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Illegitimate Shields and Unprincipled Sacredness: On the Marital Rape Verdict of the Delhi High Court

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The Delhi High Court recently delivered a split verdict on the constitutionality of the Marital Rape Exception ("MRE"), with the simultaneous affirmation of principles of human dignity, privacy and bodily autonomy along with a reminder of the degree to which violent gender stereotypes permeate into judicial verdicts with impunity. This piece evaluates the split verdict specifically on grounds of the application of the reasonable classification test, for the shielding of a single class of perpetrators raises significant questions. We argue that MRE fails the reasonable classification test, for its retention is anathema to marital sanctity grounded in individual autonomy.

The Constitutional Challenge to MRE and the Role of Reasonable Classification

The constitutional challenge concerned Exception 2 to Section 375 of the Indian Penal Code, along with Section 376B thereof and Section 198B of the Code of Criminal Procedure, with the latter two dealing with the substance and procedure respectively of the commission of non-consensual intercourse during the period of separation of the marital partners. While grounds of the challenge concern violations of privacy, personal liberty and equality, we specifically evaluate the test of reasonable classification within the equality challenge.

Article 14, as it has been repeated by Courts ad nauseum, forbids class legislation but permits reasonable classification.

This framework supposedly ensures that distinct and varied treatment may be rendered to differently placed groups in the pursuit of substantive equality. The test is one of extreme deference, for the sole judicial evaluation is that of the existence of a clearly defined class that would have the law's application, and the furtherance of the law's objective via such classification. Occasionally, there might also be an evaluation of the legitimacy and fairness of the objective itself, with the Court holding in Anwar Ali Sarkar (1952) and Dipak Sibal (1989) that the law's objective cannot be the same as its classification, and the objective itself cannot be discriminatory, unfair or arbitrary.

The challenge to MRE on the grounds of reasonable classification is twofold, with the first concerning the shielding of one class of perpetrators from prosecution for an act considered criminal for all other perpetrators, and the second concerning the creation of three classes of victims for the same offence. We deal with the former in the following section.

Shielding One Class of Perpetrators from the Offence of Rape

MRE holds that non-consensual intercourse within the marital relationship shall not constitute rape, whereas the same offence committed outside the relationship shall do so. For the commission of an offence with the exact same ingredients provided for in Section 375, solely one class of offenders is accorded distinct treatment. In order to highlight the unprincipled basis of this schema, the Court was asked to consider the logical end thereof: The offence of rape, if committed five minutes prior to marriage, shall be punishable under Section 376. The commission of the same offence ten minutes after the marriage's conclusion, however, shall not be considered rape (¶544). Hari Shanker J.'s reply to the same is grounded in an evaluation of a supposed "sacredness" of the "momentous ten minutes", that create "a new soul" and cause the inviolability of the marital bedroom (¶544, 547, 551), that must be kept immune from any allegations of rape (¶551). When confronted with the issue of distinct treatment accorded to non-consensual rape within the marital union, a particularly violent analogy, revealing the fundamentally patriarchal ideological justification for MRE was offered:

"Legally, there is no infirmity in treating the act as a crime in one circumstance, and perfectly condonable in another. A father slapping a son is not a criminal offence, whereas a stranger who slaps a child may well be committing a crime." (¶568)

The implication is clear: For Hari Shanker J., the woman is akin to the child, an infantile object to be disciplined and controlled by the patriarch, with any violence therein ensuring the sanctity of the private. As Prof. Thomas writes, a father slapping a son is also a criminal offence, for the law does not distinguish between the public and the private in matters of assault. Apart from the overwhelmingly violent misogyny permeating into the opinion, a proper Article 14 analysis is fundamentally lacking.

The oft-repeated justification of MRE has been along the themes of securing the sanctity of the marital home, preserving the marital institution and preventing the conferral of a status of illegitimacy upon the children born via marital intercourse (¶552, 557, 559), along with a legitimate expectation of sex that is present solely in marriage and not any other relationship (¶544). While it has been argued that state interest in the prevention of marital disintegration is illegitimate, we shall assume that the same is a legitimate state interest for the purposes of this piece. There exists, of course, the discernible class of married husbands who are being treated distinctly, and therefore the first prong of the classification test is satisfied. We argue, however, that the "sanctity" possessed by the marital institution is found solely in the preservation of autonomy of marital partners, and the existence of MRE functions as an affront to this marital sanctity, thereby failing the classification test.

