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The Various Facets of Criminalization of Marital Rape

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ABSTRACT

The institution of marriage is one of the building blocks of our society, unifying a man and a woman into a sacred and sacrosanct relationship. In a marriage, the husband and wife are expected to sail the ship of life together, standing by each other's side and cooperating in social, financial and emotional matters. Sexual intercourse, as a man's basic need, and also as a means for procreation of children, is one of the primary expectations of the partners entering into a union of marriage. It has been an often raised question that whether the husband and wife are expected, at all times, to give into this expectation of fulfilling the role of a sexual partner and that their consent does not matter, given they're perceived as one entity or whether the concept of individual autonomy transcends into the institution of marriage as well? This article deals with the complex issues arising out of the subtle nuances of marital relationships i.e. balancing individual autonomy vis-à-vis maintaining harmonious marital relationship. It puts forth the effect of exception of marital rape, provided under the IPC, on the indispensable right to life and personal liberty and other rights flowing from Article 21 of the Indian Constitution, like the right to sexual autonomy and right to privacy. Moving along, it takes note of the relevance of consent in the context of a marital relationship. Further, it takes into consideration and addresses the fears and apprehensions of supporters of the marital rape exception, like breaking down of the institution of marriage and creation of a new offence. And lastly, it deals with the effects of criminalization of marital rape.

Keywords: Marital rape, Right to privacy, Consent, Individual autonomy.

I. INTRODUCTION

Section 375 of the Indian Penal Code, 1860, which defines the offence of rape, states that sexual acts by a man on a woman against her free will or consent would constitute rape. The Code provides two exceptions to Section 375.

According to the second exception, "sexual intercourse or sexual acts by a man with his own wife" when the wife is above 18 years of age would not constitute rape.

Thus, the Code exempts a man from being prosecuted for rape committed on his wife on the

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basis of their marital relationship.

The contours of the different issues that stem from this exception are discussed below, with the opponents of the exception relying on various points of law and precedents whereas, the supporters of the exception take refuge in centuries old notions, making an emotional appeal on the basis of preservation of institution of marriage.

II. VIOLATION OF THE RIGHT TO LIFE, LIBERTY AND PRIVACY

The second exception to section 375 is considered by many as a blatant violation of right to life, liberty and privacy of married women.

Article 14 of the Indian constitution provides equal protection of rights to all its citizens. Any classification under this article, as the Supreme Court has ruled², should be done on intelligible differentia having rational nexus with the object sought to be achieved. However, the exception 2 to Section 375 provides legal immunity to husbands raping their wives, thus, creating a special class of women who do not have the legal recourse under criminal law. It excludes certain women from availing the remedies against rape just on the basis of their marital status, which does not have any rational basis. It violates the rights of married women to be treated equally with other women, hence, it infringes on the right to equality of married women, as provided by the Constitution to all persons. The Supreme Court's landmark ruling, in the Right to Privacy verdict³, which recognized right to privacy as a fundamental right, held that the right to make sexual decisions forms a part of the right to privacy. Right to sexual and reproductive autonomy fall under the ambit of Article 21 of the Constitution, providing to all persons right to life and personal liberty.⁴

Thus, the exclusion of married women above the age of 18 in case of marital rape goes against the constitutionally provided and protected fundamental rights.

III. THE RELEVANCE OF CONSENT

The marital rape attacks the very institution of marriage because marriages founded on principles of subordination are becoming increasingly obsolete in the modern world. The times when the IPC was framed were different and the general belief was that a marital relationship brings with it a sense of obligations- including sexual obligations, which was a right of the husband and it existed independent of the wife's consent. However, times have changed and in the modern world, consent and equality form, or should form the basis of every relationship.

² The State Of West Bengal v Anwar Ali Sarkarhabib, (1952) S.C.R. 284.

³ Justice K.S.Puttaswamy (Retd) v Union Of India, (2017) S.C. 4161.

⁴ Id.

