
CRIMINALIZATION OF MARITAL RAPE IN INDIA: A COMPARATIVE LEGAL STUDY WITH THE UNITED KINGDOM

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ABSTRACT

The legality and constitutionality of the marital rape exemption in India is explored within contemporary notions of consent, dignity and equality. The marital rape exemption originated in the doctrine of marital immunity in English common law where within the institution of marriage, spouses were assumed to have given enthusiastic and permanent consent to share their bodies at any and all times. However, current day jurisprudence acknowledges that consent must be freely given, revocable, specific to the circumstances or the parties involved, etc., thereby making it difficult to at least justify the continued existence of the marital rape exemption. This article investigates the evolving notion of consent in the context of criminal law, assessing feminist legal analysis that effectively disrupts the public/private dichotomy by demonstrating that the marital exemption from criminal prosecution for rape perpetuates gender-based inequality. The article also discusses constitutional morality as contained in articles 14, 15 & 21 of the Constitution of India, specifically concerning the rights to dignity, bodily integrity and the right to personal liberty. The article also reviews international human rights norms and the legal groundwork for elimination of marital rape in other jurisdictions practiced under common law. Ultimately, the article concludes that marital rape is inconsistent with the constitutional principles; therefore, it must be considered in terms of personal autonomy and equality.

Keywords: Marital rape; consent; feminist jurisprudence; constitutional morality; bodily integrity; human rights; India.

I. INTRODUCTION

The way in which sexual violence is treated in law in relation to marriage reveals broader beliefs regarding personhood, consent, power relationships, and the role of families in both the law and society.¹

Historically, criminal law drew sharp distinctions between sexual violence committed outside of marriage (which was considered a serious crime) and non-consensual sexual activity within marriage (which was either completely unrecognizable as a crime or had specific exceptions/immunities).² The basis for these distinctions were based upon the belief that marriage provided a permanent or irrevocable grant of sexual consent, thus a husband could not commit the crime of rape against his wife because he was presumed to have received continued consent from his wife.³ Modern constitutional thought and human rights frameworks reject these rationales and instead understand consent as being Continuing, Situational, Revocable, Contextualized.⁴ These changes in conceptual thinking will have significant implications for criminal law as they require re-evaluation of whether marital status can be used as a valid defense/exception to liability for the crime of rape.⁵ This chapter explores the foundational conceptual and historical bases of the marital rape immunity defense, trace their roots in common law doctrine explore the underlying philosophic and jurisprudence for this immunity defense and examine how feminist legal theory and human rights frameworks have challenged and undermined these bases.

Additionally, this chapter will provide the theoretical framework necessary for understanding why the marital rape exemption currently exists why it is increasingly being challenged and what alternative conceptual frameworks support the criminalization of marital rape.

II. CONCEPT OF CONSENT IN CRIMINAL LAW

Consent is a basic tenet of Criminal Law - especially concerning Crimes Against the Person and Sexually Related Conducts.⁶ Consent serves a dual purpose: First, consent can transform

¹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 171 (1989).

² Indian Penal Code, 1860, § 375, Exception 2; *R v. R*, [1992] 1 A.C. 599 (H.L.).

³ Matthew Hale, 1 *The History of the Pleas of the Crown* 629 (1736).

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 2, 3, 26 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁵ Sexual Offences Act 2003, c. 42, §§ 74-76 (UK) *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 S.C.C. 1.

⁶ H.L.A. Hart, *Punishment and Responsibility* 1 (2d ed. 2008).

an act that would otherwise be a Criminal Act into a lawful act. Second, consent can eliminate a necessary element required to create a Crime. For example: Non-consensual physical contact is not Assault. Non-consensual taking of another's Property is Theft and Non-consensual sex is Rape. In most Criminal Cases, determining if Consent exists or does not exist, will determine criminal liability.⁷

While the existence or non-existence of Consent in Criminal Law is not simply a matter of "Yes" or "No," but rather a complex Legal Issue, which involves such issues as Capacity, Voluntariness, Knowledge and Revocation, there are numerous Legal Constraints and Limitations imposed on what constitutes Valid Consent. Some examples of such constraints and limitations include: a minor's consent given before the minor reaches a particular age will likely be deemed Void in Law even though the minor actually consented to the sexual encounter.⁸ Likewise, consent given under duress, through Threats, by means of Force or Coercion, will also be Voided. Further, consent to commit a Crime (i.e. to Seriously Harm or Kill), will be deemed Invalid Consent regardless of the fact that it was given. Additionally, a consenting Adult can Revoke his/her Consent to Sexual Intercourse at any time, so long as the Adult did not provide Continuing Consent to Sexual Relations after Previously Revoking Consent.⁹