On Autonomy Constituting Equality and the Marital Sanctity

Shakhder J. begins his opinion in the split verdict with a plaintive lament on the continued existence of Hale's Ghost, a dictum of the dissolution of the wife's independent legal personality upon marriage. "Sanctity", as repeatedly invoked by Hari Shanker J., effectively means the preservation of this dictum, along with the untrammelled power of the patriarch. It means the whitewashing of all that is unfair and discriminatory towards the woman, all in the name of the institution's preservation.

Hari Shanker J., however, would deny all this, since it is not a question of consent for him at all, for he holds that some forms of non-consensual intercourse do not constitute rape definitionally. Effectively, he holds, there cannot be rape when there subsists an expectation of intercourse, for it all serves the purpose of preserving marital sanctity (¶560). A post-Puttaswamy take on marriage, however, can pedestalize the sanctity of the institution only insofar as the same has its foundation in the autonomous consent of marital parties. Marital sanctity has its coterminous existence with human dignity,

which has at its core the autonomy of the parties. If Hari Shanker J.'s perspective to marital sanctity is considered legitimate, it is likely that the preservation of such sanctity is absolutely meaningless, for it serves the sole purpose of active subordination and entrenchment of inequality.

The sole legitimate principle of marital sanctity, therefore, is the parties' autonomy therein. This principle is concertedly undermined by the retention of MRE, and therefore the classification is strictly against its objective.

Undermining of the Public-Private Divide and Judicial Anomalies

Hari Shanker J.'s opinion, while providing an unsatisfactory response to the reasonable classification test, also ignored the significant weakening of the public-private divide via the introduction of laws specifically intended to protect the interests of women within the domestic sphere. If marital sanctity demands that the institution be free from the blemishes of allegations of rape (¶551), what about allegations of sexual abuse under the Prevention of Women from Domestic Violence Act or allegations of cruelty under Section 498A of the Indian Penal Code? Even if the ulterior contention of the legitimacy of the preservation of gendered norms of control and disciplining under the title of marital sanctity is accepted, it is unlikely that the sole carving out MRE would serve his purpose of ensuring such sanctity, for there exist alternative instruments to blemish what he fiercely regards pristine.

Further, Section 376(2)(f) of the Indian Penal Code provides for greater punishment when the offence of rape is committed by a person who enjoys a position of trust or authority towards the woman. Waxing eloquent about intimacy and trust in order to pedestalize an institution's sacredness, while choosing to turn a blind eye towards the consequences of the exploitation of vulnerable relationships constitutes definitive intellectual and emotional dishonesty. Even seemingly deferential tests, such as those of reasonable classification, are moving in the constitutional tide of dignity and autonomy. The logical difficulties of justifying MRE within the reasonable classification test speaks to its status as an absolute anachronism in times when the law is undermining the public-private divide. The preservation of Hari Shanker J.'s prized marital "sanctity" demands its immediate exit.

#TumSENAhopayega: A Commentary on the Defection Crisis in Maharashtra

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The legislative turmoil in Maharashtra has brought back the 'Anti-Defection' laws to the fore of political discussions. Anti-Defection laws have been a constant source of legal and political commentary since their introduction as the 10th Schedule of the Indian Constitution. While the proponents and critics of anti-defection laws have been divided across the political spectrum, most commentators agree that the 10th Schedule has failed to adequately meet its intended objective

What is Defection and How do Anti-Defection Laws Work?

Typically, defection involves a member from one party, who had been elected under the membership of that party, leaving and joining another political party in the legislature. This was popularly known as 'horse trading', where once elected, members of the legislatures would move to other political parties for better positions or political favours. In 1967, this took the headlines by a storm when Gaya Lal, an MLA from Haryana switched political parties three times in one fortnight, causing a collapse of its legislative assembly. This was then famously dubbed as the 'aya ram, gaya ram' culture. To curb this, the 52nd amendment was brought in by Rajiv Gandhi in 1985 prohibiting d efection given to legislators under the Westminster system. It mandates that the speaker of the house shall have the power to disqualify any member of the house if they voluntarily renounce membership of their original party, or elected to vote against the party whip's policy. While the purpose of the amendment was to reduce political horsetrading, its inevitable effect was that it gave strength, and perhaps excessive power to the centralized leadership of the party and consequently curbed conscience-based decision-making of the individual members.

This has been exacerbated by judicial pronouncements like Ravi Naik, where it was held that 'voluntary renouncement' had to be given a broader interpretation than formal resignation, and Kihoto Hollohan which gave the speaker unfettered power to disqualify members for defection.

