

Marriage, Consent, and Constitutional Morality: Examining the Marital Rape Exception in India

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Abstract

This study critically examines the Marital Rape Exception (MRE) under Exception 2 to Section 63 of the BNS, 2023¹ in India, through the lenses of marriage, consent and constitutional morality, scrutinizing whether it can withstand the constitutional ethos of human dignity and individual liberty, thus questioning if its continued existence will remain compatible with the evolving socio-legal vision of contemporary society.

Moreover, the study seeks to examine how the preservation of such an exception reinforces deeply rooted patriarchal norms within society, where women are frequently perceived not as autonomous individuals but rather as subordinate subjects within the family structure who are expected to conform to the authority and sexual dominion of the patriarch. Thus, the exception leads to an environment where fundamental human rights like consent and body autonomy are systematically undermined while simultaneously reinforcing gender roles, social stigmas, and stereotypes that normalize the subordination and silencing of women within marital relationships.

Marriage, Consent, and Patriarchal Structures:

Marriage has been regarded as one of the most sacred social institutions in Indian society which is celebrated as a union that entails companionship, trust, and a sense of obligation between two individuals. But behind this institution of marriage, there is an oppressive framework of power, gendered expectations and deeply rooted patriarchal norms that continue to shape the nature of marital relationships in contemporary India.

India recognises different forms of marriage governed by different personal laws and statutory enactments, including the Hindu Marriage Act, 1955, the Muslim Personal Law (Shariat) Application Act, 1937, the Indian Christian Marriage Act, 1872, the Parsi Marriage and Divorce Act, 1936, and the Special Marriage Act, 1954². While these laws differ in their procedures, conditions and grounds for divorce, a common ground is present across all of them, i.e. the absence of 'free and informed consent' in sexual relations within marriage as an explicit ground recognizing the violation of sexual autonomy and dignity.

Despite the different legal recognition of cruelty, desertion, adultery or irretrievable breakdown of marriage under different frameworks of marital laws, the issue of consent within marital sexual relations remains clearly suppressed thus reinforcing the long standing patriarchal assumption that marriage itself constitutes perpetual and irrevocable consent.

Constitutional Morality, Marital Immunity and Bodily Autonomy

Dr Ambedkar defined Constitutional morality as the "Effective coordination between the conflicting interests of different people and the administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost"³.

It was never explicitly enshrined in the Constitution but has been judicially interpreted as a counter to popular morality like in the landmark judgement of Navtej Singh Johar's case, where the then Chief Justice of India Dipak Misra said that the concept of Constitutional morality doesn't restrict itself to the literal texts and provisions of the Constitution. The idea is not the 'mere observance of the core principles of constitutionalism'. Instead, it paves the way to make society more pluralistic and inclusive⁴.

Hale's Doctrine became the foundation for the exception of marital rape in Indian criminal law given by Sir Mathew Hale (1736), who declared "the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract"⁵. Hale's proposition was rejected in his own country (R v. R, 1991)⁶ and in other foreign nations, such as South Africa (S v. Ncanywa, 1992)⁷.

Although the exception still lingers in the Indian criminal law, the very essence of the doctrine itself has been rejected by the Indian Courts in many cases such as in the case of Nimeshbhai Bharatbhai Desai v. State of Gujarat the Bench of J.B. Pardiwala, J., where he observed that a wife is not a chattel and a husband having sexual intercourse with his wife is not merely using a property and he cannot be permitted to violate this dignity by coercing his wife to engage in a sexual act without her full and free consent⁸.

While Indian courts have progressively recognized bodily autonomy as a fundamental right under Article 21⁹ of the Indian Constitution, the continued existence of the Marital Rape Exception (MRE) stands in direct contradiction to the evolving jurisprudence in landmark judgements such as in the case of *K.S. Puttaswamy v. Union of India* (2017), where the Supreme Court recognised privacy and bodily autonomy as fundamental rights under Article 21.

It was further reinforced in the same year after the significant judgment of *Independent Thought v. Union of India* (2017)¹⁰ where the court addressed the constitutional validity of Exception 2 to Section 375 of IPC. While the court did not directly address marital rape in general, the court effectively raised the age of consent for sexual intercourse within marriage to 18 years to protect the dignity and rights of children. It became a significant step towards recognizing marital rape as a form of violence and upholding the dignity and autonomy of married women and girls.

It is humbly submitted that the constitutional morality as envisioned by Dr Ambedkar and judicially interpreted by the Supreme Court requires that marital immunity rooted in Hale's obsolete doctrine, must surrender to a woman's constitutionally guaranteed right to bodily autonomy under Article 21 of the Indian Constitution as its continued existence is nothing but a stain on the Indian Constitution.

