

MARRIAGE, CONSENT AND SEXUAL VIOLENCE: A CRITICAL APPRAISAL OF INDIA'S MARITAL RAPE EXCEPTION”

Dr. Manu Sharma¹ and Abhilasha Thakur^{2*}

¹Assistant Professor (Law), Career Point University, Hamirpur, Himachal Pradesh, India

¹manu.law@cpuh.edu.in

²Research Scholar, Career Point University, Hamirpur, Himachal Pradesh, India

^{2*}thakurabhilasha7@gmail.com

Abstract

Marriage has traditionally enjoyed a privileged status in Indian society and in Indian legal thought. Nevertheless, the fact that such marital rape exception is still present in Indian criminal law has become a subject of heated constitutional and human rights controversies over the autonomy of the body, consent, gender equality, and individual liberty. Although rape is actually a crime against the law of India, traditionally the law has traditionally left husbands to go scot free in case of non-consensual sexual intercourse with their wives in marriage on the ground that marriage is equal to a lifetime consent. These assumptions have become more and more discordant with contemporary constitutional jurisprudence that identifies dignity, privacy, and autonomy as basic rights. The present paper is a critical discussion of the development of the marital rape exception, its legal basis and constitutional ramifications in India. It follows a doctrinal research methodology where it examines statutory provisions, judicial precedents, constitutional principles and scholarly literature. The paper claims that the marital exception to rape only entails discrimination of married women and prevents the fundamental principle of consent being indispensable regardless of the marital status. It also measures the judicial progress and other international legal trends to determine whether India ought to reform its criminal law system. As it falls out in the paper, the constitutional values of equality, dignity, and bodily autonomy require revision of the marital rape exception and acknowledgment of non-consensual sexual intercourse in marriage as an offense that should be punished.

Keywords: *Constitutional rights, gender equality, bodily autonomy, consent, rape in marriage, India.”*

INTRODUCTION

Accepting of consent as the basis of legal sexual relations is one of those most important advances of the contemporary criminal jurisprudence. The modern legal systems are more and more ready to admit that each person has a right to their own body being free and at the same time being ready to choose whether, when and in what cases sex is to take place. In spite of this, the issue of marital rape remains controversial both legally and socially in India. The argument is focusing on marriage is an exception to the rule of consent and whether a husband is exempt against prosecution because of non-consensual sexual intercourse with wife.

Traditionally, marriage was considered as a legal establishment that granted a lot of power to husbands against their wives. In this context, the consent of a wife to a sexual relationship was considered as one which once is granted, it cannot be revoked after the marriage. As a result, rape in the form of forced sex in marriage was not considered a rape. This meaning may no longer be recognized in the current law of countries in the west, but hints at the doctrine can still be found in Indian criminal law.

The topic of marital rape does not only fall under criminal law, but also the expansive scope of constitutional rights. The existence of a legal exception regarding marital rape poses the basic questions related to the equality before law, non-discrimination, body, privacy, and human dignity. The Indian Constitution system envisions the society that is founded on the principles of individual

liberty and equal protection of law. To this end, it has become increasingly controversial whether a legal provision that deprives married women of safeguards against sexual violence is valid.

The constitutional jurisprudence in recent years has broadly extended the definitions of rights safeguarded in Articles 14, 15 and 21 of the Constitution. Cases that place significant emphasis on privacy, dignity, and choice have redefined court ideas on individual freedom. These developments have put increased focus on legal provisions, which seem to profile married women unlike unmarried women incidents involving sexual violence.

In this paper, the marital rape exception has been critically analyzed in terms of historical, legal and constitutional views. It contends that conception of consent could not be put beneath position of marriage and that constitutional values necessitated a re-examination of legal dogmas that had been formulated in patriarchal and colonial legality.

Understanding Marital Rape and the Concept of Consent

Marital rape can be defined as sex intercourse by a husband without consent of his wife. Even the lack of voluntary and informed consent is necessary, and not the fact of a marital relationship. From a legal perspective, the crime involves violations of the integrity of the body and sexuality through coercion, force, intimidation, and/or a lack of 'true consent'.

The idea of consent has been subjected to great transformation in criminal jurisprudence. Consent was looked at with narrow understanding and was more inclined on victims manifesting physical resistance in traditional legal systems. But modern law regards consent as must be free, free and continuous. It's not just no resistance, it is positive and free decision.

The importance of consent is that it has to do with individual autonomy. Everyone deserves to have control over him/herself and over having intercourse. Rape is always a violation of personal dignity and violation of body integrity, no matter who is the rapist. Therefore the concept of consent is applicable in-and-out of the marriages.

Scholars and human rights advocates have greatly criticized the assumption that the creation of perpetual consent is automatic through marriage. This presumption regards consent as a transitory act as opposed to an ongoing statement of individual will. It also disregards the reality that it is not only related to one person but is an in-between and separable constitutional right for spouses.

