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Marital Rape: A Glaring Lacuna in India's Rape Laws

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Abstract

*The author briefly traces the history behind the legislative stance for non-criminalisation of marital rape in India and outlines the judicial attitudes over the years towards rape and women's rights over bodily integrity. The recent judgment of the Supreme Court of India in *Independent Thought v Union of India & Anr.* ((2017) 10 SCC 800) and that of the Gujarat High Court in *Nimeshbhai Bharatbhai Desai v. State of Gujarat* (2018 SCC OnLine Guj 732) are specifically examined to understand the current points of view held by the Indian judiciary on the issue. Through an examination of the common arguments in favour of the continued retention of marital rape as an exception to statutory rape as defined in Section 375 of the Indian Penal Code, the author seeks to demonstrate the lack of logic contained in those arguments and present a succinct argument for the legal recognition of marital rape as an offence.*

Keywords: *Marital rape, Justice Verma Committee, Women's rights, Bodily integrity, Sexuality.*

1.0 Introduction

While the concept of rape as elucidated in the IPC (“Indian Penal Code”) has undergone a sea of change and has been updated to reflect some of the changed gender and social mores of the times, it still turns a blind eye towards the victims of marital rape. Section 375, IPC which defines ‘rape’ also carves out an “exception” for marital rape¹. Exception 2 to the section clarifies that “*sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.*”

This outdated position of law lends credence from the English law theory of implied or ongoing consent which professes that upon entering a marriage, the wife consents irrevocably to all future sexual intercourse with the husband. Sir Matthew Hale, the then Chief Justice of England had written in 1763 that “*the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract*”². When the IPC

¹S.375, INDIAN PENAL CODE, No.45 of 1860: “A man is said to commit “rape” if he—(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.”

²SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, 1 Hale PC (1736) 629. See also SANDRA FREDMAN, WOMEN AND THE LAW 55-57 (Clarendon Press, 1997).

was enacted in 1860, following this theory, the marital rape exemption was provided for therein.

2.0 Need for Criminalisation

As the Justice Verma Committee³ noted in its ‘Report on Amendments to Criminal Law’, most countries have revoked exemptions in respect of marital rape⁴. The Committee took note of the decisions of the House of Lords⁵ and the European Commission on Human Rights⁶ discrediting this theory. Tracing the history of the recognition of the offence of marital rape in other jurisdictions, the Committee clearly suggested *inter alia* the removal of Exception 2 from the text of Section 375⁷. The Committee also mentioned that India’s continued apathy in this regard runs contrary to its commitments under the ‘Convention on Elimination of all forms of Discrimination Against Women’.⁸ Unfortunately, the Committee’s recommendations in this regard did not get materialised in the Criminal Law Amendment Ordinance, 2013 which revamped the rape laws in India.

One observes that the marital rape exemption is antithetic to the fundamental rights to equality and life enshrined in Articles 14⁹ and 21¹⁰ respectively of the Constitution of India.

³The Committee on Amendments to Criminal Law headed by Justice J.S. Verma, former Chief Justice of the Supreme Court of India, was constituted by the Government of India in December 2012 to review the existing rape laws in the country and suggest necessary reforms, in the wake of the 2012 Delhi Gang Rape incident which shocked the nation.

⁴COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, REPORT ON AMENDMENTS TO CRIMINAL LAW (2013), <http://prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

⁵R v. R [1991] 4 All ER 481, 484 (holding that Sir Hale’s proposition of implied or ongoing consent was no longer applicable. Lord Keith, speaking for the Court while rejecting Hale’s theory also declared that “*marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be a subservient chattel of the husband*”).

⁶C.R. v. UK, Case no. 48/1994/495/577, European Commission for Human Rights [EHRR], 363 (1995) (holding that a rapist remains a rapist irrespective of his relationship with the victim).

⁷ Supra note 4, pp.113-118.

⁸ See Supra note 4, p.62. The Committee in the report specifically drew attention towards the recommendation by the CEDAW that the country should “*widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape.*”

⁹INDIA CONST. art.14: “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*”.

¹⁰INDIA CONST. art.21: “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”

By denying the remedies that would otherwise be available, to only those victims of rape who happen to be married to the perpetrators of the crime, Exception 2 to Section 375 treats victims of marital rape as belonging to a class separate from the other rape victims. There is no demonstrated intelligible differentia to substantiate this classification, rendering Exception 2 an arbitrary provision of law that is in violation of the right to equality and equal protection of laws envisaged under Article 14. Because it allows the inhuman and degrading offence of rape to go unchecked and unpunished in marriages, Exception 2 is also clearly violative of the right to live with human dignity which has been judicially interpreted to fall under the ambit of Article 21¹¹.