The Concept of Consent in Sexual Offenses has undergone a significant transformation throughout the History of the Law. Traditionally, Most Rape Statutes focused on whether the Victim had Resisted the Perpetrator and whether the Victim had used Sufficient Force to Stop the Perpetrator, rather than focusing on the Victim's Consent to the Sexual Activity.¹⁰ Such approaches were Criticized because they Required the Victim to Prove that she had Resisted the Perpetrator, and because they Failed to Acknowledge that a Victim's Fear, Coercion or the Imbalance of Power in a Relationship may Prevent a Victim from Resisting the Perpetrator, yet still prevent the Perpetrator from obtaining Valid Consent to their Actions.

Present Day Sexual Offense Statutes Have Reversed the Approach traditionally taken by Statutory Schemes, and now Consider Consent to be the Primary Factor in Sexual Offense Statutes. Many Modern Definitions of Rape Include Sexual Penetration that Occurred Without

⁷ Indian Penal Code, 1860, § 375; Indian Penal Code, 1860, § 90 (consent).

⁸ Protection of Children from Sexual Offences Act, 2012 (age of consent); Indian Evidence Act, 1872, § 114-A.

⁹ Sexual Offences Act 2003, c. 42, § 74 (U.K.).

¹⁰ Indian Penal Code, 1860, § 375 Sexual Offences Act 2003, c. 42, § 1 (UK) *State of Punjab v. Ramdev Singh*, (2004) 1 S.C.C. 421.

Consent. The Emphasis on Consent in Sexual Offenses Represents a Developing Recognition that the Wrongdoing Involved in Rape is the Violation of Sexual Autonomy, and Not Merely the Use of Physical Force to Accomplish this.

When Considering Consent in the Context of Sexual Offenses, the Only Issue is Whether the Complaining Party Voluntarily and Willingly Agreed to Participate in the Sexual Activity in Question, and Not Whether the Complaining Party Resisted the Actions of the Defendant.¹¹

There are three ways to evaluate whether consent exists in the case of sexual offenses: First: consent cannot exist where it was obtained using either force or the Threat of force, fear, Deception or Coercion. Consent that was obtained under duress, by Threat, Physical Force, by abusing authority or by Misleading Information does not exist. Therefore, consent must be given without pressure and without restriction on a Person's freedom to refuse to participate in sexual activity because they fear harm, because they are subjected to someone with authority over them, or because of Misleading Information provided to them.¹²

Second: consent only applies to specific sexual Acts and only applies to specific occasions. Consent to one sexual act does not automatically mean consent to all sexual Acts and consent at one time does not automatically mean consent for subsequent occasions. Thus, the autonomy of sexuality includes the Ability to make choices regarding sexuality at differing times and in differing situations.

Third: consent may be withdrawn at any time. Although a Person may initially agree to engage in sexual activity, they remain entitled to Withdraw Consent for such activity at any time. Participating in sexual activity after consent has been withdrawn will not be deemed consent. Therefore, consent is ongoing rather than a single event that may never be changed.¹³

Each of these three principles relating to consent fail when the marriage relationship provides for irrevocable or permanent consent to sexual inter-course.¹⁴ If marriage provides for permanent consent to sexual inter-course, then the principle of free and voluntary agreement for each occasion would be eliminated. If a spouses' consent cannot be withdrawn then the

¹¹ Lillu @ Rajesh v. State of Haryana, (2013) 14 SCC 643.

¹² Indian Penal Code, 1860, § 375, Exception 2 Matthew Hale, 1 The History of the Pleas of the Crown 629 (1736).

¹³ INDIA CONST. art. 21; Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

¹⁴ Joseph Shine v. Union of India, (2019) 3 SCC 39; R v. R, [1992] 1 A.C. 599 (H.L.).

opportunity to Withdraw Consent would also be eliminated.¹⁵

III. HISTORICAL EVOLUTION OF MARITAL RAPE IMMUNITY IN COMMON LAW

There were many historical factors that shaped the theory of marital rape immunity from the perspective of common law these included the combination of religious views about the unity of marriage, patriarchal views about the roles of men and women and sexual obligations in marriage, and the views of property ownership of marriage.

