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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

"I DO BUT I DON'T: EXAMINING CONSENT AND CRIMINALITY IN MATRIMONY"

AUTHORED BY - LIPI RASTOGI

The Supreme Court of India has scheduled March 21, 2023 as the day to consider the pleas concerning constitutional validity of the Marital Rape exception. The issue stems from the second exception to section 375¹ of the Indian Penal Code, which indicates that any sexual activity carried out by a man with his spouse, consensual or otherwise, does not qualify as rape if the wife has attained the age of majority.² This exception is built on the inherent expectation of sex that marriage entails in Indian culture along with the colonial-era doctrine of consent in perpetuity, which means that a married woman is presumed to have consented to sex forever and cannot withdraw it.

The criminalization of marital rape was recommended by the much-lauded J.S. Verma Committee in 2013; however, it was not incorporated in the subsequent Criminal Law (Amendment) Act, 2013. As of today, marital rape has been criminalized by 150 countries – some jurisdictions explicitly outlaw marital rape, while others do not differentiate between rape committed by a spouse or another individual.³ Criminalization of marital rape in India is a necessity as evidenced by the distressing statistics released by the fifth National Family Health Survey.⁴ In India, approximately one-fifth of married women feel compelled to engage in sexual intercourse with their husbands even if they don't want to. Of the married women between the ages of 18 and 49 who have experienced sexual violence, 83% report that their current husband was the perpetrator, while 13% report that it was their former husband. This is hardly surprising, considering the fact that 6% of men between the ages of 15 and 49 believe that they have the right to use force to have sex with their wives, refuse to provide financial support, get angry with their wives, and have sex with other women if their wives refuse to have sex with them. Additionally, 19% of men believe that they have the right to reprimand their wives if they

¹ (Indian Penal Code, s 375).

² Padmakshi Sharma, Plea To Criminalise Marital Rape *Livelaw* (16 Jan 2023).

³ Jejeebhoy, S. J., K. G. Santhya and R. Acharya, *Health and social consequences of marital violence: A synthesis of evidence from India* New Delhi: Population Council and UNFPA (2010).

⁴ Ministry of Health & Family Welfare *National Family Health Survey (MFHS-5)* (2019-2021) <https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf> accessed on March 17, 2023.

refuse to have sex.⁵

This paper thus seeks to adopt an intertextual approach to analyze the current Indian jurisprudence on marital rape through the lens of different schools of feminist thought.

Through the lens of mainstream feminism

With origins in the 18th and 19th century struggle for socio-political reforms aimed at achieving gender equality, mainstream/liberal feminism has evolved through four metaphorical waves. The first wave focused on securing legal rights and suffrage for women.⁶ Disturbingly enough, the present-day Indian laws on marital rape would have met with much criticism even by first wave feminists such as Mary Wollstonecraft and John Stuart Mill. In her feminist treatise⁷, Wollstonecraft talks about the role women are expected to play in men's lives and writes acerbically, "*Women were created to be the toy of man, his rattle, and it must jingle in his ears, whenever, dismissing reason, he chooses to be amused.*" The doctrine of 'consent in perpetuity' is essentially built upon this principle because it assumes that marriage gives men the right to demand sex from their wives as and when they please. It assumes a chattel-like subservience of women, which would have been heavily criticized heavily by Wollstonecraft, who like other Enlightenment era thinkers, believed in reason, individualism, self-determination, and the natural rights doctrine. She famously referred to the institution of marriage as "legal prostitution" and in the context of Exception 2 to section 375, she is not far off.

In his essay '*The Subjection of Women*',⁸ J.S. Mill likened existing marriage laws of his time to the enslavement of women, stating that "the mistress of every house" is the only legal slave remaining. True to his utilitarian philosophy, Mill advocated for changes to marriage legislation, proposing that it be transformed into a simple business agreement without any limitations on the freedom of either party. He argued for the liberty of citizens to govern their own affairs and for representative governments to make legislation that follows from the decisions of the masses for the common good. In light of this, he would unequivocally have been opposed to the second exception to section 375.

⁵ *Id.*

⁶ Rosemarie Tong, *Feminist Thought: A more comprehensive introduction* (2013).

