In this light, it is contended that the impugned exception violates the fundamental rights of married women based on unreasonable classification done on two factors i.e. Gender and Marital Status. Despite the fact that it is an express provision, it prima facie fails in carrying the true spirit behind the statute, treating offenders of the same crime differently because of difference in their marital status.

TOOLS OF JUDICIARY

It is further noted that Art. 13(2) of the Constitution of India prohibits the state from making any law which takes away or abridges the rights conferred under Part III of the Constitution of India and laws made in contravention shall be deemed void to the extent of inconsistency. Once a statute is declared void under Article 13(1) or 13(2) by the Hon'ble Supreme Court, that declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus infringed.[6] Hence it can be concluded that by virtue of the present Article, Hon'ble Supreme Court is empowered to struck down the challenged exception for it contravenes the right ensured under Part III without any reasonable differentia. Violation of Fundamental Right is sine qua non of the exercise of the right conferred by Art.32,[7] Hon'ble Supreme Court under Art.32(1) while considering a petition for the enforcement of a fundamental right, can declare an act to be Ultra Vires or beyond the competence of the enacting legislature, if it adversely affects a Fundamental Right.

[3] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 at page 616
[4] Dr. D.C. Wadhwa & Ors. v. State of Bihar & Ors. (1987) 1 SCC 378 - 5 Judge Bench
[5] (1987) 1 SCC 378 at 393-94, pr. 7.
[6] Behram Khurshid Pesikaka v. State of Bombay, (1955) 1 SCR 613
[7] Federation of Bar Association in Karnataka v. Union of India, AIR 2000 SC 2544

CULTIVATING EVIL PSYCHE

The impugned provision i.e. Exception II under Section 375 of the Indian Penal Code creates a class within the category of victims based on their marital status i.e. (i) Unmarried; (ii) Married and; (iii) Judicially Separated Women; against whom the offence of rape can be committed, inclusive of all the elements of a grave and heinous offence. It is pertinent to note here that it further creates an unreasonable class amongst the category of accused i.e. husbands protected under the impugned provision; husbands judicially separated from their wives; and strangers liable for offence under Sec. 375 of IPC. The exception to Section 375 assumes non-retractable consent of women to sexual intercourse upon marriage. This assumption reinforces various gender stereotypes leading to the subordination of women and hence is violative of Article 15 of the Constitution. Such false beliefs propel to cultivate the psyche of the social setup objectifying women and reducing them to be nothing more than a chattel to her husband. As a consequence, the exception frustrates the principle of equality in a marriage, upholding the concepts of patriarchy. While these fundamental rights continue to subsist against all strangers, it creates a classification amongst culprits for the same offence committed with same degree, thus being void of any reasonable differentia.

NO TRACES OF STATE INTEREST

In Indian scenario, where rape is a gender-specific legislation, for it to be sustained, the state must articulate an "important governmental interest" which is "substantially related" to the statutory classification.[8] Proponents of the marital rape exemption typically assert that the state's important interest in promoting marital harmony and intimacy, or, alternatively, its interest in encouraging reconciliation of warring spouses, justifies the statute.[9] Yet, the state undeniably has little or no legitimate interest in protecting the harmony or intimacy of a marriage deteriorated to the point of violent sexual abuse, and it has equally as little interest in encouraging the reconciliation of spouses whose relations no longer are consensual, much less harmonious.[10] Thus, because these statutory classifications are not "substantially related" to an important governmental interest, such marital exemption law stands unconstitutional. Marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and, therefore, cannot be raped,[11] to the common law's assumption that marriage results in the unification of husband and wife and that marital rape thus constitutes rape of oneself, a legal

[8] See Craig, 429 U.S. at 197

[9] Hilf, Marital Privacy and Spousal Rape, 16 NEW ENG. L. REV. 31, 43-44 (1980) (limited spousal immunity supports marital privacy rights and encourages reconciliations); Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 YALE L.J. 55, 74 (1952) (policy of protecting reliance on behavior of others should prevail over the demand for protection of the woman's right to withhold consent)

[10] *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567,573,485 N.Y.S.2d 207,213 (1984).

