"LICENSED TO RAPE?" : THE CRITIQUE OF THE INDIAN PENAL PROVISION INDEMNIFYING MARITAL RAPE

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Introduction:

> *"Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over women which they do not deserve and ought not to have."*[1]

~ Mahatma Gandhi

Our Constitution dauntlessly embraces its incredible provisions that protect an individual's integrity, privacy, opportunities and fundamental and human rights – especially a woman's. On top of that, India's mighty penal provisions go extra miles to ensure women safety, dignity and honour, thereby stringently punishing anyone who disregards these provisions or woman dignity. In pursuance of such phenomenal legislations and provisions, yet acknowledging their lackadaisical implementation, we have a nimiety of landmark judgements by our Supreme Court and various High Courts to uphold these basic rights of a woman. While one may appreciate the effort put in to come up with such laws and honour women dignity, but while doing so he cannot unsee what it fails to provide, rather knowingly endorses. In India, feminists and women's rights organisations have long advocated for the criminalization of marital rape. *He wanted to, she didn't*[2] – is a scenario which may best epitomize the assumption of most of us concerning the underlying dynamics of rape in marriage. Rape has forever been the most challenging crime to study, and has also been the most underreported one; in marriages – even

[1] M. K. Gandhi, Speeches and Writings. G. A. Natesan & Company, Madras, 1933

[2] 'License to Rape: Sexual Abuse of Wives' by D Finkelhor and K Yllo (1987) Criminal Justice Policy Review

more. Rape in marriage is an outright act of brutality and humiliation, and graver in its impact on the victim, when seen in parlance to one outside the wedlock. *"When a stranger does it, he doesn't know me, I don't know him. He's not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately and then to do this to me – it's such a personal abuse."*[3] This essay goes on to discredit the flawed interpretation the Government relies upon, as a consequence of which it continues to perpetuate the sheer injustice – legitimizing rape, to allegedly preserve the sanctity of marriage. The government appears to have discovered some inexplicable correlation between preserving marriage and not criminalising marital rape.

The Indian Penal Code, 1860, by virtue of Section 375, defines the inhuman act of "Rape". The particular provision was subject to extensive overhauling in 2013, in the aftermath of the infamous '*Nirbhaya*' gang-rape case. A committee was constituted, under the presidentship of Justice Verma, in response to the country-wide outcry by civil societies, against the Governments failure to ensure a safe and dignified environment for women, who continue to be exposed to sexual violence. Subsequently, the hitherto narrow definition was given an exhaustive outlook. Despite the Committee's recommendation to criminalize marital rape, neither the Legislative nor the Judiciary have taken any step, in furtherance of this proposal. Exception 2 to Section 375 exempts non-consensual intercourse between a husband and a wife (above the age of eighteen, now)[4] from the definition of "Rape" under Section 375, and in doing so defends the perpetrators from prosecution.

The International Men and Gender Equality Survey, 2011 reveals that in India one in five men have 'forced' their wives into having sex. To add to this, The United Nations Population Fund Survey, 2000 disclosed that more than two-third of married women in India have been 'beaten and forced' into having sex with their husbands. In another survey, conducted by Joint Women's Programme (an N.G.O. in New Delhi), it was found that one out of seven married women has been 'raped' by her husband at least once. What's more, is the fact that, in 2013 the UN Committee on Elimination of Discrimination Against Women (CEDAW) recommended the Indian government to criminalize marital rape. Yet, inaction persists.

[3] *Ibid.*
[4] Independent Thought v. Union of India (2017) 10 SCC

"Legal fiction of Common Law"

> *"…the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity."*[5]

