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THE NON-CRIMINALISATION OF MARITAL RAPE IN INDIA

AUTHORED BY - MADHUMITHA SHANKAR

“It was just like a rape, except I was on my own bed.”¹

Marital rape is defined as ‘unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. The words ‘unwanted intercourse’ refers to all sorts of penetration (anal, vaginal or oral) perpetrated against her will or without her consent’². Preceding the 20th century, marital rape was not criminalised in most countries, and husbands enjoyed immunity from rape charges filed by their wives.

What is even more appalling is that the marital rape exemption still exists in India and is also codified in the statutory law. The exception 2 of §375 in the Indian Penal Code reads: ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape’³. Through the decades there have been some developments, though they have been far and few in between. The 42nd Law Commission Report in 1971 recommended that the exception must not apply in cases where the husband and wife are judicially separated.⁴ In a similar vein, §376B of the IPC states that a husband can be held guilty of rape when he has nonconsensual sexual intercourse with his wife when she does not live with him by reason of judicial separation or otherwise.⁵ The JS Verma Report in 2012 suggested that the exception clause be deleted, and that the law specify that marriage is not a defence.⁶ During the public consultations by the Parliamentary Standing Committee on the Criminal Law Amendment Bill, 2012, the criminalisation of marital rape was brought up, but dismissed by the committee.⁷ The topic was

¹ Lisa R Eskow, ‘The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution’ (1996) 48(3) Stanford Law Review 677, XXXX <<http://dx.doi.org/10.2307/1229280>> accessed 8 May 2023.

² Debdatta Das, ‘Marital Rape: the Assassination of a Woman’s Dignity’ (2010) LVII The Indian Police Journal 62, XXXX <<https://bprd.nic.in/WriteReadData/userfiles/file/9412520126-April%20June%202010.pdf>> accessed 4 May 2023.

³ The Indian Penal Code, No 45, 6 October 1860 (India), XXXX.

⁴ *Indian Penal Code* (42, Law Commission of India 1971) XXXX.

⁵ The Indian Penal Code, No 45, 6 October 1860 (India), XXXX.

⁶ *Report of Committee on Amendments to Criminal Law* (Justice JS Verma Committee 2013) XXXX.

⁷ *Report on The Criminal Law (Amendment) Bill, 2012* (Parliament Standing Committee Report 167, Standing Committee on Home Affairs 2015) XXXX.

also brought up during a Rajya Sabha Debate in 2015, but the Home Minister refused to take a decision until the deliberations by the Law Commission were completed.⁸

In 2017, the Supreme Court in *Independent Thought v. Union of India*, AIR 2017 SC 4904 ruled that the exemption clause would not apply if the wife is below 18 years of age.⁹ In 2022, the Karnataka HC declared that 'A brutal act of sexual assault on the wife, against her consent, albeit by the husband, cannot but be termed to be a rape'.¹⁰ Only 2 months later, the Delhi HC delivered a split verdict in response to a writ petition challenging the validity of the marital exemption.¹¹ In the same year, the SC held that marital rape was to be considered as rape for the purposes of the Medical Termination of Pregnancy Rules.¹²

This paper does not seek to elaborate on why marital rape should be criminalised. Instead it aims to examine why marital rape has still *not* been criminalised. The arguments advanced in favour of retaining the marital rape exception, and a brief rebuttal of each, are presented.

Firstly, it is contended by those in favour of the MRE that the removal of the exception would result in excessive interference with the marital relationship.¹³ This is based on the belief that the marital relationship creates a private sphere that the criminal law should not interfere with. However forced sexual intercourse is a violation of the right to personal autonomy guaranteed under article 21 of the Indian Constitution.¹⁴ When the fundamental rights of a woman are violated in the private sphere, it is an imperative duty of the state to interfere.¹⁵ Moreover, the law has on several occasions already penetrated the marital sphere¹⁶ by way of several legislations such as the PWDVA 2005¹⁷.

⁸ Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' [2018] NUJS Law Review XXXX.

⁹ *Independent Thought v Union of India*, Supreme Court of India, 11 October 2017, SC 4904, AIR (India) XXXX.

¹⁰ *Hrishikesh Sahoo v State of Karnataka*, Karnataka High Court, 23 March 2022, 145, 2 KCCR (India) XXXX.

