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Marriage, Consent, and Constitutional Citizenship: Rethinking the Marital Rape Exception in India

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ABSTRACT

This article examines the continuing validity of the marital rape exception through constitutional, social, and feminist perspectives. It examines how Indian law treats consent differently within marriage and outside it, despite recognising the autonomy and agency of women in other aspects of life. The article begins by understanding the colonial patriarchal origins of the marital rape exception and goes on to argue how it is inconsistent with modern constitutional values of equality and dignity under Articles 14 and 21 of the Constitution. The contradiction between the legal recognition of domestic violence and the refusal to criminalise non-consensual intercourse within marriage is studied intensively. By understanding social realities such as economic dependence, structural coercion, and gendered expectations, the article opines that silence within marriage cannot always be interpreted as consent. Through comparative legal developments and constitutional analysis, the article argues that recognising a married woman's sexual autonomy would strengthen rather than weaken the institution of marriage.

I. INTRODUCTION

What really makes us human? It is not merely our biological existence or our dependence on food and survival, for those are characteristics shared with every living being. What really makes us human is the fact that we are social beings. As social beings, we get to dictate our boundaries, and the idea of consent lies at the heart of human dignity. Modern legal systems don't interpret consent as a one-time transaction but rather as a continuing expression of free will that can be withdrawn at any time. Yet, when it comes to the institution, this same interpretation becomes heavily contested. Society has long viewed marriage as creating a permanent sexual access between spouses, particularly granting husbands authority over their wives' bodies. This norm raises an important question: can a woman truly withdraw consent in a marriage under Indian law?

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This issue is not merely legal, but a profoundly social and moral one. It faces the relationship between tradition and bodily autonomy, between societal expectations and individual rights. At its core lies the conflict between two ideas — whether marriage is a sacred institution requiring legal protection at all costs, or whether it is a partnership between equals where personal dignity survives even after marriage.

II. HISTORICAL ORIGINS OF THE MARITAL RAPE EXCEPTION

Historically, the notion that a husband could not rape his wife emerged from deeply patriarchal understandings of marriage. One of the most influential propositions came from the English jurist Sir Matthew Hale in the seventeenth century, who argued that by entering marriage, a woman gave irrevocable consent to sexual relations with her husband. According to this logic, consent once granted at marriage could never be withdrawn later. The wife's identity and autonomy were effectively subsumed into the husband's¹.

This understanding reflected broader historical realities in which women were treated as dependents rather than equal citizens. Marriage was often less a partnership and more an arrangement centred around male authority and female obedience. The law historically reinforced this imbalance by denying women control over property, finances, mobility, and even their own bodies.

Ironically, many contemporary defenders of the marital rape exception portray criminalisation as a “Western idea,” despite the fact that the exception itself is a colonial import derived from English common law. In reality, the exception reflects colonial patriarchy² rather than Indian constitutionalism. Recognising marital rape would therefore not amount to importing foreign values but rather rejecting outdated colonial assumptions incompatible with constitutional democracy.

III. INDIA'S POSITION

Although constitutional democracies across the world have evolved significantly, remnants of this colonial thinking continue to survive within Indian criminal law, and thrive in society. Under Exception 2 to Section 375 of the Indian Penal Code³, sexual intercourse by a man with his own wife, provided she was above a certain age, was excluded from the definition of rape. While the age threshold was later modified following judicial intervention, the broader marital

¹ The Second Sex, Simone de Beauvoir (Vintage Books ed., 2011)

² Flavia Agnes, *Protecting Women Against Violence? Review of a Decade of Legislation, 1980–89*, 19 Econ. & Pol. Wkly. WS19 (1992)

³ Indian Penal Code, 1860, § 375 Exception 2

rape exception continues to exist in substance even under newer criminal law frameworks.

This creates a deeply troubling contradiction. Indian law recognises that consent is central in all sexual relationships except one of the most intimate and socially significant relationships — marriage. A woman can refuse consent to any stranger, acquaintance, or partner outside marriage, but once married, the law substantially weakens her ability to say no. Essentially, marriage alters the legal understanding of consent itself.

