

Marital rape: an indignity to women

The marital rape exception is antithetical to women's dignity, equality and autonomy



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The High Court of Chhattisgarh recently decided a criminal revision petition challenging the charges framed against the applicant husband. Based on the allegations of his wife, charges were framed by a trial court under Section 376 (rape), Section 377 (carnal intercourse against the order of nature) and Section 498A (cruelty towards wife by husband or his relatives) of the Indian Penal Code (IPC). The High Court upheld charges under Sections 498A and 377 but discharged the husband under Section 376 on the ground that by virtue of Exception 2 to Section 375 (the definition of rape), sexual intercourse by a man with his own wife (provided she is over the age of 18) would not amount to the offence of rape.

Since the High Court was bound by the law, which exempts husbands from being tried or punished for raping their wives by creating the legal fiction that all sex within marriage is consensual, no other conclusion was open to the Court. Notwithstanding this, the discrepancies and failings of Indian criminal law, highlighted by the judgment, deserve scrutiny.

Inconsistent provisions

First, the marital rape exception is inconsistent with other sexual offences, which make no such exemption for marriage. Thus, a husband may be tried for offences such as sexual harassment, molestation, voyeurism, and forcible disrobing in the same way as any other man. A husband separated from his wife (though not divorced) may even be tried for rape (Section 376B). A husband may be charged and tried for non-consensual penetrative sexual interactions other than penile-vaginal penetration with his wife under Section 377 (prior to the decision of the Supreme Court in *Navej Singh Johar v. Union of India*, 2018, consent or lack thereof was not relevant to Section 377, but it is now). As a result, penetrative intercourse that is penile-vaginal is protected from criminal prosecution when performed by a husband with his wife, even when done forcibly or without consent. If there is an underlying ra-



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tionale to this extremely limited exemption, it is not immediately clear.

Patriarchal beliefs

Second, the marital rape exception is an insult to the constitutional goals of individual autonomy, dignity and of gender equality enshrined in fundamental rights such as Article 21 (the right to life) and Article 14 (the right to equality). In *Joseph Shine v. Union of India* (2018), the Supreme Court held that the offence of adultery was unconstitutional because it was founded on the principle that a woman is her husband's property after marriage. The marital rape exception betrays a similar patriarchal belief: that upon marriage, a wife's right to personal and sexual autonomy, bodily integrity and human dignity are surrendered. Her husband is her sexual master and his right to rape her is legally protected.

A commonly cited rationale for preserving the marital rape exemption is that recognising marital rape as a criminal offence would 'destroy the institution of marriage'. This was the government's defence in *Independent Thought v. Union of India* (2017). Rejecting this claim, the Supreme Court astutely observed, "Marriage is not institutional but personal - nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable." If it is true, however, that criminalising marital rape will destroy the institution of marriage, what does that tell us about this so-called institution? If its very existence depends on husbands' right to rape their wives, and on the legally sanctioned violation of wives' sexual autonomy, is this institution worth saving? Does this kind of marriage deserve to be the cornerstone of our society? Surely, we can do better.

Another argument frequently raised

against the criminalisation of marital rape is that since marriage is a sexual relationship, determining the validity of marital rape allegations would be difficult. Even if we accept, *arguendo*, that marriage is necessarily a sexual relationship, this argument does not hold water. It is not marriage that creates a problem in adjudication, but the dangerously erroneous belief that consent may simply be assumed from a woman's clothes, her sexual history, or indeed, her relationship status. While the current law seems to operate under this misconception, marriage does not signify perpetual sexual consent. Therefore, the determination of consent or lack thereof in the context of a sexual interaction within marriage would be the same as in any other context (especially in other ongoing sexual relationships): through physical evidence, through the prosecutrix's testimony and through the defence of the accused.

Underlining subordination

It is shocking that Exception 2 to Section 375 of the IPC survives to this day. Antithetical to the liberal and progressive values of our Constitution, and violative of India's international obligations under instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, the provision underlines women's subordination to men, especially within marriage. In 2017, the Supreme Court, in *Independent Thought*, had read down the exception so that husbands who raped their minor wives could no longer hide behind it. It is high time adult women are afforded the same protection and dignity in marriage.

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