Medical evidence always shows that sexual violence can have an extremely serious and adverse impact, not only physically but psychologically as well. Victims often suffer trauma and depression, anxiety, emotional distress and loss of self-worth. The close context of marital relationship might enhance these evils since abuse means in the relationship that is supposed to be a situation where one can find trust and security. In addition, social stigma and financial reliance tend to make victims to shun legal redress.

The topical concept of marriage is the decrease of personal autonomy which is increasingly matched with the rejection of today's gender equality and human rights ideologies. It has been reiterated many times to the international human rights organizations that marital status shouldn't have any role in many ways of justification for violating the integrity of the body. In line with this the marriage rape is now a generally accepted fact as a severe gender based violence issue than a domestic affair.

Legal Position of Marital Rape in India

One of the most obvious disputes in contemporary criminal law in India has been that of a woman's rape in marriage. In the past, rape has been defined in Section 375 of the Indian Penal Code, 1860, although it also provided an exception, which absolved the husbands of criminal responsibility in the case of having sexual intercourse with their wives, assuming that the wife was over the stated statutory age. Despite all the changes that the criminal law surrounding sexual offences has undergone throughout the years to a great extent the marital rape exception has remained intact.

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The passing of the Bharatiya Nyaya Sanhita, 2023 has not in the basic nature, changed this stance. This is, however, not a reflection of the fact that non-consensual sexual intercourse is not criminalized in and of itself, but that this is regulated by the law in various ways for different circumstances. So, when a woman is compelled to have sexual relations with an already married man, she is left on the other side of the legal battle line as compared to an unmarried rape victim.

This difference has also faced a lot of criticism from the legal scholars, women groups and constitutionalists. Those who write about the exception insist that there is a difference between married and unmarried women in the case of this exception when the actual physical, emotional and psychological damage suffered by the women is almost the same in both cases. Marital status seems to take precedence in the law as opposed to individual autonomy.

Intermittently, there are other statutes that provide remedies pursuant to law but have limited protection. The Protection of Women against Domestic Violence Act, 2005 acknowledges sexual abuse as a component of domestic violence and allows civil remedies, e.g., protection and residence orders. Such remedies are however silent with regard to (forced) sexual penetration in marriage. Similarly, anti-cruelty legislation in matrimonial laws and criminal law will touch some aspects of cruelty — however not all of this is captured by law on a criminal level proscribing non-consensual sexual intercourse in marriage.

The outcome is a disjointed legal system where sexual violence in marriage is recognized to be harmful, and is not always considered a criminal act on the same plane as rape. By and large, this contradiction has become more and more intelligible on the basis of the different constitutional norms and world-wide formulations of human rights which have been in use over the years.

Judicial Developments and Constitutional Trends

The one which is believed to be the most important is “Independent thought v. Union of India (2017)”. Here, the Apex Court dealt with the discrepancy between laws on child protection and marital rape exception. In The Court found that denying the exception was an injustice to the minor wives and thus “sex” with a wife below age 18 would constitute a rape. However the case was not a complete death of the exception of marital rape, it nevertheless determined that marriage can be no justification for violating the rights of the children. Notably, the Court perceived the need to grasp criminal legislation, modify it in accordance with the constitutional ideals and child protection laws.

Just as important are those decisions which have broadened the sense of dignity and autonomy. In “Justice K.S. Puttaswamy v. Union of India (2017)”, the Apex Court claimed the privacy right as a basic right that is upheld in Article 21. The Court pointed out that the concept of privacy is expanded to include bodily integrity, decisional autonomy, and personal choice. These tenets have far-reaching implications in the marital rape debate in that they support the notion that people still have the choice with intimate matters even when they are married.

Likewise, the case of “Joseph Shine v. Union of India (2018)” was among the iconic rebuffs against patriarchal assumptions in the criminal law. As the Apex Court delivered the verdict, it was clear that through the marriage process, no one spouse is subordinate to the other and even the act of adultery is not immortalized in marriage and thus constitutional rights are not wiped away by the marriages. The decision focused on dignity, equality, and agency of the individual so that the conceptual premises of the marital rape exception were undermined.

The constitutional argument that has been made in these cases portrays a general judicial trend where persons in marriage are being viewed as self-governing rights-bearing individuals. The jurisprudence of the courts has not yet actually criminalized marital rape, but is well underway to undermining the assumptions on which the exception is anchored.

Constitutional Analysis of the Marital Rape Exception”

Articles 14, 15 and 21 of the Constitution of India should be analyzed as the main ones to determine

the constitutionality of the marital rape exception.

Article 14: "Equality before Law"

Article 14 is the assurance of equality before the law and equality of protection of laws. The marital rape exception provides a legal difference between the married woman and unmarried woman. A woman who has non-consensual sexual intercourse with a man not married is taken as a victim of rape and a married woman facing the same behavior by her husband may not enjoy the same protection.