The contradiction becomes even more confusing when viewed alongside other laws. The Protection of Women from Domestic Violence Act⁴ recognises sexual abuse within marriage as a form of domestic violence. Courts have also acknowledged cruelty arising from forced sexual relations. Yet criminal law stops short of recognising non-consensual intercourse within marriage as rape in the full legal sense. This produces what may be called the “contradictory wife” under Indian law. The law partially acknowledges her suffering while refusing to fully recognise her victimhood. It identifies the violence but hesitates to name it.

IV. CONSTITUTIONAL CITIZENSHIP OF MARRIED WOMEN

The marital rape exception raises serious constitutional concerns under Articles 14 and 21⁵ of the Constitution.

Article 14 guarantees equality before the law and equal protection. Yet the marital rape exception creates a distinction between married and unmarried women subjected to identical acts of non-consensual intercourse. The only basis for differential treatment is the marital relationship between the victim and the perpetrator. This essentially gives married women “lower constitutional citizenship.”⁶ After marriage, a woman’s sexual autonomy and criminal law protection are reduced. Such a framework effectively negates the constitutional guarantees of equality and dignity.

Article 21 further strengthens this argument. Over time, the Supreme Court has expanded Article 21 to include dignity, privacy, bodily integrity, and decisional autonomy. In *Justice K. S. Puttaswamy v. Union of India*⁷, the Court recognised privacy as an intrinsic part of liberty and autonomy. Also, in *Joseph Shine v. Union of India*⁸, the Court rejected patriarchal notions treating wives as property within marriage.

⁴ Protection of Women from Domestic Violence Act, 2005

⁵ Constitution of India, arts. 14 & 21

⁶ Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000)

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

⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39

Marriage cannot become an arbitrary black hole where a woman's constitutional rights disappear. A woman remains an autonomous citizen even within marriage, and these judgments establish that.

V. CONTRADICTIONS OF MODERN LAW

The strongest inconsistency in the marital rape exception is how the law treats consent elsewhere. Modern legal systems recognise that contractual consent may be withdrawn, medical consent may be revoked, and most importantly, sexual consent outside marriage may be withdrawn at any stage. Yet, marriage alone assumes continuing and irrevocable sexual consent. This contradiction is due to the exception's outdated fashion. Jurisprudence recognises that meaningful consent may remain revocable at any stage. If consent is impossible to withdraw, it ceases to be genuine consent altogether.

Indian law trusts women's agency in education, employment, voting, property ownership, and contracts, yet hesitates to recognise their agency within marriage fully. The law appears willing to recognise women as autonomous citizens in public life while limiting that autonomy within intimate relationships.

VI. LAW, SOCIETY, AND SEXUAL ENTITLEMENT

The marital rape exception is not just a legal provision; it also shapes social attitudes. Law does not merely exist to punish wrongful conduct; it communicates social values. By refusing to criminalise marital rape, the law normalises sexual entitlement.

This has much broader social consequences. In many social settings, women are conditioned to believe that refusal to sexual relations within marriage amounts to disobedience or failure to fulfil marital duties. Men, in turn, internalise the belief that marriage guarantees unrestricted sexual access.

Thus, the exception contributes to a culture where consent within marriage is undervalued. Marriage should ideally be the relationship demanding the highest degree of communication, respect, and mutual understanding. Instead, the law often provides women the lowest degree of protection precisely within marriage. It reflects persisting patriarchal structures. Institutions are prioritised over individuals, where women are expected to sacrifice bodily autonomy for familial stability.

VII. THE COMPLEXITY OF CONSENT

The question of consent cannot be looked at in a vacuum without examining social realities. In

many marriages that are conservative and economically dependent, women lack the practical freedom to refuse. Consent in such situations becomes socially complicated. A woman may submit to sexual relations because refusal leads to violence, emotional abuse, financial insecurity, abandonment, and pressures from family and society.

