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MARITAL RAPE EXCEPTION IN INDIA: A CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

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Introduction

Marriage has been regarded as the most pious institution in the Indian society but what happens if it turns out to be the most horrifying context in the need of consent for women. The issue of marital rape remains as one of the most contentious debates in the history of the constitution. Indian criminal law makes marital rape exceptional in nature, where sexual intercourse by a husband with his wife after a certain age is not considered as rape. This exception is known as “Marital rape exception” which has been criticized significantly showing patriarchal notions and denying equal protection of law for women. This forms a colonial-rule assumption that women after marriage gives irrevocable consent for sexual relations.

This debate raises a chief question for human rights, dignity, privacy and bodily autonomy. It engages India’s obligation under international human rights law. The society further recognizes that marriage cannot extinguish the woman’s right to consent, this existence of marital rape has come under the intense academic, judicial and public scrutiny. Since, it is being historically ignored and is globally recognized as a form of domestic violence and sexual abuse.

In more than 150 countries, it has been criminalized but its legal status still remains the same and forms a battleground for others and most notably in the context of India. Thereby, this note critically examines the legal framework for marital rape and further international human rights standards.

What is the historical origin for the marital rape exception?

The origin of marital rape exception lays in the English common law of 17th and 18th century. It views women getting married after as a property or more critically a legal extension for her husband. It was propounded by sir Matthew hale in 17th century. The doctrine was explained by saying husband cannot be held guilty for raping his wife because marriage gives you an irrevocable consent to sexual intimacy and contract the wife hath given up herself in this kind to her husband which she cannot take back. The logic is stated through the theory of implied

consent. It says a husband cannot force access to something he legally owns.

Another dictum was heavily enforced. It was known as the doctrine of coverture which is referred as unity of person. Here, the woman's identity is totally merged with her husband after marriage. The husband and wife become one identity and that person was represented by husband. This led to the non-prosecution for raping his wife but if we view it in the legal aspect, a single entity cannot harm themselves. This was spread globally and these common laws were spread across the colonies. It was later on drafted in the Indian penal code in the 1830s. It was further included in the marital rape exception in the final 1860 code. It exempts any wife who is of the age above 10 from getting raped by her husband.

Several reforms have occurred which have modernized rape laws in India but still the marital rape has largely survived and is still surviving.

What is the present legal position in India?

Under the Bhartiya Nyaya Sanhita (BNS) marital rape is not considered as an offence because here wife is an adult. It replaced section 375 of the Indian penal code, 1860. This law remains as an exception by stating that sexual intercourse of a man with his own wife doesn't constitute to be rape if she is above the age of 18 years or more. There lies a minor exception if there is a forced sexual act by a husband to the minor who is underage so it would be criminalized in BNS as well as the protection of children from sexual offences (POSCO) act.

Nevertheless, still some indirect protections are provided to the married women:

- If the husband and wife are living apart or there is any judicial separation then in certain circumstances it would result in criminal liability for non-consensual intercourse.
- It talks about cruelty under section 85 under BNS which is Bhartiya Nyaya Sanhita. It can be invoked anytime if forced sexual relations form a pattern of abuse.
- The protection of women from domestic violence act, 2005. It is referred as the sexual abuse which forms a part of domestic violence and provides remedies such as orders and compensation.

However, these provisions are not criminalizing marital rape as rape.

What does constitutional analysis say?

Many public interest litigations have been found challenging the verdict by the Delhi high court for this exception. The petitioners argue that the law is violating the articles 14 and 21 which states right to equality including equal protection before the law and right to life and dignity for article 21.

The analysis of the following articles is as follows:

Article 14: right to equality. It states that constitution guarantees equality before laws and equal protection of laws. It is further classified under two conditions:

- There must be an intelligible differentia (clear, understandable distinction).
- The differentia must have a rational nexus or an objective or a reason why that object has to be achieved (it finds a logical connection between the distinction and the objective).

The argument states that this exception classifies the rape victim into two categories that is married women and unmarried women. If an unmarried women is forced into any sexual act without her consent, then it is referred as rape but on the other hand if the unmarried women is forced into any non-consensual sexual act, it is legally exempted since the act is done by her husband. Petitioners declare that there is no rational nexus behind this rape law because the objective of the act should be to protect the women from any sexual act which is forceful in nature and is upheld by the bodily integrity.

Thereby, the distinction appears to be incompatible with the substantive equality.