[11] M. HALE, Historia Placitorum Coronae: The history of the Pleas of the Crown 636 (1736).

impossibility.[12] The marital rape exemption clearly is rooted in an intention to deprive the married woman of the protection of the state and to subject her to the will, sovereignty, and unchecked violence of her spouse. Because this intention serves no "important governmental interest," the impugned marital rape exemptions shall be declared unconstitutional.

CLASSES WITHIN CLASSES WITHIN CLASSES

Decoding further, it is contended that marital rape exemption creates a host of irrational distinctions that underscore its unconstitutionality: between married couples and unmarried couples who cohabitate; between married, but estranged partners still living together and married partners living apart (who often are not included in the scope of the exemption); between partners who have filed for divorce and those who have not; and between partners who have indicated their intentions to end the marital union and those who have not. Apart from the effects of the marital rape exemption on women, this statute creates an irrational distinction between married women and all other persons and that this distinction is not justified by real differences between those two groups. The classification and differential treatment of married women rests on the assumption that married women, unlike all other persons, have no interest in receiving protection from the state against violent and sexual assault. But, married women, exactly like men and unmarried women, clearly need physical security in their private spheres. Just as all human beings without the security and dignity of knowing that the state ensures their protection, women cannot lead autonomous, meaningful, and pleasurable lives. Married women need to know that sexual assault against them is criminal and punishable when committed by their husbands. For that matter, they need to know that sexual assault is as criminal when committed against them as would be any intra-familial crime of violence. Summing up the above mentioned contentions, it is concluded that the above tests do not stand qualified in the present matter as there is no reasonable backing to the classification done amongst the victims of rape. The very acknowledgement of the constitutional protection attributed to the victim by virtue of Section 375 and Sec 376B of IPC leaves no other reasonable analogy to construe the waiver of the fundamental right solely due to the change in the marital status of the women.

CLASSIFICATION AMONGST HEINOUS CRIMES

A deconstruction cannot be said to deconstruct novels but only a particular part or reading of the. novel. It is not to deconstruct the novel by itself but to show that some part of that reading maybe deconstruction in itself only. Another popular criticism is that it relies heavily on the supposed dan- ger as alternate readings. For example - Adolf Hilter's Mein kampf to show that the author secretly implies the opposite which he declares openly, that hitter is the friend of jews. We could just imag- ine what would have been the consequences if the secretly implied truth is placed upon everyone.

[12] For a good discussion of the history of the exemption, see Note, To Have and To Hold, supra note 2, at 1255- 58.

CREATING IRRATIONAL DISTINCTION

The irrational distinction of the marital rape exemption is between the protected needs and rights of the average citizen to be safe from criminal assault and the unprotected same needs and rights of married women. The creation of a class of citizens subject to legalised violence is the core effect, if not the purpose, of the marital rape exemption. Surely, the constitutional guarantee of equal protection must guard against that effect. When women are rendered weak, they become incapable of living the kinds of lives the ideal liberal state is surely meant to foster: autonomous, pleasurable, productive, civic, and educated. When state passivity renders women vulnerable to private violence, women, like men, become stunted, fearful, self-alienated, childlike, and servile.

LOSS OF SELFHOOD

The evil flaw of these exemptions is not that they irrationally treat married women differently from unmarried women, or husbands differently from rapists unacquainted with their victims. The evil is that they legalise, and hence legitimate, a form of violence that does inestimable damage to all women, not only to those who are raped. In addition to the obvious violence, brutality, and terror marital rape exemption facilitates, marital rape exemption, like the rape it legalises, also sever the central connection to selfhood that links a woman's pleasure with her desires, will, and actions.[13] The will of the married woman who learns to accept routinised rape is no longer ruled by or even connected to her desires. Eventually, her desires are no longer a product of what she enjoys or what she has learned to enjoy. What the victim of routinised rape within marriage does, sexually, is a product not of what the victim wills but of what her attacker demands. As an immediate consequence, her will becomes a function not of her desires but of his desires. Eventually her desires become a function not of her pleasures, but of his pleasures. The victim of marital rape gains survival, but she sacrifices self-sovereignty. In other words, she sacrifices the ability to control her own will and to determine her own actions, pleasures, and desires free from external influence. In short, she sacrifices selfhood.[14] The damage occasioned by these statutes is the subordination, and in many cases the annihilation, of the psychic, physical, emotional, and erotic female self. It denies married women, in the most literal sense, the protection of its laws. When the state encourages or permits a significant increase in the illegitimate power of one social group over another, the state defies the safeguards of the equal protection clause. The marital rape exemption is an instance of state complicity in men's subordination of women through routinised violent sexual assault and the threat of violent assault.

