THE INDIA FORUM
A JOURNAL-MAGAZINE ON CONTEMPORARY ISSUES

July 31, 2023

Criminalising Marital Rape in India

By: Swarati Sabhapandit

The judiciary's disinclination to criminalise marital rape flows from a vertical approach to constitutional rights, which fosters a public-private divide to the disadvantage of women. A horizontal approach, conscious of social hierarchies, is a better way of safeguarding rights.

As the Supreme Court prepares to hear pleas to criminalise marital rape, it is pertinent to underscore the problems with the dominant juridical approach that the institutions of the state routinely employ towards the issue of consent within a marriage.

Section 375 of the Indian Penal Code (IPC), which criminalises rape, makes an exception for "sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age."[1] No reason is stated for this exclusion, which takes away a married women's bodily autonomy, and stripes her right to life, dignity, and freedom of choice. The clause presupposes consent under the purview of a legal marriage. In such instances, the very idea of 'marital rape' becomes antithetical.

The archaic law that provides this exception throws up a set of questions. Do courts or legislatures have the right to adjudicate the issue? Are the state's concerns about safeguarding the institution of marriage valid?

Constitutionality of marital rape

In May 2022, the Delhi High Court delivered a split verdict on criminalising marital rape in the country. Justice Rajiv Shakdher struck down the existing law as unconstitutional, stating that the right to withdraw consent forms the core of women's right to life and liberty. Justice C. Harishanker rejected the plea to criminalise marital rape, noting that the legislature must carry out the change in the law since the issue "requires consideration of various aspects including social, cultural and legal." The case will now be heard by a constitutional bench of the Supreme Court comprising Chief Justice D.Y. Chandrachud , Justice P.S. Narasimha, and Justice J.B. Pardiwala.

> The creation of a private sphere that is shielded from the law results in deprivation of remedies for women who are victims of marital rape.

A dichotomy between the public and the private spheres is central to praxis of constitutional rights. The creation of a private sphere that is shielded from the law results in deprivation of remedies for women who are victims of marital rape. Cases reached a standstill once the discussion enters the realm of its constitutionality.

In 2000, the Law Commission rejected an argument that there was no reason for rape alone to be shielded when other instances of violence by a husband towards a wife were criminalised. It expressed concern that criminalisation of marital rape would lead to "excessive interference with the institution of marriage."

> The Verma committee argued that immunity stemmed from an outdated notion of married women being the property of their husbands and irrevocably consenting to the latter's sexual needs.

A departure from the prevailing narrative became visible in 2012 when a committee constituted under J.S. Verma, a retired judge of the Supreme Court, recommended the criminalisation of marital rape. The Verma committee argued that immunity stemmed from an outdated notion of married women being the property of their husbands and irrevocably consenting to the latter's sexual needs. The committee recommended that the exception clause be deleted and that marital relationship ought not to be a valid defence to determine whether consent existed.

Yet, the Criminal Law (Amendment) Bill, 2012, drafted in the aftermath of the Verma Commission report, did not have any provision to criminalise marital rape. The Parliamentary Standing Committee on Home Affairs that examined the bill rejected any suggestion of criminalising marital rape. Its reasoning was that the "entire family system will be under greater stress and the committee may perhaps

be doing more injustice." Additionally, it felt that sufficient remedies already existed, including Section 498A of the Indian Penal Code, the Protection of Women from Domestic Violence Act, 2005 (PWDVA, 2005), and various other personal laws dealing with marriage and divorce.

> The union government claimed that criminalising marital rape could destabilise the institution of marriage and become a potential tool for harassing husbands.

Other arguments drew on supposed Indian cultural norms. The union government has said that the conception of marital rape, as understood and acknowledge internationally, cannot be suitably applicable in the Indian context owing to a societal mindset that sees marriage as a sacrosanct institution.

In the case before the Delhi High Court, the union government claimed that criminalising marital rape could destabilise the institution of marriage and become a potential tool for harassing husbands. Solicitor General Tushar Mehta insisted that the matter required a "holistic view" as it involved a sensitive "socio-legal issues".

Courts have often skirted questioning the exception clause. The Gujarat High Court in Nimeshbhai Bharatbhai Desai v. State of Gujarat, noted that marital rape was a disgraceful offence, but did not strike down the exception clause or did it urge the state to do so. A judgement from the Delhi High Court held that forced sex within a marriage could not be considered rape and hence, an analysis of facts was not required.

A different approach

Two central questions frame the debate on the criminalisation of marital rape in India.

