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Marital Rape Exception in India: Constitutional Debate and Criminal Law Reform

Marriage as Consent: The Colonial Legacy We Never Left Behind:

The marital rape exception in India is rooted in a centuries-old legal loophole that views marriage as permanent consent to sexual relations. This idea can be traced to the English jurist Sir Matthew Hale¹, who argued that a husband could not be guilty of raping his wife because, upon marriage, a woman had given irrevocable consent to sexual intercourse. This doctrine heavily influenced colonial criminal laws in British India. Although social and legal understandings of marriage have evolved significantly, remnants of this colonialism continue to shape Indian criminal law. Historically, wives were seen as subordinate to their husbands rather than as separate individuals with respect to their bodies, identity and independence. However, current constitutional principles view marriage as equally established partnerships. Therefore, keeping a provision for presumed and continuous consent to sex through the marriage contract is becoming more and more inconsistent with modern understandings of dignity, bodily autonomy, and equality. As a result, the question of whether or not to criminalize marital rape goes beyond simply reforming criminal law.

When Equality Ends:

The challenge to the marital rape exception is primarily based on Article 14 of the Constitution of India, which guarantees equality before the law and equal protection of the laws.² The constitutional problem with the marital rape exception is surprisingly simple: if consent matters outside marriage, why does it suddenly become irrelevant after marriage? There have been arguments that the exception creates an arbitrary distinction between married and unmarried women by recognizing the absence of consent in one context while disregarding it in another.³

The effect of this exception is that it creates a separate category of law for married women, thereby reducing their legal protections from sexual violence and violating their equal citizenship rights. It seems that this distinction is increasingly inconsistent with constitutional law, which requires substantive equality and personal dignity. The Supreme Court has held in *Navtej Singh Johar v. Union of India* that laws based on outdated stereotypes cannot withstand constitutional scrutiny.⁴ Moreover, the recognition of bodily autonomy as an integral aspect of

¹ *Marital Rape and the Myth of Conjugal Consent*, <https://officeofpartapsingh.com/our-presence/f/marital-rape-and-the-myth-of-conjugal-consent>.

² INDIA CONST. art. 14

³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

personal liberty further strengthens the argument that marriage cannot extinguish a woman's right to refuse sexual intercourse. Consequently, the debate extends beyond criminal law and raises a fundamental question of whether equality truly exist if consent ceases to matter within marriage.

Privacy, Dignity and Bodily Autonomy According to the Constitution:

The constitutional debate about marital rape exception aligns with Article 21 which include the rights of privacy, dignity and bodily autonomy. Furthermore, through various recent decisions of the Supreme Court, it has become clear that all individuals have a right to make intimate decisions related to their body and intimate relationships.⁵ In contrast to the traditional view of marriage as providing partners with access to each other's bodies without limit, consent should be seen as an ongoing, revocable statement indicating a person's desire or willingness.

Judicial interpretation of the right to privacy has included decisional autonomy and bodily integrity, thereby confirming that personal freedom does not end with marriage. Additionally, a number of judicial opinions have emphasized dignity as central to moral principles enshrined in the Constitution and that no one can be treated simply as an object for the sake of gratifying someone else's wishes or desires.⁶ Furthermore, the Court has recognized sexual autonomy as an essential component of personal freedom and equality.⁷ Viewed through this constitutional lens, the marital rape exception appears difficult to reconcile with the values of dignity, autonomy, and individual choice that underpin modern constitutional jurisprudence.

Can Criminalising Marital Rape Be Misused?

Misuse of these types of laws is one of the most frequently cited reasons against making marital rape a crime. Critics claim the law could be misused by a wife to falsely accuse her husband of marital rape as a weapon during divorce, custody, or matrimonial disputes.⁸ Concerns have also been raised regarding the evidentiary challenges involved in proving lack of consent within an ongoing marital relationship, particularly in the absence of independent witnesses. These arguments are often accompanied by the claim that criminalisation may destabilise the institution of marriage by transforming private conflicts into criminal disputes.

Nevertheless, this reasoning leads us to an important consideration: Should we really be denying an entire class of victim protection under law just because they might be abused? The law criminalizes certain behaviours like dowry abuse, domestic abuse, and sexual assault, even when there are valid concerns about false complaints. There are procedures in place to provide safeguards against abuse and maintain the presumption of innocence. Additionally, those in the academic field of Feminist Studies have stated that our attention to possible cases of abuse may detract from the experiences of many women who have been subjected to sexual abuse in their marriages.⁹ The debate, therefore, is not merely about misuse but about whether concerns of abuse should outweigh constitutional commitments to dignity, autonomy, and equality.

Reform Beyond Criminalisation:

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

⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

⁷ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

⁸ *Rajesh Sharma v. State of U.P.*, (2017) 8 S.C.C. 821.

⁹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 191–94 (Harvard Univ. Press 1989).

The question of criminalization of marital rape must not be construed to be an issue of either criminalization or preservation of the existing legal status quo. However, by establishing that non-consensual sexual acts in a marital relationship are criminal acts we have taken a fundamental step toward achieving equality in society. In addition to enacting new laws, there should be more education and awareness about these issues as well as procedural safeguards designed to ensure fairness without compromising the rights of victims will create a more equitable society. Ultimately the question is not whether marriage is worthy of legal protection but rather whether dignity and autonomy are deserving of equal protection of the law within a marital relationship. No one can make a reasonable argument that one can arbitrarily determine the existence of consent based on the Legal status of an individual's marital status. Therefore, reform will require India to abandon the colonial mindset associated with marriage and move to views of marriage that are based on respect, consent, and equality. The marital rape exception ultimately forces Indian law to answer a difficult question: does marriage create a relationship of partnership, or does it create an exception to consent itself? The answer may determine whether constitutional promises of equality and dignity truly extend to all women.