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Marital Rape in India: Constitutional and Legal Analysis

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Marital Rape in India: Constitutional and Legal Analysis

ABSTRACT

This research paper is a critical analysis of the marital rape exception in India as it was provided under section 375, exception 2 of the Indian Penal Code, 1860. It is retention of section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 that continues to afford legal protection to husbands against non-consensual sexual acts with their wives. Further, this paper defines marital rape and various types of marital rape. The core of the research talks about rigorous Constitutional Analysis, testing the exception against the "golden triangle" of Articles 14, 15, and 21 of the Constitution of India. It argues that the exception creates an arbitrary classification between married and unmarried women, which violates the principles of equality and the fundamental right to bodily autonomy and dignity. Further, this paper also explains the position of marital rape in different countries. Furthermore, the paper provides a Legal Analysis of the current "alternatives" like the Domestic Violence Act, the Hindu Marriage Act, 1955, and other civil remedies, arguing that the criminal remedies are inadequate for addressing sexual violence against married women. Also, this paper provides some arguments against the criminalisation of Marital Rape.

KEYWORDS

Marital Rape, Constitution, Human Rights, Women, Hindu Marriage.

1. INTRODUCTION

Hindu marriage is often referred to as kanyadan, which means the father gifting his daughter to the boy after performing all the traditions, rights, and customs. This is marriage, and it has been the most important of all the institutions of human society. Hindu marriage is one of the most ancient traditions prevailing from the Vedic period to the modern world, with different modifications that have occurred up to now. There are 16 sacraments in Shastri Hinduism, in which marriage is one of the important sacraments. Whereas in Islam, marriage is a contract (*Nikah*) requiring a proposal (*Ijab*) and acceptance (*Qabul*). In India, there are personal laws NYAYA SANHITA, 2023

(BNS), Talking about crime against women, rape is one of the most heinous crime against women.

The word 'rape' comes from the word 'rapio', which means 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. Section 63 of the BNS defines rape and provides circumstances when sexual intercourse or sexual penetration, when there is a lack of consent or without the consent of the woman, will be considered rape.

The patriarchal ideologies of the 17th and 18th centuries served as the historical foundation for this exemption. The "Treatise of the Pleas of the Crown" by Sir Matthew Hale popularised the idea of implied consent¹, which holds that a woman gives her body to her husband in a contract that she cannot break after marriage.² The Doctrine of Unity, also known as coverture, which suspended a woman's legal life during marriage and combined it with her husband's, supported this.

2. RAPE AND MARITAL RAPE UNDER INDIAN LAW

A man is said to commit "rape" if he interacts with a woman in any of the following four ways

- entering his penis, to any extent, into the vagina, mouth, urethra, or anus of a woman.
- edging in any object or part of the body (not being the penis) into the vagina, mouth, urethra, or anus of a woman.
- Manipulating any part of the body of a woman to penetrate the vagina, mouth, urethra, or anus of a similar woman.
- Applying his mouth to any woman's urethra, anus, or vagina.

in situations that fit any of the following seven categories

- Against her will.
- Without her permission.
- With her permission, when her permission has been attained by putting her or any person in whom she's interested in fear of death or of hurt.
- With her permission, when the man knows that he's not her man and that her permission is given because she believes that he's another man to whom she's or believes herself to be lawfully married.
- With her permission, when, at the time of giving similar permission, by reason of illness of mind or intoxication or

¹ Matthew Hale, *Historia Placitorum Coronae* [History of the Pleas of the Crown] 629 (1736).

the administration by him face-to-face or through another of any startling or unwholesome substance, she's unfit to understand the nature and consequences of that to which she gives permission.

- With or without her permission, when she's under eighteen years of age.
- When she's unfit to communicate permission.

Explanation I. — For this section, “vagina” shall also include labia majora.

Explanation 2. — It says permission means an unambiguous voluntary agreement when the woman, by words, gestures, or any form of verbal or non-verbal communication, communicates amenability to share in the specific sexual act.

Exception I.—it exempts the medical procedures; it says a medical procedure or intervention shall not constitute rape. This protects healthcare professionals performing necessary examinations or surgeries.

