Should the Indian Supreme Court Scrap the Marital Rape Exemption?

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Judges always have at the ready some doctrinal basin to wash their hands of moral complicity. Incanting *dura lex sed lex* (the law is hard, but it is the law) is an age-old judicial ritual. Any combination of the traditional case and controversy or standing requirements also allows a court to avoid an overheated issue.[1] In the Philippines, where I am from, the political question doctrine is the Supreme Court's preferred washbasin.[2]

Where do Indian judges ceremonially dip their hands when they play Pontius Pilate? What often follows after they raise their cleansed hands before the public? Like neon signs these questions kept flashing brightly before me as I read Agnidipto Tarafder and Adrija Ghosh's well-argued article. The answers to them will be crucial if the goal is to persuade the Indian Supreme Court to scrap a longstanding law. Personally, these answers will also determine if I would agree with this goal.

In India, the law emphatically considers non-consensual sex between a husband and his adult wife as "not rape".[3] Most of us will find this rule reprehensible.[4] To liberals, a marital rape exemption is morally wrong,

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[1] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, YUP 1986) Chapter 4.

[2] Bryan Dennis Gabito Tiojanco, 'Why Let SC play Pontius Pilate?' (*Philippine Daily Inquirer,* 29 November 2016) <https://opinion.inquirer.net/99605/let-sc-play-pontius-pilate> accessed 8 January 2020.

[3] S375, Exception 2, The Indian Penal Code 1860; *Independent Thought v. Union of India* (2017) 10 SCC 800 [73] declaring the marital rape exemption unconstitutional with respect to girls between fifteen to eighteen years of age. The husband can still be proceeded against for cruelty, hurt, wrongful restraint, use of criminal force, or sexual harassment; s498A The Indian Penal Code 1860; see Gautam Bhatia, 'Addendum: The Impact of the S.2(q) Judgment upon the Marital Rape Exception' (*Indian Constitutional Law and Philosophy*, 12 October 2016) <https://indconlawphil.wordpress.com/2016/10/12/addendum-the-impact-of-the-s-2q-judgment-upon-the-marital-rape-exception/> accessed 6 February 2020.

[4] There may be disagreements on this point. Some may believe, for example, that non-consensual sex between husband and wife is not rape because saying "I do" is shorthand for

since any sort of sex without the consent of one of the parties should be punishable as rape, regardless of their marital status.[5] Thus, for liberal judges the exemption could raise what Yale Law Professor Robert Cover called a "moral-formal dilemma":[6] should they apply the legal rule and acquit a proven rapist, or should they apply the moral rule and place the criminal behind bars?

One way out of the moral-formal dilemma is legal formalism, which claims that 'there is always a right answer to every legal question, and that it is the responsibility of the judge to find and apply this answer without resorting to moral considerations of any sort.'[7] By asserting that there is but one way to apply the rule, the judge avoids moral responsibility for acquitting a criminal. The notion that a judge is a mere mechanical conveyer of rules who has no choice in the matter pushes considerations of justice and morality out of mind. In fact, this notion makes these considerations improper when interpreting law.[8]

Tarafder and Ghosh close this escape route to formalism by arguing that a judge can in fact choose to invalidate the marital rape exemption on the legal ground that it violates the Constitution of India 1950. First, since the purpose of rape law is to punish non-consensual sex, classification based on marital status is both unreasonable and arbitrary and hence violates the Constitution's guarantees of equality and non-discrimination. Second, the exemption is based on an unjustified gender stereotype and thus violates the Constitution's anti-stereotyping principle. Third, the exemption denies married women their fundamental rights to a dignified existence, bodily integrity, and sexual autonomy. Fourth, the constitutional right to free expression includes a woman's right to refuse sex, including to her husband. Fifth, the exemption is an official endorsement of the subjugation of wives by their husbands, which violates the constitutional guarantee against both public and private exploitation of the oppressed.

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an irrevocable "You can always have sex with me anytime". Others may believe that criminalizing marital rape will unduly undermine family unity and integrity. If so, the task here is not to change these differing views; rather it is to ask whether the moral intuition that marital rape should be rape can be reconciled with the state of the law.

[5] Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013)122 Yale Law Journal 1372 I do not wish to tackle the issue of "rape-by-deception" in this essay. I use the word "consent" in its ordinary sense, to sidestep Rubenfeld's argument that 'sex-by-deception *is* sex without consent, because a consent obtained by deception, as courts have long and repeatedly held *outside* of rape law, is 'no consent' at all' ibid 1376.