[13] D. RUSSELL, RAPE IN MARRIAGE (1983) (describing effects of marital rape exemptions); West, supra note 44.
[14] Fineman, Challenging Law, 42 FLA. L. REV. 25 (1990); West, The Difference in Women's Hedonic Lives, 3 WIS. WOMEN'S L.J. 81 (1987).

SOVEREIGN & SUBJECT

With the exemption in place, a marriage becomes not a nurturant, safe heaven offering shelter from the storm, but a separate political world in which the husband is sovereign and the wife subject. Moreover, her vulnerability to this organised, dehumanising, and alienating violence is fully legitimated by the state under which she lives. Sexual force and violence within marriage is unleashed and legalised, and legalised force and violence, of course, is the precondition of political power. A marriage thus becomes a separate state of sovereignty. The marital rape exemption creates, fosters, and encourages not marital intimacy, harmony, or reconciliation, but a separate state of sovereignty ungoverned by law and insulated from state interference.

RELIGIOUS FAITH OR RELIGIOUS PRACTICE

As far as the argument relying on Art. 25 of the Constitution is concerned, a sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health or policy of social welfare upon which the state has embarked, then the religious practices must give way for the good of the people.[15] It is contended that marriage as an institution in India is closely read to be a religious practice, and an integral part of the religion. However, it cannot go above and beyond the above-mentioned restrictions under Art. 25(1) which is exactly the anomaly with the impugned exception. Exception II under Sec. 375 of IPC, by legalising rape committed by a husband on her wife has outrightly frustrated all the three limitations i.e. public order; morality and health, and hence should be declared unconstitutional. It may be raised that the impact of the impugned provisions boils down to protecting married men against misuse of laws by their wives, in case of a bitter marriage/divorce. However, the said provision is not only unfounded and misplaced but also disentitles innocent rape victims who face violent sexual assault by their husbands, without adequate protection or support from the law. For that matter, any law may be misused, the law of cheating under Section 420 is often cited when contracts break down in order to pressurise a defaulting party, however the laws on perjury and malicious prosecution are appropriate remedies rather than the decriminalisation of cheating. It is respectfully contended that when any systemic power is displaced a little, by such as patriarchal power, the backlash is strong to suppress such challenge. It is further submitted, Parliament passed the Protection of Women from Domestic Violence Act, 2005, clearly recognising the need to protect women suffering violence in their relationships, i.e. at the hands of the husband or a live-in-partner and/or their in-laws. The threat of misuse of the said law did not prevent Parliament from empowering women and protecting them from physical, mental, emotional and economic violence committed in a domestic relationship and from standing up to violence inflicted by their own husbands.

[15] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84

CONCLUSION

There could have been a fashion of deconstruction between 1970s and 1980s but it is still not dead yet. Deconstruction does not aim to provide answers. It does not seek to prove an objective truth or to support any one particular claim to justice over another. For this reason deconstruction itself is indeterminate. The 'happening' of deconstruction is not going to lead to a determinate outcome. It will not reveal the one true meaning of justice that can be embodied in law. Rather, deconstruction requires first and foremost the relentless pursuit of the impossible. What is 'happening' is not the pursuit of an answer which marks the end of the inquiry, but rather the ongoing questioning that keeps our minds open to the idea that there may be alternative views and understandings of the meaning of justice. When seen in these terms, it is not a method but simply a way of reading, writ- ing, thinking and acting. Rather than seeking an endpoint or a solid conclusion, the means cannot be distinguished from the end. The ongoing process of questioning is the end in itself. It is about nego- tiating the impossible and the undecidable and, in so doing, remaining open to the possibility of justice.