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Defying the Legislature:

A Case on Karnataka High Court's Marital Rape Verdict

Shaurya Gupta

Research Scholar

Campus Law Centre

Faculty of Law, University of Delhi

A recent order rendered by the Karnataka High Court dealing with the eye-catching issue of a husband's immunity in teeth of accusations of marital rape has raised significant jurisprudential and constitutional questions. The single judge bench of Justice M Nagaprasanna while dealing with a writ petition filed by the accused husband against the order on charge passed by the special court has opened a jurisprudential Pandora 's Box, which would have been better left shut. The reasoning for such a cynic statement shall follow soon, but let us first look at the facts that led to this event. A complaint was filed by the wife of the accused, alleging multiple instances of marital rape, sexual gratification and harassment. The complaint also enumerated sexual assault, perpetuated by the accused husband, against the girl child of duo. On basis of the said complaint an FIR was registered which did not mention a violation of S.376 of the IPC. However, the chargesheet filed by the police contained a charge related to S.376 which was accepted by the trial court. Thus the police and in sequitur the trial court were the first in the chain to bring about a charge of S.376 against the accused. The framing of the said charge raised the defence's eyebrows as the same was against the mandate of Exception 2 to S.375, the defining section of S.376, which categorically grants an immunity, in instances of sexual intercourse and sexual acts, to the accused if he is the husband of the victim. Thus as per the present position of law, marital rape is not an offence in India. The said exception was

disregarded in an apparent overshadowing of procedure with subjective notions of justice, morality and sentimentality.

The first prong of criticism emerges from the salutary concept of 'Rule of Law'. The judges should heed the dictum espoused by Thomas Fuller: "Be ye never so high, the law is above you", and thus adhere to the fountainhead of its powers i.e. The Constitution and closely follow its own dictums and pronouncements. As per the erudite jurist HLA Hart, any modern legal system has secondary rules of recognition, change and adjudication to cure the defects of uncertainty, static nature of laws and inefficiency respectively. It falls upon the legislature, as representative of the public will, to remove the 'uncertainty' regarding primary rules by mandating those laws which must be adhered and then amending, deleting or creating such mandates as per the requirement of the society i.e. dynamism. The judiciary has a limited role of adjudication, which must take into account the mandates of the legislature lest uncertainty looms.

A Constitution Bench of the Supreme Court in the case of ***State of T.N. v. State of Kerala, (2014) 12 SCC 696*** held that, *"The structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognised separation of power as a basic feature of the Constitution and an essential constituent of the rule of law."* The Court went on to opine that violation of the separation of powers is violative of Art 14 of the Constitution. Thus the separation of power being present in spirit within our Constitution, the law making role should be left for the legislature as is mandated by Article 245 of our edifying Constitution. The said article specifies that it is only our Parliament or any of our State Legislature that may make laws. The spirit of this provision was lucidly explained by a full bench of the Delhi High Court in ***P.L. Mehra v. D.R. Khanna, 1970 SCC OnLine Del 203*** which held that *"No statute can come into existence unless the Legislature makes it. No statute can go out of existence unless the Legislature repeals it. The Courts do not possess the power to make a statute or repeal a statute. The function of the Courts is to interpret a statute and to give it a meaning."*

The Courts cannot sit as a super legislation to add, amend or delete the express words of a provision as per their disposition. It is always assumed that the legislature knows what is best for the society and that certain deference needs to be paid to its laws. Jawaharlal Nehru, the first prime minister, while discussing the role of judges expressed his sentiments in the following

words: *"If we go wrong here and there, it can be pointed out, but in the ultimate analysis, no judiciary can stand in judgment over the sovereign will of the entire community. Judges can correct the wrong here and there; they cannot arrogate to themselves the position of super-house of a parliament."* His sentiment also resonates with the prescriptions of the noted jurist John Locke when he explains the origin of society, from the state of wilderness, to note that men came together and ceded some of their liberty to the society in general, to make laws regulating conduct, in lieu of the advantages received by them from dwelling in a collective union as opposed to singular solitude. This ceding was done to society at large which came to be represented by the legislature and not the judiciary.