It may also be appurtenant to refer to certain rulings by the Supreme Court which have recognized rape and sexual violence as violations of a woman's right to privacy. The Supreme Court has in *State of Karnataka v Krishnappa*¹² held thus:

“[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity- it degrades and humiliates the victim and where the victim is a helpless child, it leaves behind a traumatic experience.”

Recently, in *Independent Thought v Union of India and Another*¹³, the Supreme Court partially struck down the pre-amended version of Exception 2 inasmuch as it allowed marital rape of girl children between the ages of 15 and 18¹⁴. While the Court did specifically state in

¹¹See Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608 (“[A]ny form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21.”).

¹² State of Karnataka v. Krishnappa, (2000) 4 SCC 75, 82 para. 15.
See also Vishakha v. State of Rajasthan (AIR 1997 SC 3011) and Apparel Export Promotion Council v. A.K. Chopra (AIR 1999 SC 625) (observing that the Constitution guarantees the right to be protected from sexual harassment and sexual assault).

¹³ Independent Thought v. Union of India and Another, (2017) 10 SCC 800.

¹⁴Exception 2 to Section 375, IPC which previously read as “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape” was evidently contrary to the provisions of the Prevention of Children from Sexual Offences Act, 2012 that considers girls aged between 15 and 18, irrespective of their marital status, as children and mandates stringent penalties for penetrative and aggravated penetrative sexual assault committed on children. Since the judgment, the reference to “fifteen years of age” was removed and amended to “eighteen years of age”.

this case that it was not making any comment on the validity of the exception clause in respect of married women above the age of 18, the verdict is still significant for its discourse on women's rights over their own bodies and reproductive choices, excerpts of which are extracted below:

“66. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition.”

“75. ...on a combined reading of C.R. v United Kingdom and Eisenstadt v Baird, it is quite clear that a rapist remains a rapist and marriage with a rapist does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.”

“92. The view that marital rape of a girl has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal- nothing can destroy the institution of marriage except a statute that makes marriage illegal and punishable”.

The Gujarat High Court too has extensively dealt with the issue of marital rape in *Nimeshbhai Bharatbhai Desai v State of Gujarat*¹⁵ and observed in no uncertain terms that the marital rape exemption no longer holds good. Although the Court in this case could not uphold the conviction of the accused husband on the charge of marital rape on account of the exception clause, the following observations of the Court are indeed reassuring:

“140. A woman is no longer the chattel antiquated practices labelled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with

¹⁵*Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732.

dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent.

...

143. Moreover, to treat the marital rape cases differently from the non-marital rape cases in terms of the elements that constitute the crime and in the rules for their proof, infringes on the equal protection clause. The Constitutional right to equal protection of the laws ordains that similar subjects should not be treated differently, so as to give undue favour to some and unjustly discriminate against the others; no person or class of persons shall be denied the same protection of laws, which is enjoyed, by other persons or other classes in like circumstances.

144. The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such rights by contracting marriage for the simple reason that human rights are inalienable.

145. Husbands need to be reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield.”

In the light of the above judgments, the continued retention of the marital rape exemption in the statute seems to be rather illogical and unjust. Further, a definite ruling by the Apex Court striking down Exception 2 altogether is yet awaited.

3.0 Irrational Grounds on which the Exemption is Retained

Even as the law refuses to acknowledge the reality, the National Family Health Survey conducted in 2015-2016 (NFHS-4) reveals a gruesome reality that 83% of married women between the ages of 15 to 49 years in India have experienced sexual violence perpetrated by their husbands¹⁶.

Perhaps the obstinate legislative response to the calls for criminalisation of marital rape is best summarised in the remark made by the Law Commission of India which described the same as an “*excessive interference with marital relationship*”¹⁷. This has to be condemned as an unfounded and archaic notion which has no place in any modern nation that claims to treat its citizens equally. It is absurd to suggest that the institution of marriage which could not be destroyed through the legal recognition of rights to divorce and judicial separation and/or right against domestic violence will meet its eventual destruction through the criminalisation of marital rape¹⁸. Moreover, as aforesaid, the Supreme Court itself has denounced this view when it held that “*marriage is not institutional but personal- nothing can destroy the institution of marriage except a statute that makes marriage illegal and punishable.*”¹⁹

There is also a prevailing paranoia that criminalisation of marital rape will have the unwarranted effect of staggering numbers of false cases being filed by vengeful wives.²⁰ However, as yet, there is no quantifiable data available on such alleged misuse of women-centric laws to the detriment of men.

