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The Legal Conundrum: Analysing the Legal Dimensions of Marital Rape in India

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Abstract

Despite increasing awareness around combating sexual violence, rape within marriage remains both legally and socially invisible in India. This article seeks to highlight how the legal reform is quintessential for social reform to follow, especially in the context of India. The normalisation of marital rape is a direct consequence of gender socialisation, which reinforces dichotomised ideas of masculinity and femininity from generation to generation. The result is the conditioning of women into accepting roles of subordination and the invisibilisation of the sexual coercion within the institution of marriage. This article aims to problematise the institution of marriage and unravel the social and legal silence around marital rape by drawing upon feminist theoretical frameworks and legal analysis.

Keywords: Marital Rape, marriage, criminalisation

1. Introduction

The idea of criminalisation of marital rape is considered to be an 'impossibility' in the context of present-day India. Consequently, it remains one of the few countries in the world that has not criminalized forced sex in marriage. The state condones marital rape by exempting husbands from punishment who rape their wives if the wife is above the age of eighteen (BNS: 23). There exists a contradiction between the legal definition of rape, which involves non-consensual sex, and the understanding of marriage as a sacrament in our culture, which tacitly implies continuous and a priori consent with no option to retract the same (Mandal, 2014). The cultural connotations around marriage have perpetuated the invalidation of marital rape as a crime, and consent is not that an individual gives but rather is given to the husband by the family of the bride. Hence, a woman's sexuality in a matrimonial relationship is considered to be "owned" by the husband, and her virginity is something which is gifted to the husband at the time of marriage (Yllö et al., 2016; Banerjee, 2022). The popular notion of marriage implies that the conjugal rights and the duties of the partners are beyond the scope of the scrutiny of the criminal law, and the marital rape exemption further reifies legally the impunity granted to husbands (Mandal, 2014; Banerjee,2022). A woman is supposed to perform her 'duty' of serving her husband, and if she fails to do it, it is justified on his part to employ violence and coerce her into sex. To make matters worse, there is a 'culture of silence' around sexual violence that is perpetrated within the four walls of a home (Shirwadkar, 2009). Hence, the feminist challenge to the marital rape impossibility thesis should be grounded on a better understanding and theorisation of marriage as a legal, economic, social and sexual institution and how the law can regulate it. Against this background, it becomes pertinent to understand the factors which are impeding the criminalisation of rape within marriage, and how the marital rape laws have evolved around the world, only after which a true social reform could follow.

2. History of Marital Rape Laws Around the World

The grounds for the impunity provided to husbands were a result of the marital rape exception propounded by Chief Justice Sir Matthew Hale in The History of the Pleas of the Crown, published in 1736. Influenced by notions of Victorian morality, it became a part of the English common law, and husbands could not be prosecuted for raping their wives (Hale,1736; Indian Express, 2017). He wrote, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she can not retract" (Hale, 1736 p. 629).

This exception found its way into the common laws of most Commonwealth countries, granting husbands complete legal immunity. Although two-thirds of the countries have laws against domestic violence, few have explicitly criminalised marital rape and 127 countries around the world have not explicitly outlawed coercive sex in marriage (UN Women,2011). Many countries grant legal protection to husbands who rape their wives, including many in Central and Eastern Europe; Central, East, and South Asia; the Pacific; the Middle East; and North and sub-Saharan Africa. Legal frameworks in different countries differ vastly in how they address the question of spousal rape (Anderson,2016; UN Women, 2011).

However, few countries worldwide took the first step in protecting women's rights and outlawed the anachronistic provision due to the popular women's movement. For example, in 1932, Poland became the first country in the world to do away with the marital rape exception, which was followed by other countries in the region like Sweden, Denmark, Norway and the erstwhile Soviet Union and Czechoslovakia (Randall and Venkatesh, 2017; Singh, 2021). Since the 1970s, several judgments in the USA paved the way for the removal of the marital rape exception, and in 1984, the *Liberta* Case, the archaic provision was finally done away with (Anderson, 2016). In a landmark judgment in 1991, the marital rape exception was declared unconstitutional by the House of Lords in the UK. It paved the way for other Commonwealth countries to do away with the archaic provision (R *v.* R, 1991). In South Asia, the precedent was set up by Nepal when, in 2002, the Supreme Court ordered the Parliament to amend the rape law and remove the marital rape exception (UN Women, 2011).

3. Indian Context: The Debate around Marital Rape Exemption

In the Indian context, Section 375 lays out the exemption that is granted to husbands if they are charged with raping their wives. It incorporates the idea of marriage meaning continuous consent and the two parties merging and becoming one unit. The trauma of a woman who is trapped in a relationship where she suffers not once but repeatedly throughout her life should not be trivialised or normalised. The Hale doctrine of implied consent is fundamental to the Indian interpretation of the possibility of rape in marriage. This is rooted in the doctrine of marital unity, a view that is common to most cultures. In the Indian context, marriage is considered to be a sacred union of two souls, and thereafter they transform into one entity by renouncing their individual identities. Henceforth, the wife lives under the protection of the husband, and the duty of protecting her shifts from the father to the husband (Ryan,1995).