Exception 2. —talks about the marital rape, which says Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”.

Thereby the marital rape occurs when a man commits the aforementioned acts of sexual acts against his own wife. Because of Exception 2 of Section 375 (and Section 63 of the BNS), the legal consequences are completely different from non-marital rape, even though the physical form of the assault is the same. A "Legal Fiction" of permanent agency is created by this exception². One could say that marriage itself forever waives a woman's right to sexual autonomy. Because of the couple's "status" as husband and wife, which effectively grants the husband a "right" to the woman's body regardless of her future consent or will, the statute states that the behaviour is no longer unlawful.

The 42nd Law Commission Report proposed keeping the marital rape exception for cohabiting couples to protect the "institution of marriage," but it can be removed in circumstances of judicial separation. It also recommended categorising sexual activities against minor spouses as a separate, lesser charge than rape,³ reflecting a longstanding unwillingness to punish spousal sexual assault.

By recognising the discriminatory nature of the marital rape

² The Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.

³ Law Comm'n of India, Rep. No. 42, The Indian Penal Code ¶ 18.2 (1971).

exception and discussing its elimination to conform to human rights standards, the 172nd Law Commission Report (2000) suggested a change. But in the end, the Commission decided not to completely criminalise marital rape due to worries about the "sanctity of marriage" and the possibility of abuse⁴.

3. TYPES OF MARITAL RAPE

Battering rape: In "battering rapes," women experience sexual and physical abuse in their relationships, which can take many different forms. Some women are mistreated while being raped, or the rape may follow a violent incident in which the husband tries to make amends by coercing his wife into having sex against her will or consent. This includes the majority of victims of marital rape.

Force-only rape: In "force-only" rape, husbands only use the amount of force necessary to convince their wives; these marriages do not necessarily involve beatings. The attacks typically take place after the woman has refused to have intercourse.

Obsessive rape: Other women experience "sadistic" or "obsessive" rape, which frequently involves physical violence and torture and/or "perverse" sexual practices.

4. MARITAL RAPE IN OTHER COUNTRIES

In the United Kingdom

In the UK, according to English law, a husband could not be guilty of raping his wife, but in the case of *R v. R*, the House of Lords held that the "fiction" of implied consent is no longer acceptable in a modern democracy, that a rapist remains a rapist⁵, his relationship with the victim does not matter.

In the United States

Initially, all the states in the United States were following the English common Law exception, but later changes occurred state by state. Through the late 20th century, the courts and the legislature recognised that these exemptions were violative of the "Equal Protection" clause of the Constitution. By 1993, all spousal exemptions were removed, treating sexual assault within

⁴ Law Comm'n of India, Rep. No. 172, Review of Laws Relating to Rape ¶ 3.1.2 (2000).

⁵ *R v. R*, [1991] UKHL 12; [1992] 1 AC 599.

⁶ The Equal Protection Clause, part of the [14th Amendment](#), ratified in 1868, mandates that no state shall deny any person within its jurisdiction "the equal protection of the laws."

marriage as a serious felony. In the case of *People v. Liberta*⁷, The court found no rational basis for distinguishing between marital and non-marital rape. It rejected "archaic notions" that a wife is the property of her husband or that she gives irrevocable implied consent to sex upon marriage.

In Nepal

In Nepal, in a landmark case of *Meera Dhungana v. Government of Nepal*⁸, The Supreme Court of Nepal struck down the marital rape exception, ruling that it was violative of the constitutional guarantee of equality.

In Canada

Before 1983, Canada followed the same common law as India on marital rape, means a husband could not be prosecuted for raping his wife, but through Bill C-127, the Canadian Parliament repealed the spousal immunity. The law was amended to explicitly state that "no person shall be deemed to have consented to a sexual activity by reason only that the person is the spouse of the other person. In the relevant case of *R. v. Ewanchuk*, the court ruled that there is no such thing as "implied consent" in Canadian law; consent must be positive, active, and ongoing⁹. Canada is in the notion that the Individual's body must be protected, not the sacrament of marriage.