The result is, not only has it failed to reduce cases of defection, it has concomittantly reduced the space for dissent, and democratic decision-making within the party since all members are bound to follow the directions of the party whip. It has since been argued that this provision should be amended to restrict the scope of such whips. Perhaps to reduce this dominance, in 2003, the 92nd amendment mandated that if more than 2/3rd of the members of the original party in the legislature defected then they would not be disqualified.

The Curious Case of Maharashtra

The breakup of Maha Vikas Aghadhi ('MVA') however did not follow the conventional route. When the rebelling MLAs led by Eknath Shinde were holed up in Assam eventually prompting Udhav Thakeray to resign in light of Supreme Court's refusal to put a stay on the floor test, it seemed all too familiar. But here's the catch - even if Eknath Shinde's rebels reach the magical number of 37, which is 2/3rd of MVA's total strength in Maharashtra's legislative assembly, that alone would not save them from disqualification. The 92nd amendment requires the faction with more than 2/3rd of the original party members to merge with another party. While an easy guess would be that the rebel faction will merge with BJP, it appears that the 'rebels' may go another route.

An Identity Crisis

In an ingenious way to avoid merging with BJP, the faction led by Eknath Shinde now claim to be the actual 'Shiv Sena'. If successful, not only would that make the need for a merger redundant, it would allow the faction to retain control over the party symbol, organisational support and even the need to follow party whips. It raises an important question of law - how would the 'real' Shiv Sena be decided, and which institution is mandated to the same?

As per Rule 15 of the Election Symbols (Reservation and Allotment) Order, 1968, the power to decide the 'original party' rests with the Election Commission of Indiaandated to the same?

Although the rule does not provide any procedural regulations as to the basis and criteria through which the ECI may come to its decision, it states that it shall be done in accordance with the 'facts and circumstances of each case and it shall decide only after hearing from the representatives of all factions claiming to be the original party.Interestingly, the power of ECI itself to adjudicate on the issue of splits was challenged in Kanhaiya Lal Omar v. R K Trivedi, however, the Supreme Court upheld ECI's powers through a broad reading of Article 324 of the Constitution.

The use of Rule 15 has generally been based on testing which party has the majority of organizational support. Typically, it has been easy to decide since the first application of Rule 15 during the Congress split in 1969 since the majority of the splits have been either minor or landslides. In the case of the recent Shiv Sena split, it appears to be more complicated since a landslide of the MLAs and organisational support aren't with one faction alone, so the ECI may have its work cut out.

They Way Out

While the current quagmire in Maharashtra continues, there have been suggestions in the past to reform the law. Two Private Member Bills, moved by a Congress and a BJP MP, proposed that the anti-defection law apply only when the survival of the government is at stake. This would significantly curb the power of a central whip- an issue with the present form of the law, increase engagement within Parliament and allow MPs to exercise their conscience while voting on policy issues. It might be mentioned here that in more developed democracies like the US, the UK, Canada and Australia, there is no bar on an MP crossing over to the other side.

Of Pawns in the Game of Politics: A Perusal of Interstate Arrests

Kanishk Srinivas

The acrimony between the UP and Chattisgarh Police over the arrest of Zee News anchor Rohit Ranjan in Noida is another incident in a long chain of events that has raised the contentious issue of procedure surrounding interstate arrests. In this case, the Chattisgarh police sought to arrest the anchor with regard to an allegedly doctored video of a political leader who was also the head of the political party in power in Chattisgarh. The police obtained an arrest warrant and then proceeded to detain the anchor when the UP Police intervened and whisked away the anchor. The UP police claimed that they had detained the anchor for a lawful enquiry and proceeded to shield him from arrest by the Chattisgarh Police, who ultimately had to return empty handed. The issue has acquired political overtones given the competing political parties in power in the two states - UP and Chattisgarh.

However, this is not the first case concerning the issue of interstate arrests in recent times. The case of a Delhi legislator Tejinder Pal Bagga who was sought to be arrested by the Punjab Police but was (again) stalled by the UP Police is another noteworthy example. This case, was akin to the Rohit Ranjan case in that it involved contestation between police departments belonging to states with competing political parties. But it was even more dramatic - with the UP Police intercepting the Punjab Police who had made the arrest in Haryana (which has the same ruling party as UP) and bringing the legislator back to UP on the grounds that they were investigating a parallel offence. These cases are symptomatic of a growing trend of political contestation through use of state police as highlighted in the Second Administrative Reforms Committee. The Committee highlighted the multiple areas of political interference in the functioning of bureaucracy like transfers and postings and recommended the creation of Civil Service boards (along the lines of the UPSC) to manage the same.