[6] Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (YUP 1975) 199.

[7] Scott Shapiro, *Legality* (HUP 2011) 240.

[8] Cover (n 6) 232-36.

I find these arguments persuasive.[9] But suppose the Indian Supreme Court agrees with Tarafder and Ghosh. What then? Should it scrap the exemption? This brings us back to the pivotal questions I set out at the start. Formalism is not the only judicial road out of the moral-formal dilemma. Another is what Cover called the "judicial 'can't'": a judge can suggest that her decision is unjust or immoral, but then declare herself bound by her robe and gavel to apply the law, howsoever immoral it may be.[10] This road is as old as the putative parent of judicial review, *Marbury v Madison*, in which the US Supreme Court declared itself without jurisdiction to issue the writ of mandamus to which it said the petitioner before it was rightfully entitled.[11] In the Philippines a court who chants the judicial "can't" can cite The Revised Penal Code

> *Art. 5. Duty of the court in connection with acts which should be repressed but which are not covered by the law, and in cases of excessive penalties. — Whenever a court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision, and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of legislation.*
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> *In the same way, the court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper, without suspending the execution of the sentence, when a strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.*[12]

Philippine law no longer has a marital rape exemption, but it continues to harbour an honour killing exemption. Under Article 247 of The Revised Penal Code

[9] See Gautam Bhatia, 'The Constitutionality of the Marital Rape Exception' (*Indian Constitutional Law and Philosophy*, 16 January 2014) <https://indconlawphil.wordpress.com/2014/01/16/the-constitutionality-of-the-marital-rape-exception/> accessed 6 February 2020.

[10] Cover (n 6) 119-23.

[11] 5 US 137 (1803).

[12] Act No 3815 (1930) (emphasis in the original).

> *Any legally married person who having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro.*

This article 'defines no crime', but 'merely provides or grants a privilege or benefit – amounting practically to an exemption from an adequate punishment'.[13] Someone sentenced to *destierro* is not imprisoned, but merely banned from approaching a list of places.[14] 'Punishment, consequently, is not inflicted upon the accused', explains the Philippine Supreme Court; he or she is 'banished, but that is intended for his [or her] protection.'[15] A Philippine judge who thinks that it was wrongful for a man to have gunned down his wife and her lover a full hour after catching them having sex must nonetheless sentence him to *destierro*.[16] Afterwards the judge can file the corresponding penal law reform report, listing down the reasons why Congress should remove the exemption.

The court can also do away with submitting such a penal law reform report by proclaiming that it can itself expand an 'unconstitutionally underinclusive' criminal statute.[17] In fact, in 1984, this is what the New York Court of Appeals did in *People v Liberta* when it declared that the marital rape exemption in the New York Penal Law violated the US Constitution's equal protection clause.[18] It would not be unusual for a Philippine court to follow this precedent, considering that the Philippine Supreme Court freely cites US case law as 'a rich source of persuasive jurisprudence'.[19] The Indian Supreme Court has also recently enlarged the scope of the Indian Penal Code when it declared the unconstitutionality of the marital rape exemption with respect to girls between fifteen to eighteen years of age;[20] hence it has itself closed off the judicial 'can't' route.

Even the *Liberta* Court, however, recognised that 'a court should be reluctant to expand criminal statutes, due to the danger of usurping the role of the Legislature'.[21] The aftermath of its decision also counsels such reluctance. In 1996, twelve years after *Liberta*, the New York Penal Code still failed to expressly criminalize marital rape, prosecutors seldom filed

[13] *People v Araquel* GR No L-12629, 9 December 1959.
[14] Act No 3815 (1930), art. 87.
[15] *People v Abarca* GR No 74433, 14 September 1987.
[16] This was the ruling in ibid.
[17] *People v Liberta* 64 NY2d 152, [52] (1984).
[18] ibid [54]–[55].
[19] *Social Justice Society v Dangerous Drugs Board*, GR No 157870, 3 November 2008.
[20] *Independent Thought v Union of India* (n 3).
[21] *People v Liberta* (n 17) [55].

