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MARITAL RAPE EXCEPTION IN INDIA: JUDICIAL CONCERNS AND CONSTITUTIONAL PERSPECTIVE

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“When a woman is ravished, what is inflicted isn’t mere physical injury but deep sense of some deathless shame...”

- Justice V. R. Krishna Iyer

Introduction

The problem of violence under the institution of marriage has been recurring throughout history. India being a diverse nation having differences based on gender has been trying to seek empowerment for women since independence. Art15(3) of the Constitution of India¹ directs the state to secure for the women and children some special provisions, which empowers them. It is an imperative duty on the part of the state. In 21st century where the Constitution of India provides the equal status to the woman as that of man, the married woman doesn’t even have the right on her own body.

Indian society is a hub of traditions, values, morals, ethics and custom. These customs have prevailed in Indian society since time immemorial. Indians place a very special place for women and worshipped her as a Goddess. Sadly, this special position changes within the four corners of a home. From the birth of girl till her death, the mind-set of the society takes girl as responsibility and thus this pressure of responsibility is borne by women till her last breath.

Rape means the sexual intercourse when there is lack of consent². It is an offence against women, violating her dignity and self-respect. Marital rape is something which occurs within four walls of matrimonial house, when the husbands treat their wife as a mere object, and they use them for mere sexual gratification. Burden of proof to prove lack of consent rests on the victim. Often this presumption is believed to exist when the parties are married. Now here the

¹ The Constitution of India, 1950, Art. 15(3).

² The Bharatiya Nyaya Sanhita, 2023, S. 63.

idea of marital rape becomes antithetical. A wife sexually abused within the relationship of marriage is a phenomenon which undermines dignity of a wife as human in the society. The neglected condition of women under marriage is debateable on political and legal landscape regarding their protection.

QUESTION - Whether there is any difference between a fourteen-year old girl and a twenty-four year old girl in the case of non-consensual intercourse with her husband? Whether the woman lose her right to bodily autonomy after marriage?

These questions highlight the institution of marriage and the constitutional guarantee of dignity, equality and bodily-autonomy. The present study will examine the marital rape exception prevailing in India with particular reference to judicial concerns and constitutional perspectives.

MARITAL RAPE EXCEPTION UNDER INDIAN LAW

- The 2013 Amendment in the IPC has enlarged the Scope of Section 375, now Section 63 of BNS. Giving an expanded definition including sexual intercourse as well as oral sex within the definition of 'rape'. However, in Exception 2, the sexual act between the spouses above eighteen years of law has been excluded from applying the section. Therefore, the rights of the women to recourse has been abridged leaving no remedy for her. The wording of Section 375 of the IPC (now Section 63 of BNS)³ on account of the Criminal Law (Amendment) Act, 2013 are:

A men is said to commit "rape" if he –

Commits the coitus as well as the oral sex under the following Seven circumstances i.e. firstly it should be against her will and secondly if there is consent of given by the female in certain circumstances like there is fear of her death or hurt, or thirdly if she is believing that men is going to be her husband or fourthly believes herself to be lawfully married with him, or fifthly given consent in by reason of unsound mind or intoxication and sixthly with or without consent when female is under age of eighteen years and last one is that when female is unable to communicate her consent.

Provided that a woman who doesn't bodily withstand to the act of penetration shall no longer through the cause most effective of that truth, be regarded as consenting to the sexual hobby.

³ The Bharatiya Nyaya Sanhita, 2023, Sec. 63.

Exception 1. —A medical procedure or intervention shall not constitute rape.

Exception 2. —Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, isn't rape”.

- Domestic violence Act, 2005 has provided only civil remedies while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Act condones sexual abuse in a domestic relationship of marriage or a live-in, only if it's life threatening or grievously hurtful. The Protection of Women from Domestic Violence Act, 2005 considers the term “domestic violence” which covers all form of physical, sexual, verbal, emotional and economic abuse that can harm, cause injury to, endanger the health, safety, life, limb or well- being, either mental or physical of the aggrieved person. This Act didn't consider marital rape as an offence but consider it as domestic assault.
- Section 114A Indian Evidence Act/ Section 116 Bharatiya Sakshya Adhiniyam
In a prosecution for rape, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the women alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she didn't consent⁴. The above presumption makes it clear that the testimony of women raped will be presumed to be true by the court prima-facie, whether it has happened in actual or not. But this presumption doesn't give protection to a married women adverse her husband which is arbitrary to the Right to Equal Protection of Law under Indian Constitution.