⁷ Mary Wollstonecraft, *A Vindication of the Rights of Woman* (Penguin Classics 1792).

⁸ John Stuart Mill, *The Subjection of Women* (Longmans 1869).

The second wave of feminism, which originated against the backdrop of the 1960s, expanded the feminist discourse to criticize systemic male hegemony and the issues of marital rape and domestic violence.⁹ Betty Friedan, in her 1963 book *The Feminine Mystique*,¹⁰ focused on the pervasive dissatisfaction and stunted development of housewives and argued that it resulted from the cultural misconception that a woman can only find fulfillment through marriage. Quite revolutionarily, she highlighted the increasing number of affairs that women of the time had as their husbands were unable to gratify their desires.

In view of this critique, one must note that the marital rape exception in India has been defined from the vantage point of a man – who he can and cannot have sex with. However, as Friedan reminds us, women are also innately sexual creatures, and they possess the right of choice – a choice that is not always their husband. The existence of the married woman's choice is thus at odds with the doctrine of consent in perpetuity because women may revoke their consent at any time and give it to someone outside their marriage.

This line of reasoning follows from that of Simone de Beauvoir¹¹ who wrote that man is considered the default, while woman is considered the "Other". "Thus, humanity is male, and man defines woman not herself, but as relative to him." Beauvoir opined that marriage is a perverted institution that served to oppress both men and women. She would likely view the marital rape exception in India as a manifestation of the pervasive cultural and social norms that subordinate women and perpetuate gender inequality.

The third wave of feminism, which emerged in the 1990s as a response to the perceived limitations of the second wave, encompassed intersectionality, sex positivity, and placed emphasis on individualism.¹² One of its earliest proponents, Judith Butler, presented a different perspective on marriage by asserting that it served as a tool for the State to validate and invalidate sexual relationships. Throughout history, marriage has been the sole location where women could engage in socially and legally acceptable sexual behavior. The exception for marital rape allows husbands to exercise control over their wives' sexual, emotional, and physical autonomy, thereby preserving the

⁹ *Id* (n6).

¹⁰ Betty Friedan, *The Feminine Mystique* (W. W. Norton 1963).

¹¹ Simone de Beauvoir, *The Second Sex* (1949).

¹² *Id* (n6).

traditional structure of marriage and, in turn, maintaining patriarchal social mores. Thus, according to Butler's concept of gender performativity, the present law fails to challenge the standard notion of gender as a cultural construction of biological sex, thereby sustaining what Butler terms "heterosexual hegemony."¹³

The fourth wave in the postcolonial Indian context

The fourth wave of feminism is characterized by a focus on intersectionality, inclusivity, and the use of digital media for activism. This wave emerged in response to ongoing gender inequality and the lack of progress in previous waves, particularly with regard to the experiences of women of color, LGBTQ+ individuals, and those with disabilities. The fourth wave in the Indian context is especially conscious of the interlocking of class, caste, color, sexuality, and gender in its treatment of feminist discourse.¹⁴ This is crucial considering the NFHS-5 concluded that education and wealth are significant factors in the incidence of sexual violence against married women. Those with less education and lower wealth are more likely to experience such violence.

Indian developmental feminist activist Kamla Bhasin notes that violence, sexual or otherwise, in marriages is extremely common for the lower economic strata; however, the issue is only reported when it concerns members of the middle and upper class.¹⁵ The ideological underpinnings of present-day Indian feminism may be best found in Nivedita Menon's book '*Seeing Like a Feminist*',¹⁶ in which Menon urges readers to question the traditionalist and patriarchal structures of marriage and family within which women suffer. She also warns against the domestication of gender through state policy and places emphasis on the fluidity of gender and the political nature of our bodies. She points out that the "*patrilineal and virilocal*" form of marriage prevalent today is not even Indian per se but based on upper-caste North-Indian patriarchal norms that gained popularity only during British rule. It is common in Indian jurisprudence to acquit rapists because the victim was not a virgin. It is also common in Indian society for rape victims to be married off to their abusers to legitimize the harm. This is telling of the incapability of Indian Courts to comprehend female sexuality as divorced from

¹³ Elena Loizidou, *The Trouble with Rape: Gender Matters and Legal Transformations*. *Feminist Legal Studies* 7, 275–297 (1999).