charges because they found it difficult to convince victims that marital rape was a crime, and some New York courts continued to rely on the exemption in dismissing marital sexual assault cases.[22] Part of the blame can be placed on the US Court of Appeals for the Second Circuit, which 'caused confusion among lower courts and scholars' by refusing to rule on the exemption's constitutionality when it affirmed the conviction in *Liberta*.[23] But the New York legislature's failure to amend the State's penal code by expressly criminalizing marital rape also deprived *Liberta* of a 'publicly visible' change in legislative policy which, rape law reformers then argued, could 'influence public attitudes toward criminal acts' and 'ensures that a judge cannot rely on the current statutory language to dismiss a case.'[24] In the Philippines, Congress made such a publicly visible change in legislative policy in The Anti-Rape Law of 1997[25] by 'recognizing the reality of marital rape and criminalizing its perpetration'.[26]

Herein lies the crux of my dilemma. Cover notes that it is 'commonplace for a result to be justified' by a court 'on the basis of the direction in which the law is moving.'[27] If a judge thinks that their unjust decision is 'only a temporary phenomenon', in light of 'a perceptible movement of a particular legal issue toward conformity with libertarian values', then they could sleep well with the thought that nudging the legislature towards amending the law was the more democratic route to take.[28] He called this the 'professional role' justification:[29] a court should refuse to scrap the marital rape exemption because that would in effect criminalize a legal act, and it is for a legislature, not a court, to determine which acts deserve imprisonment and for how long.[30] The Indian Supreme Court should instead—à la *Marbury*—declare itself constrained by the exemption to acquit the accused while urging the Indian Parliament to promptly criminalize marital rape. By trusting the legislative process, the Indian Supreme Court can wash its hands clean by giving reasons while withholding relief (much like what a Philippine judge does by submitting a penal law reform report). 'Yes; the marital rape exemption is reprehensible for the following reasons,' the Court will say. 'We cannot remove the exemption ourselves, but these reasons should get the Parliament swiftly started on amending the Indian Penal Code.'

[22] Cassandra DeLaMothe, '*Liberta* Revisited: A Call to Repeal the Marital Exemption for All Sex Offenses in New York's Penal Law' (1996) 23 Fordham Urban Law Journal 857.
[23] ibid 870.
[24] ibid 883.
[25] Repeal Act No 8358 (1997).
[26] *People v Jumawan* GR No 187495, 21 April 2014.
[27] Cover (n 6) 201.
[28] ibid 202–03.
[29] ibid 215.
[30] For a doctrinal answer to this objection see Bhatia (n 3).

This third road out of the moral-formal dilemma is smoothly paved by the doctrine of separation of powers.[31] Under this doctrine, each branch of government must agree before one can suffer a conviction.[32] Thus in the US, for example, it has been 'long since settled in public opinion', as a matter of 'simple, obvious' logic, that for a federal court to exercise criminal jurisdiction '[t]he legislative authority...must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.'[33] And even then no criminal trial is held unless the executive decides to prosecute.[34]

Further asphalting this road is the institutional-competence argument.[35] The *Liberta* aftermath shows the advantage of a legislative repeal over a judicial invalidation. In addition, legislatures are more adept than courts in finetuning criminal statutes. Merely extending the scope of an unconstitutionally underinclusive statute by removing a longstanding exemption is a crude relief; it would not address important concerns that such a removal might raise. For example, Tarafder and Ghosh note that one objection to removing the marital rape exemption in India is that, by jeopardizing the family's informal role as primary arbiter of domestic disputes, it will reduce the possibility of amicably settling such cases. Philippine Congress addressed this or some similar concern by providing for a marital rape pardon in lieu of an exemption.[36] Thus in the Philippines 'the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty' for her rape by her husband[37] (The Philippine Commission on Women recommends the repeal of this forgiveness clause[38]).

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[31] Cover (n 6) 236.

[32] Rachel Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 Stanford Law Review 989, 1017.

[33] *US v Hudson & Goodwin* 11 US 32, 32-34 (1812); Gary Rowe, 'The Sound of Silence: *US v Hudson & Goodwin*, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes' (1992) 101 Yale Law Journal 919, 920-21 arguing that *Hudson & Goodwin* 'departed from what was arguably the original understanding of those who framed the Constitution and penned the Judiciary Act of 1789'.

[34] Barkow (n 32) 1017.

[35] John Hart Ely, D*emocracy and Distrust: A Theory of Judicial Review* (HUP 1981).