CONSTITUTIONAL ANALYSIS

A. Violation of Fundamental Rights

The Constitution of India is a unique document. It embodies certain human values, cherished principles, and spiritual norm and recognizes and upholds the dignity of a men . Marital rape hits at the very fundamental rights of life of a women ensured by Article 21 of Constitution of India. The doctrine related with marital exemption to rape is against both articles 14 and 21 of the constitution. Article 14 of the India Constitution ensures right of equality before the laws and identical protection of laws to each citizen of India.

1. Right to Equality

Article 14 of the constitution ensures that the State shall not deny any person equal protection

⁴ The Bharatiya Sakshya Adhiniyam, 2023, Sec. 116.

of law and equal treatment before law. The right to equality promises a person fair and equal treatment bereft of any prejudice of gender, religion, financial status, in the eyes of law. It also prohibits class legislation but based on intelligible differentia permits reasonable classification. In view of above-mentioned provisions, the exception of 'marital rape' can perplex anyone as it's in direct contravention of Article 14⁵. The IPC provides a difference between 'rape' & 'marital rape', where the former is graver than later because of the status of a woman being 'married'. This differentiation done based on status of a woman, nowhere, seems to be intelligible.

2. Right to Life and Personal Liberty

Article 21 of the Constitution of India envisages the valuable rule that no one shall be denied of his life or personal liberty. It's one of the most important fundamental rights as it's protected by State itself and one can't be deprived of his life and personal liberty, except according to procedure established by law⁶. It must be observed that the procedure must not be arbitrary. The right of Protection of life and liberty also carries a woman's right to hold on to her dignity, privacy, and health. Hence, this right also in its ambit has the right to refuse submission of her body to the lust of her husband.

3. Right to Live with Human Dignity

In the famous case of *Francis Corallie Muin v. Union Territory of Delhi*⁷, the Hon'ble Supreme Court explored the idea of right and held every person has right to live with dignity. Dignity includes the basic essential of life and when someone does not consent for coitus, it would then be a violation of Article 21 of the Indian Constitution.

B. Privacy v. Autonomy

In marital rape, the laws treat a married woman and an unmarried woman different with respect to their rights based on their marital status. The concept of marriage in Indian society has gone through a significant change in the past decades. Now various religions themselves govern the institution of marriage or else they are dealt under special marriage act. This codification of marriage laws in the religious laws has proved to change the whole concept of spousal relationship. At earlier times women were regarded to be a property of husband and thus not

⁵ The Constitution of India, 1950, Art. 14.

⁶ The Constitution of India, 1950, Art. 21.

⁷ AIR (1981) SCC 746.

equal to their partner. But with this codification in religious laws dealing with marriage has changed this whole concept and regarded women to be equal to their husband. There are also provisions relating to women's right to divorce and right to property which shows that both men and women are equal as partner. Now supreme court is also recognising the rights of third gender also.

Institution of marriage entails that women give their full consent to sexual intercourse. Marriage does not presuppose the consent to every sexual activity, and it cannot be held as a rule. However, state want to protect the institution of marriage for the stability of the society. But harm caused to women will outweigh the harm caused to society because of a broken marriage. Protection of the institution of marriage in all circumstances cannot be called as a goal and it will produce the dichotomy between public and private sphere and hence it should be avoided.

In *Justice KS Puttaswamy v Union of India*⁸, the concept of private sphere can be moved away when the rights of any women are involved.

In *Sareetha*⁹, court stated that the Restoration of Conjugal Rights was unconstitutional as they are not in sync with the marital privacy. Therefore, court should struck down the unconstitutionality of sec 9 of Hindu Marriage Act on the grounds of individual liberty instead of interfering with the marital sphere of two persons. Martha Nussbaum, a *feminist scholar* argues that we should focus on arguing for women rights on the basis of equality for self and choice. So, marital rape should be criminalised in the context of choice, autonomy for the women and not in terms of privacy and private sphere. So we can conclude that this concept of private sphere which is immuned from constitutional law is flawed.

