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# FROM MARITAL PRIVILEGE TO CONSTITUTIONAL PERSONHOOD: A TRANSFORMATIVE CRITIQUE OF THE MARITAL RAPE EXEMPTION IN INDIA

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## ABSTRACT

Criminalization of marital rape has become a legal and constitutional issue of concern in the modern world of gender justice especially in regard to the current legislative stagnation, judicial review, and the global requirements of human rights that seem to focus on consent, dignity, and bodily autonomy in intimate relations. The changing normative order notwithstanding, in a number of jurisdictions criminal law still overlooks marital rape, and this shows a lack of correspondence between constitutional morality and patriarchal ideas of marriage. The main issue being discussed is the fact that sexual violence in marriage remains a hidden issue legally and that institution of marriage is given precedence over the human right. The issue considered is whether the given exemption can be constitutionally and normatively justified, and what the consequences of this exemption are in terms of equality, autonomy, and access to justice. The primary goal and objective of the research is to critically evaluate legal grounds of immunity to marital rape and identify the need to criminalize it according to the rights-based framework. The study uses the doctrinal and comparative research methodology to examine statutory provisions, constitutional jurisprudence, and international human rights instruments and also perceives the gaps in existing literature that inadequately explores substantive equality and misuse discourses. The results show that the exemption is based on the outdated common law doctrines, it is not constitutionally justified, and cannot be justified by the comparative evidence proving that criminalization does not weaken the marriage or increases the misuse beyond the current criminal law issues. The paper can help in the reformulation of marital rape as a gender justice concern of the law by offering a constitutional and human rights model that opposes the traditional family-centered analyses and provides the normative ground through which the legislative intervention, the judicial interpretation, and the policy discussions regarding sexual violence in marriage can be restructured.

**Keywords:** Constitutional Morality, Consent, Gender Justice, Marital Rape, Substantive Equality.

## I. Introduction: Constitutional Morality and The Marital Exception.

The question of criminalizing marital rape is one of the most burning unresolved tensions of the Indian constitutional law in the modern era. Although post 2013 changes redefined rape around the question of consent, Exception 2 to Section 375 of the Indian Penal Code and its continuation in the Bharatiya Nyaya Sanhita highlights that sexual intercourse between a married man and a wife does not amount to rape.<sup>1</sup> The consequence is a doctrinal anomaly which places that consent is a necessity of sexual legality in all contexts except marriage. This contradiction and inconsistency is not just statutory, but constitutional. Over the past few decades, the Supreme Court expressed a fairly strong rights based jurisprudence of dignity, privacy, and substantive equality,<sup>2</sup> but the marital rape exemption establishes a safe haven in which such protections are weakened. The continuation and persistence of this immunity demonstrates revealing a disjunction that constitutional morality and traditional patriarchal ideas of marriage are in disconnection. The fundamental research question that will guide this paper whether marital rape exemption is constitutionally justified in the light of the Articles 14, 15, and 21. The argument put forward is that it can not. The exemption represents a form of constitutional exceptionalism grounded historically in coverture, supported structurally and sustained by gender hierarchy, and doctrinally incompatible with transformative constitutionalism because of its teachings. Criminalization is not an encroachment into marriage but it is a recovery of constitutional personhood within it.

## II. The Genealogy of the Exemption: Coverture ,Status and Sexual Access.

Marital rape immunity is doctrinally rooted in the statement made by *Sir Matthew Hale*, that a husband could not rape his wife because she by marriage had made an irrevocable consent<sup>3</sup>, which is itself a development of the more general doctrine of coverture, according to which the legal identity of a married woman became that of her husband. Consent was not presented as an ongoing action of agency but rather a transfer of status. It is as shown in a historical treatise by *Jill Elaine Hasday* that the marital rape exemption was neither inevitable nor culturally universal , but rather, it was created by the judiciary to enforce male authority and marital order<sup>4</sup>. Its stability was due to the unwillingness by the institutions to acknowledge

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<sup>1</sup> Indian Penal Code, No. 45 of 1860, § 375 Exception 2 (India).

<sup>2</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India); *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India)

<sup>3</sup> 1 *Matthew Hale*, *Historia Placitorum Coronae* 629 (1736).