¹⁴ Saumya Uma, *South Asian feminist engagements with law: Some explorations in the context of violence against women* *Jindal Global Law Review* 10, 197–221 (2019).

¹⁵ Shoumik Hassin, 'Rape is crime of power used to control women' *BDDNews24* (20 May 2017).

¹⁶ Nivedita Menon, *Seeing Like a Feminist* (Penguin India 2012).

the institution of marriage. Marital rape is a nullity because a wife is not a virgin, she has already had sex and therefore she must be a whore who would not object to further impositions of sex, forceful or otherwise. It is also a nullity because she is married to her abuser which must mean she suffers no shame or injury.

Srimati Basu concedes that the apprehensions of Indian men regarding false accusations and misuse of marital rape provisions are not without merit. Basu's theory, echoing Menon, is that this is the result of systemically entrenched patriarchy in the Court system that presumes female passivity, docility and victimhood and repunctuates how the patriarchy hurts both men and women.¹⁷

Such feminist ideas have been gaining ground within the legal fraternity of late as is evident from the Court's censure of 'implied marital consent' in *Nimeshbhai Bharatbhai Desai v. State of Gujarat (2018)*.¹⁸ It explained that "dehumanised treatment of women will not be considered acceptable" and that "marital rape is not a privilege of the male partner in a marriage, but instead a violent conduct and an unfair treatment that should be criminalized." Furthermore, the 3-judge bench of the SC considering the issue of marital rape consists of J. DY Chandrachud who has made it known previously that he believes the freedom to say no to intercourse must exist even after marriage.¹⁹

The Radical Feminism Perspective

Leading American radical feminist Catherine MacKinnon postulates that gender and sexuality are intertwined in a clash of powers.²⁰ The male is dominant, and the female is submissive. Thus, sex is inherently oppressive and leads to gender inequality. Feminist epistemology is essentially a critique of this power imbalance because the male perspective is imposed on the world as the dominant way of understanding it; it is hegemonic and consequently, normative.

She observes that there is a dichotomous perception of rape within feminist circles – one views rape as an act of violence, not sexuality, which is used to intimidate women; the other views rape as an expression of male sexuality, where male dominance and power define the social imperative for all

¹⁷ Srimati Basu, *Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory*, Feminist Studies , (Spring 2011) pp. 185-211.

¹⁸ SCC OnLine Guj 732, [128] 65.

¹⁹ Zoya Hussain, Indian Legislature's Stand About Marital Rape *Indiatimes* (Jul 21, 2022).

²⁰ Catherine Mackinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence', (1983) 8 Signs 635-658.

women. MacKinnon supports the latter view as being more feminist because “where the legal system has seen the intercourse in rape, victims see the rape in intercourse.” To the heterosexual male, sexuality is inherently violent – a force of domination over women’s will, simultaneously a tool of female subjugation as well as a means to control female sexuality. MacKinnon suggests that in order to understand the problem with rape, we need to understand what is different about it compared to consensual sex. However, this can be difficult, and the fact that men struggle to differentiate between the two is telling. She notes that the difficulty in articulating the wrongness of rape may be because rape is often defined as distinct from intercourse, when in reality it can be difficult for women to distinguish the two under conditions of male dominance.

She vociferously asserts the dubious intentions of marital rape law: little girls are not legally allowed to give consent, while wives are expected to do so. The Law carelessly presupposes the unconsenting, virginal, rapable nature of the former as opposed to the consenting, impure, rapable nature of the latter. The delimitation of women’s consent along age lines perpetuates a state of sexual coercion that women can never escape from. This is evinced through Section 376A of the IPC²¹ which outlines the punishment for raping a separated wife as less severe (2 to 7 years) than that for raping any other woman (7 or more years).

