LICENSE TO RAPE: MARITAL RAPE IN INDIA AND THE EFFECT OF *INDEPENDENT THOUGHT* v. *UOI*[1]

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Abstract

The issue of marital rape in India has been a centre of long drawn debate. Ironically, it has not received much of judicial attention that it deserves. In the leading case of *Independent Thoughts* v. *UOI*, the apex court has ruled on the matter of marital rape of girls between the age group of fifteen to eighteen years. However, the broader issue of marital rape of adult woman has been categorically excluded. This paper tries to analyze the issue of marital rape from the lens of the Constitution of India and also gives a jurisprudential, historical and comparative analysis of the same. It further describes the case of Independent Thoughts and examines its effect on the legal system and society at large.

I INTRODUCTION

The conflict between two or more fundamental rights guaranteed under the Constitution of India is not something unheard of. There have been innumerable cases decided by the Supreme Court of India, where it has played its role as the able interpreter of the constitution by harmonizing the conflicting fundamental rights. However, the challenges that the court faces in giving its verdict using the doctrine of harmonious construction when one of the fundamental rights is right to freedom of religion, are magnanimous. Religion and personal laws have always been very sensitive issues in India and it is difficult to draw a line between the two. Any reformation relating to the personal laws has the capacity to create chaos in the country in the name of religion. With its firm roots in patriarchy, marriage is one such issue. Marriage, in India, is governed in accordance with the personal laws of each religious community. Therefore, any

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[1] AIR 2017 SC 4904.

reformation in the system of marriage, even in the name of human rights is construed as interference in the institution of marriage. In the same light the issue of marital rape has always faced the backlash of the Indian society. In the words of Eugen Ehrlich, "the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. There is a 'living law' underlying the formal rules of the legal system and it is the task of the judge and jurist to integrate these two types of laws."[2] The staunch criticism of marital rape to be considered a criminal offence is generated from the view that it has the capacity to destroy the institution of marriage. It reflects a tussle between right to life (article 21) and right to freedom of religion (article 25).

This tussle was also visible in the case of ***Independent Thought*** v. ***UOI.*** In the instant case the aberrations in the Indian Penal Code was brought into light. It highlights the grave topic of marital rape of girl child between the age group of fifteen to eighteen years. In the concerned case exception 2 of Section 375 of the Indian penal Code was brought into question in the apex court. The sixth description attached to the definition of rape under section 375 makes it clear that the consent of a girl under eighteen years of age will be an irrelevant factor when the crime of rape is being alleged against a defendant. However, anomalous to this description exception 2 states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. The case revolved around the age of consent of a girl child to have sexual intercourse and what constitutes a child as per the definitions given under different Indian legislations that were legislated keeping in view the protection of girl child. The points raised by Union of India relating to marital rape having the potential to destroy the institution of marriage and the explicit disclaimer given by the Supreme Court that it will not deal with the broader matter of marital rape of adult women brings into light the constant tussle between article 21 and article 25 of the Constitution of India.

II CRIMINALISATION OF MARITAL RAPE: A COMPARATIVE ANALYSIS

The history of almost all the societies in the world shows the unequal relationship that existed between a husband and wife in a marriage. Women have been portrayed as a property of the husband since time immemorial. The consistency of portrayal of women as chattel has been the common point of all the major religions of the world. This depiction has been found in Victorian

[2] V.D.Mahajan, *Jurisprudence* 539 (Eastern Book Publication, Lucknow, 5th ed.,2015).

laws as well as in *Manusmriti*.[3] Polygamy and other regressive practices existing in almost all the religions reiterate the fact that women were never viewed as equals within marriage. The entire second wave feminist movements concentrated on equal rights of women in different aspects of her life including family, sexuality and work.[4] The superior position accorded to the husband in a marriage led to the granting of immunity to the husband in cases of marital rape. The explicit mention of the issue in law was first done by Chief Justice Sir Matthew Hale in the History of Pleas of the Crown which was published in 1736 in which he stated that "the husband cannot be guilty of rape committed by himself on his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[5]

This dictum continues to be the reason for the non criminalization of marital rape in many of the common law countries, including India. The Hale dicta faced ambivalent opinions of the UK courts, whenever it was brought into question.[6] However, in the landmark judgement of ***R*** v. ***R***[7], the House of Lords removed the exception of marital rape from the Common law and held: [8]

> Marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of her state of health or how she happens to be feeling at the time. In modern times any reasonable person must regard that exception as quite unacceptable.