<sup>4</sup> *Jill Elaine Hasday*, *Contest and Consent: A Legal History of Marital Rape*, 88 *Cal. L. Rev.* 1373 (2000).

wives as separate and independent legal subjects. In her feminist critique, *Catharine MacKinnon* puts this doctrine in a wider context of a sex hierarchy legislated by law<sup>5</sup>. In putting the law in this perspective, she tends to justify how power is hidden through consent rather than through force naturalising male sexual access. Within this context, the fact that gendered social ordering grants marital rape immunity is not an anomaly. The theory of “*preservation through transformation*” by *Reva Siegel* explains how the cheating structure of patriarchal doctrines is preserved even after being reformed<sup>6</sup>. The language of law becomes modernized, yet the hierarchical structure is maintained. According to the *India’s 2013 rape law amendments*, the definition of sexual assault was radically revised and focused emphasizing on affirmative consent. But the conjugal exception left alive the assumption of conjugal entitlement. Even though Reform has taken place, hierarchy still continues to exist. To see the point of this genealogy, it is important to understand that the exemption does not have a cultural necessity but rather contingency historically. Its existence is indicative of an institutional necessity instead of relying on principled constitutional reasoning.

### **III. Article 14: Formal Equality to Anti-Subordination.**

Article 14 assures equality before law as well as equal protection of the laws. According to traditional doctrine the classification is possible when there exists a rational nexus to a legitimate objective with a valid end. Modern jurisprudence has however changed to move towards substantive equality. In *Navtej Singh Johar v. Union of India*, The Court acknowledged that equality was the necessity of breaking down subordination structures in union of India<sup>7</sup>. The marital rape exemption produces a classification between married and unmarried women. The given goal, the ability to protect the institution of marriage, has no rational nexus with the goal of rape law to prevent the case of non consensual sexual intercourse. Further, when measured by the anti subordination principles the exemption propagates and entrenches structural inequality. The vulnerability theory by *Martha Fineman* criticizes the liberal approach of the autonomy of individuals in a relationship occurring in a symmetrical manner in the private world<sup>8</sup>. Individuals are integrated into social arrangements that exhibit unequal distributions of power. Indian marriage is usually bound into the world of economic dependence, social stigma surrounding divorce, and gendered commitment and

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<sup>5</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989).

<sup>6</sup> Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117 (1996)

<sup>7</sup> *Navtej Singh Johar*, (2018) 10 *SCC* 1

<sup>8</sup> Martha Albertson Fineman, *The Vulnerable Subject*, 20 *Yale J.L. & Feminism* 1 (2008)

expectations to sexual availability. Empirical evidence reinforces this structural analysis. According to the *The National Family Health Survey 5 (2019-21)*, which holds that approximately 29 percent of married women have ever experienced spousal violence<sup>9</sup>. Other studies indicate shows that a large share of sexual violence within intimate relationships rather than outside them<sup>10</sup>. These data negate the utterance that spousal intimacy is necessarily and inherently consensual. Not protecting married women against rape insulates those women, thus the state sets up a layer of constitutional subjectivity. Substantive equality does not go with this kind of stratification.

#### IV. Delhi High Court Split Verdict

The constitutional complexity on the matter is marked in the divided judgment of the High court of Delhi on *RIT Foundation v. Union of India*<sup>11</sup>. Justice *Rajiv Shakti* believed that, the marital rape exception contravened Articles 14 and 21 by establishing an inadmissible distinction and deprived married women of autonomy over their bodies<sup>12</sup>. Justice *Hari Shankar* concurred with the exception, emphasizing legislative domain and the supposed special nature of the relationship between marital relationship<sup>13</sup>. The point of divergence between the two opinions leans to a more jurisprudential dispute: Whether constitutional morality should actively reshape social institutions? or Whether judicial courts must leave to legislative gradualism in issues that are seen to be socially delicate<sup>14</sup>? The divide therefore serves to highlight the fact that the discussion is not only that on criminalization, but the input of the judiciary in promoting substantive equality.

