SHOULD MARITAL RAPE BE CRIMINALISED? A SOCIAL AND LEGAL ANALYSIS

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I. INTRODUCTION

There is a particular cruelty in a violation that the law refuses to name. For millions of women across India, this is not an abstraction - it is an everyday reality, occurring within the domestic space that society labels '**home,**' perpetrated by the person the law calls a **'husband.'** Non-consensual sexual intercourse by a husband is one of the most controversial and awkward loopholes in Indian criminal law. The rest of the world has gradually come to recognize and criminalize the marital rapist, but in India, the exception is deeply rooted in the colonial history and sits right in the statute books, and has been enforced by a patriarchy.

Sexual intercourse by man with his own wife (where she is **not below eighteen years of age**) is not rape' is the sum and substance of **Exception 2 to Section 375 of the Indian Penal Code 1860** and its new enunciation in **Section 63 of the Bharatiya Nyaya Sanhita 2023 (BNS)**. This exception, which was adopted from a legal doctrine of the British called 'irrevocable matrimonial consent' introduced by Sir Matthew Hale in 1736, has remained in India since then, well after the British abolished it in 1991. At its heart, the question that this article poses – whether or not marital rape should be criminalised – is a question of treating married women as full legal persons or as property of their husbands.

The analysis is carried out from a socio-legal perspective with reference to constitutional jurisprudence, feminist legal theory, international human rights norms and the lived reality of Indian women. The article challenges the landmark judgments, the recommendations of the **Justice Verma Committee (2013)**, the NFHS findings and the scholarly work of judges like Pratiksha Baxi and Flavia Agnes to conclude with a thoughtful argument: the marital rape exception is socially injurious, constitutionally unpalatable and morally repugnant. It lives on because it is a statement of the state's unwillingness to look at suffering **(Baxi 1196; Agnes 520).**

II. HISTORICAL BACKGROUND

Marital rape exception under the Indian law is a direct adoption from the English common law system. The philosophical basis of rape law throughout the British Empire was Matthew Hale's observation that a wife, by the contract of marriage, gives herself to her husband which she cannot retract, and therefore he is not guilty of rape. The fiction of irrevocable consent was inserted into the Indian Penal Code in 1860 when the law was enacted, and was embedded in the Victorian belief that marriage involves the transfer of the woman's body, will and autonomy to her husband.

In Britain the marital rape exception was lifted in 1991, after the House of Lords ruled in the case of ***R v. R [1991] 4 All ER 481*** that it was no longer acceptable in today's society to rely on the common law fiction that the wife gave her husband consent to intercourse once she got married. Since then, over 150 countries have enacted laws to criminalize marital rape, including all the member states of the EU, South Africa, Australia, Canada and the United States. On the contrary, India has taken a step backwards. Criminal Law (Amendment) Act, 2013, which has built upon the definition of rape and added progressive reforms after the **Nirbhaya gang rape case**, has intentionally included and re-enacted the marital rape exception. The Justice **J.S. Verma Committee**, which was set up post the **2012 Delhi gang rape**, and was charged with recommending changes in law, expressly recommended the repeal of the exception in its recommendations, which stated that there is no right for the husband to have sexual intercourse with his wife without her consent. However, Parliament did not take action on this recommendation.

III. MEANING AND CONCEPT OF MARITAL RAPE

Marital rape, broadly speaking, is rape that is committed in a marriage. It includes any unwanted sexual act performed by one spouse on the other, such as vaginal penetrations, anal and oral sex, and penetration with objects. Three general types of marital rape have been established by scholars: force-only rape (where only the smallest amount of force is used); battering rape (rape in conjunction with physical abuse); and sadistic and obsessive rape (rape with torture or perverse acts).

In her groundbreaking study on sexual violence and state responsibility, Pratiksha Baxi argues that marriage rape is different from rape at the hands of a stranger, not in terms of its gravity,

but because of the structural role it plays in intimate and socially normative relationships, making it invisible to neighbours, to family, and to law (**Baxi, "Rape, Retribution, State: On Whose Bodies?")**. **Economic and Political Weekly, vol. 35, no. 14, 2000, p. 1196)**. This is the very reason why the legal silence is so devastating. When the law withholds criminal punishment for a group of sexual violence, it not only fails to punish, it is telling that group of women that their suffering is not criminal, it is not a crime. The woman who is violated by her husband is denied justice, and the language to name her hurt.