~ Dr. Shashi Tharoor

Exception 2 creates a 'legal fiction' whereby the wife is presumed to have perpetually consented for sexual activities as a consequence of the marriage. The infamous case of *Hurree Mohan Mythee*[6] talks about the same legal paradox, saying that – a man cannot be held guilty for raping his own wife, owing to a matrimonial consent which she has given and can not revoke. However, based on a simple understanding of the Constitutional postulations, one can easily ascertain that this 'legal fiction', that continues to diligently be endorsed by the Government, violates every basic human right and the spirit of the Constitution itself. One ventures into the provisions of the Constitution as his conceptual precipitates tend to pivot around the intricate theories of the subject. The justification given by Union of India that, by virtue of marriage a woman is expected to have consented perpetually, either expressly or through necessary implication, for sexual activities has no substance. Consent based on implication arising out of a wedlock stands no ground. The subsequent ramifications would be nothing but an unjust and psychologically biased analysis. Constitutionally, man has equal, and no more, recognition as that of a woman. And no statute, or legislation, should be interpreted or understood to detract from this position; *"…if there is some theory that propounds such an unconstitutional myth, then that theory deserves to be demolished."*[7] The notion of implied consent is outdated and flawed. A legislation may be reasonable at the time of its enactment – which in our case is the Victorian era – but as law is dynamic in nature and tends to change with every little ripple of advancement, it eventually becomes obsolete, unreasonable and arbitrary. And, it isn't uncommon to know that a legislation may be struck down on grounds of arbitrariness.

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[5] Dr. Shashi Tharoor, for *'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018'*; A private member's bill, No. 255/2018.

[6] Queen-Empress vs Hurree Mohun Mythee on 26 July, 1890; (1891) ILR 18 Cal 49.

[7] Independent Thought v. Union of India (2017) 10 SCC

India, being a British colony, has many of its penal laws in the pristine state till date. Exception 2, which effectively exempts acts of "Rape" committed by husbands against their wives, is substantially influenced by and drawn from the hitherto prevalent notion of blending the woman's identity with that of her husband. Indian laws date back to the 1700s, when Matthew Hale of England said that – *"…the husband cannot be guilty of rape committed by himself against his lawful wife, for by their mutual matrimonial consent and contract the wife had given herself over in this kind unto her husband which she cannot retract".* In this regard, Blackstone asserted, in what came to be known as *"The Unities Theory"*, that – *"As a consequence of the marital relationship, husband and wife become a single personality in law: that is to say, the woman's very being or legal existence is put off during the marriage…".* The exception to marital rape in the IPC was inserted in Clause 359 of Macaulay's Draft Penal Code and was retained in the final version of Section 375 after deliberations by the Select Committee in the 1960's version of India's Penal Code. The IPC's marital exemption was established based on Victorian patriarchal ethics that did not regard men and women as equals, kept married women from holding property, and blended husband and wife identities under the "*Doctrine of Coverture*". Modern jurisprudence, however, not only affords wives and their husbands separate legal identities, but also explicitly provides for legislations in protection of women. The same is evident in the abundance of statutes drafted with the intention to protect women from violence and harassment, that have been passed since the turn of the century, including "The Protection of Women from Domestic Violence Act" and the "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act."

Marital rape, despite having undergone a major revamp in the country we derived it from, remains a grey area in our country. The three-decade old landmark judgment of *R v R*[8], where the Court observed that exception to marital rape is a 'legal fiction of common law', announces the much-needed developments India needs to start chasing. Unfortunately, however, India is among the only 36 countries in the world that has not criminalized marital rape yet. India, a burgeoning superpower and a regional leader, continues to legitimize marital rape in the guise of upholding cultural ethos and allegedly saving the institution of marriage. A legitimate question one may seek to clarify is – what keeps India from giving a pro-women interpretation to the flawed provision? A scrupulous examination reveals several factors, such as – outdated penal laws belonging to the Victorian era; a thoroughly patriarchal society that oppresses

[8] (1992) 94 Cr App R 216.

women's voices and agency across India's many religions; and a culture where marriage and family, in an anachronistic sense of the words, continue to hold paramount importance as the pillars of society.

Despite many of our Penal laws continue to be governed by Victorian principles and rely on prehistoric ideologies, India today is the world's biggest democracy and a regional superpower. It has the world's eyes glued to what it adheres to and purports. Its acts are used as examples and templates to work upon. Therefore, it must act accordingly. A milestone in this regard could be seen in the recent High Court of Gujarat ruling, in *Nimeshbhai Bharatbhai Desai vs State of Gujarat*[9] that – "It has long been time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status."

Article 14 – Equality before Law and equal protection of laws: It says every individual, irrespective of their gender, caste, religion etc. shall be equally protected by the law and shall not be discriminated whatsoever. Yet, the law in India unreasonably and arbitrarily differentiates, therefore discriminates, between the consent of a married woman and that of an unmarried one. A rapist remains a rapist; he cannot get converted into a non-rapist merely by marrying the victim. The fact is that marital rape is rape as conventionally understood, though the Parliament has been pig-headed not to see so.