Normalization of Gender Roles and Socio-Legal Consequences

Feminine characteristics have come to be associated with submissiveness in sexual relationships i.e. power for men and powerlessness for women. These notions perpetuate the deeply rooted gender roles in society leading to normalization of women as subjects to the patriarch in the family. This not only takes away her individual agency but undermines her right to consent and her ability to say 'no' as for the patriarch, marriage renders implied and irrevocable consent so her consent and 'no' become irrelevant to him. Marital Rape Exception (MRE) stems from and is sustained by this very notion.

This is not merely a social reality but is reflected in data as well, as per the National Family Health Survey (NFHS-5), 2019-21 where it shows that sexual violence is most often committed by individuals with whom women have an intimate relationship. Among ever-married women age 18-49 who have ever experienced sexual violence, 82% report their current husband and 14% report a former husband as perpetrators¹¹.

The data clearly state the husband as the most common perpetrator yet the Marital Rape Exception (MRE) gives him complete immunity.

This was also earlier acknowledged by the Justice J.S. Verma Committee in 2013 where they explicitly recommended that the exception for marital rape be removed¹², the same view supported by the judgment of the European Commission of Human Rights in *C.R. v UK*, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim¹³.

The socio-legal consequences of the Marital Rape Exception (MRE) are far reaching, the gap of justice for the victim who cannot even file her FIR as there is no remedy under the *Bharatiya Nyaya Sanhita (BNS)* subsequently shielding the perpetrator.

There is also the psychological impact which is often neglected in these cases, where survivors of marital rape suffer from trauma, depression and anxiety which is wholly disregarded by the law making their suffering invisible and invalid. As stated in the 84th Report of the Law Commission, the woman who is raped goes through two trials i.e. the rape and the subsequent trial. While the former displaces her dignity, her bodily autonomy and her sense of security, the second is no less potent as it forces her to relive the traumatic experience again and that too in the grudge of the public in a totally strange atmosphere with the whole criminal system focused entirely upon her¹⁴.

Moreover, compounding these consequences is the deeply rooted social stigma around marital rape, where the woman is expected to uphold the sanctity of the marriage or else be blamed for 'failing' as a wife. Victims of marital rape are actively suppressed by their own family, in-laws, and society while the social stigma itself is reinforced legally by the Marital Rape Exception (MRE) neglecting the grave crime and telling the victim what happened to them is not wrong in the eyes of the law.

This dual socio-legal stigma leaves the survivor completely alienated from the social help as well as the legal remedy.

It is thus submitted that when the law itself refuses to acknowledge a crime, it not only fails in its duty to safeguard the victim but it actively takes part in the victim's systematic suppression.

Counterarguments to MRE Criminalization

The criminalization of Marital Rape Exception (MRE) has not been without opposition having several counterarguments against the recognition of it as a criminal offence under Indian Law.

According to the data in the landmark case of RIT Foundation v. Union of India (2022)¹⁵, out of the 19 states and Union Territories that responded, the majority of state governments were in favour of retaining Exception 2 of Section 375 IPC. Their stance was further reinforced by the National Commission for Women and the Ministry of Women & Child Development who were of the same opinion. However as stated in Navtej Singh Johar v. Union of India (2018)¹⁶, constitutional morality must prevail over popular morality, and as the opinion of the state governments reflects the popular morality thus, the popular morality does not have the power to reject the guaranteed fundamental rights.

The judgement was a split verdict between the two judges: Justice C. Hari Shankar and Justice Rajiv Shakti. Justice Hari Shankar explained that the continuing legislative intent behind retaining the Marital Rape Exception (MRE) is to preserve the institution of marriage. He highlighted that the legislature, has chosen to treat non-consensual sexual acts within marriage differently from those outside of marriage¹⁷.

He argued that this distinction is based on an intelligible differentia that has a rational nexus to the object of preserving the marital institution. His deference to the institution of marriage created a fallback for the perpetrator, also significantly undermining the consent and bodily autonomy of the woman, subsequently creating a sexual expectation in a marital relationship.

While, Justice Shakti gave a verdict stating that classification between married and unmarried couples in the context of forced sex is not just unequal in its operation but is also manifestly unjust. He tested the exception against fundamental rights under Articles 14, 15, 19(1) (a) and 21 and dismantled the sexual expectation argument of Hari Shankar signifying that a woman's fundamental rights and individual agency prevail over the institution of marriage¹⁸.

Justice Shakti also stated that the fact that the legislature hasn't acted doesn't mean courts can't step in. Navtej Singh Johar (2018)¹⁹ made it clear that legislative inaction is a "neutral

fact” and doesn’t block judicial review. The judgement recognises this and follows the same principle.

Another counterargument was made by the Union of India that the criminalization of Marital Rape Exception (MRE) would lead to excessive state interference in marital privacy. However, as established in *K.S. Puttaswamy v. Union of India (2017)*²⁰ that Right to Privacy under Article 21 protects the individual rather than the institution and it cannot be used to shield the perpetrator.

