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MAPPING THE EVOLUTION OF MARITAL RAPE LAWS OF THE UK, USA AND AUSTRALIA AND THE LESSONS FOR INDIA TO BE LEARNT

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ABSTRACT

Marriage is such a bond where two unrelated persons are tied into a sacred union. The Feminist movement all over the world has allegedly given a strong blow to this sacrosanct institution by contesting the absolutism of conjugal rights of the parties over each other basing their arguments on the concept of consent and basic human rights. This paper explores the evolution of the concept of criminalising marital rape across the developed nations of the UK, the USA and Australia and compares it with that of India. India is where marriages in almost all cultures, across all religions, are regarded as a ceremonial, religious and sacramental institution with some aspect of a contractual relationship involved, enforcing the liberal thought of criminalising marital rape is often met with strong arguments from both sides. This paper delves into the arguments put forth by the sides, analyses them in light of the evolution of marital rape laws in the abovementioned countries and attempts at reaching a solution.

INTRODUCTION

With the rise of the feminist movement and greater awareness of gender rights many age-old beliefs, practices, and laws are being challenged and reformed. Nowhere is this churn more visible than in India post the horrific Delhi gang rape and murder case of 2012. Gender rights especially, reforms related to rape and sexual violence have become a hotly contested topic. One such issue in regards to rape laws has been the marital exception given in section 375[2] exception 2, of the Indian Penal Code, 1860. One of the most frequent argumentsgiven in favour of criminalising marital rape is that it has been criminalized in most developed and

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[2] Indian Penal Code, section 375, exception clause

developing countries (150 as of 2019)[3] and India by keeping it non-criminalized gets the undignified distinction of being part of the comity of nations withgender-related regressive practices like Saudi Arabia, Iran, and Afghanistan. The next argument that goes up for a debate is where do we draw the line between two women, one subjected to forced sexual assault by a stranger and another, by her husband. The quick answer that comes from the 'protectors of tradition' is *'marriage in itself is a proof of 'consent'*. This argument, up to an extent, though not completely, holds good for developed countries where marriage is essentially based on the idea of partners being in love and consenting to the union but when the culture of the Indian sub-continent comes into the picture, the reality is, most marriages here are performed with the consent of families more than the consent of the parties to a marriage. In such a scenario, the need to criminalise a bond made out of force and more than that, the need to criminalise forced sexual assault in such a union becomes a subject of utmost importance. Additionally, as a society, we must also focus on developing and inculcating the concept of consent into the minds of those who dwell in it to eradicate the evil from the roots and not just keep filling the jail cells.

This opinion article is an attempt to explain the evolution of marital rape laws and the current legal status of select few countries that have a striking resemblance to developing Indian society to have a more informed and nuanced debate over the issue.

REFLECTING ON THE LAWS GOVERNING MARITAL RAPE IN DEVELOPED NATIONS

Britain and the English common law

The concept of conjugal rights available to spouses against each other is not an old one. Many cultures and legal systems have had these rights. The English common law in force in the British Commonwealth and North American 17th century was no exception. Under it, the event of a husband having ‘forceful’ sexual intercourse or committing marital rape on his wife was treated as an impossibility.

It was widely believed that marriage gives birth to conjugal rights of a nature that cannot be annulled except by a private act of Parliament - thus a spouse has no authority to rescind the conjugal rights from the marriage only to conclude that there can be no scrape between a

[3]Sylvia Walby, "Stopping Rape: Towards a Comprehensive Policy" 2015, pg. 123.

married couple. Marriage thus gets defined not as an exception but rather as a contradiction to rape[4].

This understanding of marital rape continued to be in vogue with some minor changes[5] for a long period. However, with the advent of second-wave feminism, as issues of sexual autonomy and gender equality gained prominence, this understanding underwent significant reform. Throughout the twentieth century, the exemption of marital rape underwent significant narrowing[67]. In *R v. Clarker* (1949)[8], a husband who raped his estranged wife was held guilty of rape and an injunction order was issued against him. Similarly, in *R v. Steele* (1976)[9] the husband was held guilty of molesting his wife. This was followed by many judges expressing doubts over the traditional understanding of marriage put forward by the likes of Hale[10] and Archbold[11].