There is a heteronormative ideological imposition of the belief that rape cannot be committed by someone familiar to the woman. At the very least, that rape committed by a known is not as egregious as that committed by a stranger. The fact of the matter is that to be raped by someone you trusted is a much greater transgression and represents a profound breach of trust for women. MacKinnon artfully elucidates the conundrum with defining rape as mere violence by stating that “*assault consented to is still assault, rape consented to is sex.*” Women’s experiences of rape will not be recognized as a violation until society acknowledges that sex and violence are inherently linked. For now, the stance of the Law on marital rape indicates to women that rape is not prohibited, it is merely *regulated*. It invalidates the experiences of all married women who have been raped by their husbands by assuming that they are not capable of being raped in the first place; that their trauma must be treated as normal conjugal relations between a husband and wife.

²¹ (Indian Penal Code, s 376A).

Therein lies the dilemma of considering marital rape from the viewpoint of masculinist jurisprudence: the average man is incapable of differentiating between a consenting and a non-consenting woman. Rapists tend to believe that their victims secretly enjoyed the act. Furthermore, the fear of Indian men's rights protestors²² regarding false rape accusations stems from the fact that men cannot control the meaning of sexual encounters to women, and accusations of rape threaten their sense of control over the situation. We may even accede that men's incorrect perception of consent may serve as a defense that they had no *mens rea* to commit rape. Here, MacKinnon entreats us to re-examine why men's perception must dictate the determination of a rape. Whose perspective and interests are being considered when a law allows one person's biased awareness to override another person's lived experience of being violated? This aspect of the rape law highlights the gender inequality in Indian society, not just in recognizing sexual assault from the viewpoint of the perpetrator, but also in rewarding men with acquittals for not understanding women's perspectives on sexual encounters.

Discarding the violence-sexuality dichotomy entirely, legal scholar Robin West says that unwanted intercourse is "harmful" because it is invasive, not because it is (necessarily) violent.²³ In the tradition of radical feminism, she advocates strongly for the complete abolition of patriarchy as a *sine qua non* to achieve true feminist jurisprudence because the hamartia of patriarchal legal doctrine is that it fundamentally differs in its understanding of human nature from that of feminist theory. Feminists give considerable importance to the humanity of women; which is not adequately recognized by the law.

In the context of marital rape, West stresses on the need for reconstructive feminist jurisprudence that voices women's subjective perspectives of their lived realities so that feminist legal reforms may accurately gauge the impact the Law has on nearly half the human population. Wives essentially live outside the ambit of rape law and thus, there is a pressing need to show the harm of invasive intercourse even though it might be hard for men to fully appreciate its dangers. She draws on the works of Susan Estrich, Diana Russell, and others to show the substandard position of a "wife" within a legal system that defines rape merely as nonconsensual intercourse by a man with a woman *not his wife*.

²² Payal Gwalani, Men's rights activists threaten hunger strike against marital rape PIL in SC, *HindustanTimes* (Feb 27, 2023).

²³ Robin West 'Jurisprudence and Gender' (1988) 55 University of Chicago Law Review 1.

Radical feminism says that the important difference between men and women is that *women get fucked and men fuck*. Intercourse is described as an invasion of the female self and as a source of oppression. Prominent radical feminist Andrea Dworkin²⁴ says that a woman's body is often viewed as penetrable during sexual intercourse, contradicting the solidity and wholeness of her physical being. Pursuing this line of thought, one must also acknowledge that intercourse tends to result in pregnancies; in the case of marital rape – unwanted pregnancies – and these too have been described by Dworkin as intrusive, violative, and restrictive of women's mental, emotional, and physical freedoms as a child tends to completely change the trajectory of women's lives. In deciding the verdict on marital rape, the Indian Supreme Court must look to the views of radical feminists to better understand the perspectives of the ones this Law will invariably affect.

The Marxist-Socialist Feminist Perspective

Scholars who draw on Marxist socialist feminist theory suggest that capitalism and patriarchy are mutually reinforcing, and that the oppression of women is rooted in the economic and social structures that capitalism creates. This approach posits that women's oppression cannot be understood in isolation from class exploitation and economic inequality, as these factors are deeply intertwined.

In her book "*Why Women Have Better Sex Under Socialism*",²⁵ Kristen Ghodsee discusses the issue of marital rape and argues that the concept of marital rape is a relatively recent one, emerging only in the late 20th century. She notes that the idea of women having the right to refuse sex with their husbands, even in marriage, is a relatively new development in human history and that socialist societies have been more successful in addressing the issue of marital rape than capitalist societies. She points out that in socialist societies, the state has played a more active role in protecting women's rights and promoting gender equality, and this has led to more progressive attitudes toward sex and sexuality.