#### V. Article 21: Dignity, Privacy, Nondisruptive Decisional Autonomy.

The establishment of the right of privacy as a fundamental right of Justice *K.S. Puttaswamy v. Union of India* provided a turning point in constitutional history<sup>15</sup>. Privacy did not mean seclusion but rather decisional autonomy which meant the ability to control choices central to personhood. If sexual autonomy is a part of the integrity of dignity, then its non-existence in

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<sup>9</sup> Ministry of Health & Family Welfare (India), NFHS-5 (2019–21)

<sup>10</sup> World Health Organization, Violence Against Women Prevalence Estimates (2021)

<sup>11</sup> *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (India)

<sup>12</sup> *Id.* (Shakti, J.) (holding that Exception 2 to § 375 IPC is unconstitutional for violating Articles 14 and 21 by denying married women equal protection and sexual autonomy)

<sup>13</sup> *Id.* (Hari Shankar, J.) (upholding the exception on grounds of legislative competence and the distinct nature of marriage)

<sup>14</sup> Gautam Bhatia, *The Transformative Constitution and the Role of the Court*, 13 NUJS L. Rev. 1 (2020)

<sup>15</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

marriage is theologically coherent. The definition of consent presupposes that it has to be contemporary and revocable. When the assumption of an irrevocable consent is conducted in a way that denies autonomy, then, this assumption counteracts autonomy. In *Joseph Shine v. Union of India*, The Court declared the provision of adultery as invalid and unconstitutional in regard to treating women as human property in the hands of their husbands<sup>16</sup>. Yet the marriage rape exemption is based on proprietary conception of conjugal rights. According to *Carol Smart's* critique of legal objectivity, by introducing legal doctrines of coerced marital intercourse as consensual, the law makes invisibility out of coercion<sup>17</sup>. The dignity that is promised in the constitution is conditional with respect to being married.

## VI. Public-Private Divide and Constitutional Accountability.

Criminalization has frequently been opposed with a cry of the holy sanctity of the marriage institution and the threat to the privacy of the state into the marriage domain. The public private separation has, however, been criticized over some time in feminist legal scholarship as one of the ways in which domestic violence is insulated against criticism. *Ratna Kapur and Brenda Cossman* argue that the family has historically functioned as an unruly place of power where gender hierarchy can be observed<sup>18</sup>. When violence is framed as private, constitutional redress is denied. International human rights jurisprudence rejects this insulation. The *Committee on the Elimination of Discrimination Against Women* has indicated that the states have the duty of preventing and punishing the gender based violence in marriage<sup>19</sup>, which failing to criminalize this violence may amount to discrimination. This is reflected in comparative constitutional reform. In *R v R*, the *House of Lords* found the marital rape exemption obsolete and intolerable to the equality principle<sup>20</sup>. Reforms in *Canada* similarly abolished systemic abuse and collapse of marriage in the wake of the reform<sup>21</sup>. These developments indicate that criminalization supports individual rights without undermining the stability in families.

## VII. Misuse Narratives, Transformative Constitutionalism, and the Reconstruction of

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<sup>16</sup> Joseph Shine, (2019) 3 SCC 39

<sup>17</sup> Carol Smart, *Feminism and the Power of Law* (1989)

<sup>18</sup> Ratna Kapur & Brenda Cossman, *Subversive Sites* (1996)

<sup>19</sup> CEDAW Comm., Gen. Recommendation No. 35 (2017)

<sup>20</sup> *R v R* [1992] 1 AC 599 (HL)

<sup>21</sup> Criminal Code, R.S.C. 1985, c C-46 (Can.)

## Marriage.

Criminalization of marital rape is often justified by opponents who resort to the inform of false allegations and the criminal law being ultimately turned against the marital conflict. Nonetheless, this story becomes complex with the help of empirical studies and socio legal research. As an ethnographer of the rape trials in India, *Pratiksha Baxi* explains the prevailing institutional issue is not with the overcriminalization of rape but rather with the failure to acknowledge the problem<sup>22</sup>. Victims of sexual violence routinely confront hostile cross examination, evidentiary skepticism and entrenched gender bias within courtrooms. Instead of the easy conviction that is touted by the structure of trial procedure, this structure occasionally causes attrition and retraumatization. The misuse argument, thus, has to be balanced out with the overall systemic truth that sexual offences are systematically underreported and prosecuted. Still more clearly, as *Nicola Lacey* clarifies in her writing concerning the topic of criminal responsibility, the modern criminal law is architecturally structured to handle the uncertainties of the world by ensuring procedural protection and responding to the category of criminal liability<sup>23</sup>. Presumption of innocence, proof beyond reasonable doubt, appellate scrutiny and evidentiary standards operate precisely to prevent wrongful conviction. Blanket exemption of a group of culprits based on hypothetical abuse would mark a deviation of the basic criminal law provisions. If this type of logic was applied across the board, many crimes perpetrated in intimate or home environments would have to be repealed.

