

THE UNCONSTITUTIONAL SANCTUARY: A CRITICAL ANALYSIS OF THE MARITAL RAPE EXCEPTION IN INDIA

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Abstract- The legal treatment of marital rape remains one of the most contentious issues in contemporary Indian constitutional and criminal jurisprudence. While rape is recognized as a grave violation of bodily integrity and personal autonomy, Indian law has historically exempted husbands from prosecution for non-consensual sexual intercourse with their wives through the marital rape exception. Rooted in colonial legal doctrines and patriarchal assumptions regarding marriage, the exception creates a legal distinction between married and unmarried women in matters of sexual consent. This article critically examines the constitutional validity of the marital rape exception in light of the guarantees of equality, dignity, privacy, and personal liberty under the Constitution of India. It analyzes the historical origins of the doctrine, judicial interpretations,

international legal developments, and arguments advanced both in support of and against criminalization. The article argues that the marital rape exception is incompatible with modern constitutional values and human rights principles. It concludes that legislative reform is essential to align Indian criminal law with constitutional morality and the evolving understanding of women's autonomy within marriage.

Keywords: Marital Rape, Constitutional Law, Bodily Autonomy, Equality, Article 14, Article 21, Gender Justice, Criminal Law Reform.

I. INTRODUCTION

The relationship between marriage and consent has become one of the most debated questions in modern legal discourse. While democratic constitutions increasingly recognize bodily autonomy

and sexual self-determination as fundamental rights, many legal systems have struggled to reconcile these principles with traditional conceptions of marriage. India's marital rape exception represents one such unresolved conflict.

The criminal law traditionally recognizes rape as a serious offence against bodily integrity, dignity, and personal autonomy. However, Indian law has historically denied married women equal protection against sexual violence by exempting husbands from rape liability under certain circumstances. The underlying assumption is that marriage entails continuing consent to sexual intercourse, rendering the possibility of rape within marriage legally inconceivable.

This assumption is deeply problematic in a constitutional democracy founded upon equality and individual dignity. The Constitution of India recognizes every individual as a rights-bearing citizen entitled to autonomy, privacy, and equal protection of the law. The notion that marriage extinguishes a woman's ability to refuse sexual intercourse appears increasingly inconsistent with these constitutional commitments.

The controversy surrounding marital rape is not merely a criminal law issue. It raises

broader questions concerning gender equality, constitutional morality, state intervention in private relationships, and the transformation of family law in a modern democracy. As courts and legislatures around the world have moved toward recognizing marital rape as a criminal offence, India's continued retention of the marital rape exception has attracted significant criticism from scholars, activists, and international human rights bodies.

This article critically examines the constitutional and legal dimensions of the marital rape exception in India. It argues that the exception represents an outdated legal fiction that undermines women's fundamental rights and perpetuates patriarchal notions of marriage incompatible with contemporary constitutional values.

II. HISTORICAL EVOLUTION OF THE MARITAL RAPE EXCEPTION

The origins of the marital rape exception can be traced to English common law. The doctrine is commonly associated with Sir Matthew Hale, who asserted in the seventeenth century that a husband could not be guilty of raping his wife because

she had given irrevocable consent upon entering marriage¹.

Hale's proposition emerged within a legal framework shaped by the doctrine of coverture. Under this doctrine, a married woman's legal identity was effectively merged with that of her husband. Women possessed limited property rights, restricted legal capacity, and minimal control over their personal affairs². Consequently, marriage was viewed not as a partnership of equals but as a hierarchical institution in which the husband exercised authority over the wife.

The Indian Penal Code, enacted in 1860 during British colonial rule, incorporated this understanding into its definition of rape. Exception 2 to Section 375 provided that sexual intercourse by a man with his

own wife, provided she was not below a specified age, did not constitute rape³.

The retention of this colonial provision after independence illustrates the persistence of patriarchal assumptions within Indian criminal law. Although constitutional developments have transformed the legal status of women, the marital rape exception continues to reflect historical notions that are fundamentally inconsistent with modern understandings of equality and consent.

III. CONSENT, AUTONOMY, AND THE CHANGING NATURE OF MARRIAGE

The concept of consent lies at the heart of contemporary sexual offence jurisprudence. Modern legal systems increasingly recognize that valid consent must be voluntary, informed, and capable of being withdrawn at any time.

1. ¹ Sir Matthew Hale, *Historia Placitorum Coronae* (1736), Vol. I, 629.

2. William Blackstone, *Commentaries on the Laws of England* (1765–1769), Book I, Ch. 15.

3. ³ Indian Penal Code, 1860, s. 375, Exception 2 (prior to repeal and subsequent legislative developments).