Recently in *Independent Thought v Union of India*¹⁰, the court struck down a part of sec 375 IPC(earlier) exception clause. Sexual contact with a child under the age of 18 is forbidden by the Protection of Children from Sexual Offences Act, 2012 (often known as "POCSO"). The exemption clause, however, permits this if a girl is between the age of fifteen to eighteen and married. The Court stated that treating the girl differently based on her impending marriage was utterly unlawful. This was because marriage was an illogical categorisation. It is heartening that the Court has acknowledged that women's rights cannot be supplanted because of marriage, even though the Court was eager to note that the judgement was not for adult marital rape.

We have determined that there is no presumption of consent to sexual activity in a marriage by

⁸ AIR (2017) 10 SCC 1.

⁹ *T. Sareetha v. Venkata Subbaiah*, AIR (1983) AP 356.

¹⁰ AIR (2017) 10 SCC 800.

applying these criteria. In addition, when a constitutional right is at risk and when other factors are present, it is important not to criminalise marital rape just to protect the institution of marriage. It would be unreasonable to continue criminalising acts of violence. As a result, this does not pass the Article 14 test, and the exemption provision is therefore illegal.

A. Law Commission Report

The *Law Commission in its 172nd report* though expanded the Scope of the offence of rape by taking within its stride various sexual acts but, while giving matrimonial concession, its Scope was limited to sexual intercourse only. The word “sexual act” was purposefully omitted. Since the import the two terms “sexual intercourse” and “sexual acts” is different, therefore, the Law Commission wished to give concession to the husband for his acts of sexual intercourse alone. This was the upright position of law but the Amendment Act of 2013¹¹ without paying attention to the long-term consequences of the amendment, widened the Scope of matrimonial concession to sexual acts as well in addition to the acts of sexual intercourse. This exemption granted to the husbands, therefore, places them in the position of high handedness over their wives and is clear denial of the right guaranteed under Article 14 and 21 of the Constitution to the women includes the basic essential of life and when someone does not consent for coitus, it would then be a violation of Article 21 of the Indian Constitution.

B. Data and Statistics

According to data that is currently available, approximately one in four women may experience sexual assault by an intimate partner in various countries, according to the World Health Organisation (WHO) 42 percent of women who endured physical or sexual abuse at the hands of an intimate partner suffered injuries as a result, according to the most recent and comprehensive WHO report on the incidence and health implications of gendered violence. In addition, women who experience sexual assault from male intimates are 1.5 times more likely to have STIs including gonorrhoea, chlamydia, or syphilis infection. Additionally, in some areas, women who have been sexually assaulted by intimate males are 1.5 times more likely to contract HIV. According to additional studies, male partners occasionally coerce women into having sex, accounting for about 40% of all raped women.

¹¹ Criminal Law Amendment Act, 2013.

JUDICIAL CONCERNS

There are three broad themes in the arguments against criminalisation of marital rape:

1. Goal of protecting the institution of marriage and we should not interfere with it to ensure that the institution remains sacred.
2. The other alternative remedies that exist for woman to seek recourse through sec 85 of the BNS¹² , and the Protection of women from domestic violence act 2005¹³ and other various personal laws dealing with concept of marriage and divorce. Women have alternate recourses which reduce the urgency of the criminalisation of marital rape.
3. The Cultural values in India which focus on that these values should not be hampered.

In the case of *State of Maharashtra v. Madhukar Narayan Mardikar*¹⁴, The Supreme Court stated that no one has the right to violate the person of another, especially an unchaste lady. Even a woman of simple virtue has the right to privacy, and no one has the right to disturb it whenever he wants. It is not permissible for anyone to violate her rights. She is entitled to protect her person if there is an attempt to violate it against her wish. She is also entitled to legal protection.

In *Bodhisattwa Gautam v. Shubhra Chakraborty*¹⁵- Supreme Court said that; "rape is an offence adverse basic human rights and a violation of the sufferer, mostly lovable of fundamental rights, particularly, the Article 21 of the Indian constitution enshrines protection of life but the judgment passed by the courts which deny to recognize the marital rape as an offence.