The continuation of the misuse narrative shows underlying worries of redistributing the power within marriage. It implicitly gives precedence to alleged hypothetical harms to accused husbands, over reported structural harm to women. Empirical evidence of the *National Family Health Survey-5* has shown that intimate partner violence exists at consistent levels across socio-economic groups<sup>24</sup>, highlighting the fact that the absence of criminal recognition does not necessarily mean the lack of coercion but rather makes it legally invisible. It is this debate that should then be put in the larger context of transformative constitutionalism. *Navtej Singh Johar v. Union of India*<sup>25</sup>, *Joseph Shine V. Union of India*<sup>26</sup> reflects a commitment to the constitutional ideas of breaking down inherited hierarchies and the establishment of individual

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<sup>22</sup> Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (2014)

<sup>23</sup> Nicola Lacey, *In Search of Criminal Responsibility* (2016)

<sup>24</sup> Ministry of Health & Family Welfare (India), *National Family Health Survey-5* (2019–21)

<sup>25</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India)

<sup>26</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India)

dignity as opposed to privilege based on status. In *Navtej*, the Court favored an anti-subordination concept of equality; at *Puttaswamy* the privacy was defined as exhausting the discretion; In *Joseph Shine*, the Court turned its back on any proprietary conception of marital domination. With these judgments combined, it is an indication that marriage cannot be a constitutional enclave beyond questioning.

Transformative constitutionalism does not only require them to change things gradually but to recalibrate the structure. Marriage, as envisioned in the constitution, is to be rebuilt as a partnership between equal citizens as opposed to status with presumed sexual rights. Criminalization of marital rape does not criminalize intimacy, it criminalizes coercion. All other relational contexts already identify the distinction between consensual acts and non consensual acts by the law. Forging that uniqueness in the context of marriage asserts the right to be universal and not to be an extraordinary intrusion. The concept of consent as it was invented in modern constitutional jurisprudence is perpetual, contextual and revocable. It cannot be assumed to be irrevocable by virtue of marital status. The acknowledgement of marital rape as a crime therefore supports that constitutional personhood is not broken down by the domestic walls. It replaces marriage in the constitutional order and does not oversee it.

### **VIII. Conclusion: From Institutional Preservation to Constitutional Personhood**

The marital rape exception ends up revealing the half baked constitutional change in India. It unveils the conflict between marital privilege in terms of status and constitutional personhood in terms of rights. Eliminating the exemption would not be a sign of judicial activism or inflation of moral response and authority, it would be evidence that constitutional guarantees do not seep through domestic walls. The institution of marriage can not be used to practice legal exceptionalism in the context of a democratic order that upholds the values of dignity, equality and autonomy. Consent should still be the police of all forms of sexual legality, revocable, unremitting and universal. The exception of marital rape ultimately exposes the boundary of the biased constitutional change. It exposes the extent of entrenched hierarchies existing below the radar of doctrine reform that are even enduring in a constitutional system that declares the equality principle and dignity as a core commitment. The abolishment of the exemption would not be constitutionalizing marriage, but rather constitutionalizing the personhood in the marriage. Whether criminal law must encroach on intimacy or not is not the question, but whether or not intimacy should be allowed to trample upon autonomy. In

constitutional democracy where people rather than institutions are primary bearers of rights, consent cannot be presumed by status, nor suspended by ceremony. Eliminating the immunity of marital rape would thus be the occasion that would turn the status based marital privilege into rights based constitutional equality and gender equality that asserts dignity is uninterrupted, autonomy is indivisible and justice does not halt at the threshold of the home.

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