International treaties, like CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), mandate that it is a state's duty to protect women from all forms of violence¹⁰, including domestic sexual abuse. The UN has repeatedly called for the criminalisation of marital rape, arguing that "private" marital traditions cannot override "public" fundamental rights.

5. CONSTITUTIONAL ANALYSIS

The constitutionality of the marital rape exception 2 of Section 63 of the BNS (formerly Section 375 of the IPC) needs to be tested against the 'Golden Triangle' of the constitution of India that is Article 14, 19, and 21. These 3 articles together form a cohesive

⁷ *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984)

⁸ *Meera Dhungana v. Law & Justice Ministry*, 44 NKP 468 (Sup. Ct. Nepal 2002).

⁹ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

¹⁰ see Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38 (1992).

whole that protects the liberty and dignity of every citizen.

Under Article 14, Article 14 guarantees equality before the law and prohibits arbitrary discrimination¹¹. For checking the constitutionality of the marital rape exception provided in BNS¹², We should apply the 'twin test' of Article 14, which is Intelligible differentia (there should be a clear distinction, like married women and unmarried women), and Rational nexus (This distinction must have a logical connection to the law's objective that is protecting bodily autonomy). The physical act of a non-consensual act is almost similar for unmarried women and married women as well, and consequence and injury may also be similar for rape and marital rape; then, exempting husbands from raping their spouses seems arbitrary and violative of equality before law under Article 14. In a landmark case *Independent Thought v. Union of India*, the Hon'ble Supreme Court has observed that a female's body cannot be treated as a "property" of her husband. In 2013, the Justice J.S. Verma Committee Report, following the Nirbhaya case, formally recommended removing the marital rape exception, stating that marriage does not imply "permanent consent."¹³

Under Article 19, Article 19 guarantees the right to freedom of speech and expression¹⁴. Article 19 can be used to argue for the protection of a woman's sexual agency and autonomy. Under section 63 exception 2, presuming "irrevocable consent" within marriage, the exception effectively silences a married woman's ability to assert her sexual choices, thereby it seems to be violative of her freedom of expression. In a landmark case, *Independent Thought v. Union of India*, the Hon'ble Supreme Court has struck down the exception for minor wives (under 18), ruling that it was arbitrary and discriminatory and violated the fundamental rights of the child bride to her own bodily integrity and expression¹⁵.

Under Article 21, Article 21 says that 'No individual shall lose their life or personal freedom unless it is done in accordance with the process that the law directs.'¹⁶. To check the constitutionality of the marital rape exception, Article 21 can be read as the Right to Dignity and Bodily Integrity. Talking about the right to bodily autonomy, it is an absolute right of women to decide with whom, how, and when they will have a sexual relationship. A law that creates an "exception" that exempts husbands from raping their

¹¹ India Const. art. 14.

¹² Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India).

¹³ Justice J.S. Verma Comm., Report of the Committee on Amendments to Criminal Law (2013)

¹⁴ India Const. art. 19, cl. 1(a).

¹⁵ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

¹⁶ India Const. art. 21.

own spouse seems violative of women's right to bodily autonomy under Article 21 of the Constitution of India. In a relevant case of *K.S. Puttaswamy v. Union of India*, the Hon'ble Supreme Court has held that the right to privacy under Article 21 includes sexual orientation and reproductive decisions. This serves as the foundation for the claim that a woman's sexual autonomy cannot be violated by the state by giving her husband rape immunity¹⁷.

6. LEGAL ANALYSIS

Sometimes, the Union of India and some legal scholars argue that criminalising marital rape is unnecessary because there are some alternative criminals as well as civil remedies provided. However, this paper examines how these "alternatives" are fundamentally incapable of addressing the specific gravity of marital rape.

Talking about Rape vs Cruelty, Rape is a distinct offence against the "body" and "dignity" of a woman. Categorising non-consensual sexual penetration with married women by her husband as "cruelty" diminishes the heinous nature of the act. Cruelty is a kind of harassment or torture, but it is different from rape. There is a punishment difference; punishment for rape is Rigorous imprisonment for a term not less than 10 years, which may extend to imprisonment for life, and a fine¹⁸ And punishment for cruelty is Imprisonment for a term which may extend to 3 years and a fine¹⁹. Hence, it seems punishing the husband for marital rape under section 85, Cruelty, is not sufficient or appropriate.