Later, the union government argues by stating marriage is the most pious institution and the objective is to protect this institution from the criminal complaints of rape as they can be normally handled through civil laws.

Article 21: Right to life and personal liberty

The major constitutional challenge happened in the Article 21, it states that no person shall be deprived of any personal liberty or their life according to the procedure established by law further supreme court has extended this right to live with dignity, bodily privacy and personal autonomy.

In the major rulings such as, *K.S. Puttaswamy v Union of India* (2017), the supreme court stated that privacy is referred as a fundamental right and the person's control over their body is an absolute and most important element of article 21 but this becomes contradictory on the behalf of marital rape implying that after marriage woman's body starts to belong to her husband and her bodily autonomy stripes off.

In another case of *Suchita Srivastava v Chandigarh Administration* (2009), the court further recognized reproductive autonomy as the most essential component of personal liberty.

Critics thereby, argue that right of a married women is denied for sexual self-determination that every other citizen possesses. If a woman is being denied to her rights and the sexual act committed would not be considered as rape it may lead to degradation of her human dignity along with mental and physical health dilapidation.

The state argues that criminalizing of marital rape would lead to the intervention in the private domestic sphere also they further state that article 21 has sufficiently taken part in the other chores such as domestic violence act and laws against marital cruelty. It will allow women to escape from the abusive marriage which has a high scale punishment.

Has any transformative constitutionalism occurred?

There have been many transformative measures where Indian jurisprudence emphasized constitutional morality over social morality.

The cases are:

- The first one is *Navtej Singh Johar v Union of India* (2018)
- Another one is *Joseph Shine v Union of India* (2018)
- Next is *Indian Young Lawyers Association v State of Kerala* (2018)

Here, the patriarchal traditions were overthrown and substantive equality was promoted this is what is expected in the doctrine of transformative constitutionalism but under this framework many petitioners, scholars have argued that it leads to the domination of patriarchal conception of marriage and the excessive oppression takes place for woman.

Judicial developments?

The judicial developments in the marital rape exception in India has evolved from a position where there was no absolute interference to structured intervention that primarily took place through reproductive autonomy, child protection and individual privacy.

The landmark judgment ruling by supreme court was *Independent Thought v. Union of India (2017)*, it read down that marital rape exception is applied between 15 years of age to 18 years of age. The court stated that if sexual intercourse constitutes with a minor, it would be considered as rape but this judgment did not completely abolish the exception of marital rape entirely since it is for minors.

This decision thereby weakened the assumption that marriage legitimizes sexual relations.

Delhi high court verdict (2022) states about *RIT Foundation v. Union of India*, which was two bench decision here, Justice Rajiv Shakhder held that exception violated articles 14, 15, 19 and 21. Further, justice C. Hari Shankar upheld this exception by saying that marriage holds a distinct institution and the law should be changed strictly to the parliament.

There are many countries like United Kingdom, Canada, Australia, south Africa, Nepal, Bhutan, united states where marital rape have been abolished. These courts recognized that marriage cannot negate the requirement of the consent. This shows almost every country has criminalized marital rape as a violation of consent, human rights and gender equality.

Therefore, consent remains as the primary context for the sexual relations. Equality before law says that married women deserve the same legal protection as available to the unmarried women.

If we criminalize violence within marriage it would act as a strong message for the people in society.

Removing the exception would align the criminal laws with article 14,15 and 21.

This whole process can become a major source of improvement and it could strengthen India's compliance with CEDAW (Convention on the Elimination of All Forms of Discrimination

against Women) and the other human rights and development commitments.

Conclusion

This marital rape exception remains as one of the last colonial and patriarchal thinking in Indian criminal law. It is being founded that after marriage the husband gets the unrestricted sexual access to their wives. This exception appears to violate the fundamental rights lying from equality which is article 14 to right to life and dignity which is article 21. The transformation of this jurisprudence weakens the normative basis of the exception.

The other standpoint states that there are many countries which have criminalized marital rape as a sexual violation of women's rights. This proves their fundamental rights are being protected and their consent is a serious concern.

The whole point of the short note raises a serious concern that marriage can diminish an individual's consent. It should be taken into serious concern that marriage is a bond of mutual respect, dignity and equality. Implementing these laws would not degrade marriage instead it would resolve the conflict of the traditional assumption, patriarchal domination and better understanding of human rights.

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