CRIMINALITY OF MARITAL RAPE IN INDIA THROUGH THE LENS OF ANTONIN SCALIA AND ARIE ROSEN

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Background

The case of Hrishikesh Sahoo vs State of Karnataka[1] has been widely discussed among proponents and critics alike, primarily for its notorious disregard of the textual provisions of the law, leading to a groundless exercise of judicial powers. The case dealt with the question of criminality of marital rape, when the very same is explicitly exempted from punishment by the law and one such instance where the Court relied on a interpretative process aiming for a "just" outcome while ignoring the clear wording of the statute and its intent.

The accused, one Mr. Hrishikesh Sahoo contented, in a writ petition filed before the Court, that the he cannot be prosecuted for the charge under Section 375 of the Indian Penal Code[2], as the act of marital rape, under the grounds specified by the Section, is from criminality[3]. This exception, resulting in gross injustice to the victims and preventing them from seeking justice, was lambasted by the Court for acting as an undeserved protection to the offenders culpable of such heinous acts. Solely existing due to the legislature's insistence on upholding near-draconian standards of the institution of marriage, this exception has been up for contention for decades in the courts of justice in India.

Justice Nagaprasanna's approach - An overreach of justice?

The judgment authored by Justice Nagaprasanna, the lone judge presiding over the case at the High Court of Karnataka from its very foundation, identifies a clear moral standing upon which the Court was adjudicating the matter. In Para 1[4], the judge drives home the severity of the acts committed by the accused, with the help of colorful adjectives, cannot be absolved by such an

[1] MANU/KA/1175/2022
[2] Indian Penal Code, 1860 § 375
[3] Indian Penal Code, 1860 § 375, Exception (2)
[4] MANU/KA/1175/2022 at 1

exemption that clearly causes prejudice to the victims.

The Bench does not deny that the exemption is entrenched specifically to tackle such situations and states that the IPC statute has been clear in its wording and intent, deriving itself from age-old British era laws such as Macaulay's Code. But the judge also emphasizes that the pervasiveness of this regressive concept of coverture into contemporary laws defeats the purpose of the constitutional protections guaranteed to every citizen of the country, man and woman alike. Using the interpretative method of competing interests, the bench aimed to achieve the most 'sensible' result. This prudential method values the particular facts presented over established legal principle.

This is a troubling approach to the question of law as it does call out the unethical nature of the exception and recommends its removal but only chooses to ignore it when dealing with the matter at hand. This sets a improper precedent where other jurisdictions may seek to approach this very same issue using the unsubstantiated argument of the court as seen in case of Anjanaben Modha vs State of Gujarat[5] where the Single judge sought to supplant Justice Nagaprasanna's opinion verbatim into the judgment.[6]

Antonin Scalia's textualist approach

Justice Antonin Scalia was a staunch originalist in his approach to abiding by the textual interpretation of the law with a strong and strict adherence to the idea of the supremacy of the Constitution over all[7]. Based of the jurisprudential evidence from various landmark individual rights cases such as Planned Parenthood vs Casey[8], United[9] States vs Windsor etc, one could clearly deduce that Scalia's approach to the case of Hrishikesh Sahoo would divert significantly from that of Justice Nagaprasanna's, as his fundamental method of textual application would result in the exemption being put to its intended use, no matter how unjust.

[5] C/LPA/675/2022

[6] S. Basavaraj, *Judicial Plagiarism? – A Tale of Two Judgments*, https://dakshalegal.blog/2023/12/21/judicial-plagiarism-a-tale-of-two-judgments/ (Dec 21, 2023)

[7] Ralph A. Rossum - Ralph Rossum, *The Textual Jurisprudence of Justice Scalia*, Perspectives on Political Science (1999)

[8] 505 U.S. 833 (1992)

[9] 570 U.S. 744 (2013)

