

# WHEN DOES 'CONSENT' IN MARRIAGE END AND THE SEXUAL ACT TRANSGRESS INTO RAPE: COMMENT UPON JUSTICE HARI SHANKAR'S UPHOLDING THE CONSTITUTIONALITY OF THE MARITAL RAPE EXCEPTION

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## ABSTRACT

The marital rape exception under Section 375 has been a topic of debate and discussion ever since its codification in the Indian Penal Code. The recent judgment by a division bench of the Delhi High Court gave a split verdict on whether or not to declare such an exception unconstitutional in light of transformative and progressive development of fundamental rights jurisprudence in the country. This case comment traces the origin of the marital rape exception then goes on to explore Justice C. Hari Shankar's opinion on upholding the validity of this outrageous exception, while contrasting it with Justice Rajiv Shakti's opinion for striking down a legal provision which was in blatant violation of a woman's fundamental right to dignity protected under the Indian Constitution. The comment delves into judicial precedents, scholarly work by authors, researchers and practicing advocates to substantiate the criticism of one opinion and appreciates the judicial wisdom and insight in the other opinion on the issue of how presumption of consent in marital sexual relations a violation of right to dignity of victim wives. The fact that the law on the present issue is not settled and it merits a decision by a larger bench is not forgotten.

## INTRODUCTION

When did consent to sexual intercourse become a presumption in marriage? Was it since the inception of institution of marriage or by virtue of the deeply ingrained patriarchy that imposed ‘obedience’<sup>i</sup> of male desires upon the woman. In the concluding scenes of movie ‘Lipstick under my Burkha’, character of Shirin Aslam should have been able to prosecute her husband for rape and sexual assault<sup>ii</sup> for forcefully indulging in intercourse with utter disregard to contraceptive measures. Unfortunately, all she could do was talk about want of affection in closed quarters with three other destitute women. Hence, not only is marital rape not recognised as an offence against all women under the current Indian penal regime, it is also an act that carries with it centuries of embedded social stigma.

## GENESIS OF MARITAL RAPE EXCEPTION (MRE)

The roots of MRE rest in India’s colonial history. Under the English jurisprudence, the woman once having given consent to marry a man was deemed to have submitted herself to her husband’s wants and wishes<sup>iii</sup>. This meant that a wife invariably estopped herself from retracting the matrimonial consent as such consent to sexual intercourse was ‘ongoing and unbreakable’<sup>iv</sup>. This can be further substantiated by the fact that Indian Penal Code, 1860 (hereinafter referred to as the ‘IPC’) was brought to life by English statesman Lord Macauley, thus it heavily borrows the underpinnings of the archaic English law. However, under the current Indian legal jurisprudence, women are no longer recognised as property of men which can be disposed or violated as per whims and fancies of men<sup>v</sup>.

Focus of the present case comment would be to juxtapose the views of the division bench of Delhi High Court (DHC) on the issue of how presumption of consent in marital sexual relations a violation of right to dignity<sup>vi</sup> of victim wives.

## THE MRE SPLIT VERDICT 2022

DHC’s division bench comprising of HMJ Hari Shankar and HMJ Rajiv Shakhder gave divergent opinions while adjudicating a bunch of four petitions<sup>vii</sup> challenging the constitutional validity of MRE, which reads under Explanation 2 to Section 375, IPC as “sexual intercourse

or sexual acts by a man with own wife, the wife not being under fifteen years of age (now read as 18 years<sup>viii</sup>), is not rape”. In the present case, HMJ Shankar upheld its validity, while HMJ Shaktidher struck down MRE on the basis that it does violate married women’s right to dignity.

HMJ Hari Shankar, in his opinion says that MRE should not be tested on the mantle of constitutional validity since ‘consent’ is not the issue in this case because in a marriage, consent is not contested as there is “legitimate expectation of sex” and all that MRE says is that intercourse between a married couple is not rape since marriage is one of the purest relationships that humans have and sex within marriage is “sacred”. It may be so, but is any sanctity attached to a relation when it is forced, and the wife’s psychological and bodily health deteriorate because of abuse in this ‘sacred’ relation. He further makes an absurd distinction while comparing importance of consent in a marriage and that in other amorous relations. He says that violation of consent entitles every woman who is not married to be outraged for rape but when the same consent is violated by a husband in a marriage, similar outrage is unrealistic because sexual intimacy constitutes an integral part of duties within the institution of marriage, and that prosecution of husband would shake the society’s belief system in its sanctity. It seems that even in 21st century, HMJ Shankar subscribes to the feudal doctrine of coverture propounded by Sir William Blackstone. The doctrine viewed a husband and wife as ‘one entity’ in the eyes of law, because of which the wives were deprived of physical and legal autonomy and husbands exercised complete control over their being only by virtue of marriage<sup>ix</sup>. Fortunately, we are past that period and HMJ Shaktidher is cognizant of significance of consent and how its absence, irrespective of relation between the parties, is a key ingredient for establishing the offence of rape. The purpose of IPC was and is, to detect, deter crimes and to punish of culprit for offences defined therein. Hence, in codified law, indeterminacy of language is limited by the purpose sought to be achieved by the legislation. Considering the above, to accept and opine that legislature decides which kind of non-consensual sex qualifies as rape and that the same kind within a marriage is not rape, fails the very purpose behind the enactment of IPC.