South Australia became the first jurisdiction in the common law world to scratch the exception of marital rape in the year 1976. In 2012, the High Court of Australia reaffirmed the said abolition. It was followed by Canada in 1983 and by New Zealand in 1985. It may be noted that United States courts were less critical of the Hale's dictum and it only in the 1984 New York

[3] Samparna Tripathi, "Marital Rape and not its criminalization, debases society", *The Wire*, Sep.5, 2017.
[4] Elinor Burkett, Women's Movement, Political and Social Movement, *available at* https://www.britannica.com/topic/womens-movement, (visited on Feb 2, 2018).
[5] Melanie Randall, Jennifer Koshan et. al. , *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, 145 (Hart Publication, London, 1st Edition, 2017).
[6] *Ibid.*
[7] (1992) 94 Cr App R 216.
[8] *Ibid*

Courts of Appeal judgement in *People* v. *Liberta*[9], the marital rape exception was held to be unconstitutional and the assumption of continuous consent was rejected.[10] By the end of 20th century all the states have eliminated the marital rape exemption, however, the criminal justice system continues to address spousal rape differently than non spousal rape.[11]

It may be noted that within South Asia, Nepal and Bhutan are the only two countries to criminalize marital rape.[12] According to the UN Women Report of 2011, only 52 countries out of 179 countries had made marital rape a criminal offense and concluded that more than 2.6 billion women live in countries where it has not been explicitly criminalized.[13] As of today 70 countries across the world have criminalized marital rape.[14]

III *INDEPENDENT THOUGHTS* v *UOI*

Facts

The writ petition was filed by a registered society Independent Thought that works in the area of child rights. It was argued on behalf of the petitioner that exception 2 of section375 creates an arbitrary artificial distinction between a married and an unmarried girl in the age group of fifteen to eighteen years and that it is discriminatory and against the philosophy of article 21 & article 15(3) of the Constitution and in abnormality with India's commitment to several International conventions including Convention on the Rights of the Child (CRC)[15] and CEDAW.[16] It was also in conflict with POCSO Act[17] that categorized sexual acts with a girl under eighteen years of age as rape irrespective of her consent.

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[9] 474 N.E. 567 (N.Y. 1984).
[10] ***Supra*** note 3.
[11] Ross, Joann M., "Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage" 85 Dissertations, Theses, & Student Research, Department of History 233 (2015) ***available at***: https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss (last visited on Feb.2, 2018).
[12] Chayanika Saxena, Half the sky is still dark: Marital rape in South Asia**,** ***available at***: http://southasiamonitor.org/detail.php?type=sl&nid=16307 (visited on Feb.2, 2018).
[13] UN Women Press Release**,** ***available at*****:** http://www.unwomen.org/en/news/stories/2011/7/justice-still-out-of-reach-for-millions-of-women-un-women-says (last modified July 6, 2011).
[14] ***Supra*** note 3.
[15] UN General Assembly, ***Convention on the Rights of the Child***, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, ***available at***: http://www.refworld.org/docid/3ae6b38f0.html (Visited on Feb. 3, 2018).
[16] UN General Assembly, ***Convention on the Elimination of All Forms of Discrimination Against Women***, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, ***available at***: http://www.refworld.org/docid/3ae6b3970.html (last visited on Feb. 3, 2018).
[17] Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012).

In the counter affidavit filed by the Union of India, it has been argued that child marriages are a reality in India and criminalizing marital rape would not only be against the interest of the husband and the wife, but understanding the socio-economic conditions of the country, it would also not be appropriate and practical. It was also argued that by virtue of getting married the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. Another substantive justification given by the UOI was that child marriages have been traditionally performed in our country and as a matter of tradition, it should be respected and in this respect 167th report of the Parliamentary Standing Committee of Rajya Sabha was presented which stated that several members felt that marital rape has the potential of destroying the institution of marriage.