NFHS-4 (2015-16) found that about 30% of Indian married women (aged 15-49) reported that they had experienced any physical, sexual or emotional violence by their husbands **(Government of India).** For those who were sexually abused, there was a large proportion of husbands. These are no statistical aberrations, but the lived experience of tens of millions of women. However, none of these women are currently entitled to a crime against her husband as per the existing Indian law.

IV. LEGAL POSITION IN INDIA

Sexual intercourse is defined as rape in **Section 375 of IPC** and outlines circumstances in which sexual intercourse is rape. **Exception 2** to the above excludes sexual intercourse by a man with his own wife, if the wife is not under the age of fifteen. ***In Independent Thought v. Union of India (2017) 10 SCC 800***, age threshold was increased to eighteen in recognition of the age of consent and the **Prohibition of Child Marriage Act, 2006**. The Court declared Exception 2 to Section 375 IPC as unconstitutional in part relating to the case of a girl child aged between 15 years and 18 years. But the Court did not consider the larger issue of adult marital rape, expressly saying that it was something that needed to be looked into greater.

As of 2023, Section 63 defines rape as part of a new legislation called Bharatiya Nyaya Sanhita that superseded IPC. It has been left in substance as sex or sexual acts by a man with his own wife, provided the wife is not below eighteen years, is not considered as rape. With the exception of the criminal law, which was revised in many respects, and with a lot of public discussion, Parliament decided to keep the exception. The BNS thus stands not for reform but for continuity - for legislating the doctrine that marriage involves “permanent sexual consent.”

A prominent feminist legal academic and Majlis founder, Flavia Agnes, has authored numerous articles about the historical marginalisation of women as legal dependents by Indian family

law. It is virtually impossible to deny that in our society the law regulates women's sexuality through the institution of marriage - and that consent is negotiated not from the woman at each sexual encounter but from the marriage agreement (**Agnes, "Protecting Women Against Violence? Review of a Decade of Legislation, 1980–89," Economic and Political Weekly, vol. 27, no. 17, 1992, p. 520)**. This is the key to comprehending why the exception is allowed to remain: it is not simply an oversight, it's an affirmative environment of this legislative point of view, in which married women don't have sexual agency.

V. CONSTITUTIONAL ANALYSIS

Article 14: Right to Equality

In the Constitution, Article 14 states that everyone is treated equally before the law and accorded equal protection of the law. The marital rape exception establishes a clearly arbitrary distinction: If a woman is raped by a stranger she has full legal remedies under Section 63 BNS, but if raped by her husband she has none. The classification is not based on any rational distinction in matters for which the law was enacted, but rather on the medieval myth of marriage consent. In **Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1**, the Supreme Court has invalidated the protective legislation based on stereotypical notions about women and ruled that stereotypical notions do not form the basis of a valid classification. The marital rape exception, which rests on the notion that a woman who marries her husband consents to sex forever, is similarly tainted with stereotypical thinking, and cannot withstand Article 14.The marital rape exception, based on the assumption shared by all of history that once a woman has entered into a marriage, she has consented to sex for life, is similarly infected with stereotypical thinking and is incapable of withstanding Article 14.

Article 15: No discrimination on the basis of religion, race, gender, disability or economic status.

Article 15(1) of the Constitution bans the State from discriminating against any citizen, based on, inter alia, sex. The marital rape exception is sex discrimination in its purest form, as it only protects women and not men from the crime of rape in marriage. In their seminal book Subversive Sites: Feminist Engagements with Law in India (1996) published by **SAGE Publications, Ratna Kapur and Brenda Cossman** contend that law is not merely about the regulation of women's lives, but is an active part of constructing the position of women in social

institutions such as marriage. If a law does not provide criminal protection to women based on marital status, then it is not gender neutral, it is structurally discriminatory.

The right to free expression and personal right to self-determination.

