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No Country for (Married) Women

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'A culture where the rights of women and sexual and gender minorities can be wholly erased without even having to defend such a move clearly shows where the centre of power lies, and how it views those at the margins. '

A recent judgment of the Chhattisgarh High Court in *Gorakhnath Sharma v. State*, has been widely criticised for its outcome: the acquittal of a man accused of the death of his wife following injuries from forceful anal penetration.

Apart from how the court employed the problematic marital rape exception to ensure an acquittal in this case, the decision in *Gorakhnath* is concerning because it is symptomatic of a flaw in the culture of legal thinking around the law of sexual assault, particularly within marriage. This is a problem engendered in the way we conceptualise bodily autonomy of a married woman within the bounds of marriage, and therefore is also a methodological flaw, particularly of legal reasoning. Viewed in this light, the *Gorakhnath* decision is not an outlier, but the outcome of persistent structures in the service of patriarchal interests in the law.

These problems have been compounded by the opacity with which criminal law reform has occurred in recent years, particularly the enactment of the Bharatiya Nyaya Sanhita, 2024 (BNS) which has rendered married women without recourse to any kind of marital penetrative sexual assault. A judgment such as *Gorakhnath* becomes possible due to the entrenched legal culture surrounding issues of marital rape, and therefore, is far more concerning than just the individual outcome in the case.

The marital rape exception

The definition of “rape” in the Indian Penal Code (IPC) provides an exception for married men having sexual intercourse with their wives.[1] Such intercourse cannot amount to rape even when done without the consent or against the will of his wife, as long as she was not a minor. This has been criticised as being antiquated, antithetical to equality and to the rights of dignity and bodily autonomy of women.

> Gorakhnath is an example of how law reform, aimed at protecting women, may be subverted to serve interests inimical to them.

The constitutionality of the exception has been challenged and is pending adjudication by the Supreme Court. The government of India has defended the exception and legislative opinion has been strongly opposed to making marital rape a criminal offence. In the meantime, the newly enacted BNS, which replaced the IPC, carried forward the same marital rape exception into its provisions. Therefore, the litigation now is effectively on the constitutionality of the BNS’ provisions.

On the other hand, law reform efforts have led to broadening the scope of acts that can be definitionally considered 'rape'. The reform of rape law in 2013 followed the horrific New Delhi gang-rape and murder and was accompanied by the Justice Verma Committee’s recommendations. Whereas initially the law only recognised peno-vaginal sexual intercourse as potentially constituting rape, the scope was broadened to include non-consensual penetration of the vagina, mouth, anus, or urethra with the penis or any other part of the accused’s body or with any object. Additionally, it also recognised oral sex as potentially constitutive of rape. However this reform too did not alter the marital rape exception in the statute.

Along with the offence of rape, the IPC also criminalised what it termed “unnatural carnal intercourse against the order of nature” under Section 377. The terms used in the section were never clearly defined or set out, but were variously interpreted to mean non-peno-vaginal sex, or sex without any possibility of procreation, or sex between members of the same sex or gender. Consent to the sexual activity was not a defence, but was often used as a mitigating factor in sentencing.

It is instructive to note that the original IPC never extended the marital rape exception to this provision. A husband could, therefore, be prosecuted if he committed an offence under Section 377 on his wife. It is well known that Section 377 was used to persecute, harass, and intimidate queer persons, and after a long legal battle, the Supreme Court read the provision down in its judgment of *Navtej Singh Johar* in 2018, holding that consensual sexual activity between adults of the same sex or gender in private would no longer be an

offence.

Nonconsensual sexual activity, as well as sexual activity with a minor continued to be criminal offences under Section 377. Yet, in an inexplicable legislative move, the BNS removed Section 377 of the IPC in its entirety, and no provision now exists to punish nonconsensual sexual intercourse between members of the same sex or gender in the new code.

The "wife's" body meets a patriarchal legal culture

Gorakhnath involved allegations that the accused forcefully inserted his hand into his wife's anus, causing injuries which led to her death. A trial court convicted the man for recklessly causing death, for rape under Section 376 of the IPC, and for unnatural carnal intercourse under Section 377.