Against Indian Culture?

> *"The state's failure to recognize and condemn marital rape is its complicit acceptance."*

The Union Government appears to undoubtedly be the most obstinate impediment in the way of India criminalising marital rape. Despite the fact that there are multiple writ petitions challenging the marital rape exception to Section 375 before the Supreme Court and several high courts at any given time, the government has continued to safeguard men who rape their wives by claiming the same few grounds over and over. It only takes one critical scrutiny to strip the justifications down to their bare bones: misogyny and misconceptions.

The argument that marital rape is against Indian culture in severely flawed and baseless. Chief

[9] April 2, 2018; (R/CR.MA/26957/2017)

Justice of India, Dipak Misra, in August 2019, opined that marital rape must not be criminalized as it seeks to destroy the institution of marriage, and that criminalizing the same would be against Indian culture.[10] The argument relied upon here by the Government is an acknowledgment of the stark difference in India's and West's socio-economic circumstances. The Government goes on to accuse the masses, that support the criminalization of marital rape, as unduly influenced by the Western culture. The government unashamedly continues to rely upon the argument that the majority of Indians are illiterate, uneducated, impoverished, traditional, and religious – unlike the West. Our Government feels that a husband cannot rape his wife, as a decent Indian wife would have perpetually consented for the sexual activities. If the fear of the failing institution of marriage is keeping the Government from criminalising marital rape, it inadvertently accepts that if women had legal recourse and protection, they would wish to eradicate the sexual abuse they endure on a daily basis. When this happens, it becomes pertinent to question whose rights is the government safeguarding, by placing such value in marriage and family, and desperation for the status quo – Is it the husbands who rape, or the wives who are raped?

In 2016, Maneka Gandhi, the Union Minister for Women and Child Development, asserted that the international interpretation of marital rape could not be applied in the Indian context due to a variety of factors including lack of education or illiteracy, poverty, a myriad of social customs and values, religious beliefs, and society's demeanour toward marriage as a sacrament. In another petition seeking to criminalize marital rape in 2015, the Supreme Court dismissed the petition stating, *"the law wouldn't change for one woman"*, hereby presenting us the grim reality and the sorry state of affairs we live in today. So much so, that even The National Crime Records Bureau (NCRB) does not keep distinguished data, or data at all, on marital rape – as it is not a crime to rape a wife. For the glorification of culture, the family realm, and privacy, the government appears to have turned a deaf ear. Even the judiciary has delegated duty to the legislative and has not performed well in this regard. In doing so, the Governments only end up portraying the culture in a bad light, and end up immortalizing the patriarchal outlook the society.

Article 21 – Right to Life: Everyone has the right to life, liberty and security of person. And this right, as an outcome of the overabundance of judicial pronouncements extends to virtually anything one's basic human rights vest in, and even beyond. And, in regard to a woman's right

[10] "*Marital rape shouldn't be a crime in India: CJI Misra"* Deccan Herald, April 9, 2019.

to life it extends to her right to live with dignity; the right to good mental, physical and psychological health; right of bodily integrity; right of sexual autonomy and reproductive choices; and the right to privacy. The fundamental rights to life with human dignity, to equality, and to work in ones chosen profession or trade inherently include protection from sexual harassment. It is indubitably the position that the Constitution guarantees fundamental rights to women. In this regard, it is also necessary to note that Article 21 applies equally to women. Article 51A(e) provides that it shall be the duty of every citizen to renounce practices derogatory to the dignity of women.

Reasonable Classification, harmonious & purposive interpretation, and an irrational nexus:

The Government's beliefs, opinions and implementations are all unreasonable, arbitrary and lack a reasonable nexus. One doesn't need to scrupulously analyse the provision of the Constitution to confirm that whatever the Government relies on, to continue legitimizing marital rape, blatantly disregards the basic human rights and the spirit of the constitution outrightly. Not only does the faulty implementation of the bad penal provision disregard India's obligation to cater to its International ratifications, but also violates its own law of land.