4. *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

5. *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

Marriage does not negate individual autonomy. A married person remains entitled to make decisions concerning bodily integrity and sexual relations. The assumption that consent given at the time of marriage continues indefinitely ignores the dynamic nature of human relationships and reduces marriage to a contractual surrender of personal liberty.

The Supreme Court of India has repeatedly emphasized the centrality of autonomy to constitutional rights. In *Suchita Srivastava v. Chandigarh Administration*, the Court recognized reproductive choice as an essential component of personal liberty under Article 21⁴. Similarly, in *Justice K.S. Puttaswamy v. Union of India*, the Court recognized privacy as a fundamental right encompassing bodily integrity and decisional autonomy⁵.

These decisions establish an important constitutional principle: autonomy cannot be permanently surrendered through a social or legal relationship. If individuals retain the right to make decisions concerning reproduction, healthcare, and personal relationships after marriage, it follows that they must also retain the right to refuse sexual intercourse.

The marital rape exception therefore rests upon a legal fiction incompatible with contemporary constitutional jurisprudence. It assumes continuing consent where none may exist and denies married women recognition as autonomous individuals capable of exercising agency over their own bodies.

IV. CONSTITUTIONAL CHALLENGES TO THE MARITAL RAPE EXCEPTION

A. Article 14 and the Principle of Equality

Article 14 guarantees equality before the law and equal protection of the laws. Any legislative classification must satisfy the tests of intelligible differentia and rational nexus.

The marital rape exception creates a classification between married and unmarried women. If a woman is sexually assaulted by a stranger, acquaintance, or partner outside marriage, the law may recognize the act as rape. However, if the same conduct is committed by her husband, criminal liability may not arise.

This distinction lacks constitutional justification. The injury suffered by the victim does not vary according to marital status. Physical violation, psychological

trauma, and emotional harm remain equally severe irrespective of the relationship between the perpetrator and the victim.

The Supreme Court has repeatedly held that arbitrariness is antithetical to equality⁶. A legal rule that excludes an entire category of women from protection against sexual violence solely because they are married appears manifestly arbitrary.

Furthermore, constitutional equality requires substantive rather than merely formal protection. The state cannot selectively protect some women while denying comparable safeguards to others. The marital rape exception effectively creates a hierarchy of victims in which married women receive diminished legal protection.

B. Article 21: Dignity, Privacy, and Personal Liberty

Article 21 protects life and personal liberty and has been interpreted expansively to include dignity, bodily integrity, and privacy.

6. ⁶ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

7. *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

The Supreme Court's constitutional jurisprudence increasingly places human dignity at the centre of rights adjudication. In *Puttaswamy*, the Court observed that dignity constitutes the foundation of individual autonomy and liberty⁷.

Non-consensual sexual intercourse directly infringes bodily integrity and personal dignity. By denying legal recognition to such conduct when committed within marriage, the marital rape exception effectively deprives married women of constitutional protection against serious violations of their bodily autonomy.

The constitutional guarantee of privacy further reinforces this conclusion. Privacy protects the right of individuals to make intimate decisions free from coercion. Sexual autonomy forms an essential component of this right. A legal framework that compels sexual relations within marriage undermines both privacy and personal liberty.

C. Article 15 and Gender Discrimination

Article 15 prohibits discrimination on grounds of sex. Although the marital rape exception is framed in terms of marital status, its practical impact falls overwhelmingly upon women.

⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

The exception reflects traditional stereotypes concerning the role of wives within marriage. It presupposes that women owe sexual access to their husbands and that refusal of intercourse is inconsistent with marital obligations.

Modern constitutional jurisprudence rejects legal provisions grounded in stereotypical assumptions regarding gender roles. In numerous decisions, Indian courts have emphasized that constitutional equality requires dismantling structures that perpetuate women's subordination⁸.

The marital rape exception continues to institutionalize precisely such subordination by denying women equal control over their own bodies within marriage.

V. JUDICIAL RESPONSES IN INDIA

Indian courts have increasingly questioned the rationale underlying the marital rape exception.

A significant development occurred in *Independent Thought v. Union of India*⁹. The Supreme Court addressed the

⁸ Joseph Shine v. Union of India, (2019) 3 SCC 39; Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

⁹ Independent Thought v. Union of India, (2017) 10 SCC 1.

inconsistency between child protection laws and the marital rape exception. The Court held that sexual intercourse with a wife below eighteen years of age would constitute rape, notwithstanding the marital relationship.

Although the Court did not invalidate the exception for adult women, the judgment acknowledged that marriage cannot justify violations of fundamental rights.

The constitutional challenge before the Delhi High Court in *RIT Foundation v. Union of India* further intensified the debate¹⁰. Justice Rajiv Shakti concluded that the marital rape exception violated constitutional guarantees of equality and dignity. He emphasized that marriage does not extinguish a woman's right to bodily autonomy.