First: can the state compel a woman to have sexual intercourse with her husband. Second: what is the role of the judiciary to protect the constitutional rights of a woman under Articles 14 and 21 of the Constitution.

The judiciary encourages a vertical approach in the case of women's right against marital rape by maintaining a strict public-private divide. This approach to constitutional rights has become a default mode thinking over time. It assumes constitutional rights as safeguard against the state, which is the by-product of the contract between the state and its citizens.

Although the judiciary has been hesitant to bring constitutional rights within the private sphere in the case of marital rape, there is a selective penetration of the state. Take, for instance, court-mandated restitution of conjugal rights. Found in Section 9 of the Hindu Marriage Act, 1956, the crux is that if a husband and a wife do not live together 'without reasonable excuse', the court can grant a decree of restitution. The section works to the disadvantage of women, who are often forced to resume conjugal relationship with their husbands.

A horizontal approach to constitutional safeguards offers insights.

Scholars like Van der Walt, Jean Thomas, Gautam Bhatia have proposed that the institutions and structures embedded in our society are constitutive of a set of norms, conventions, patterns of conduct. These norms assign roles, functions, and power to individual actors, often in a hierarchical manner.

> The law should examine the allegedly right violating practices between two parties in the context of the background institutions and the individuals' relative position.

Hierarchies of domination and subordination created by and through institutions, are permanent, enduring, and pose difficulties to overcome. Thus, the law should examine the allegedly right violating practices between two parties in the context of the background institutions and the individuals' relative position within these institutions (for example, patriarchy, caste, class).

When there exists a difference in power between parties enabling one to violate certain constitutional rights of the other and difference is flowing from the parties' relative position within the institution in place, the constitutional rights should be enforceable horizontally.

A notable judicial precedent was set in Indian Young Lawyers Association v. State of Kerala (2018), when the Supreme Court, by a 4:1 majority, held that the exclusion of women between the ages of 10 to 50 from the Sabarimala temple was unconstitutional. The

concurring opinion of Justice Chandrachud is specifically insightful that aspires to bridge the gap between the constitutional ideas and our social reality.

> The scope of Article 17 could be extended to other situations where "social exclusion of the worst kind has been practiced".

Chandrachud referred to Constituent Assembly Debates around the 'untouchability' clause (Article 17). He argued that the framers of the Constitution had refrained from further concretising the concept of 'untouchability' for two reasons. First, the purpose of Article 17 was to combat "social norms which subjugated individuals into stigmatised hierarchies." Second, and following from the first, the scope of Article 17 could be extended to other situations where "social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution." Thus, Chandrachud used the analogous logic of patriarchy which discriminates menstruating women based on their sex to uphold their constitutional right to participate in "key social activities."

The court in Sabarimala indicated a paradigm shift, from a binary understanding of the public and private spheres to individual autonomy pertaining to the application of constitutional rights. This simultaneously weaves a narrative where the essence of liberty and aspirations of equality go in hand in hand.

Conclusion

When the language of autonomy slips away amidst the bargaining between constitutional rights and an overarching structural narrative, it becomes crucial to look beyond the strict binary of public and private, where the efficacy of constitutional rights is only viable within the public sphere defined by the state.

The premise of a horizontal approach underscores three things.

First, since it does not limit the application of fundamental rights to the public sphere by creating a public-private binary, it delegitimises the statist approach of selective penetration in the private sphere.

> The Constitution was drafted not only as a tool of liberation against the colonial administration but also as a document for social transformation against conservative forces.

Second, the Constitutional Assembly Debates bears the testimony of individual as the primary unit of fundamental rights. Since the primary goal of the constitutional rights is the emancipation of individual, there is an urgent need to shift the focus from the private sphere to a language of individual autonomy.

Third, the Constitution was drafted not only as a tool of liberation against the colonial administration but also as a document for social transformation against conservative forces and a site for democratising both the public and private spheres. The horizontal application of constitutional rights will not only recognise the repressive impulses amongst which patriarchy features prominently but simultaneously emancipate individuals who stand at the lower rungs of these hierarchical institutions.

Swarati Sabhapandit is a Ph.D. research scholar at the department of International Relations and Governance Studies, Shiv Nadar IoE.

Footnotes:

1 The section has an expansive definition of 'rape', which not only includes sexual intercourse but also other form of penetration such as oral sex. In Independent Thought v. Union of India (2017), the Supreme Court read down the exception to define as rape sexual intercourse by a man with his wife if she was below 18 years of age - rather than 15 as in the clause. The judgement "refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above."