In the case of United States vs Windsor[10], where the Supreme Court of the United States of America held Section 3 of the Defense of Marriage Act[11] to be unconstitutional as it defines the terminology of the act in only heteronormative terms with binary gendered application, Scalia dissented from the majority opinion and stated that this judgment diminishes the power of the people to govern themselves by invalidating a democratically adopted legislation without any constitutional claim to do so[12]. This line of thinking, when applied to the present case, would result in Scalia claiming that the court lacks the power to overrule the legislature's work without a strong constitutionally backed argument. As the disregarding the exception for marital rape under Section 375 of the IPC would directly violate the Fundamental rights of the accused entrenched in Articles 14[13], 20[14] and 21[15], Justice Scalia would advocate against such judicial overreach and instead call upon the legislature to tackle this issue. His dissent in the case of Hamdi vs Rumsfeld[16] criticizes the "Mr. Fix-IT Mentality" of judges who try to achieve the most 'rightful' outcome over the literal interpretation of the statute.

While it is prudent to observe that the very nature of the exemption, fails this constitutionality test when applied to modern standards. As a staunch dis-believer in the idea of a living, evolving constitution[17], Scalia's reliance on the flawed reasoning of testing such issues against the constitution at its inception[18], causes the misapplication of generations old ideas of equality, justice as the guidelines for current judicial decisions. This conservative attitude is the core of his legal arguments throughout his tenure as part of the SCOTUS. The drafters of the constitution cannot possibly conceive the ever changing nature of moral and legal standards across the plethora of topics ranging from crime to marriage. It is thus retrogressive logic to apply their notions of societal norms to dictate the current judicial understanding of constitutionality. While the fact that it is primarily a legislative oversight to fix the unjust application of the exception to 275, the judiciary cannot be expressly barred from penalizing

[10] 570 U.S. 744 (2013)
[11] Defense of Marriage Act (1996) § 3
[12] 570 U.S. 744 (2013)
[13] Article 14, Constitution of India, 1950
[14] Article 20, Constitution of India, 1950
[15] Article 21, Constitution of India, 1950
[16] 542 U.S. 507
[17] Kevin Walsh, *Tribute: Justice Scalia and the next generation of constitutional custodians* (Feb 26, 2016) https://www.scotusblog.com/2016/02/tribute-justice-scalia-and-the-next-generation-of-constitutional-custodians/
[18] Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 62 UCLA Law Review (2014)

such a flagrant violation of bodily autonomy as failing to do so would set a bad precedent, showing the rights of individuals being disrobed by the very laws that should protect them.

The question of constitutionality of prosecution of the accused versus the constitutionality of the very exception is one that Justice Scalia's reliance on the supremacy of the constitution would be most well equipped to tackle with. As the exception explicitly creates two classes - married and unmarried woman and unjustly prejudices the former, it breaches the long established tenets of equality, protection against discrimination based on gender, unequal application of law etc[19]. Thus the very exception has to be deemed unconstitutional to allow for the prosecution of the individual rather than disregarding the rights of the accused and directly judging the criminality of the act.

Arie Rosen's correctness-oriented approach

Arie Rosen, a legal theorist, based out of New Zealand, arrives at a different understanding of correctness oriented approaches that are heavily criticized by Scalia. In his paper, titled "Statutory interpretation and the Many Virtues of Legislation"[20] He defers from the control maximization method of placing a greater importance on the author's words and intent, and instead suggests an alternative mode of interpretation termed the correctness-oriented approach, relying on the expertise of judges and jurists to arrive at the most commonly regarded and rightful outcome. This method of interpretation, according to Rosen utilizes the correctness based application while sometimes being contrary to the textual provisions of the law or disregarding the author's intent.

But this method of thinking, would result in the accused, Mr Sahoo being convicted for an act that has been explicitly delineated to not be criminal. While the current facts of the case show an act of serious and grave nature, would the same approach be as lauded as the one employed as Justice Nagaprasanna's if applied in a different scenario with a not-so-clear act to vilify? Would such an approach be restricted in the most extreme circumstances or would this standard be applicable to every scenario where the judge can exercise their discretionary powers?