Article 19 is explicitly bound up with the freedoms of speech, movement, and profession, but the Supremes have interpreted this article's penumbra to include a right to make intimate choices that are not subject to the coercive state restrictions. In the case of **Navtej Singh Johar v. Union of India (2018) 10 SCC 1**, the Court ruled that the state cannot tell who a person may love or how they may express their sexuality after decriminalizing consensual same sex relations under **Section 377 IPC**. The same logic is applicable to marital rape, as the state cannot control consensual intimate decisions, it cannot control non-consensual ones. If a woman is forced to have sex she doesn't want, the free expression she has is meaningless.

Article 21: Right to life and personal liberty.

The strongest constitutional basis for criminalization is the article 21. In **Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1** the Supreme Court has declared that the right to reproductive choice is a facet of personal liberty guaranteed by Article 21. The Court noted that any limitation on a woman's reproductive options should be weighed against this constitutional right. The most basic violation of reproductive autonomy that can be thought of is forced sexual intercourse, possibly leading to pregnancy. A woman who can't say no to sexual intercourse in marriage, she does not own her reproductive ability.

It is also a significant judgment of **Puttaswamy vs Union of India (2017) 10 SCC 1**. The Supreme Court in a unanimous verdict said right to privacy was an intrinsic part of Article 21, which embodies the right to life. In particular, the Court acknowledged recognition of the concept of privacy, which includes the right to personal and intimate choices, and privacy of the body from the intrusion of the state or private parties without consent. The Court noted that the body of a person is the most private of spaces. The intrusion of this space is absolutely prohibited in case of forced sexual intercourse. The right to bodily integrity cannot be said to extend beyond the front door of a marital home but not into it.

VI. Trends and split verdict of Delhi HC – Judicial System

The recent Delhi High Court judgement in **RIT Foundation v. Union of India (2022)** in May

was the most direct of judicial decisions relating to adult marital rape. Two judges gave split verdicts with one judge coming up with the opposite verdict to the other. **Justice Rajiv Shakdher** declared the **marital rape exception as unconstitutional**, stating that it infringed the Constitution's Articles 14, 15, 19 and 21. He argued that the exception was based on the antiquated and outdated concept of irrevocable consent, on the absence of the married woman from the equality of laws, and on the violation of the woman's right to bodily integrity, dignity and privacy.

Writing separately, **Justice C. Hari Shankar** agreed with the exception, arguing that the marriage is a "**special relationship of a different nature**" between husband and wife, and that the legislature's exception of treating marital sexual relationships differently from non-marital sexual relationships was a "legislative choice" and not an unconstitutional discrimination. The dissenting opinion is based on a school of thought which was in stark contrast to the constitutional morality that the Supreme Court had set in the case of **Navtej Singh Johar ([2018] 2 SCC 189) and Joseph Shine v. Union of India ([2018] SCC 1 (Puttaswamy)**. It is now being appealed to the Supreme Court.

In Joseph Shine, Supreme Court has struck down the offence of adultery under **Section 497 IPC**, observing that a law which treats a married woman as the chattel of her husband is constitutionally unacceptable. It was clear from the Court's language that a woman is not a chattel. If a law which punishes a man for having consensual sex with another man's wife is unconstitutional because it violates the husband's interest in the property of his wife, how much more so will a law be unconstitutional which allows a man to have non-consensual sex with his own wife simply because the institution of marriage is believed to have transferred her sexual autonomy to the husband?

The constitutional framework is further strengthened in State **of Karnataka v. Krishnappa [(2000) 4 SCC 75]**. Supreme Court also observed that sexual violence is dehumanisation and an infringement of the right to privacy and sanctity of female, and "sexual violence is a violation of bodily integrity. The Court's definition of sexual violence as an attack on dignity and privacy extends to sexual violence in marriage.

VII. SOCIAL REALITY AND THE ARCHITECTURE OF PATRIARCHY

The law is not a self-contained, autonomous system. It is important to recognise the marital

rape exception because one must have knowledge of the patriarchy that structures Indian marriage and that which sustains it. In many parts of India marriage is interpreted as a social contract between the two families, where the woman's body, labour and reproductive abilities are handed over from her natal family to her marital family. This transactional definition of marriage has nothing to do with being culturally inherited: it is produced on a daily basis through the legal frameworks in which women are viewed as objects of marital and family exchange.