The final nail in the coffin of marital rape exception was put in *R v. R* (1991)[12] where the House of Lords reasoned that "the definition of marriage has moved forward in time to marriage being a contract among equal partners from that of Hale's time where the woman was always subservient to the man in a marriage."The reasoning of this case was taken from *Stallard v HM Advocate* 1989[13]. The marital rape exemption was declared 'anachronistic' and 'a common law friction' and was thus criminalised in Britain.

United States of America

The USA on gaining Independence followed similar laws as prevalent in the British Isles. Women were devoid of any personal autonomy and except for scant few rights and were generally accepted as subordinates of the men of their house. The historical strong influence of Christianity in the United States also had a key role to play inthe protection of marital rape.

[4]"A Treatise of the Pleas of the Crown" - Edward Hyde East.
[5] R v Clarence (1888) 22 QBD 23
[6] R v. O'Brien [1974] 3 All ER 663
[7] R v Roberts [1986] Crim LR 188
[8] R v Clarker [1949] 2 All ER 448
[9] R v Steele (1976) 65 Cr App R 22
[10] Sir Matthew Hale, "HistoriaPlacitorumCoronæ: The History of the Pleas of Crown, Volume 2"Published on 27 Oct. 2021, http://lawlibrary.wm.edu/wythepedia/index.php/History_of_the_Pleas_of_the_Crown.
[11]John Frederick Archbold "Archbold, pleading, evidence, and practice in criminal cases" 1822 https://www.amazon.com/Archbold-pleading-evidence-practice-criminal/dp/1561691097.
[12] R v R [1992] 1 AC 599
[13] Stallard v HM Advocate 1989 S.C.C.R. 248

Scholars opined that the concepts like 'conjugal debt'[14] which indebts a spouse to have sexual relations with the other, was a clear rejection of accepting the possibility of marital rape.

This norm of considering women as subordinates of men begin to face some challenges in the 19th century[15]. Feminist movements actively challenged the presumed right of meant to engage in forced sex with their wife. Suffragists like Elizabeth Cady Canton considered woman's "ability to control marital sex as a core component of equality"[16]. Thus, personal freedom and social equity were linked to political rights this amount of outspokenness in the nineteenth century was remarkable considering the taboo against public discussion of sexuality. But these movements meet only limited success, as while they managed to gain political autonomy, sexual freedom especially forthe wife in regards to her husband was denied and marital rape continued to be exempted from ordinary rape laws[17]. *Oregon v. Rideout* (1978)[18] became the first-ever case in the States where a man was charged withraping his wife while they were still living together. While the man was acquitted of the charges, it spurred a wave of reform across the country.[19] with many American states allowing prosecution for spousal rape. Through the revision of rape laws by the legislature in some states (Oregon) and reformist judgement by courts in others (like New York)[20], a married American woman was given the same rights concerning control of her own body as her unmarried counterpart. By the time it was 1993, all States of the United States of America had withdrawn the exceptions provided under the law against marital rape.

Despite progress made over the years, marital rape is treated the same as non-marital rape in only 17 states. In most states, marital rape continues to be a 'milder' crime with less severe penalties, a blanket exemption in case of no violence, or a shorter reporting period[21]. The lack of uniformity in rape laws in different states is a major factor in hindering the progress towards the uniform treatment of rape victims in the United States. As such the fight for justice for marital rape victims in the US is still a continuing one.