However, there is enough empirical evidence to suggest that unwanted sex in marriage is pervasive and embedded in the very patriarchal nature of society. In a study published in 2020, it was found that 32% of married young women (between the ages of 15-24) in the country have had experiences of unwanted sexual intercourse with their husbands, with 12% of them experiencing it frequently (Banerjee,2023). Harrowing accounts of the same highlights why it should be criminalized:

"After she tried standing up for herself, N said, "The nights have become worse ever since. He penetrated me one night, gagged my mouth, and entered. 'I will rape you as long as you are here,' he declared. This body is mine till you depart or divorce me.*" -(Banerjee,2023)

Hence, the cultural notions around marriage have greatly influenced how the state has responded to the call for doing away with the marital rape exception. We cannot understand the responses given by the state without highlighting its inherent masculinist nature, not just in India, but all over the world. The masculinist nature of the state was brought in by Baxi (2000) to explain what transpires when capital punishment is meted out to rapists; the state is celebrated, but the root causes of the normalisation of violence against women are never addressed. The state is hailed as the protector of women, but what is striking is that the idea of the bodily autonomy of women is never the primary concern but rather saving the honour of women (Baxi, 2000). The logic of the masculinist role of protector can also be extended to the Indian State, like any other state, when it refuses to change in the face of incessant demands by feminist organizations.

However, all feminists are not on the same page about the removal of the marital rape exemption. An argument was laid out by Agnes (2015), who believed that sensationalisation by the media has given undue limelight to the false cases under Section 498a, and argued that the need of the hour is to club the interpretation of the civil law of the Domestic Violence Act with the criminal section 498a and not limit it to dowry-related cases alone. This would open doors for the consideration of sexual violence as a crime against married women, without any need to legislate a separate law or remove the marital rape exemption (Agnes, 2015).

1. Judiciary's Role and State's Response

Feminists and women's rights organisations have argued that marital rape exemption is in direct conflict with fundamental rights that include Article 14 of the Indian Constitution which provides that the State shall not deny any person equality before the law or the equal protection of laws within the territory of India, Article 21 which states the right to life and personal liberty and the right to privacy and bodily integrity. She is also robbed of her reproductive rights as the man uses her body and may force pregnancy on her irrespective of her choices (Singh,2021). Hence, the marital rape exemption is in direct violation of the fundamental rights of married women.

The Nirbhaya movement prompted nationwide sympathy for violence against women and in this context, the Verma Committee was constituted in 2012 with the purpose of revisiting the rape laws in the country. It came up with the following recommendations concerning marital rape:

> *The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.*

Hence, it is recommended that the exception for marital rape be eliminated and that it should be replaced with a clause that says that the relationship between the complainant and the accused will not matter in the crimes of rape or sexual assault (Verma et al., 2013). However, the government did not change the law, although it incorporated other recommendations, suggesting its reluctance to do away with the archaic provision.

Subsequently, the issue of age of consent came up, and up until this judgment, the husband could rape his wife even if she were under the age of 18 years, but could be prosecuted for the same under the provisions of the POSCO Act. In the Independent Thought vs Union Of India, 2017, the Court held that the Age of Consent should be increased to 18 years of age in contrast to the earlier law where the age of consent was

15 years, which was in direct clash with the POSCO Act. It meant that the court held that in the context of child wives:

> *The marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. (*Independent Thought vs Union Of India, 2017)

The judgments by the courts around the country have been moving in the direction of recognising the anomalies in the marital rape exception. Recently, the Gujarat High Court opined that the punishment meted out should not be different based on the relationship between the perpetrator and the victim (Upadhyay, 2023). The idea of reproductive justice has also influenced the legal milieu. In a landmark judgment in 2022, the court expanded the notion of reproductive justice and held that under the Medical Termination of Pregnancy Act, rape victims seeking to terminate pregnancy would include marital rape victims (Sharma,2022).

However, the Indian government has reiterated its stance multiple times, stating that the removal of the marital rape exemption would 'destabilise the institution of marriage' and would have social ramifications (Economic Times, 2023). The government's reluctance came to the forefront when in 2015, the Ministry of Home Affairs refuted the bill on criminalising marital rape, stating that the Western understanding of marriage can not be extended to the Indian context as the social conditions here differ on account of education, poverty, the perceptions of the society, religious customs and so on (Singh, 2021; Ministry of Home Affairs, 2017). Hence, the issues of burden of proof, dependence on verbal testimonies and the misuse of the law remain major hurdles for the criminalisation of marital rape in India.

Hence, several legal nuances need to be incorporated to make a robust law and any hasty legislation, even in favour, could do more harm than good. One of the law students who participated in this study elaborated on this:

> *Criminalising marital rape is the need of the hour, but the tussle is again between desirability and practicality. We have seen clear misuse and abuse of 498A by some women, pursuant to which higher judiciary has adopted a liberal view of that statute. Therefore, it is an urgent need of the hour to cautiously develop a law against marital rape where genuine victims do not suffer and perpetrators are not spared.*

In conclusion, although removing the marital rape exemption would be the first stepping stone in the right direction, it will not be enough, and the real challenge would be changing the perception of society, increasing awareness and improving the legal accessibility to tackle the obstacle of underreporting. In this journey of our nation to gender equality, there are glimmers of hope that the day is not far when society would treat a rape as a rape, irrespective of the nature of the relationship between the victim and the perpetrators.

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