Furthermore, a counterargument was raised regarding women having alternative legal remedies such as Section 85 of BNS or Section 498A IPC. This argument was also refuted by Justice Shakti Chaudhary where he stated married women having alternative legal remedies under IPC and BNS such as Section 498A (cruelty), Section 304B (dowry death), and Section 306 (abetment of suicide) do not address rape as they deal with specific forms of abuse. Even the Domestic Violence Act (D.V. Act), while recognizing sexual abuse, does not criminalize marital rape. Instead, it provides civil remedies like protection orders and financial relief but denies the survivor the ability to prosecute her rapist husband under Section 376(1) IPC²¹.

Thus it is humbly submitted that cruelty, domestic violence and marital rape are distinct crimes violating different dimensions of the individual’s dignity, so, treating them as interchangeable only undermines the graveness of the crime and the law must recognize them properly.

Challenges to MRE Criminalization

Besides the several counterarguments and opposition to the Marital Rape Exception (MRE), it also faces certain technical and practical challenges.

One of the most significant challenge in the criminalization of marital rape is the burden of proof as to determine whether the act was non-consensual in the confines of their marital relationship is extremely hard.

This challenge can be circumvented as seen in *State of Punjab v. Gurmit Singh (1996)*²² where the court held that the testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of the victim’s statement, the

courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

Another challenge regarding the criminalization is the fear of misuse, that the wives may file marital rape cases during matrimonial disputes.

It is true that the false cases are a risk in every criminal offence as seen under Section 498A IPC or Section 85 of BNS i.e. dowry harassment for many years. But the possibility of misuse shouldn't be the grounds to completely deny the existence of an offence and the legal protection that should be rendered to the victim. Moreover, the existing legal remedy of malicious prosecution²³ already provides enough safeguard to an accused against any false cases.

These challenges, while being genuine, seek careful legislative action and judicial sensitivity rather than the complete neglect of marital rape and denial of a woman's fundamental right to bodily autonomy.

Suggestions

Sexual expectation within a marital relationship not only undermines the wife's consent and bodily autonomy, but is treated as an expectation that matrimony entails.

It is suggested that the doctrine of implied consent rooted in Hale's proposition²⁴, which assumes a wife's consent by virtue of marriage should be abolished as it puts the institution of marriage above the guaranteed fundamental rights of the woman.

It is further suggested to repeal the Marital Rape Exception (MRE) under Exception 2 of Section 63 of BNS which continues to perpetuate the doctrine of implied consent, while shielding the perpetrator under the institution of matrimony. The unconstitutionality of the exception was affirmed by Justice Shakti Chaudhary in *RIT Foundation v. Union of India* (2022) stating that Marital Rape Exception cannot be shielded from the ambit of testing against Articles 14, 15, 19(1) (a) and 21, against which it failed to withstand²⁵.

Moreover, mandatory explicit consent within sexual intercourse regardless of their marital status is necessary. Anything other than a clear and voluntary ‘yes’ under no undue influence constitutes rape, as ‘no’ means ‘no’ regardless of the relationship between parties.

The present need for legislative action and judicial activism is of utmost importance to correctly and carefully frame the new law criminalizing marital rape. It is suggested to frame the draft bill on the foundations of Swedish Penal Code (Brottsbalken)²⁶, to eliminate the concept of ‘implied consent’ while also relying on voluntary and explicit consent throughout the sexual act which can be revoked at any time. If consent is not given, meaning silence, passivity, or prior sexual history will not equate to agreement and the act will be classified as rape. Another necessary reform would be to add the offence of “Gross Violation of Integrity” to the offence of marital rape which states sexual or physical offense committed by a man against a woman with whom he shares a close intimate relationship, can also be charged with "gross violation of a woman's integrity" (grov kvinnofrid)²⁷. Incorporation of such provision in Indian law would ensure that the violation of a wife’s dignity within marriage is seen as an aggravated offence, providing stronger protection to her bodily autonomy and dignity.

These reforms would not only ensure criminalization of marital rape but also provides an effective and balanced framework in its implementation, that will uphold the victim’s dignity, bodily autonomy and her value of consent regardless of her marital status.

Conclusion

This paper has examined the Marital Rape Exception (MRE) through the dimensions of marriage, consent and constitutional morality and found it failing in all three areas.

The MRE, rooted in Hale’s archaic doctrine which was abolished even in his own country, stands unconstitutional when tested against Articles 14, 15, 19(1) (a) and 21. Under the already existing patriarchal norms, expectations and socio-legal consequences, the urgency for judicial and legislative intervention is of utmost importance.

Rape is rape, regardless of the relationship between the perpetrator and the survivor as marriage cannot be used as a license to rape for ‘no’ means ‘no’, and anything other than a clear and voluntary ‘yes’ constitutes rape.

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