In such situations, silence cannot automatically be interpreted as willingness⁹. The absence of resistance does not necessarily indicate free consent. Many women comply not because they genuinely want to, but because their circumstances make refusal impossible. Consent here is shaped by societal pressures rather than free will. Consent is not a simple “yes” or “no”, since lived realities are far more complex

The “Misuse” Argument

One of the most common objections to criminalising marital rape is the potential for misuse. Critics argue that false cases may increase, and marital disputes will become criminalised. However, does this argument not carry selective scepticism towards women-centric laws? Every criminal law carries the possibility of misuse, including murder, theft, financial fraud, and corruption. Yet in these cases, misuse alone is never considered a sufficient reason to deny legal recognition to genuine victims.

The fear of fault cases cannot outweigh the reality of victims. If misuse could be accepted as a valid basis for refusing criminalisation, many protective laws would not exist altogether. Furthermore, concerns regarding evidence collection are not unique to marital rape alone. Criminal courts routinely examine complex evidence in cases of domestic violence, sexual harassment, and assault. Marriage does not make assessment of evidence complex, however, it does make society uncomfortable with recognising the possibility of violence within intimate relationships.

Preservation of Marriages or Protection of Dignity?

Another major defence of the marital rape exception is that criminalisation would destabilise the institution of marriage. This argument rests on the assumption that preserving an institution is of a higher social order than protecting individual dignity.

The purpose of law is not just to mechanically preserve institutions, but to ensure justice within them. The contrasting reasoning is deeply problematic in a constitutional democracy. Institutions serve their true purpose by protecting individuals, not by suppressing rights in the name of institutional protection.

⁹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989)

What is also ignored in the argument is that the state already extensively regulates marriage through divorce laws, domestic violence legislations, dowry prohibition laws, and other personal laws. Therefore, the claim that the state should not interfere in marriages becomes rather hypocritical. The state enters marriages whenever property, finances, and family structures are involved, but non-interference is selectively invoked concerning women's sexual autonomy.

VIII. A COMPARATIVE PERSPECTIVE WITH GLOBAL DEVELOPMENTS

Several democratic countries across the globe have acknowledged that marriage cannot dissolve consent. The United Kingdom itself abolished the marital rape exception in *R v. R* (1991)¹⁰, despite having historically originated it. In the United States, all 50 states criminalised marital rape. European countries such as Germany, France, and Sweden recognise non-consensual intercourse within marriage as rape, with Sweden particularly emphasising affirmative consent. Nepal too criminalised marital rape, demonstrating that recognising spousal autonomy is not incompatible with South Asian social realities.

India's hesitation in criminalising marital rape increasingly places itself at odds with changing standards of international human rights. While it is true that legal systems cannot simply change by imitating foreign models while ignoring social contexts, it must still be acknowledged that individual dignity remains central.

Importance of Criminalisation

Critics often argue that even if marital rape were criminalised, conviction would remain difficult. This argument fails to understand the very nature of criminal law. It is not merely punitive; it is symbolic in nature¹¹. Criminalisation communicates what society considers morally and legally unacceptable.

Recognition matters. When the law refuses to acknowledge marital rape, it sends the message that somehow, violence within marriage is less serious or real compared to violence outside it. Criminalisation, therefore, has a deeper symbolic significance than conviction statistics.

IX. CONCLUSION

The question of whether a woman can withdraw consent within a marriage ultimately forces society to confront a fundamental issue: Does marriage create ownership over her body? In an

¹⁰ *R v R*, [1991] UKHL 12

¹¹ Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1984)

ideal constitutional democracy dedicated to equality and dignity¹², the answer must be no. Marriage may create emotional and legal obligations, but it cannot extinguish individual autonomy.

The marital rape exception does not reflect modern constitutional values, but historical patriarchal laws rooted in colonial legal traditions. By denying married women full sexual autonomy, the law creates unequal constitutional citizenship and reinforces structures of entitlement and silence.

An institution that depends upon the unequal distribution of rights for its preservation reveals its own fragility. Marriage can remain socially meaningful only when it is treated as a partnership between equals rather than a structure of entitlement and control. Far from destroying marriage, recognising a married woman's sexual autonomy may strengthen the institution.

The future of this debate will determine more than the scope of criminal law. It will determine whether Indian society is prepared to recognise women not merely as wives within familial structures, but as full constitutional citizens whose dignity survives marriage itself.

¹² Karuna Nundy, *The marital rape exception is unconstitutional*