This difference sets in serious doubts, concerning arbitrariness and unfair treatment. Whether the victim is married or not, the injury worked on him or her is the same. The exception thus seems to deprive married women of equal rights under the law in regard to sexual violence.

The interpretation of the Article 14 by the Apex Court has always placed more emphasis on the fact that arbitrary classifications are going against constitutional guarantees. The Court in *E. P. Royappa v. State of Tamil Nadu* (1974) came out to declare that arbitrariness is the opposite of equality. The subsequent decisions reinforced the idea that laws have to have a rational relation and justifiable goals. The marital rape exception is not fulfilling this test since it is based on assumptions about consent that become even less consistent with modern constitutional principles.

Article 15: Outlawing Sex-Based Discrimination"

Article 15 outlaws discrimination based on sex. Though the marital rape exception is reposed on marital status formally, its practical ramifications disproportionately impact on women. The exception indicates conservative theories that wives have sexual liabilities to their husbands and the marital relationships entitle them to reduce their protection against sexual violence.

"*Hotel Anuj Garg v. Hotel association of India*" (2008) underlined that constitutional interpretation should oppose stereotypes, which is not based on these, but promotes them. Substantive equality is not consistent with laws based on obsolete assumptions about gender roles.

The marital rape exception also contributes to the stereotype that a marriage obedience is secondary to the rights of a wife. This type of reasoning contradicts the contemporary constitutional interpretation of gender justice and equal citizenship.

Article 21: "Right to Life and Personal liberty"

The biggest constitutional challenge of the marital rape exception is contained within Article 21. Judicial interpretation has broadened the definition of personal liberty to comprise dignity, personal privacy, body integrity, and choice.

The apex Court in *Suchita Srivastava v. Chandigarh Administration* (2009) acknowledged that reproductive choice is the part of personal liberty. The Court dwelt upon the fact that people have the freedom of making choices related to their physical bodies.

This stance was further reinforced by the rationale in *Puttaswamy* which acknowledged privacy and bodily integrity to be fundamental values in the constitution. Coercive sex is a direct breach of such interests since it takes away individuals the right to control their bodies.

The rights under the constitution cannot be dampened by marriage. Providing that bodily autonomy and dignity are human rights, the marital status could not be used as a way to justify legal failure to protect against sexual violence. Accordingly, the marital rape exception does not seem to derive well on the broad conception of liberty that has been elaborated by the Apex Court.

Propositions in favor and against Criminalization

The proponents of criminalization believe that marriage must not provide immunity against criminal

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liability. Consent is a necessity whether a person is married or not and this needs to be echoed in the law. The criminalization would enhance the constitutional protection, gender equality, and equal protection to victims of sexual violence.

Proponents further argue that legal reform would have significant symbolic meaning. Law is both a means of punishment and statement of values in the society. By accepting marital rape as a crime, we would be acknowledging sexual violence as wrong independent on whether there was a relationship between the two parties. Critics, on the other hand, express concerns about abuse of the legal provisions, evidence challenges, and possible impact on the marital relationships. Criminalization might criminalize more false allegations; in some cases, they believe that this would disrupt the family stability. Although these issues are significant and should be taken into account, they are not exclusives of rape in marriage. There are already procedural safeguards that are put in place to guarantee fair investigation and trial.

Besides, constitutional rights are not subject to hypothetical issue of abuse. Criminal law aims at guarding against harm to people especially when it touches on the fundamental rights.

CONCLUSION

The marital rape exception is one of the ongoing disputes between the constitutional values and historical legal assumptions. Having its roots in colonist and patriarchal conceptions of the marriage relationship the exception is based on the idea that consent is forever provided by marriage. This premise is more and more inconsistent with the contemporary conceptions of dignity, equality, privacy, and bodily autonomy.

Courts in India have created and sustained an increasing constitutionality regarding personal freedom and autonomy. This is quite evident in decisions like *Independent thought*, *Puttaswamy*, *Suchita Srivastava* and *Joseph Shine* where a trend of acknowledging rights in marriage than marital status is recognized. These trends greatly undermine the principles of normative bases of the marital rape exception. The difference in the sexual violence messages applied to married and unmarried women does not inspire any convincing constitutional reasons. Incidents of non-consensual sexual intercourse damage are inescapable despite the status of the relationship between two individuals. Denying the constitutional commitment of equal citizenship and human dignity, denying the same protection to married women is an assault.

Constitutional morality and not the historical tradition must be the guiding force behind the future of Indian criminal law. By criminalizing marital rape, marriage would not be weakened since it will confirm the authority of marriage wherein marriage is a union of equals that is built on mutual respect and consent. The law should then be corrected so that the constitutional rights of equality, dignity and body autonomy are given to all women regardless of whether they are married or not.

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