The Supreme Court of Canada has vehemently argued in favour of Parliamentary sovereignty in matters related to penalization of wrongful acts and prescription of immunities and punishments by reducing Court's interference in such topics of public policy. Recently, in the case of ***Joseph Ryan Lloyd vs. The Queen, 2016 SCC OnLine Can SC 3*** the Canadian SC opined that *Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts owe Parliament deference. As Borins Dist. Ct. J. stated in an oft-approved passage*:

> *It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament.*

Of course the Courts in exercise of their power of judicial review are free to strike down the laws which are ultra vires of the Constitutional scheme but the same has to be done whilst lucidly explaining the reasoning and distinctly holding the law to be unconstitutional. A presumption of

constitutionality is always made in favour of the legislature, after all the legislating task has been entrusted by 'we the people' to it. Infact, it was the Apex Court itself which recently had ratiocinated in the case of ***State of Manipur vs Surjakumar Okram, 2022 SCC OnLine SC 130*** that, *"The law passed by the legislature is good law till it is declared as unconstitutional by a competent Court or till it is repealed."*

Thus the judicial wing whilst not scrutinizing the Constitutional validity of a statute must endeavor to interpret the statutes constructively whilst keeping various principles of interpretation in mind. As far as interpreting the statute goes, a constitution bench of the apex court, in the case of ***Tata Consultancy Services v. State of A.P, (2005) 1 SCC 308 73***, illumines to us that *"A statute ordinarily must be literally construed. Such a literal construction would not be denied only because the consequence to comply with the same may lead to a penalty."* The rule of literal construction is the main governing principle through which a provision of law should be interpreted. Only if the literal interpretation espouses multiple meaning of the provision should the purposive rule, golden rule or the mischief rule of interpretation be resorted to. The Courts would be advised to interpret the provisions like a judge atop an isolated tower doing an academic exercise free from societal, personal or ideological nudging.

The Karnataka High Court, with all due respect, has viewed the objective law from the subjective prism of social justice as it notes in Para 25 of the order that, *"In my considered view, the expression is not progressive but regressive, wherein a woman is treated as a subordinate to the husband, which concept abhors equality."* The Court might have taken the society towards a progressive tomorrow but the cost of this modus operandi seems to be great enough to outweigh the benefits in comparison. The act of creating an exception within the immunity seems to be a qua timet move if one takes a step back to look at the broader picture. The Hon'ble High Courts of Delhi and Gujarat are already seized of this matter and are pondering over the Constitutionality of the said exception. If the Courts, in due time, strike this immunity down, the entire exercise of the Karnataka High Court would not just be rendered otiose but will act as an unfortunate precedent bearing witness to the calamitous disregard of the written law duly legislated by the empowered legislature, thus, a priori, challenging the validity of the Grund Norm itself.

In light of these considerations, the open defiance of the executive wing, by including S.376 into the chargesheet despite the said exception, as well as the judicial wing, by framing a charge of S.376 is violative of the basic structure of the Constitution and the Rule of Law. The Special Court, not being a Constitutional Court, cannot choose to pick and selectively apply the relevant provisions of law, mandated by the legislature, as per its own whims and fancies and thus in effect render the non-applied provisions as having been repealed or declared unconstitutional. Even a Constitutional Court cannot selectively apply relevant provisions of the law without declaring the unused provisions as unconstitutional. Otherwise this would be a prime example of what HLA Hart[1] described as the *'threat that the legal system will dissolve'*. If the officials of a legal system pose themselves to be at variance with the legislature and refuse to apply the law fixed by the latter then the rule of recognition gets suspended and the society knows not the law it is governed with. If the Karnataka High Court allows its subordinate courts to digress from the mandate of the Parliament then one State of the Union would be following a particular set of norms qua criminal law, whereas another State of the Union would be ascribing to different criminal law norms. Infact, this is no longer a mere academic warning but the harsh reality, as far as the States of Gujarat and Karnataka are concerned. The Gujarat High Court had previously held in 2018 that there is no concept of marital rape in India and thereafter quashed the order framing charges of a subordinate Sessions Court which had included a charge of S376. The Court was at that time also considering a plea by an emotionally distraught wife alleging gross perversity and torture against her husband. Thus whereas Gujarat doesn't recognize marital rape, Karnataka does and what makes it even more troublesome is the fact that it is a central penal law which is being applied thusly. As far as the alleged victims in these cases are concerned, an equal law has been applied to them, who are similarly situated, unequally. In sequitur has the equal protection of laws been denied to certain citizens by the Courts? The dichotomy looms large as the police and the public in the other 'undecided' states is flummoxed regarding their lex loci. It is for the prevention of such uncertainty and such differential application of the norms that the legislating role has been conferred to the legislature and the Courts have been asked to only interpret and apply the law as laid by the legislature. The Karnataka High Court could have requested the legislature to take a relook in to the law, instead of usurping their powers and role.

