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MARITAL RAPE APPROACHES

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Pati, Patni Aur Woh (Consent)

A careful perusal of literature reveals that feminists across the globe continue to highlight their concerns over law and social reality of rape.[6] *It is undisputed that the number of rape cases in Inpal is dreadfully high, and the threat of rape affects the lives and freedoms of most, if not all women.*[7] *At the outset, it becomes imperative to mention that criminal law perceives the private act of 'sex' as criminal in the absence of 'consent' by the woman. To this end, unequal economic and social setting of the individuals,*[8] *or their masochistic tendencies does not determine the criminal character of sex if the consent has been found to be valid.*[9] *The validity of consent in-turn becomes irrelevant in the classic instance of marriage wherein the submission (consent to sex) of a woman (wife) to her husband is her deemed duty.*[10]

This report reflects on the statutory laws of Inpal encompassing the exception of marital rape as exception 2 to Section 375 of the Penal Code. The aim is to provide a holistic understanding of the law for ideation of protection of rights in the criminal law. The report hereby focuses on three interpretations of law.

[6] *See* Susan Brownmiller, *Against Our Will* (1975) *cited in* Gary LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Belmont: Wadsworth, 1989); Lynne Henderson, 'Rape and Responsibility' (1992) 11 Law & Phil 127.

[7] Geeta Pandey, 'Nirbhaya case: The rape victim's mum fighting for India's daughters' (*BBC News* 15 December 2022) < https://www.bbc.com/news/world-asia-india-63968198 > accessed 2 April 2023.

[8] Catharine A. MacKinnon, 'Rape Redefined' (2016) 10 Harv L & Pol'y Rev 431 at 444.

[9] ibid at 445.

[10] *See* Lisa R. Eskow, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution' (1996) 48(3) Stanford Law Review 677 at 679.

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I. The Righteous Legislation: textual approach

The textualists believe in adopting a straightforward approach towards conceptualising a legal order. The judges who adhere to complying with the literal meaning of the provision adjudicate in accordance with what was coined by Dworkin "the rule book approach".[11] This approach is rooted in the democratic understanding that the 'exercise of power is best justified by the will of a democratically elected majority'.[12] According to the textualists, the judiciary comprises of unelected judges who are bound to abstain from adjudication upon their personal political bias.[13] The judges must therefore follow the authoritative rule book as intended by a democratically elected institution—the legislature.

The textualist approach is perhaps not characterised merely by a 'strict preference for enacted text over unenacted context'[14] instead as a form of legal communication. This entails routine consultation to other sources of law for context given the obscure meaning attached to ordinary words used in the legislation.[15] This scope of judicial discretion is, however, only acceptable in cases where the legislative text lacks specific directions.

In the instant case, the marital rape exception is explicitly laid out which does not entail any obscure meaning. The language of the legal text is specific and clear leaving no scope for judicial discretion. It is hereby observed that criminal law while protects the potential victims, pure textual approach may prove to be counter-productive to criminal justice mechanisms and yield undesirable societal impact. To this end, the textual approach advocates for the provision of marital rape without moving beyond the text to understand the social repercussions of the same.

II. The Historical Nexus: intentionalist approach

The intentionalists emphasize that the meaning of legal content is dependent upon the intention of the legislation.[16] It is consequently argued that the content of law is the resultant of long drawn legislative history, deliberations, and discussions; the legal content is not exhausted by the mere legal text.[17] The theory of intentionalism is considered to have subjective and objective strands.[18] Both these strands aim at "recovering the intention of the lawmaker"[19] but an objectivist, approaches the issue from the standard of "reasonable man"[20] while the subjectivist-approach argues that "an interpretation is correct only if it matches the *actual* intention of the lawmaker"[21]. Arguably, the subjective intentions of the legislations become helpful to the judges to reach precisions on the case that encompasses the larger intent of the legislation.[22] Therefore, for the purposes of this report, the legal adjudication over criminal law shall dwell by tracing the *actual* intention of the lawmaker.