Marital rape is a vicious double bind for women. On the other hand, they are not given any legal recognition of their experience – the law says it was not rape. At the same time, the social stigma, the economic dependence of women, the fear of their family's honour and the normalisation of marital sex as a responsibility for women work to keep most of them silent. Internalisation and normalisation of gender-based violence is apparent from the fact that a significant percentage of women believes a husband has a justification for beating his wife in certain situations, as documented in the same National Family Health Survey.

Marital rape has a far-reaching and profound impact on the psychological well-being of victims. The studies conducted in clinical psychology have established that the survivors of marital rape are prone to post-traumatic stress disorder (PTSD), depression, anxiety, sexual dysfunction and feelings of betrayal and worthlessness; in some ways, these are more intense than those of the victims of stranger rape, because the identity of the perpetrator is known and the individual is one who is trusted and intimate. This psychological harm is compounded by the lack of enforcement of the law: by the lack of protection, the law is telling the survivor that what happened to her wasn't serious enough to warrant the protection of the law: that her suffering was her own fault, that it is manageable, and that it is private.

VIII. INTERNATIONAL PERSPECTIVE

India's current laws on marital rape put it in the minority and into a shrinking and discreditable list of nations. More than 150 countries, such as the UK, the USA, Canada, Australia, South Africa, all the member states of the EU and many in Asia and Africa, have criminalized marital rape. Marital rape is clearly defined as a form of violence against women in UN Declaration on the Elimination of Violence against Women (1993) and states are required to eliminate violence against women, including marital rape, by all appropriate means, including through penal legislation.

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has consistently called for the criminalisation of marital rape and has been concerned with India's continued failure to do so in its concluding observations on India's periodic reports. India is a signatory to the **Beijing Platform for Action (1995)** which has demanded action and punishment of women abusers regardless of the nature of their relationship with the victim.

India is also bound by the **International Covenant on Civil and Political Rights (ICCPR)**, which it ratified in 1979, which also calls on states to protect people from torture and cruel, inhuman, and degrading treatment, and to ensure the equal protection of the law. Non-consensual sexual intercourse, whether in a marriage or otherwise, is a type of degrading treatment within the scope of these instruments. India's failure to fulfill these obligations is not only a failure of domestic law it is a failure of international responsibility.

IX. ARGUMENTS FOR CRIMINALIZATION

Equality, consent and dignity are the three core principles that underlie the case for criminalisation. The first and most obvious one, is equality: if the law condemns non-consensual sexual intercourse in all other situations, there is no rational or constitutional argument for the exception of marriage. Whatever harm is done to the victim – physical injury, psychological trauma, violation of his/her corporeality – is the same no matter whether the perpetrator is a stranger or a husband. A law that discriminates among these two victims on the basis of marital status would be a law that gives a preference to the married women over the unmarried women and such preference cannot be constitutionally upheld.

Secondly, dignity: in **Puttaswamy**, the Supreme Court stated that human dignity is an intrinsic value that is acknowledged by the Constitution. That dignity has a sexual component that is inherent and inalienable: sexual autonomy. If a woman is not able to say "no" to her husband, she is not free, she is, at the most basic level, enslaved in her marriage. Criminalization would acknowledge her dignity-and make it clear that marriage does not take away her fundamental rights from either of the people who marry!

Third, Consent: Consent is not an end-of-the-marriage procedure that happens at the wedding. It is a continuous and revocable will that is expressed in the context or circumstances of a particular situation. The myth of irrevocable matrimonial consent must not exist in a

constitutional republic which affords personal liberty. The law must acknowledge that a woman's 'no' - or the silence - or her tears - or her fear - counts, just as it does outside of marriage.

X. ARGUMENTS AGAINST CRIMINALIZATION AND THEIR LIMITS

Opponents to criminalisation often make a number of arguments. First, marriage is essentially a private affair and the State should stay out of the marital bedroom. Second, that a disgruntled wife might make false accusations to harass her husband especially when he is in the middle of a marital squabble. Third, Indian society is not yet ready to embrace such a radical change in legislation.