Rosen concludes that correctness-oriented approaches need not act as a license to disregard the

[19] The Preamble, Constitution of India, 1950

[20] Arie Rosen, *Statutory Interpretation and the Many Virtues of Legislation*, Oxford Journal of Legal Studies, vol. 37, no. 1, 2017, pp. 134–62.

legislature's precedent but rather promote the idea that such interpretation, if properly applied, would allow for the correct action to take place in clear-cut cases. He raises a point in the same article that the idea behind reliance on the expertise of the author of the text does not always enable the legislative intent to materialize. In a cyclical system of political authorities and changing governments, the status quo as to what constitutes law is ever rotating, and thus for example, a rule of law that far overstays its welcome might not ever be amended or removed due to the state of flux modern governments operate in.

A law student's rudimentary opinion

Justice Nagaprasanna's opinion, while not fundamentally backed by legal statute, does have some merit to it. It relies on the understanding that modern societal shifts on the ideas of justice cannot be hindered by the legislature's inertia. For example, in the Sabarimala case[21], where the apex court of the country held that exclusionary practices that affected a specific section of people, in this case - women from the ages of 10 to 50, are unconstitutional and the Justice Chandrachud in his majority opinion held such definite rulings aid in bridging the constitutional goals to current realities. The question of marital rape exception's provision in the IPC despite growing dissent towards it, was raised in various cases such as Nimeshbhai Desai vs Gujarat etc[22].

It was the failure of the legislature in rectifying the law to prevent further unjust application that caused such a judicial overreach on part of Justice Nagaprasanna.

The Law Commission rejected the plea for removing the marital rape exception, arguing that doing so would interfere in the institution of marriage.[23] Further attempts such as the Verma committee report[24] recommending the criminalisation of the act of marital rape have been unrecognised as the Criminal Law (Amendment) Bill of 2012[25] did not any such intentions to aim for a progressive change in the rape law.

While critics of the Sahoo judgment argue that the court's decision is unfairly dealt to the accused and while they agree that the accused is responsible for such a vile act, they base their

[21] MANU/SC/1094/2018
[22] MANU/GJ/0291/2018
[23] 172nd Report of the Law Commission (2000)
[24] Justice Verma Committee Report on Amendments to Criminal Law (2013)
[25] Criminal Law (Amendment) Bill, 2012

argument of strict adherence to the textual implication of the law, without considering a recourse for the victim[26]. Conventional norms of interpretation, ranging from literal to golden rule interpretations rely on the base assumption that the best outcome would result in understanding the law in the right way. This logic fails when the very law itself operates on outdated and borderline discriminatory societal norms. Scalia's opinions on various progressive reforms have always erred on the wrong side because of his insistence on relying on the legislature to move the needle forward. This is extremely malignant in the case where the current political climate of the country is perhaps against such changes and hence it would fall upon the judiciary to correct it. Even the very parent laws where the Penal Code supplanted this exemption have been recognized to be unconstitutional. In various nations such as the US, France, Germany that have their own self-developed constitutions and the countries adopting the colonial era laws, marital rape has been declared an offence. His understanding of the constitution and the misuse of arbitrary legislation would however allow him to approach this issue with the possibility of severing the exception.

The illogical application of the law where a rape is considered a rape, whether by a stranger or a family member or associate but not in the case of a husband is rightly criticized in the case of Iqbal vs State of Jharkhand[27]. Even though law circuits around the country have recognized the outright malicious application of the exception, it still remains decriminalized. Recognized only as a method of domestic violence under the PWDV Act[28], the only recourse available to victims is to seek separation or compensation but this is a mere band-aid rather than actual consequential penalties. While judicial overreach is undesirable for several other reasons, there should be a medium for such precedents to carry out justice even in the face of a lawful but in no sense just and constitutional protection. The separation of powers exists to keep the powers of all the bodies of government in check but this should not be a cause for the lack of reciprocation of efforts of one another to incite much-needed changes in society.

[26] Kaleeswaram Raj, *Why Karnataka marital rape verdict is problematic, The New Indian Express* (15 Apr, 2022)
[27] AIR 2013 SC 3077
[28] Protection of Women From Domestic Violence Act, 2005