The court in its judgment reproached the Union of India for trying to portray that child marriage is a tradition in India that should be protected. This approach is completely against the object and purpose of PCMA[18]. It emphasized at length on the ill effects of child marriage and its physical, social and psychological effect on the girl child. The court also reflected on various International conventions and reports which categorized marriage as commonly identified forms of violence. It dealt with Indian legislations like PCMA, Protection of Human Rights Act, 1993, Protection of Women from Domestic Violence Act, 2005 that are incongruent with the exception 2 of IPC that legalizes sexual intercourse with a married girl child between the age group of fifteen to eighteen years. The court further negated the justification posed by UOI about the marital rape having the potential to destroy the institution of marriage by stating that marriage is not institutional but a personal thing that can only be destroyed by a statute that makes it illegal. Appreciating the arguments of the petitioner the court held that exception 2 should be read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."

Implications of the judgement: Has it set a benchmark or is it just another opportunity lost?

The case is of phenomenal importance with respect to the rights and health of a girl child. It also brings to our notice the highly regressive opinion of the state on the issue of marital rape. The arguments given by the UOI shows the attitude of government towards the matter. Ours is a

[18] The Prohibition of Child Marriage Act, 2006 (Act No. 6 of 2007).

representative democracy and the representatives elected by us voice the opinion of general public. The sociological school of jurisprudence considers law as the mirror of society. Do we really believe in the idea of equality of women and men? If so, then why do we differentiate between the bodily integrity of married and unmarried women? Why does the law create this artificial distinction? Do we still believe that by virtue of marriage a woman submits herself to her husband and her consent does not matter? And isn't this belief against the ethics and philosophy of article 14, 15(3) and 21 of the Constitution? These are the questions posed to all of us as a "democracy".

It may however be stated that Indian judiciary has played a phenomenal role in the shaping of the Indian legal system. It has stepped up innumerable times in the situation of crisis. Many a times it has assumed the role of the legislature to fill in the legal void left due to the indifference of the legislature through its activism. Independent thoughts can surely be categorized as one such case. The issue of marital rape has always been an issue of long parliamentary debates which somehow always ended up being neglected. When article 15(3) of the constitution was being drafted, it was done keeping in mind the vulnerable position of women in India that needs special impetus to realize the ideals of right to equality. It is an undeniable fact that women are discriminated in every aspect of life. One of the major concerns of feminist movements has been the bridge between public and private space. The public space is deemed to be an arena of men whereas the private space belongs to women. Marriage and family is considered to be a part of private space and is thus kept out of the reach of law. The feminist movement has largely focused on doing away with this distinction as what is private is public. It is hard for people to accept that marital rape is a reality because it is deemed to be a concern of private space and therefore, out of legal bounds. The end of criminal law is to deliver justice to the victim. However, in the case of marital rape the concern shown by the legislature is always to protect the wrongdoer i.e. husband. Somewhere, the idea of justice takes a backseat. Ironically, this position is incongruent with the ideals of article 15(3).

The court has noted the views expressed by Justice Verma Committee in its Report on Amendment to Criminal Law on the issue of marital rape and it also made a reference to the decision of the European Commission of Human Rights in *C.R.* v. *UK*[19] and that of US Supreme

[19] App No 20190/92.

Court in the case of *Eisenstadt* v. *Baird*[20] which established that rapist remains a rapist regardless of his relationship with the victim. The court also mentioned cases like *State of Karnataka v. krishnappa*[21], *Bodhisattwa Gautam* v. *Subhra Chakraborty*[22], *State of Punjab* v. *Gurmit Singh*[23] to establish the dehumanizing effect of rape that destroys a woman's self esteem and degrades her soul and violates her right to life.