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[14] 1 Corinthians 7:3-5
[15]Catherine Helen Palczewski. "Voltairine de Cleyre: Sexual Slavery and Sexual Pleasure in the Nineteenth Century." NWSA Journal, vol. 7, no. 3, The Johns Hopkins University Press, 1995, pp. 54–68.
[16] Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," 88 California Law Review 1373 (2000).
[17] Model Penal Code, 1962
[18]"Oregon v. Rideout - Significance, Does Marriage Mean ...." https://law.jrank.org/pages/13228/Oregon-v-Rideout.html.
[19] Rape and Marriage: A look back at the Rideout case, 1980.
[20] New York Court of Appeals case People v. Liberta, 64 N.Y.2d 152
[21] L Schafran, S Lopez-Boy and M Davis; Making Marital Rape a crime: A long road travelled, a long way to go (2009)

Australia

The history and evolution of marital rape laws in Australia are in some ways similar while in other ways different from Britain and USA. Australia just like the United States derived the exception provided to marital rape in rape laws from British common law. Here was a society that used to function on the axiom that "rape and marriage are contradictory". Sexual Intercourse between the spouses was given a contractual meaning wherein there existed a pre-determined agreement among the parties to engage in sexual intercourse with one another without one spouse claiming they were not interested or that they never consented to it. With the veil of marriage being enough to legitimise the most heinous sexual trespasses, consent was a nonentity[22].

With the rising rates of divorce in the mid-20th century, a conundrum arose as to what point during divorce proceedings would a woman be no longer expected to fulfil her wifely duties? The debate and judicial pronouncements around this issue started to dwindle the scope of absolute immunity given to a spouse in matters of sex with each other. However, these rulings were too circumspect and generally tried not to challengethe conjugal rights of spouses or the expectation of sexual intercourse as one of the implied duties to be fulfilled in a marriage[23].

By the 1970s, such views (sex as a core of marriage) became increasingly difficult to maintain. With clamour rising for socio-legal protection in case of domestic violence, the facet of including sexual violence from spouse under domestic violence or of it as a separate category also arose. The state of South Australia eventually commissioned a report by Justice Roma Mitchell, to investigate a wide range of issues related to sexual violence including marital rape. Surprisingly, neither the mainstream feminist organisations nor the Mitchell reports sought to criminalise marital rape. While all of them condemned considering marital contract as a 'Right to Sex', none of them tried to treat assault of sexual nature in a marriage similar to assault of such naturally occurring outside marriage[24].

Here, it is worth noting that unlike its counterpart in UK and USA, the politicians of Australia did not dally and instead sought to change the laws despite a lack of support from wider

[22]Easteal, Patricia Weiser. "Balancing the Scales: Rape, Law Reform and Australian Culture." (1998).
[23] 'Lisa Featherstone, 'Rape in Marriage: Why was it so hard to criminalise sexual violence? Australian Women's History Network, December 2016.
[24] Featherstone, Lisa. (2017). 'That's What Being A Woman Is For': Opposition To Marital Rape Law Reform In Late Twentieth-Century Australia: Opposition To Marital Rape Law Reform In Late Twentieth-Century Australia. Gender & History. 29. 87-103. 10.1111/1468-0424.12281.

society. For instance, in 1976 the state of South Australia's government not only rejected the Mitchell report's moderate take on spousal rape but sought to remove immunity even while spouses still stayed together[25]. This incident sparked a wave of reforms with other states enacting similar laws. The Northern Territory 1994 became the last state of Australia to criminalize marital rape.

ANALYSING INDIA'S SITUATION OF MARITAL VIOLENCE AND DRAWING A CONCLUSION.

British Philosopher, Bertrand Russell in his book Marriage and Morals[26]remarked that "Marriage is for women the commonest mode of livelihood, and the total amount of undesired sex endured by women is probably greater in marriage than in prostitution." Most people reading this will probably consider it a gross exaggeration on Russell's part, but anyone in touch with statistics published by National Family Health Survey[27] would do nothing but node his/her head sombrely. Despite the large-scale awareness being generated in regards to rape, eve-teasing, and domestic violence, these crimes continue to be widespread. Manypeople, including women (as per the National Family Health Survey, 52% of women and 42% of men) still consider it right for a husband to physically hit his wife[28]. For a crime like marital rape which has not even obtained statutory protection, the data, if one ever gets collected at all will be even more horrific. It pains to even imagine how many women are forced to concede to the sexual advances of their husbands whether they desire it or not. To be violated and abused by the person who is supposed to be your ' life partner' and then for the law and society to not even deny your pain but also the fact that any abuse ever happened must be the most horrific combination of physical and mental scarring any person has to endure in 21st century India.