> The marital rape exception effectively insists that women's sexual autonomy within marriage does not exist. No consideration is given to the right to dignity or life.

The high court reversed this conviction. It must be noted that the prosecution evidence in the case, as seen from the high court judgment, was extremely flawed. Prosecution witnesses recanted from their versions in the trial court, leading them to be declared hostile. The executive magistrate who recorded the dying declaration of the victim in hospital admitted to having made statements in addition to what the victim had said. Such contradictions in the prosecution case are often fatal to the chances of securing a conviction, particularly when the case is based on circumstantial evidence.

However, what is particularly concerning is the way the high court expanded the scope of the marital rape exception to cover all forms of penetrative sexual assault committed by a husband on his wife.

Since the 2013 amendment recognised non-peno-vaginal sexual intercourse as potentially constitutive of rape, and an offence under Section 377 may also involve non-peno-vaginal sexual intercourse, the high court held that the marital rape exception for rape would also extend to offences under Section 377. In the words of the judgment, "sexual intercourse or sexual acts by a man with his own wife is not a rape and therefore if any unnatural sex as defined under section 377 is committed by the husband with his wife, then it can also not be treated to be an offence."

The high court's logic indicates that a husband can never be criminally prosecuted for subjecting his wife to any kind of sexual assault covered under the definition of rape. This effectively ensures that the marital rape exception completely negates women's sexual autonomy within marriage. This non-existence of a woman's sexual autonomy extends to all aspects of sexual behaviour, and therefore to all kinds of sexual assault.

By the court's logic, if the wife has no right against being raped by her husband, then she does not have any right against being subjected to sexual assault similar to rape. Since rape by hand or rape by penis does not make a difference under Section 376, why should it make any difference under Section 377? Such an analysis is fully focused on equating the kinds of sexual intercourse, in terms of bodily parts involved, between Section 376 and Section 377. The court gives no consideration to the woman's right to dignity or life.

The reform of rape law in 2013 was intended to broaden the scope of legal protection for women from different forms of sexual assault. *Gorakhnath* is an example of how this law reform may be subverted to achieve a diametrically opposite result. With the reformed rape provisions covering different kinds of sexual activity under its ambit, the high court held that both the doors of Section 376 as well as Section 377 are closed to the victim. [2]

A flaw of method

The entire focus and reasoning of the court raises important questions on the kind of legal culture prevalent around marital sexual assault.

Gorakhnath misdirected the issue for determination by asking a flawed question. The only question before the court was whether the offence had been proved or not. However, to bring it within the marital rape exception, the court converted it into an issue of whether the marital rape exception would apply to the case or not. Further, it single-mindedly focused on the nature of the sexual act involved, and equated it across provisions. It ignored textual and policy reasons to not equate offences under Section 376 to those under Section

377.[3]

This preoccupation with the marital rape exception speaks of a general way of approaching sexual assault charges within marriage, where the predominant concern appears to be the preservation of the marital rape exception. In this light, *Gorakhnath* more than being an outlier in terms of its outcome, is problematic for the way in which it conceptualises the issue. This error, far from being an isolated one, reveals a crucial flaw in the way we think of women's sexual autonomy, which, in this case, is viewed only from the lens of the husband's immunity for sexual assault.

> Greater the variations of sexual assault that are considered rape, higher the number of acts that husbands can commit without punishment.

In a germinal article, Katharine Bartlett (1990) remarked that a question becomes a method when regularly asked. She argued for a methodological intervention called "Asking the Woman Question." Briefly stated, a woman question is an inquiry that uncovers the gender implications of rules and practices that may appear to be neutral. In a case such as *Gorakhnath*, the gender implications of collapsing Section 377 into Section 376 are wholly absent from the judgment. Therefore, there is no consideration except that of the marital rape exception, which is approached as a value neutral principle which deserves to be upheld and expanded. It is this erasure of gender implications from consideration that feminists have persistently critiqued as a flawed legal method that ultimately serves patriarchal interests.