¹¹ *RIT Foundation v Union of India*, Delhi High Court, 11 May 2022, 1404, SCC OnLine Del (India) XXXX.

¹² *X v Health and Family Welfare Department, Govt*, Supreme Court of India, 29 September 2022, 1321, SCC OnLine SC (India) XXXX.

¹³ *Review of Rape Laws* (Report No. 172, Law Commission of India 2000) XXXX.

¹⁴ *T Sareetha v T Venkata Subbaiah*, Andhra Pradesh High Court, 1 July 1983, 356, AIR 1983 AP (India) XXXX.

¹⁵ Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' [2018] NUJS Law Review XXXX.

¹⁶ Tan Cheng Han, 'Marital Rape - Removing the Husband's Legal Immunity' (1989) 31(1) Malay Law Review 112, XXXX.

¹⁷ Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' [2018] NUJS Law Review XXXX.

Why is there a selective interference of the state in the marital sphere?

Secondly, it is argued that the exception is retained to save the institution of marriage. However, the marital relationship is accorded an unnecessarily grandiose status in the discussion of marital rape. It is contended that allowing wives to prosecute their husbands for rape would be tantamount to ending a marital relationship that could have otherwise been saved. The criminal law, if it allows this line of reasoning, would be viewing families, rather than individuals, as the basic units of the social order. Arguably the harm suffered by a woman who is raped by her husband is greater and far more painful than the harm caused to society by the breakdown of an abusive marriage.¹⁸ It is also to be noted that the mandate of the criminal law is to punish criminals and deter crime, not concern itself with the saving of marriages.¹⁹

Why is the law prioritising spousal relations over individuals, namely women?

Thirdly, the proponents of the MRE assert that the married woman who has been subjected to non consensual intercourse with her husband has access to alternate remedies of law, therefore there is no need to remove the exception.²⁰ The provisions of the PWDVA 2005 as well as §376B and §498A of the IPC are highlighted by those who oppose criminalisation of marital rape as existing remedies that a woman can avail in response to sexual assault by the husband. But these have been proven to be inadequate. The maximum punishment for rape is life imprisonment.²¹ §376B only deals with spouses who are living separately and the maximum sentence that can be imposed is 7 years.²² It creates a falsified classification, that is, husbands who are separated from their wives, and accords them a lesser punishment for the sole reason that they are married to the woman they raped, regardless of the state of the marriage. §498A deals with cruelty and attracts a maximum sentence of 3 years.²³ The standard of threshold for what amounts to cruelty is different from that of rape, and the conduct that is to be deemed as cruelty is required to be perpetrated repeatedly or over a long period of time, thus keeping a large number of rapes outside the purview of §498A.²⁴

¹⁸ Ibid.

¹⁹ Tan Cheng Han, 'Marital Rape - Removing the Husband's Legal Immunity' (1989) 31(1) Malay Law Review 112, XXXX.

²⁰ *RIT Foundation v Union of India*, Delhi High Court, 11 May 2022, 1404, SCC OnLine Del (India) XXXX.

²¹ The Indian Penal Code, No 45, 6 October 1860 (India), XXXX.

²² The Indian Penal Code, No 45, 6 October 1860 (India), XXXX.

²³ The Indian Penal Code, No 45, 6 October 1860 (India), XXXX.

²⁴ Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' [2018] NUJS Law Review XXXX.

Why are the provisions that attach lesser punishments to husbands as opposed to other men for the same crime considered by the legislators as adequate and sufficient?

Fourthly, an environment of unnecessary fear and excessive caution is created by the misleading belief that the criminalisation of marital rape would provide another avenue for women to misuse the law by filing false cases.²⁵ It is a common misconception that women misuse the provisions made for their benefit by lodging false complaints, especially under §375 and §498A. This view was also endorsed by the Supreme Court.²⁶ False complaints can be lodged on the basis of any of the provisions of the penal code²⁷, but it is only with regard to gender-specific laws that this argument is encountered.

Why is it that primarily women are accused of filing false cases and thereby misusing the law?