Despite the evident need, the opposition to the criminalisation of marital rape in India is significant. It majorly comes in three forms, i.e., the fear of damage to the institution of marriage, the 'vengeful wife', and the difficulty of obtaining pieces of evidence which may range from difficult to impossible in some cases.

[25] "Marital rape included in NSW sex-assault laws" Canberra Times, November 26, 1980. https://trove.nla.gov.au/newspaper/article/126160623
[26]"Bertrand Russell: Marriage and Morals, 1929 - full text." https://russell-j.com/beginner/MaM1929-TEXT.HTM.
[27] National Family Health Survey 2004-05
[28] National Family Health Survey-4 (2015-2016)

Not surprisingly these were the same arguments given against dowry prohibition, against penalising domestic violence, and long ago even against the implementation of the Hindu Code Bill. This just goes to show that the opposition is more motivated by their inherent patriarchal and misogynistic bias than out of any real concern for the institution of marriage. The Indian legal situation regarding marital rape is still in the early stages of development, with a contradiction between the conventional patriarchal attitude and the contemporary, liberal, and feminist perspectives visible. The lack of a specified legal code to punish marital rape, as well as the spousal exemption under section 375 of the Indian Penal Code, has recently drawn widespread criticism in the form of proposed revisions and enactments by active organisations working in the public interest. Another unsolved tension may be seen between the marital right to sexual intimacy and the idea of rape, which is a never-ending cul-de-sac in and of itself. The abovementioned 'vengeful wife' argument is a classic in itself too and in our opinion, a seemingly reasonable one. The gender-specific rape laws stating that there exist only two classes of people – the man and the woman and it is only the woman who can be raped, is in itself a flawed and outdated law. The law in that regard *prima facie* refuses to acknowledge the sex-related violence faced by men and gender-fluid persons and thus gives rise to harsh criticism and opposition of "why should men be the victim of malicious prosecution by women with ulterior motives?". The dilemma of protecting women from abusive marriages and also keeping together the institution of marriage intact raises pressure on the legislature to take an unambiguous stand.

Not all is lost though. On observing the previous three countries it becomes clear that India 2020 is at the same praecipe as US, UK, and Australia were in the 1970s and 80s. Civil society and NGOs have been trying hard for recognising marital rape as a crime and while some optimistic judgement like *Independent Thought v/s Union of India (2017)*[29] kindle hope, there is still a long way to go. Marital rape is recently in talks again between the judiciary, government and the general public as seen in the ongoing litigation at the High Court of Delhi wherein on 21 February 2022, HC refused to grant more time to the central government to present its stand on the criminalisation of marital rape. Again, on May 11, 2022, a split judgement[30] was pronounced by the division bench of the High Court of Delhi regarding the criminalisation of marital rape in India. While Justice Rajiv Shakdher, favouring the strike down the infamous exception clause 2 of section 376, opined that

[29] Independent Thought v/s Union of India (2017) 10 SCC 800
[30] RIT Foundation v. UOI and other connected matters, 2022 LiveLaw (Del) 433

husbands forcing themselves on their wives deserved no protection under the clause, their act being violative of Articles 14, 19 and 21 of the Constitution with respect of the wives, Justice Hari Shankar remarked that expectation of conjugal relation forms the very essence of marriage and the exception clause did not violate the contested fundamental rights thus making the issue finally knock the doors of Apex Court.

India is yet to have a case like the UK had in *R v. R*(1991) or the US had in *Oregon v. Rideout* (1978). There is also a sizeable opportunity for the legislature to become an active agent of change like the state of South Australia did in 1976 instead of being a passive bystander. The best time to do the right thing was yesterday second-best time is now. The preamble of our constitution promises 'Justice, social-economic and political' to all its citizens, and we ought to fulfil that promise to every married woman of India by removing Exception 2, Section 375, Indian Penal Code, 1860.