[1] HLA Hart; The Concept of Law; 2nd Edition; Pg. 123

The second prong of criticism derives from the fact that the High Court sought to justify the charge by looking at the pitiable condition of the wife. The Court remarked that, *"to consider this issue (whether a husband can rape his wife), it is germane to notice what drove the complainant to register the complaint and what drives the petitioner-accused No.1 to this Court."* The Court should have applied the law as it is and not what it ought to be. The averments mentioned in the complaint should not have led the Court to digress from the express words mentioned by the legislature. While the law is to be applied to the sui generis facts of each case, the law per se cannot be transmutated by the Courts to suit the facts before it. The plight of a person, howsoever poignant it may be, cannot force the law to be modified without due process or else the equal protection of the laws will become a dead letter law.

The third prong of criticism takes root from the fact that the Court pondered over the findings of the Justice JS Verma committee to substantiate its point of carving exceptions in the immunity. However, the Court failed to draw inference from the fact that the same committee had been mandated by the Government and it was only after due consideration of the said report that the Government tabled the Criminal Law Amendment Bill, 2013 in the Parliament. During the course of Parliamentary proceedings the aspect on exception to marital rape was duly considered and the Parliament thought it wise to grant such an immunity to the husbands. The judiciary can of course find faults with such a view and hold the same to be unconstitutional, but it would be advised not to tinker with the express intention of a Constitutional institution of utmost eminence. The Court also went on to remark that such an exception emanates from the regressive, older English days of Sir Matthew Hale and thus should find restricted or no use in contemporary times. However, the Court again failed to consider that the Parliament had discussed upon this issue as close as in 2013 itself and had consciously decided to retain the exception.

Fourthly, the Court further contrasted the state of law regarding marital rape in other common law countries in contrast to that in India to hold that even the countries from where the penal law has been adopted has rescinded this once available immunity to declare marital rape an offence. Even though the Court recounted these instances it failed to notice that it was the legislature of these countries that had done so and the courts were merely interpreting and applying the law as legislated. In Australia, the common law 'marital rape immunity' was legislatively abolished in

all jurisdictions from 1976. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. In Canada, the provisions in the Criminal Code, which denied criminal liability for marital rape, were repealed in 1983. South Africa criminalized marital rape in 1993 by enacting the Prevention of Family Violence Act 1993 whose section 5 expressly stipulated that a husband may be convicted of the rape of his wife. Thus these instances cannot come to the Court's rescue as it sought to create an exception within the immunity by reading in non-present words of imagination.

However, the Hon'ble High Court does seem to be paying obeisance to the Parliament as it notes in Para 31 that:

> *"....it is for the legislature to delve upon the issue and consider tinkering of the exemption. This Court is not pronouncing upon whether marital rape should be recognized as an offence or the exception be taken away by the legislature. It is for the legislature, on an analysis of manifold circumstances and ramifications to consider the aforesaid issue. This Court is concerned only with the charge of rape being framed upon the husband alleging rape on his wife."*

However, the Court still perplexingly creates an exception within the exemption by finding no fault with the charges framed by the learned Sessions Judge and holding that, *"The exemption of the husband on committal of such assault/rape, in the peculiar facts and circumstances of this case, cannot be absolute, as no exemption in law can be so absolute that it becomes a license for commission of crime against society."*

Whereas the Court seems to be obeying the 'Separation of Powers' in letter, it has undercut its spirit and essence by inserting an exception within an intelligibly worded exemption whose meaning is clear ex facie. This might not appear as a significant divagation from the 'Rule of Law', especially so if one adopts the 'ends justify the means' approach, but as students of the law aware of the importance of preserving the balance inter se between the great organs created by the Constitution, we must take cognizance of such divagations and attempt to restore the sacred balance. For if the balance were to deteriorate, the stability, efficiency and enforceability

of our hard-won legal system would perish. This solemn duty of acting as sentinels of the legal system is best illumined by the words of the Constituent Assembly member, Prof. KT Shah[2]:

"I would, therefore, suggest, in the first place, that the Judiciary should in any case be completely separated, and should attach regard only to the written letter of the law, irrespective of Party or personal considerations, irrespective of any other motives that might otherwise affect human and mundane things."

[2] Constituent Assembly Debates On 10 December, 1948