

## Unpacking the Centre's affidavit on marital rape



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It is very much within the jurisdiction of the judiciary to determine whether 'marital rape exception' violates a fundamental right

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The Marital Rape Exception (MRE), in Section 63, Exception 2 of the Bharatiya Nyaya Sanhita, 2023 (Section 375, Exception 2 of the Indian Penal Code, 1860) states that 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.' The provision is under challenge before the Supreme Court of India and the Centre has filed an affidavit in support of MRE which needs unpacking.

### The issue of 'expectation'

Most of the arguments made by the Centre will, by now, be familiar to those acquainted with the debate around marital rape. It is stated that the differential treatment of married and unmarried women by MRE does not violate Article 14 of the Constitution of India (the right to equality) because married and unmarried women are not equally placed. The factum of marriage, it is argued, creates 'a continuing expectation of reasonable sexual access', which is absent in case of a stranger or of another intimate relationship. This, the affidavit contends, is a sufficient basis for the legislature to make a distinction between an incident of rape within and outside marriage. As a legal argument, this is alarmingly vague. Who gets to define what 'reasonable sexual access' means? And on what parameters? Is it a subjective definition (the person who has the expectation decides) or an objective one (there is one standard for everyone)? Does it encompass questions of different sexual acts or frequency or both?

That marriage creates a continuing expectation of reasonable sexual access is, at the outset, a dubious claim. More importantly, however, it remains to be established that it is a sound legal argument against striking down MRE. Going by traditional gender norms, marriage also creates a continuing expectation that a husband will 'provide for' his wife. Surely that cannot be grounds for saying that if a wife takes her husband's cars and sells them as scrap metal without his consent (perhaps even by force), she has not committed theft. It is also unclear why marriage creates such an expectation but other intimate relationships (for instance, live-in relationships) do not. Ordinarily, an expectation (a hope or belief that something will happen) is personal. It can arise as much in one kind of relationship as it can in another, depending on the person and the relationship. Perhaps the subtext of this claim is that the expectation of sexual access in a marriage is socially sanctified and acceptable in a way that a similar expectation in a live-in relationship is not. Even if that were the case, it remains to be argued why that ought to be legally relevant in a jurisdiction where individual autonomy (including sexual autonomy) and the dignity of the individual are constitutionally protected.

## **'Institution' and 'misuse'**

Other familiar arguments found in the Centre's affidavit are that the recognition of marital rape as a criminal offence would affect the sanctity of the institution of marriage and potentially lead to false allegations of marital rape which would be difficult to disprove. As I have argued in this space, there is no evidence to suggest that the recognition of marital rape has a causal link with the strength of the institution of marriage. In any case, if the institution of marriage is so dependent on the impunity of a husband who rapes his wife, perhaps that is a reason to question its value and consider reforming it. The argument grounded in concerns of 'misuse' is a red herring. Any criminal offence may be misused and the very purpose of a criminal trial is to determine whether an alleged offence was committed (usually, to a standard beyond reasonable doubt). Moreover, statistics show that sexual offences are generally under-reported, and the real challenge is in proving, rather than disproving, an allegation of rape.

## **Arguments on jurisdiction**

The Centre's affidavit also makes the claim that marital rape is a social, not a legal issue, and, therefore, not within the Court's jurisdiction. Given that law regulates (nearly) every aspect of human life and society, it is not clear whether and how there can be such a watertight distinction between a social and a legal issue. In any case, the fact that the Centre has addressed arguments on Articles 14 and 21 (the right to life) in its affidavit indicates that there is a legal issue at stake here. A related argument is that the decision on what should or should not be a criminal offence is a matter of legislative, rather than judicial, competence. There is some merit to this claim. It may, however, prove largely irrelevant. The Court is not required, in this matter, to declare marital rape a criminal offence (though the issue may colloquially be framed as such), but to assess the constitutionality of an existing law. MRE, being a 'law', is subject to Part III of the Constitution of India. In other words, the Court may not be empowered to decide whether marital rape should be a criminal offence or not, but it is very much within the jurisdiction of the Court to determine whether MRE violates a fundamental right, and to strike it down if it does.

Thus, the Centre's affidavit rehashes many familiar arguments in favour of MRE, but the legal merit of these arguments is questionable.

*The views expressed are personal*