Given the long history of acrimonious and contentious interstate arrests, the procedure to be followed in such cases was formulated by the Delhi HC in the Sandeep Kumar v The State (Govt. of NCT of Delhi) case. The HC set up a two-member Committee to suggest the procedure to be followed in the case of interstate arrests. The MHA was asked to support the functioning of this Committee and also examine the suggestions provided. This case in turn, was premised on the Tasleema v The State (Govt. of NCT of Delhi) case where the Delhi HC recognised the loopholes in the procedure of interstate arrests and had no compunction in awarding damages to an immigrant family whose son was illegally arrested by the Gujarat police from Delhi.

The core procedure that the Court mandates can be broken into 3 parts - prior to, during and after arrest.

Prior to the arrest the visiting police department is required to seek prior permission of the superior officers in writing or on phone. The police are also expected to obtain an arrest warrant from a Magistrate, except in exceptional circumstances. While going for the arrest the visiting police are encouraged to contact the local police and secure their cooperation. After reaching too, they must inform the concerned police station of the purpose of the visit to seek assistance and cooperation. Given that the Chattisgarh police never reached the third part, a perusal of the procedure post arrest is not required here.

The procedure set out by the Delhi HC, though specific to case at hand, has binding value with regard to cases in its jurisdiction given the compendium of mandatory sources it is based on. The findings of the Committee were based on the provisions of CrPC and an OM issued by the MHA on the issue of interstate arrests. The question now is whether the aforementioned procedures were followed by the Chattisgarh Police in carrying out the arrests and what the zone of contention between the police of the two states is. While the analysis can be easily dismissed as being a political battle waged through the bureaucratic machinery, it is important to examine the constitutional and criminal implications of this contestation. The major concern is the procedural safeguards provided to the arrested individual under Article 22 of the Constitution and S. 76 of CrPC which include being produced before the Magistrate within 24 hours of arrest. In the present case, the anchor was kept under UP Police custody for close to 12 hours with a vague excuse of "investigation". Analysing the issue from the lens of the suggestions in the Sandeep Kumar case, it is evident that the Chattisgarh Police fulfilled all the conditions for carrying out an interstate arrest. They sought the permission of a superior officer, informed the local police of the need to arrest the individual and yet were not allowed to proceed with their duty.

This begets the important question of balancing the competing claims of the two different police departments in investigating offences arising in their respective jurisdictions. While the interests of these two police departments seem to be primarily driven by the motivations of the opposing political parties at the helm of their respective states, the ambiguity surrounding the procedure for interstate arrests is palpable. The guidelines laid down in the Sandeep Kumar case are explicit with regard to the procedure to be followed before and after the arrest but the complexities arising during the arrest itself have not been adequately addressed. As seen in this case, the guidelines are not clear with regard to the procedure when separate police departments have competing claims. In such instances, it is only fair to assume that the visiting police department should have priority given the higher procedural safeguards they have fulfilled to reach the stage of arrest. The fact that multiple approvals have to be sought from both higher officials and members of the judiciary makes it difficult to carry out arbitrary arrests.

However, broader questions remain. What happens when multiple police departments come to one state to arrest an individual? Which department gets the priority in such cases? Do the local police have the right to prevent the visiting police department from conveying the individual beyond their jurisdiction, especially when criminal cases are pending? While the Courts may continue devising procedural safeguards, the root of the problem lies in the use of the bureaucracy for the satisfaction of narrow political goals. As highlighted in the Second ARC, there is a need for the civil service machinery to function independent of personal considerations and political ideologies. The fundamental assumption behind the need to investigate offences pertaining to political figures in specific states is that the police in an opposing party ruled state will not conduct a fair enquiry. This is an affront to the justice delivery mechanism of the State and raises the stakes of the Courts to not only lay down the ideal procedure for regulating interstate arrests but also find methods for limiting the use of bureaucratic machinery as pawns in the game of politics. While the MHA and various bodies like the Bureau of Police Research and Development have formulated principles for regulating interstate arrests, the task of consolidating these guidelines and effectively enforcing them is best served by the judiciary. Until then, the independent character and effective functioning of the bureaucratic machinery will remain under the shadow of political interference.