If examined, each of these arguments is found to be wanting. **The first**, the privacy of marriage, is a misunderstanding of the nature of the right to privacy. Privacy does not ensure consensual intimacy, it does not ensure violence. Domestic violence is criminalized, and the marital home has never been a legally mandated safe house for abuse. If the logic applied is that if marital rape is legal then all domestic violence is legal, then more than just marital rape must be decriminalized. If consistently applied, the logic of marital rape being legal for marital privacy would imply decriminalization of all domestic violence.

The second argument - the fear of false accusations - is a valid point for any other crime and has never been considered an excuse not to criminalize harmful behavior. There are existing mechanisms in the criminal justice system that prevent wrongful conviction: the burden of proof (beyond reasonable doubt) and the right to a fair trial. Furthermore, the low rate of reporting of marital rape cases, as a result of social stigma and economic dependence, indicates that there is a problem of near total impunity, rather than surcharge prosecution.

The third argument - social unreadiness - is likely the most telling. It tacitly admits that marital rape is a wrong act, but advises patience. You could make the same argument for the legality of untouchability, child marriage, widow immolation - on the basis that society isn't ready for it. Law is not only a reflection of the social morality, it is a formative element of it. If marital rape becomes a crime, it would clearly be a message that consent should be a factor in any relationship, including marriage.

XI. CRITICAL ANALYSIS

The arguments in opposition to the criminalization of marital rape are not, essentially, legal or rational arguments, but political ones advancing the interests of those who find it convenient to stay in the present state of affairs. The legal and constitutional arguments in favor of criminalization, by comparison, are legion. The marital rape exception is not consistent with the right to equality (Article 14); it is sex-based discrimination (Article 15); it infringes on the right to privacy and body (Article 21); and is inconsistent with the reproductive autonomy recognised in the case of **Suchita Srivastava, Navtej Singh Johar, and Joseph Shine** and the dignity jurisprudence developed in the latter two cases.

The **Justice Verma Committee**, which was formed only to recommend reform of the rape law, had said that the law should be criminalised without any modifications. The need to review the exception was also highlighted in the **Law Commission of India's 172nd Report (2000)** on the Review of Rape Laws in view of the changing constitutional expectations. The Delhi High Court divided its verdict and now has the Supreme Court itching to hear the matter. Now, the Court has a chance to articulate, as Parliament has so often failed to do, that marriage is not a license to rape.

This debate is not just about India's economy, it is also about India's society. A society that permits a man to do whatever he wants to his wife's body is not a society that does respect women as equal citizens. It is a society that has decided, with full awareness of its consequences, to have a hierarchy of persons, with the legally diminished position of married women. While the criminalization of marital rape would not take care of all the social and structural factors that contribute to gender-based violence, it would at least strip the state of its endorsement of one of its most pernicious forms.

XII. CONCLUSION

At the heart of the discussion over marital rape is the question “Is a married woman a person?” If she is - if she's equal... if she has dignity, if she's got her body, if she's got a right to refuse, if she's got a right to be protected under the law, if she's got the same rights as any other human being, - then the marital rape exception has no defensible place in the law of India. It reflects a time when women had no legal existence, were under-represented in the Constitution, and were viewed as extensions of the men's will and rights.

The Constitution of India has never spoken of a lessened personhood of the wife. It is not put aside at the doorstep of the marital home. It does not fade away with the exchange of garlands because of its protection of dignity, privacy and personal liberty. In a series of landmark decisions, the Supreme Court has gradually eroded the patriarchal framework of law that has been restricting women, giving them reproductive autonomy in **Suchita Srivastav**a, the right to privacy in **Puttaswamy,** emancipation from the notion of 'adultery' in **Joseph Shine** and protection from child marital rape in Independent Thought. The last step, which is in many ways the most crucial - declaring that marriage isn't a barrier to rape - is the one that should have been acknowledged at some point: that no relationship, regardless of its intimacy, can overcome a woman's right to say no.

Earlier, every day that the marital rape exception stays on the statute books, it sends a message to the women of India. The message is their suffering, if it happens in marriage, is not enough to be considered a crime to the state. It's a message a constitutional democracy should never send, and one India's top court can finally put to bed, forever, in the name of equality, dignity and the most fundamental of constitutional moralities - that everyone, no matter who they have wed, is a human being, first and foremost.

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