[36] Venus Lique, 'The Anti-Rape Law and The Changing Times: Nature, Issues and Incidents' 43 (1999) Ateneo Law Journal 141, 174–75 (1998) arguing that the wholesale removal of the marital rape exemption in the Philippines 'will prejudice the family' and thus 'runs counter to the principles of the Constitution where the State vows to protect the sanctity of the family.'

[37] Rep Act No 8353, sec. 2 (1997).

[38] Philippine Commission on Women, 'Amending the Anti-Rape Law—Women's Priority Legislative Agenda for the 18th Congress' <https://www.pcw.gov.ph/sites/default/files/documents/laws/wpla/2019/October/webmaster/PCW%20WPLA%20PB%20%23%2001-%20Amending%20the%20Anti-Rape%20Law%20AEB.pdf> accessed 2 April 2020.

The big "if" of this professional role justification is that the legislature will soon enough do its part. No documented case on marital rape ever reached the Philippine Supreme Court before the exemption for it was repealed.[39] It is likely, however, that Congress would have swiftly heeded a penal law reform report from it to repeal the marital rape exemption. First, The Anti-Rape Law of 1997 was enacted promptly after the Senate in 1996 began inquiring into how the country must implement The Platform for Action of the 1995 Beijing Conference on Women.[40] Second, Congress swiftly enacted the Anti-Violence Against Women and Their Children Act of 2004, which allows abused women to invoke battered woman syndrome as a defense from legal liability,[41] a few months after the Supreme Court promulgated a decision saying that 'While our hearts empathize with recurrently battered persons, we can only work within the limits of law... Neither can we amend the Revised Penal Code. Only Congress, in its wisdom, may do so.'[42] Third, Congress has been responsive to public demands for greater gender justice, enacting such landmark laws as the Safe Spaces Act 2019 (which punishes 'any unwanted and uninvited sexual actions or remarks against any person regardless of the motive')[43] and the Magna Carta for Women 2009 (which mandates governmental agencies to 'give priority to the defense and protection of women against gender-based offenses and help women attain justice and healing').[44]

Tarafder and Ghosh seem to suggest that the Indian Supreme Court cannot similarly trust the Indian Parliament to do its part when they note that the Criminal Law (Amendment) Act 2013 had rejected the recommendation of the Justice Verma Committee in 2012 to remove the exemption. This though is not enough. Historically, the professional role justification closes down only when judges are forced to confront the claim that the unlikeliness of legislative change 'justified re-examination of the role assumptions', and that given this unlikeliness '[t]he normal appeal to a professional role would no longer be sufficient, for it was just that role that had been put at issue.'[45] In short, if the goal is to persuade the Indian Supreme Court to scrap the marital rape exemption, then it first needs to be boxed into the moral-formal dilemma. Doing this requires closing off the main escape route still open to it. This, in turn, requires a re-examination of the professional role of a Supreme Court in a constitutional

[39] *People v Jumawan* (n 26).
[40] Lique (n 36)147–48.
[41] Rep Act No 9262, sec 26 (2004).
[42] *People v Genosa*, GR No 135981, 15 January 2004.
[43] Rep Act No 11313, art I, sec 4 (2019).
[44] Rep Act No 9710, sec. 9 (2009).
[45] Cover (n 6) 228.

democracy in which the legislature cannot be trusted to do its part in protecting fundamental rights.

Closing off this route may unduly lengthen Tarafder and Ghosh's article. In 2009, a co-author and I took eighty-one pages to defend the Philippine Supreme Court's foray into promulgating novel writs and convening multisectoral summits—a then controversial departure from the traditional judicial confines of an actual case or controversy.[46] Perhaps Tarafder and Ghosh have decided, understandably, that it was enough for one article to close off (as they have) the formalist escape route. My hope then is that they would follow up on their present effort with another article which argues why it is the Indian Supreme Court's duty to criminalize marital rape given the systematic dysfunction preventing the Indian Parliament from suitably amending the Indian Penal Code.

[46] Bryan Dennis G Tiojanco and Leandro Angelo Y Aguirre, 'The Scope, Justifications and Limitations of Extra-decisional Judicial Activism and Governance in the Philippines' (2009) 84 The Philippine Law Journal 73. The argument was that extra-decisional judicial activism and governance (as we called it) was a necessary corrective to a dysfunctional democratic process and had basis not only in the Constitution's text and structure, but also in the country's political culture and history.