In the present, it is analysed that the provision of law under contention belongs to the Penal Code which in the case of Inpal was not democratically elected. The task of tracing the legislative intent if thus complicated. Perusal of Supreme Court archives in the *Joseph Shine* case[23] enabled an understanding that the exception of marital rape under Section 375 is premised on the 'doctrine of coverture'. As a common law doctrine, it was noted that "in

[11] Ronald M. Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1985), 9-32.
[12] ibid at 18.
[13] ibid at 13.
[14] John F Manning, 'What Divided Textualists from Purposivists?' (2006) 106 Columbia Law Review 70, 85.
[15] ibid; HLA Hart, *Concept of Law* (OUP 1961).

[16] Larry Alexander & Saikr that English You're Speaking?" Why Intention Free Interpretation ity, 41 San Diego L. Rev. 967 (2004).
[17] Maija Aalto, 'Fairness in Statutory Interpretation: text, purpose or intention?' (2016) 1 International Journal of Legal Discourse 193, 195.
[18] David Tan, 'Objective Intentionalism and Disagreements' (2021) 27 Cambridge University Press: Journal of Legal Theory 316.
[19] ibid.
[20] Justice Stephan Breyer, Chapter 6 in *Active Liberty: Interpreting our Democratic Constitution* (New York School of Law 2005).
[21] Larry Alexander, 'Originalism, the Why and the What' (2013) 82 Fordham Law Review 539; Richard Kay, 'Original Intention and Public Meaning in Constitutional Interpretation' (2009) 103 NW UL Review 703.
[22] *David Tan* at 318.
[23] *Joseph Shine v. Union of India* (2018) Cri WP 194 of 2017; Ishita Pande, 'Phulmoni's body: the autopsy, the inquest and the humanitarian narrative on child rape in India (2013) 4 South Asian History and Culture 9, 13.

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return for support and protection, the wife owed her husband a 'consortium' of legal obligations, which included sexual intercourse"[24]. Matthew Hale furthered this thesis by reciprocating it into the exception under rape law by citing that "by the virtue of matrimonial consent and contract, a husband cannot be held guilty of committing rape on his wife"[25]. This formulates the legislative intent behind the marital rape exception in the current Penal Code as these notions profoundly impacted the drafting of Penal Code during the British rule in Inpal.

The intent was also supplanted by the circumstances of Inpal at that time. It is pertinent to mention that during the reformist phase, the colonial government intervened within the private sphere of the society and took note of the brutality caused to women within the contour of "marriage". Various post-modernists urged that women lacked voice and that British passed various legislations (for instance, sati prohibition) that was targeted at their social upliftment.[26] It was the case of Pulmoni Dasi—an eleven-year-old child wife who died because of brutal rape committed by her husband.[27] To this end, the British introduced a bill that expansively objected to the marital rape exception but the same was critiques by larger portions of the society. This bill was later passed as the 'Age of Consent Act' raising the age of consent to 12 years and pre-emptively decreasing the scope of martial rape exception.

In the present facts, it is argued that the legislative intent has never been to criminalise marital rape and the law remains fractal. Taking into consideration the subjective intentionalism approach, it is evident that the legislature intended to assume that a husband can never commit rape on his wife and that there is always an "implied consent". To this end, the judges' actions can result in applying what was *actually intended* by the legislature. The text provision once again results in its simple application which in-turn confines the concept of "justice" in the favour of husband.

III. Scrutinizing the Aim and Purpose: purposive approach

The purposive approach opposes the originalist approaches to interpretation. Aharon Barak produced an influential series of legal texts wherein he advocated for purposivism form of legal adjudication. Barak argued that the content of legal texts is not primarily "legal or even political creations" but a form of "social consensus"[28]. The purposive interpretation of law is premised on the Durkheim-theory of law which assumes that there is "one-to-one" relation between the "legal system and "society"[29]. This attribution encompasses "social consensus" as an essence of the judicial system. If the consensus is not articulated properly through legal texts, the judges apply their knowledge of the society to "remedy the legislatures' failure".[30] Thus, by giving due consideration to the object of a particular legislation and placing it within the perimeters of present social circumstances amounts to an expansive and well-suited application of law.