It is to be noted that the judgment acknowledges in explicit terms that it would not deal with the general question of marital rape in adult women as this issue although raised in the main petition, was limited by the petitioners during the course of their arguments to marital rape of girl child and that it should not be understood to advert to that issue even collaterally. However, the mentioning of aforesaid case laws related to marital rape can still be construed as a positive suggestion from the apex court that can have a persuasive bearing on future cases. It may also be noted that Madan B. Lokur, J. in his judgement has stated that on the complete assessment of the law and documentary material, one of the options before the court is to strike down exception 2 to section 375 of IPC as unconstitutional, but this relief was given up and no such issue was raised by the petitioners. This may also reflect the positive view of the court on the issue.

It is however submitted that the explicit disclaimer given by both the judges shows a bit of hesitance of the court in reverting to an issue which has serious political ramifications. Without the disclaimer this case had the capacity to create a new horizon in the jurisprudence of the issue.

It is submitted that the court should also have emphasized on the public and private divide created by society which is reflected in the law. The bridging of this divide is very important for the empowerment of women and their rights within the family including reproductive rights.

The idea of dominance of men on women in a marriage emerges from draconian laws like, personal laws that considers the husband as the legal guardian of the wife, father being the natural guardian of his children (only in certain cases mother has custodial rights over her children), custodial rights of the father over the children that considers place of residence of the father as the place of residence of the children, matrimonial house as the house of the husband,

[20] 405 U.S.438 (1972).
[21] (2000)4 SCC 75.
[22] (1996) SCC (1) 460.
[23] (1996) SCC (2) 384.

personal laws allowing practices like polygamy.[24] These issues could also have been highlighted by the court to draw the attention of legal scholars, lawyers and legislature towards these laws that negates the concept of equality in a marriage. As it has been said by Jerome Frank, "No one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision (decree, judgement or order) with regard thereto."[25]

Further, since marriage is a matter of personal law, the impact of interpretation of exception 2 as articulated by this judgement on the personal laws needs elaboration. Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939, entitles a Muslim women married before attaining fifteen years of age to repudiate the marriage, if it has not been consummated. If the marriage is consummated then the women cannot seek dissolution of the marriage. This creates a dichotomy in law. If the said women is raped the marriage would be considered to have been consummated, thus, barring her from seeking dissolution of marriage. If the marriage is not dissolved and the husband is convicted, then how would the interest of girl child be protected who would remain married to her rapist? The matter of PCMA being a secular law that would prevail over Muslim Personal Law has been addressed by Gujrat and Madras high courts.[26] However, these judgements do not bind the courts situated beyond their jurisdictions. Therefore, a ruling of the Supreme Court is necessary on this point. Although Justice Deepak Gupta, in his separate judgement has categorized PCMA as a secular law applicable to all, it is a part of obiter dicta and therefore does not form a legally binding precedence for the courts all over the country.

IV CONCLUSION

It could therefore be concluded that Independent Thoughts showcases the proactive role played by judiciary in shaping the laws of the country and making it suitable with the changing times. It would be appropriate to quote Justice Benjamin Cardozo here: "The judge seeks to interpret the social conscience and to give effect to it in the law, but in doing so he sometimes helps to form and modify the conscience he is called upon to interpret."[27]

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[24] Kalpana Kannabiran, "Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India", 44 ***EPW*** 88 (2009).
[25] Edgar Bodenheimer, ***Jurisprudence, The Philosophy and Method of the Law***125 (Universal Law Publishing Co., Delhi, 6th Edition, 2009).
[26] Editorial, "Prohibition of Child Marriage Act to prevail over personal laws" ***The Indian Express***, Sept. 25, 2015.
[27] ***Supra*** note 25 at 121.

However, the case can only be said to be a first step towards a colossal issue that needs the immediate attention of law and society. Although the case has emphasized on the equality of woman in a marital relationship, it has disassociated itself from the main issue by explicitly mentioning that it will not deal with the wider issue of marital rape. Maintaining the status quo, this approach leaves the issue of marital rape of adult women unaddressed.

Nevertheless, the observations of the Supreme Court in the instant case would have a significant persuasive value in the future cases, which can be termed as the silver lining amidst a sky covered with clouds.