Perhaps the only reasonable criticism levelled against the criminalisation of marital rape is that being an act done typically within the confines of a marital household, instances of marital rape may not leave substantial evidence behind leading to an eventual onerous and probably ineffective prosecution. While it may be true that proving spousal rape may be

¹⁶MINISTRY OF FAMILY AND HEALTH, GOVERNMENT OF INDIA, NATIONAL FAMILY HEALTH SURVEY (NFHS-4), 2015-16, <http://rchiips.org/nfhs/NFHS-4Reports/India.pdf>.

¹⁷LAW COMMISSION OF INDIA, 172nd REPORT ON REVIEW OF RAPE LAWS (2000), para.3.1.2.1, <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

¹⁸ See Nitya Bhalla, *Men may suffer if marital rape becomes crime: India government*, REUTERS (Aug. 30, 2017, 10:20 PM), <https://www.reuters.com/article/us-india-rape-marriage/men-may-suffer-if-marital-rape-becomes-crime-india-government-idUSKCN1BA28E>.

¹⁹ Supra note 13.

²⁰See SHIVIKA CHOUDHARY, *MARITAL RAPE: AN EVALUATION OF THE PATRIARCHAL INJUSTICE IN THE CRIMINAL LAW (AMENDMENT) ACT, 2013*, 3 Christ University L.J. 97, 100 (2014), <http://journals.christuniversity.in/index.php/culj/article/view/484/364>.

manifestly more difficult than proving rape committed by a stranger, it would certainly be wrong to take a view that the former cannot be proved at all. The prosecution in most cases of marital rape would definitely revolve around circumstantial evidence, witness accounts etc. of any possible marital discord. More direct kinds of evidence in the form of video and audio recordings and forensic evidence may also be available in certain cases. Be that as it may, complexities in proving a crime ought not to be a reason to plainly disregard it as being non-existent.

Yet another argument raised against the criminalisation of marital rape alongside the aforementioned ones is that marital rape is already recognised in Indian law as “sexual abuse”²¹. While sexual abuse as understood in the Protection of Women from Domestic Violence Act, 2005 does encompass abuse in the nature of marital rape, one cannot lose sight of the fact that this statute views domestic violence strictly as a civil wrong and provides only civil remedies such as monetary compensation and protection in the marital household. While these remedies, especially a protection order, could help a woman escape from sexual abuse *inter alia*, the same do not offer conclusive or long term solutions and are also ineffective in deterring the committing of the criminal act itself. Thus, the patent arbitrariness with which the law makes rape a prosecutable crime only so long as the rapist is not married to the victim cannot be countervailed with this argument.

4.0 Conclusion

Perhaps there is no greater travesty of justice today than its denial to a section of rape victims solely on the basis of certain anachronistic and problematic notions. The unyielding legislative stance in favour of the retention of the marital rape exemption, therefore, begs two poignant questions. Firstly, is it fair to deprive countless women in the country of their legal rights and remedies in an attempt to prevent a few potential false prosecutions? Secondly, can the legislature of a democratic nation choose to ignore the existence and gravity of a crime merely on account of the difficulty in proving it?

²¹ Sexual abuse is considered as one of the four forms of domestic violence under the Protection of Women from Domestic Violence Act, 2005.

The issue also raises a conspicuous incongruity that while men can be prosecuted and put behind bars for lesser crimes committed on their wives such as voyeurism, stalking, outraging her modesty, sexual harassment, assault, use of criminal force etc., they are exempted from blame for the more heinous crime of marital rape.

Nevertheless, in the wake of the landmark judgments of the Supreme Court in *Independent Thought*²² as well as in *Justice K. S. Puttuswamy (Retd.) & Anr v Union of India & Ors.*²³ (where decisional privacy including the ability to make intimate decisions concerning one's sexual and reproductive nature and intimate relations has been recognized as a facet of the constitutionally protected right to privacy), it is hoped that a more favourable consensus will soon emerge in the country towards the recognition of marital rape as an offence. However, it ought to be emphasized that the mere creation of a statutory offence of marital rape will not suffice as the law should necessarily enjoin the judiciary and the police force to deal with such cases with the requisite sensitivity and awareness.

²² Supra note 13.

²³ Justice K. S. Puttuswamy (Retd.) & Anr v. Union of India & Ors. ((2017) 10 SCC 1)