In his judgment, HMJ Shaktidher opines that there is a “conjugal expectation” to engage in sexual communion with one’s wife is legitimate in a happy marriage. However, the same cannot be extended to construe “unbridled access” and cannot be put at par with “unfettered right” to have communion without the wife’s consent. Absence of consent and willingness

constitutes the bedrock for establishing the offence of rape under Section 375, IPC. But MRE, with a single stroke, uses marriage as a firewall to shield a category of men i.e., the offender husbands from prosecution despite all criteria which establish commission of rape are met. It goes against constitutional principles of fairness and equality to deprive victim wives' protection under S.375 when the offence and injury from rape are same when inflicted on other women, just because their offender is their husband.

He relies on *Joseph Shine* to refute the argument that MRE removal is an invasion of private domain because subscription to such idea would mean that a woman, only by the reason of her marriage is denied constitutional rights of personal autonomy, bodily integrity, and agency<sup>x</sup>. Furthermore, he says that marriage today is a communion between equals and at no point does a wife give an "irrevocable consent to sexual intercourse" and that the right to withdraw consent draws its existence from the fundamental right to life and liberty. In their work, Menaka Guruswamy and Arundhati Katju also rely on Joseph Shine judgment to argue that constitutional morality accompanied with right to dignity can now permeate the otherwise perceived intimate realm of marriage<sup>xi</sup>. Thus, to accept that non-consensual sex within a marriage is not rape and continuance of protection of abusive husbands, is not only preposterous but also a flagrant violation of constitutional morality and right to dignity of victim wives.

## CONCLUSION

Saying yes or no, irrespective of the nature of relationship, is a woman's fundamental right. Violation of such right should attract amendment of laws, criminal or otherwise, to penalise the offending party to the highest degree. The Justice Verma Committee Report, 2013 suggested removal of MRE because relationship between the victim and the accused should be irrelevant if the intercourse is devoid of consent and that marriage by itself should not be discerned as an irrevocable consent to sexual intimacy. In what can be termed as a landmark judgment, the Supreme Court has recently acknowledged intimate partner abuse as a reality and the three-judge bench has expanded the meaning of rape to enfold within its scope marital rape, albeit only for the purpose of Medical Termination of Pregnancy Act, 2021. The Court reiterated that sexual intercourse without consent qualifies as rape<sup>xii</sup>. HMJ Shankar's view that

consent is omnipresent and irrevocable in marriage thus stands further weakened and ought to be rejected and HMJ Shakhder's judgment be upheld by a larger bench.

The idea that wives are a property of their husband, is moribund in times of today since neither do they identify themselves as subordinates of husbands; nor does marriage mean an all-pervasive and perpetual consent for intercourse. Thus, though recognition of marital rape may have been an unfathomable idea in the past, the times have now changed, as is evident from the statistics which indicate that out of 185 countries 77 have criminalised marital rape<sup>xiii</sup>. Coupled with the developments in our legal jurisprudence and a transformative reading of the constitution, it looks like India is not far behind in criminalizing marital rape.

## ENDNOTES

<sup>i</sup> James Schouler, *A Treatise on the Law of the Domestic Relations; Embracing Husband and wife, parent and child, guardian and ward, infancy, and master and servant* (4<sup>th</sup> edn., Boston Little and Brown, 1889).

<sup>ii</sup> *R. vs. Hutchinson*, 275 N.S.R.(2d) 128 (SC).

<sup>iii</sup> Rebecca M Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption' (American Bar Association, Vol.20, No.4 1995)

<sup>iv</sup> Matthew Hale, *The History of the Pleas of the Crown* 629 (London: Sollom Emlyn, 1778).

<sup>v</sup> *Joseph Shine v. Union of India*, (2018) 2 SCC 189.

<sup>vi</sup> INDIA CONST. art. 21.

<sup>vii</sup> *RIT Foundation v. Union of India*, (2022) SCC OnLine Del 1404.

<sup>viii</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>ix</sup> William Blackstone, *Commentaries on the Laws of England* (1765).

<sup>x</sup> *Joseph Shine v. Union of India* (n 5).

<sup>xi</sup> Menaka Guruswamy and Arundhati Katju, From Adultery to Sexual Autonomy: The Constitutional Potential of *Joseph Shine*. Saurabh Kirpal, *Sex and the Supreme Court: How the Law Is Upholding the Dignity of the Indian Citizen* (Hachette UK 2020).

<sup>xii</sup> '[MTP Act] Excluding Unmarried Woman from Terminating Pregnancy beyond 20 Weeks Violative of Article 14: Supreme Court' (*Bar and Bench - Indian Legal news*) <<https://www.barandbench.com/news/litigation/mtp-act-excluding-unmarried-woman-terminating-pregnancy-20-weeks-violative-article-14-supreme-court>>.

<sup>xiii</sup> Sandhya Mehrotra, 'Laws on Marital Rape in Other Countries?' (*Ground Report*, 14 May 2022) <<https://groundreport.in/laws-on-marital-rape-in-other-countries/>> accessed 30 September 2022.