In *Bhupinder Sharma v. State of Himachal Pradesh*¹⁶ Supreme Court held that, "rape" is defined as "the ravishing of a female without her permission or against her will, and if permission is obtained, it is obtained through fraud, force, fear, or misrepresentation." On the notion that women in their marriage give their husbands irrevocable agreement for all sexual activity, the husband is immune from spousal rape punishment. The husband has been given the right to irretrievably acquire sexual activity from their wives and they may or may not be consenting to such an activity but they have to submit to the desires of the husband.

¹² The Bharatiya Nyaya Sanhita, 2023, S. 85.

¹³ The Protection of Women from Domestic Violence Act 2005.

¹⁴ AIR 1991 SC 207.

¹⁵ AIR (1996) SC 922.

¹⁶ AIR (2003) SC 4684.

In the case of *Hari Ram v. State of Haryana*¹⁷ the right of equality of a citizen was considered as a pillar which protects the rule of law and makes it the basis on which it can be rested. It is important that state must conduct its actions in a reasonable and justifiable approach and if the existing malpractices remain untouched by the law makers the whole purpose of equal protection to all is failed and people remain aggrieved and deprived of their basic rights. The burden is on the state to protect its citizens from all kinds of inequalities and maintain an environment of peace and security within the nation. All persons must be at equal position.

Prof. Sandra Freedman of the University of Oxford, said:

“Training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife”.

The overall goal is of ensuring equality, dignity, and protection for all individuals, regardless of their marital status.

1. *Consent and Autonomy*: Marital rape is a violation of an individual's autonomy and right to sexual self-determination. It recognizes that consent is crucial within a marriage, just as it is in any other relationship. Criminalizing marital rape sends a clear message that no one should be subjected to sexual violence, even within the confines of marriage.
2. *Gender Equality*: Recognizing and criminalizing marital rape is a step towards achieving gender equality. It challenges the traditional notion that a wife is the property of her husband and reinforces the principle that women have equal rights and bodily autonomy within marriage.
3. *Protecting Vulnerable Individuals*: Many women suffer in silence due to the lack of legal protection against marital rape. Criminalizing it provides a legal recourse for victims, allowing them to seek justice and protection from abusive situations.
4. *Combating Domestic Violence*: Marital rape is often linked to other forms of domestic violence. By criminalizing it, the legal system can address the broader issue of violence within marriages and provide a comprehensive framework for protection and support for victims.

¹⁷ AIR (2010) 3 SCC 621.

5. *Changing Societal Attitudes*: Criminalizing marital rape can help challenge societal attitudes and norms that condone or trivialize such acts. It can contribute to raising awareness about consent, sexual rights, and healthy relationships.

CONCLUSION

Domestic life had been considered by our society as a part of private life wherein State actions were not appreciated by our society. However, the time has changed today after the coming into force of our visionary Constitution which guarantees equal protection of rights for man and woman. Further, our Constitutional jurisprudence clearly dictates that the fundamental rights of citizens are no longer merely negative obligations of the State. As it stands today, the State is under Constitutional mandate to protect the fundamental rights of its citizens by taking positive steps for guaranteeing the enjoyment of fundamental rights by its citizens. The criminalization of marital rape is supported by modern juristic opinion on international plane. Marital rape is against the basic Human Rights recognized by the International Covenant on Civil and Political Rights (ICCPR) and CEDAW. The European Commission of Human Rights has held that rapist remains a rapist regardless of his relationship with the victim. Importantly, the judgment acknowledges that this change in the common law is in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity, and freedom.

Besides the International bodies, modern democratic nations have also endorsed the criminalization of marital rape considering it as a gross violation of women's rights. For instance, in Canada, the provisions in the Criminal Code, which denied criminal liability for marital rape, was repealed in 1983. It is now a crime in Canada for a husband to rape his wife. South Africa had criminalized marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. In Australia, the common law 'marital rape immunity' was abolished in all jurisdictions from 1976 onwards through legislative initiative. In 1991, the Australian High Court held that it has no doubt that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.' According to Justice Brennan, "The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse." These jurisdictions have also gone further by recognizing that consent should not be implied by the relationship between the accused and the complainant in any event.

Further, it is conceded that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law. Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable. The immediate need is criminalization of marital rape.