Fifthly, the advocates of the retention of the MRE submit that gathering evidentiary material in relation to marital rape cases would prove to be difficult considering the intimate and private nature of the spousal relationship.²⁸ But, it could be argued that gathering evidence for the commission of any offence in a private sphere is difficult, yet the law criminalises different kinds of offences that take place within the home among different familial relationships. By the same logic, women in live-in relationships must also be considered unrapable by their partners, but the IPC does permit them to seek the appropriate redressal.²⁹ Certainly then it is possible to bring evidence to a trial prosecuting a man for raping a woman whom he cohabits and shares an intimate relationship with. Additionally there arises a question of whether difficulty of proof is a justified basis upon which the law decides what behaviour should be criminalised.³⁰

²⁵ *RIT Foundation v Union of India*, Delhi High Court, 11 May 2022, 1404, SCC OnLine Del (India) XXXX.

²⁶ *Sushil Kumar Sharma v Union of India*, Supreme Court of India, 19 July 2005, 3100, AIR 2005 SC (India) XXXX.

²⁷ Tan Cheng Han, 'Marital Rape - Removing the Husband's Legal Immunity' (1989) 31(1) Malay Law Review 112, XXXX.

²⁸ *RIT Foundation v Union of India*, Delhi High Court, 11 May 2022, 1404, SCC OnLine Del (India) XXXX.

²⁹ *RIT Foundation v Union of India*, Delhi High Court, 11 May 2022, 1404, SCC OnLine Del (India) XXXX.

³⁰ Tan Cheng Han, 'Marital Rape - Removing the Husband's Legal Immunity' (1989) 31(1) Malay Law Review 112, XXXX.

Why is the difficulty of proof a relevant consideration in cases of marital rape but not in instances of other crimes that occur in a household or in an intimate relationship?

The answers to the questions that arise upon an inspection of the aforesaid arguments lie in the ideology behind the hesitation and refusal to criminalise marital rape. The marital rape exception has its origins in the patriarchy.

Marriage was treated as a contract between the husband and wife, and according to the terms of the contract, the woman gives complete consent to sex when she marries a man. This then invites notions of sex being a husband's right and a wife's duty.³¹ Even the murky beginnings of rape as a crime continue to affect the existence of the marital exception. Rape was considered a crime against property, the property being the chastity of the woman belonging to her father, or the fidelity of the woman belonging to her husband.³² The husband, when he rapes his wife, does not violate any other man's property, and therefore need not have been held accountable.

Ideas of the ideal victim also plague the conceptualisation of marital rape. Vamps, or provocative and apparently blameworthy victims, are unrapable compared to virgins, or chaste and innocent women. Married women are grouped in with the vamps as the stereotypical wife is manipulative and vengeful, and therefore rendered unrapable by their husbands.³³

The understanding of rape by the courts is another manifestation of patriarchy that provides husbands with legal immunity. Rape is perceived not as an attack on the woman's autonomy, but as a loss of honour for the victim.³⁴ Courts ordering rapists to marry the victims³⁵ proves the emphasis that the socio-legal climate places on marriage as a way to restore the woman's honour.³⁶ The logical inference then would be that rape by husband is not an act worth criminalising as it

³¹ Rebecca M Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption' (1995) 20(04) *Law & Social Inquiry* 941, XXXX <<http://dx.doi.org/10.1111/j.1747-4469.1995.tb00697.x>> accessed 8 May 2023.

³² Lisa R Eskow, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution' (1996) 48(3) *Stanford Law Review* 677, XXXX <<http://dx.doi.org/10.2307/1229280>> accessed 8 May 2023.

³³ Lisa R Eskow, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution' (1996) 48(3) *Stanford Law Review* 677, XXXX <<http://dx.doi.org/10.2307/1229280>> accessed 8 May 2023.

³⁴ Geetanjali Gangoli, 'Controlling women's sexuality: rape law in India', *International approaches to rape* (Policy Press 2011) XXXX <<http://dx.doi.org/10.1332/policypress/9781847426208.003.0006>> accessed 9 May 2023.

³⁵ Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37(1) *Feminist Studies* 185, XXXX <<http://dx.doi.org/10.1353/fem.2011.0018>> accessed 9 May 2023.

³⁶ Stellina Jolly and MS Raste, 'Rape and Marriage: Reflections on the Past, present and Future' (2006) 48(2) *Journal of the Indian Law Institute* 277, XXXX.

does not violate the wife's honour in society.

Thus the criminalisation of marital rape would begin with a change in the perceptions that lawmakers and society have about marriage, rape, and women.

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