Just because marital rape is not rape, some necessary procedural protections are also not provided to the marital rape victims, such as under Section 184 of the BNSS, mandatory medical examination of the rape victim by a registered medical practitioner within 24 hours and Section 183 of the BNSS, mandatory recording of the statement by a Judicial Magistrate, preferably a female Magistrate.

Talking about the Protection of Women from Domestic Violence Act (PWDVA), 2005, which is known as the complete code for domestic violence. Under Section 3, "domestic violence" explicitly includes sexual abuse, defined as any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of a woman²⁰. For which the victims can seek the Protection, Residence Orders, and Monetary Relief, but these remedies are more of a civil nature, not criminal.

¹⁷ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

¹⁸ Bharatiya Nyaya Sanhita, 2023, § 64 (India) (Punishment for rape).

¹⁹ Bharatiya Nyaya Sanhita, 2023, § 85 (India) (Punishment for cruelty)

²⁰ Protection of Women from Domestic Violence Act, 2005, § 3 (India).

7. ARGUMENTS AGAINST THE CRIMINALISATION OF MARITAL RAPE

The "Sanctity" of the Matrimonial Institution - The most frequent argument is that marriage is a sacred institution (Sanskara) of society that must remain in a private sphere. It is feared that criminalising marital rape would lead to excessive state interference, ultimately causing the "disintegration" of the family unit, and also criminalising it can cause a bad relationship or trauma to husbands.

"Implied Consent" after marriage- This argument says that by entering into a marriage, whether by choice or arrangement, a woman provides a "standing consent" that is continuous consent to sexual relations. It suggests that the marriage contract itself is an irrevocable waiver of the right to say "no."

Cultural Boundaries and Traditional Gender Roles- Critics often argue that there are some roles and responsibilities of a married woman deeply connected with cultural norms, that is to say, it is a wife's responsibility to meet her husband's requirements.

In this framework, marital rape is "normalised" as a domestic friction rather than a crime.

Fear of misuse - the legislature fears that a marital rape law would become a "weapon" for disappointed and annoyed wives to harass husbands and their families.

Sufficiency of Pre-existing Legislation- critics argue that with many alternate provisions in the BNS, like cruelty, etc., and the Protection of Women from Domestic Violence Act (PWDVA), 2005, already covers "sexual abuse" under Section 3. Therefore, it is argued that a separate criminal provision for marital rape is not required.

8. CONCLUSION

Not criminalising marital rape because of the threat to the sanctity of marriage, the principle of implied consent is not a good argument; such sexual acts without the consent of the woman or married women themselves tend to violate the sanctity of a woman.

The critical constitutional analysis of section 63, exception 2 (Marital Rape) in this paper shows that this provision seems unconstitutional against the golden triangle of the constitution, that is, articles 14, 19, and 21. This provision fails the test under Article 14 by creating an arbitrary and unintelligible classification between married and unmarried women. Under section 63

exception 2, presuming "irrevocable consent" within marriage, the exception effectively silences a married woman's ability to assert her sexual choices, thereby it seems to be violative of her freedom of expression under Article 19 of the Constitution. Also, this exception exempts husbands from raping their own spouse, which seems violative of women's right to bodily autonomy under Article 21 of the Constitution of India.

Also in legal analysis paper finds that just because marital rape is not rape, some necessary procedural protections are also not provided to the marital rape victims, such as under Section 184 of the BNSS, mandatory medical examination of the rape victim by a registered medical practitioner within 24 hours and Section 183 of the BNSS, mandatory recording of the statement by a Judicial Magistrate, preferably a female Magistrate.

Hence, based on research, I am of the opinion that the judiciary should strike down the marital rape exception. Marriage should be the bond of two independent, equal identities, where a married woman should have all the rights as an unmarried woman.