The widely held view is that, in a relationship as intimate as that of marriage, there is an implied consent by both the parties for sexual intercourse. The dilemma faced in this matter is whether each and every sexual contact between a husband and wife requires consent, which as many hold will destroy the institution of marriage, as it will take away the component of trust and faith reposed by spouses in one another. However, taking into account the right of privacy and bodily autonomy, marriage cannot be seen as an irrevocable consent to sexual intercourse. The J.S.Verma Committee⁵, set up after the December 2012 gangrape and murder of a physiotherapy student in a moving bus in Delhi, which sent shockwaves across the nation, had recommended removing the marital rape exception. It said that in order for an accused to be charged for the act of rape, the relationship between him and the victim should be immaterial. This means that in a marriage, consent for sexual intercourse is not everlasting and it can be revoked by any of the spouses. And if revoked, the act of sex between the husband and the non- consenting wife should be rape. However, that is not the case in our criminal jurisprudence, which is still in many respects deeply rooted in patriarchal notions like Hale's doctrine. Hale's doctrine says that since wife and husband are part of a matrimonial contract, the wife has given herself up to her husband and she cannot retract that consent. And so, the husband cannot be guilty of rape committed by himself upon his lawful wife.⁶

IV. STRIKING DOWN THE EXCEPTION: WILL IT CREATE A NEW OFFENCE?

Many hold the view that striking down the marital rape exception will shift the law making power from the Parliament to the Judiciary and this is an attack on the law making power which is vested in the Parliament. However, it is to be noted that removing this exception from the IPC will not create a special law per se. The ingredients of rape are already set out in section 375 of IPC. Exception 2 provides legal immunity to one class i.e. husbands and shield them from prosecution. When the exception goes away, it will not set in motion a new law, it will only remove a shield, which has been enjoyed by a particular class for so long due to reasons unsustainable in the present day and age.

V. THE EFFECTS OF CRIMINALISATION OF MARITAL RAPE

Many supporters of the view that immunity provided to husbands should not be taken away argue that this would destabilise the institution of marriage, in that women should always give into the demands of their husbands and any refusal is seen as a weakening of the relationship

⁵ Justice J.S. Verma, Justice Leila Seth, Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law*, Government of India (2013).

⁶ Sir Matthew Hale, *The History Of The Pleas Of The Crown* (2 ed. 1736).

between the husband and wife. If husbands are criminally charged for the rape of their wives, it will destroy the sanctity of their relationship and they will turn from spouses to adversaries. Not only will their relationship end, it will also have an adverse impact on their children, who will now have to deal with the bitter relationship between their parents and their possible divorce or separation. Their ties will be destroyed beyond repair and their social standing will take a hit. However, the petitioners arguing before Delhi High Court, which heard petitions for marital rape exception to be struck down and delivered a split verdict and granted certificate to appeal to the Supreme Court, stated that it is the forced sexual intercourse which desecrates the institution of marriage, and not the condoning of it. With a large number of rights made available to women under various laws, the provisions like exception to marital rape take women back to a position of subjugation where they're not treated as equals in a marriage, rather they're subjected to the whims and fancies of their husbands.

Further, there is apprehension that criminalisation of marital rape will lead to abuse of law by women. However, it is to be remembered that this is the case with every law and every law is open to abuse. This argument cannot be the reason to deny women the remedy to avail of their basic rights and to live a life of dignity.

VI. THE CURRENT SCENARIO

A two judge bench of the Delhi High Court delivered a split verdict on the question of criminalisation of marital rape. Justice Rajiv Shakhder, who headed the two-judge Bench, struck down the marital rape exception and held it to be unconstitutional. However, Justice C. Hari Shankar rejected the plea to criminalise marital rape. He stated that it is the work of legislature to bring changes in any law because various social, cultural and legal issues are to be taken into consideration. The different standing of the Judges clearly represents the differences between the two widely adopted positions whenever the question of criminalisation of marital rape arises.

VII. CONCLUSION

The marital rape exception touches upon the crucial question of consent in a marriage. Sexual autonomy is at the core of dignity of an individual. Denying this agency to women results in deprivation of their basic human rights. The exception 2 to Section 375 is rooted in the patriarchal idea of subjugation of women. While a large number of nations have criminalised marital rape, India remains one of the 36 nations to not have done so. Marriages continue to be avenues where relationships of domination and subordination are reproduced. According to a survey conducted by the Indian government, about 30% Indian women aged 18-49 reported

having experienced spousal violence⁷. Where other provisions of law make strides towards ensuring equality between men and women, the marital rape exception brings women two steps back to the ages old idea that wife is the property of their husband. Doing away with the marital rape exception will bring women a step closer towards the ideals of equality, liberty and sexual autonomy.

⁷ International Institute for Population Sciences, *National Family Health Survey- 5* (2019-2021).