Justice C. Hari Shankar, however, upheld the provision, reasoning that marriage constitutes a unique social institution requiring distinct legal treatment. The split verdict reflected the complexity of the issue and highlighted the need for authoritative resolution by the Supreme Court or Parliament.

The Delhi High Court proceedings nevertheless marked a significant shift in

¹⁰ RIT Foundation v. Union of India, 2022 SCC online Del 1404.

judicial discourse by framing marital rape as a constitutional question rather than merely a matter of criminal policy.

VI. COMPARATIVE INTERNATIONAL PERSPECTIVES

The global trend overwhelmingly favors criminalization of marital rape.

The United Kingdom abolished the marital rape exemption in *R v R*¹¹. The House of Lords rejected the doctrine of irrevocable consent, holding that marriage does not create permanent permission for sexual intercourse.

Canada similarly removed marital immunity through legislative reform, recognizing that consent remains essential irrespective of marital status. Australia, New Zealand, South Africa, and numerous European jurisdictions have adopted comparable approaches.

International human rights instruments reinforce this trend. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates states to eliminate discrimination

against women and ensure effective protection from gender-based violence¹².

The United Nations has repeatedly called upon states to criminalize marital rape and recognize sexual violence within marriage as a human rights violation. India's continued retention of the exception therefore places it increasingly at odds with international standards.

VII. ARGUMENTS AGAINST CRIMINALIZATION: A CRITICAL ASSESSMENT

Opponents of criminalization generally advance three principal arguments.

Preservation of Marriage

It is often argued that criminalizing marital rape would undermine the institution of marriage. However, this argument assumes that legal immunity for sexual violence is necessary for marital stability.

Healthy marriages are based on mutual respect and consent rather than coercion. Protecting individuals from violence strengthens rather than weakens the institution of marriage.

Risk of Misuse

¹¹ *R v R* [1992] 1 AC 599 (HL)

¹² Convention on the Elimination of All Forms of Discrimination Against Women, 1979; CEDAW Committee, General Recommendation No. 35 (2017)

Concerns regarding false allegations are frequently raised. While misuse of legal provisions remains a legitimate concern, such risks exist in relation to many criminal offences.

The criminal justice system contains procedural safeguards, evidentiary requirements, and judicial oversight designed to prevent wrongful convictions. Potential misuse cannot justify withholding legal protection from genuine victims.

Availability of Civil Remedies

Some argue that existing remedies under the Protection of Women from Domestic Violence Act, 2005 are sufficient¹³.

This argument overlooks the distinction between civil protection and criminal accountability. Domestic violence legislation provides important safeguards but does not recognize the specific gravity of rape as a criminal offence. The absence of criminal liability sends a troubling message regarding the seriousness of non-consensual sexual intercourse within marriage.

VIII. THE NEED FOR LEGISLATIVE REFORM

¹³ Protection of Women from Domestic Violence Act, 2005.

The continued existence of the marital rape exception reveals a disconnect between constitutional principles and criminal law.

Legislative reform should be guided by several considerations. First, consent must remain the central criterion in determining sexual offences. Second, marriage should not operate as a defence to acts that would otherwise constitute rape. Third, procedural safeguards should be developed to ensure fairness and prevent abuse.

Reform should also be accompanied by broader educational initiatives aimed at challenging societal attitudes concerning gender, sexuality, and marital relations. Legal change alone cannot eradicate deeply entrenched patriarchal norms; however, it plays a crucial role in shaping social expectations and affirming constitutional values.

A constitutional democracy committed to equality cannot maintain legal doctrines that effectively deny women autonomy over their bodies.

IX. CONCLUSION

The marital rape exception is a relic of a legal order founded upon assumptions of female subordination and marital control. Its historical origins lie in doctrines that viewed wives as extensions of their

husbands rather than independent legal persons. Such assumptions are incompatible with the constitutional vision of equality, dignity, and individual liberty.

The exception creates an arbitrary distinction between married and unmarried women, undermines bodily autonomy, and perpetuates gender stereotypes inconsistent with Articles 14, 15, and 21 of the Constitution. Judicial developments in India and comparative experiences across the world increasingly recognize that marriage cannot extinguish the requirement of consent.

The Constitution protects individuals, not institutions. While marriage remains an important social institution, its preservation cannot come at the cost of fundamental rights. The law must recognize that consent is as essential within marriage as outside it.

The abolition of the marital rape exception would not criminalize marriage; rather, it would affirm a foundational constitutional principle—that every person retains ownership of their body, dignity, and autonomy regardless of marital status. In this sense, the criminalization of marital rape is not merely a legal reform but a constitutional imperative necessary for the

realization of substantive gender justice in India.

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