Another key figure in socialist feminism is Iris Young who famously presented the "five faces of oppression"²⁶ which comprised of exploitation, marginalization, powerlessness, cultural domination,

²⁴ Andrea Dworkin, *Pornography : men possessing women* (Women's Press, London, 1981).

²⁵ Kristen Ghodsee, *Why Women Have Better Sex Under Socialism* (2018).

²⁶ Iris Young, *Justice and the politics of difference* (1990).

and violence. In her seminal work, Young proposes a model of justice that recognizes and affirms the differences among individuals and groups, rather than seeking to erase them. This model stresses the need for collective action and solidarity across marginalized groups. India prides itself on its socialist philosophy, as enshrined in the Preamble, and application of Young's model in the Indian context would thus entail working toward the democratization of political and economic systems, and advocating for policies that challenge gender-based discrimination and violence.

The Postmodern Take on Marital Rape

Postmodern feminism is a theoretical framework that combines elements of post-structuralism, postmodernism, and French feminism. Feminist scholars of the poststructuralist tradition such as Julia Kristeva, Luce Irigaray, and Helene Cixous have developed the concept of "*écriture féminine*" to celebrate the qualities of women's writing and to challenge male-dominated discourse, questioning the literary canon and exploring how gender differences are constructed through language. Poststructuralist feminism has therefore sought to assert women's sexual pleasure, challenge oppressive language, and liberate women from patriarchal oppression through strategies such as *jouissance*, play, metamorphic mobility, and transgression.

In 1975, Helene Cixous published an essay titled "The Laugh of the Medusa" to introduce a new theoretical concept that aimed to empower feminist voice. In it, critical of Freud's theory of penis envy, Cixous propounds that Freud has established a dangerous bias against women based on biology. She argues that writing has been historically tied to reason and phallogocentric tradition, with language being prioritized as a tool for men to express themselves. This has resulted in other forms of language, including women's language, being marginalized and considered insignificant. Cixous proposes that women should reclaim their sexuality and use it to establish a new perspective on language and writing that challenges phallogocentric (admixture of phallogocentric and logocentric) concepts and controls. By doing so, women can dismantle the patriarchal structures that have dominated literature and language for centuries.

In light of this, one may consider the argument of countries that do not recognize the concept of marital rape. To them, it is etymologically redundant since the verb "to rape" from the Latin "*rapere*" meant "to steal" or "to seize and carry off". The term further evolved during the Middle Ages to mean "violent abduction of a woman for the purpose of forced coitus". The argument thus questions how it

is possible for a husband “to steal” or “abduct” that which he already “owns” (his wife). Thus, we see how language implies a reductive approach to and minimizes women’s issues. This same language informs the worldview of the masses and patently makes its way into codified laws as it has in India.

Conclusion

Those who reject the criminalization of marital rape frequently cite section 498A as an alternative. It was originally created to address cases of cruelty against women, but it is insufficient for two reasons. Firstly, there is a significant difference between the nature of cruelty and the act of rape. Secondly, as is delineated by the various schools of feminist jurisprudence, it is inadequate for dealing with rape cases.

This author subscribes to the viewpoint of esteemed human rights lawyer Vrinda Grover who rightly asked why changes in every law on rape and sexual assault require amending a 155-year old colonial law. She submits that instead of continuously tinkering with the existing criminal law on rape, we need a freshly drafted legislation that reflects contemporary understandings. That a feminist practice of justice should be ready to play off eclectically, various systems of regulation against one another depending on the situation – laws against rules, rules against laws, judicial orders against government. The author suggests a model for making marital rape a criminal offense through a four-pronged approach. Firstly, the exception clause must be removed. Secondly, the SC must clarify that a marital relationship between the accused and the victim cannot be used as a defense. Thirdly, the sentencing policy for marital rape should be consistent with other forms of rape. Lastly, the Evidence Act must be suitably amended to address the unique challenges of prosecuting cases of marital rape.²⁷

²⁷ Raveena Rao Kallakuru , *Criminalisation of Marital Rape in India* (2018).