



ARE WE REALLY SERIOUS ABOUT WOMEN'S DIGNITY? LET'S WAIT AND WATCH

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Sexual intercourse *per se* is not an offense. It becomes an offence when the consent of the woman is not there. The pre 2013 criminal law did not define consent but post 2013 it means, “unequivocal voluntary agreement” which is to be communicated either through words or gesture. The amendment while making very significant changes in the rape provisions chose to retain the marital rape exemption and made it more appalling by declaring that not only sexual intercourse but “sexual acts by a man with his own wife” will not be considered rape. It may be axiomatic to mention that feminists had worked very hard to widen the definition of rape and took it beyond the patriarchal parameters of peno-vaginal assaults.¹ But within the institution of marriage, where patriarchy is most blatantly practiced, the woman is left to suffer all kinds of sexual acts which Maya John describes as 'bad sex' and where there is total disregard of both her feelings and bodily autonomy.² The wives below 15 years of age (in a country where there is Child Marriage Restraint Act) were mercifully exempted from the exemption. When Macaulay drafted the Penal Code for this country, he was heavily influenced by Victorian values and since one of the constitutive elements of marriage is sex, so it was assumed that once a woman consents for marriage she no longer has a right of bodily integrity. As Sir Mathew Hale bluntly stated that “by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract”. This clearly is a case of inverted logic and projects a chattel-master sort of a relationship rather than a relationship of equality and dignity. It was a case of human dignity (in case of women) being made subservient to the institution of marriage. Many jurisdictions across the globe have done away with the regressive marital rape exemption. It is true that marital rape will be difficult to prove, but one must not forget the normative function of law. It declares norms and the societal members are incentivised (or deterred) to conform to these declared norms. In the pre 2013 position only penile/vaginal penetration was exempted and I want to believe that procreative logic of marriage was taken seriously.³ But now the rape definition is not constricted by penile penetration but extends to many non-procreative sexual acts. And so I say it with conviction that the bodily autonomy and dignity rights of a woman have been totally compromised (not to say it was partial earlier) in the Amendment Act. The Apex Court of the country had the chance to set things right. The chance came in the form of a writ petition - *Independent Thought v. Union of India*.⁴ The issue was “whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?” Two issues need to be highlighted. *Firstly*, the issue was only ‘sexual intercourse’ and not ‘sexual acts’ (which also is now included in the exception). *Secondly*, the marital rape exemption was not challenged but the age factor *i.e.* 15

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¹Flavia Agnes, “Protecting Women against Violence? Review of a Decade of Legislation 1980-89”, 27(17) EPW 13 (25th April, 1992).

²Maya John, “Class Societies and Sexual Violence: Towards a Marxist Understanding of Rape”, available at: <http://radicalnotes.com/tag/maya-john> (last visited on Feb. 21, 2018).

³See Carol Smart, *Law, Crime and Sexuality* 41 (Sage Publications, 1995).

⁴Writ Petition (Civil) No. 382 of 2013.

years was under scrutiny. The Court benevolently taking help of the Protection of Children from Sexual Offences Act (POCSO Act) 2012 declared that this exemption creates “an unnecessary and artificial distinction between a married girl child and an unmarried girl child”. The Court kept reiterating that it was not dealing with the issue of “marital rape not even collaterally”. But all the arguments in the judgment are against the whole exemption and not one part as the court would want us to imagine. For example, Hale’s principal has been derided which considered woman as chattel where in it “was presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband”.⁵ The privacy argument was put forth by the intervener and the court almost apologetically confessed that it had “purposely not gone into this aspect of this matter”.⁶ Why not is the big question? Why did the Court then enter into the matter at all? The justification of the court was to bring this exemption into consonance with the Constitution and POCSO Act. As far as the Constitution is concerned, the entire marital rape exemption is violative of Articles 14, 15 and 21 and not just the 15 year part! So how did the court sever an exemption and dealt with the latter part, even when they are empowered to do “complete justice” by the very Constitution which they were invoking. Talking of ‘consonance’, I beg to submit that one cannot have harmonious construction of different Acts when each Act has its own objects and reasons for its enactment. Hence the *Independent Thought* judgment is deeply flawed.

And as the argument goes for marital rapes, the same will be true for marital rape below 18, that the quantum or rate of conviction would be dismal. The court through this judgment almost endorses Saptarishi Mandal’s assertion that ‘the law kicks in to regulate sexual violence in marriage only in cases when it is accompanied by extreme physical violence or when the health and safety of the wife is endangered as in cases of minor wife’.⁷ And hence stayed away from the larger issue of marital rape!

This issue of woman’s dignity in marriage and bodily autonomy is now before the Delhi High Court where the RIT Foundation and the All India Democratic Women’s Association are arguing that not recognising marital rape as an offence violates a woman’s right to access to justice. The women have pinned their hopes on the Delhi High Court, which has had a stellar record. Fingers crossed!

⁵*Id.* at para 72.

⁶*Id.* at para 86.

⁷Saptarishi Mandal, “The Impossibility of Marital Rape” in *Australian Feminist Studies* (Published Online Oct. 23, 2014).