This absence of consideration in the *Gorakhnath* judgment leads to a deeper, consequential problem. A close reading of the judgment shows that the entire issue is reductively treated as a question of the types of sexual assault that a husband can legally commit on his wife. If a wife alleges sexual assault by her husband, the question effectively changes to whether the assault constitutes rape. Then, if the answer is in the affirmative, then the husband has committed no offence due to the exception. Therefore, greater the variations of sexual assault that are considered rape, higher the number of acts that husbands can commit without punishment.

The expansion of the definition of rape was meant to ensure that different kinds of sexual assault could be punished appropriately. The absurdity in the logic of the judgment reverses this effect. Could one perversely argue that, by the court's understanding, a husband who commits the offence of 'cruelty' (Section 498A of the IPC) on his wife can go scot-free if he ensured that the same also amounted to rape?

None of these potential implications are considered by the high court, proving Bartlett's point. Often, the servicing of patriarchal power requires nothing more than an act of unseeing gender implications and not asking the correct question.

The absurd ends of formalism

The judgment of the Chattisgarh High Court is an example of a legal culture that is perhaps reflexively devoted to the protection of patriarchal power and impunity. The court does not ask the simple question of whether what it is about to do would be normatively correct or desirable for criminal adjudication, but employs the most basic formalistic reasoning to reach the quickest conclusion possible. This is then presented as simply the most apparent legal outcome.

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The legal theorist HLA Hart had argued that legal formalism was not necessarily a vice in adjudication, nor was legal activism a necessarily desirable attribute for judges. In the vast majority of cases, he had said, the application of a legal rule to a simple problem provides an adequate solution. However, Hart had also stated that at times, legal problems fell into what could be called the "penumbra of doubt." These problems required judges to apply additional and extra-legal considerations before reaching a conclusion. Here, Hart argued, formalistic thinking would lead to an absurd result. In not even considering arguments from legal history, or even a more nuanced textual interpretation, the high court in *Gorakhnath* reaches an absurd result and perpetuates an unfair position under the guise of being formalistically correct.

We must additionally ask ourselves what perpetuates this legal culture of impunity around marital sexual assault in India. The answer should be located at least partly in the piecemeal and careless drafting of law, which has failed to take into account longstanding

concerns around the working of these provisions. The BNS did not consider high court decisions on the interplay between Section 376 and Section 377 of the IPC and, bizarrely, removed Section 377 in its entirety, effectively ensuring that there was no protection for married women from penetrative sexual assault by their husbands at all. Similarly, same-sex rape is now no longer an offence under the criminal code.

Such fundamental errors could not have been made by a system unless it absolutely shut itself to the questions of the gender implications of what it was proposing to do. The fact that they could be made by expert committees, and that they could be enacted by Parliament, and remain in force without any great consternation again points out the reality of our legal culture. A culture where the rights of women and sexual and gender minorities can be wholly erased without even having to defend such a move clearly shows where the centre of power lies, and how it views those at the margins. But perhaps this has always been evident in the fact that we continue with the marital rape exception well after it has been discarded by modern legal systems across the globe.

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Footnotes:

1 Non consensual sexual intercourse with a separated wife was treated as a crime, but with far lesser punishment than for rape.

2 In doing this, the Chattisgarh High Court also ignored the judgments of two other high courts on this issue. In 2022, the High Court of Karnataka refused to quash rape charges filed by the wife against her husband and directed the framing of additional charges under S.377. Additionally, the interplay of Sections 376 and 377 came to light in a case before the Gujarat High Court in 2018, where the Court held that a husband could not be prosecuted for rape, but that "A wife can initiate proceedings against her husband for unnatural sex under section 377 of the IPC […] Consent is not a determining criterion in the case of unnatural offences and rather any offence which is against the order of nature and can be described as carnal penetration would constitute an offence under section 377 of the IPC."

3 Section 377 was always considered a distinct offence involving none of the reasons that allowed for a marital rape exception. The exception was never extended to offences under Section 377.

References:

Katharine Bartlett (1990) . 'Feminist Legal Methods', *Harvard Law Review* Vol. 103, No. 4: 829–888.