Section 375's Exception too gravely errs to classify reasonably. It arbitrarily makes a difference in married women and unmarried ones, and also in married wives below 15 years of age and those above. Such an erroneous classification violates the principle of "intelligible differentia", and is thus prima facie in defiance of the principles of Equality established in Article 14. The recent annulment of the '15 year' age restriction, which has been raised up to '18 years', is a little triumph for us. This is just the first step toward the repeal of the entire clause. It is past time for the government to recognise this legal flaw and put marital rape under Section 375 of the Criminal Code. The Section creates an artificial and an unreasonably vague classification between married women and unmarried women, whereby the notion of consent is outrightly disregarded. The Government does not seem to have a rationale for this distinction, other than a frail argument to preserve the institution of marriage. The fact the Government needs to realise is that marriage is not institutional, but personal.

Another potent anomaly in our penal laws is that a man would not attract charges for raping his wife, whereas he would be held liable in case of physical hurt, or molestation – to the extent that bare knowledge of a certain act likely to outrage the modesty of his wife, would attract

serious charges here. This is another example of an unjust, unreasonable and baseless classification. Karuna Nandi – a human rights expert, an advocate at the Supreme Court of India and the lead draftswoman for the Indian anti-rape bill – has rightly conveyed it, saying– "*They don't want the law in the bedroom despite the fact that you are not allowed to kill your wife in the bedroom, or slap your wife in the bedroom, nor are you allowed to sexually molest her in the bedroom (under the Domestic Violence Act). Only thing the criminal law has an exception on here is raping a wife in her bedroom."* The legal provisions to a victim's avail for her redressal are under the Protection of Women from Domestic Violence Act, 2005, whereby the act is punishable as merely an 'aggravated sexual assault'. Although, the Act does recognize forced sexual assault as punishable under the Indian laws, however, the Magistrate has no power when the perpetrator here is the husband.

The NHRC has in a statement held the Government responsible and accountable for the violation of human rights within its jurisdiction, saying – "*... it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the act of its own agents, but is also responsible for inaction that may cause or facilitate the violation of human rights."* [11]

The root cause, in my opinion, to sexual violence, amongst other things, is 'gender discrimination'. The indemnity granted to the perpetrators via that particular exception is nothing more than the Government aided legal mechanism to endorse gender inequality. Here, the 'Sex Role Socialization' also comes into play. The same can be seen to be diligently subscribed to in the States stance that – "*the wife's duty is to sexually please her husband on his time and demand...".* And that this horrendous act cannot be brought under the purview of rape, as the woman is merely performing her "wifely duties".

Concluding reflections

> *"The greatest of all means…for ensuring the stability of Constitutions – but which is generally neglected – is the education of citizens in the spirit of the Constitution…"*[12]

[11] NHRC Order dated April 1, 2002 in Case No. 1150/6/2001-2002.
[12] Aristotle, "*Politics"*, ed. R. F. Stalley, trans. Ernest Barker (Oxford, 1998)

Rape is rape. Non-consensual, forced sexual intercourse, regardless of the arbitrary boundary of marital status, is rape. Exception 2 creates an unnecessary and artificial distinction that has no rational nexus and it unreasonably differentiates, with absolutely unclear objectives sought to be achieved. Policy matters although are not in the realm of Courts, they can nevertheless be struck down on the basis of being arbitrary and unreasonable. If the Legislature legislates, and the subsequent outcome is not in congruence with the provisions and spirit of the Constitution, the provision can be declared infructuous. The Courts would fail in performing their duty if either the same isn't struck down, or moulded to fit within the four-walls of the Constitution.

Unlike domestic violence, marital rape is yet to be a part of mainstream public discourse, especially in India's deep-rooted patriarchal society. The proposition that criminalizing marital rape will precipitate "anarchy" or "stress" in households is merely a rationalisation for the State to let spousal domestic violence go unpunished by characterising forced sexual violence under the all-encompassing right to marital privacy, where the State's intrusion would be unwarranted. However, rape within a marriage suggests dissension and violence in the relationship, and the family would already be in a state of 'stress'. The threshold of domestic violence in the form of marital rape would have already been crossed, needing state intervention in order for it to no longer be considered a "private concern."

We mustn't oversee the fact that these are not just legal concepts we are talking about, but is a horrendous reality that millions of women face every day. Arguably, marital rape is no less an offence than culpable homicide, murder or rape itself. It degrades the dignity of a woman and has severe physical, emotional and psychological consequences. Exception 2 to Section 375 of the Indian Penal Code, that decriminalizes marital rape is arbitrary, discriminatory, unjust, unfair, irrational, unreasonable, and violative of a woman's integrity, sexual autonomy and privacy. It must be struck down.