Section 375 of the Penal Code to this end falls within the ambit of "offences against the human body"; section dedicated to "sexual offences". The provision aims at premising the act of sexual intercourse to consent of the woman thereby protecting woman's bodily integrity. It poses the notion that non-consensual sex is punishable. The Supreme Court in *Vishaka case*[31] for instance maintained that right to bodily integrity and privacy are basic fundamental rights which form the basis of rape laws in India. The marital rape exception therefore undermines the guarantee of these fundamental rights as it promotes non-

[24] ibid; *The New international Webster"s Comprehensive Dictionary of the English Language*, (1996 Trident Press International) at 21.
[25] Matthew Hale, *History of the Pleas of the Crown* (published in 1736).
[26] Prabha Kotiswaran, 'Governance Feminism in the Post colony: Reforming India's Rape Laws' (2018) Governance Feminism: An Introduction University of Minnesota Press 75, 78.
[27] *Queen-Empress v. Hurree Mohun Mythee* (1891) ILR 18 Cal 49.
[28] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) at 167.
[29] ibid at 111.
[30] ibid at 119.
[31] *Vishakha v State of Rajasthan* (1997) 6 SCC 241.

consensual sex between a husband and the wife.

The exception poses an understanding that a woman, by the virtue of being a wife can never say "no" to engaging in sexual intercourse with her husband. It is then concern if a legislation can purport such a rule. On the other hand, let us consider that the exception was included with the purpose of preserving sanctity of marriage—i.e., preserving the right of a husband over his wife. In this case, the consequences of this exception would mean provisioning non-consensual sex and incentivising the husband or control the "bodily integrity" of the woman (his wife). This understanding once again warrants violation of fundamental right guaranteed under Part III of the Constitution. Thus, the correct interpretation of section 375 would require that the exception must be struck down.

IV. Surpassing the Legislation?

The last point of analysis subjects itself to the presumption that judiciary has struck down the marital rape exception. Has the judiciary created new legal norm by undermining legislature?

The power of the courts to invalidate a statute or judicial review is perceived as an aggressive version of creating new rules.[32] Waldron for instance argued that judicial review trivializes democracy by consigning legislative issues to the judiciary.[33] Thus, Waldron's conception of legislative process makes an influential point about legislations having supreme authority.[34] However, Richard Posner correctly identified that such conception of law remains "insufficiently attuned to realities of the judicial system"[35]. Moreover, within the Indian judicial system, the Constitution (supreme legislation) provides for judicial review through Articles 13, 32 and 372 to provide an edge to substantive review of laws. Thus, striking down of marital rape exception falls within the ambit of judicial review and does not amount to creation of a law. Arguendo, even if the rule has an effect of *new law*, it aims at achieving moral outcomes which shall be permitted to be the law of the land.

V. Conclusion

The report hereby makes a case that while textualism achieves supremacy of the text for the purpose of adjudication and intentionalists perceive establishing *actual* intention of the legislation as the norm for adjudicating authorities, the theories fall flat for achieving moral outcome. It was hereby argued that it is true that the legal content is resultant of agreements and deliberations—that impart procedural fairness. However, the Penal Code having codified during the colonial rule does not carry forth procedural fairness. Implying the intention of the legislature or simply apply the text of the exception would amount to conceding to colonial interpretation of law. Given the present social circumstances, it is important to dwell into the purpose of the section 375—which has argued cannot subject a woman to give up her bodily integrity or restrict her sexual freedom (as granted through Article 19(1)(a)) at the instance of marriage. The exception caters to differentiating between unmarried and married women, thereby violating Article 14—which once again cannot be the object of the legislation. It was also presented that striking down of the exception by the judiciary amounts to judicial review and not creating a new law. Thus, the report concludes that marital rape exception shall be struck down.

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[32] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 332.
[33] ibid at 292. Waldron criticises the version of judicial review as put forth by Dworkin along with Rawls—"who thinks that courts are reliable at making good decisions about democracy and that [t]hat is all a partisan of democracy should care about".
[34] ibid; Waldron concedes to what was also theorised by HLA Hart.
[35] Richard Posner, 'Reviewing Jeremy Waldron, Law and Disagreement' (2000) 100 Columbia Law Review 582.