A. Historical Bases in English Common Law

Sir Matthew Hale provided the best-known articulation of the marital rape exemption during the seventeenth century in his treatise. He stated that a man cannot be convicted of raping his wife because when a woman marries, she provides her husband with consent to engage in sexual acts with her at all times and therefore cannot withdraw her consent. His articulation was widely accepted and was adapted into other forms of common law across jurisdictions such as colonial India.¹⁶ The basis of Hale's articulation of the marital rape exemption was several interrelated ideas. First, the idea of the doctrine of coverture was central to his articulation. The doctrine of coverture is based on the premise that once a woman marries, she relinquishes all of her legal rights and abilities to enter into contractual agreements, buy property, etc., and is therefore incorporated into her husband's legal identity. Therefore, the wife was viewed as a non-independent legal entity and her legal rights and/or ability to enter into legal agreements were exercised/protected by her husband.

Secondly, the view of marriage as an economic partnership where the wife's body is viewed as a resource owned by her husband was another factor in his articulation. Under this view, the wife is expected to provide her husband with sexual access as part of the obligation of marriage, and therefore does not require the mutual consent of both partners each time that sexual intercourse occurs. Thirdly, religious and moral views of marriage were also a significant influence. For example, in Christian views of marriage, a couple becomes "one flesh" when they get married, and the sexual act is a symbol of the unity of marriage. It can be conceptually

¹⁵ Law Commission of India, 84th Report: Rape and Allied Offences (1980); Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law (Jan. 23, 2013).

¹⁶ 1 Matthew Hale, *The History of the Pleas of the Crown* 629 (1736).

difficult to articulate the idea of a husband committing rape against his wife, as it represents some form of self-violation or disunity within the marital unit.

As a result, when the above concepts are combined, they create a legal doctrine that makes marital rape a conceptually impossible crime. If the wife's legal identity is merged with that of the husband, if the husband has a right to sexual access to his wife as a marital right, and if marriage creates a state of unity that cannot be broken, then it logically follows that the husband's sexual activity with his wife cannot be considered rape, regardless of whether she consents or resists.

B. Criticism and Decline of the Doctrine

The marital rape immunity doctrine has been subject to increasing criticism since the nineteenth century and since the start of the trend towards legal equality for women. As the laws that restricted the rights of married women to property, contract, and sue in their own name (the Married Women's Property Acts) were enacted in the various common law jurisdictions, the legal fiction of marital unity in the area of law where it still existed was progressively eliminated, and thus the rationale for marital rape immunity became increasingly anomalous.

In addition, late nineteenth and early twentieth-century feminist movements attacked the idea that marriage creates sexual obligations that supersede a person's consent to engage in sexual activity. They pointed out that treating wives as always sexually available to their husbands, regardless of their consent, is inconsistent with women's equality and dignity. They also documented the frequency and the harm caused to the physical and emotional well-being of women by sexual abuse in marriage.

Legal scholars began to question whether Hale's rule was ever good law and pointed out that it was formulated as a general proposition without any specific legal reasoning or supporting precedent. They also suggested that although the rule may have reflected the social attitudes of the time, the underlying assumptions about marriage and women's legal status that supported the rule are no longer tenable in modern legal systems that recognize women as equal persons under the law.

By mid-twentieth century, the marital rape exemption was being criticized in multiple common law jurisdictions. Critics argued that the exemption is predicated on antiquated assumptions,

that it is inconsistent with the principles of equality and bodily autonomy, that it denies married women legal protection against serious violence, and that it sends a negative social message about the nature of marriage and consent.

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C. Elimination of Marital Rape Exemption in Different Jurisdictions

Common-law jurisdictions differed significantly in the time frame, and the manner in which, they eliminated or altered the marital rape exemption. Legislation was one way in which jurisdictions removed marital status as a defense to rape, while others achieved the elimination of the common-law immunity through judicial decisions that recognized the common-law could and should adapt to changing social attitudes and the evolving legal status of women.

The United Kingdom is a paradigmatic illustration of the judicial process of eliminating the marital rape exemption through judicial actions rather than legislative ones. The House of Lords issued a landmark decision indicating that the marital rape exemption was no longer part of the law of England and Wales based upon the fact that the common-law could and should evolve to reflect changing social attitudes and women's legal status.¹⁷ The Court also dismissed the proposition that the only way to change the common-law was through legislation, finding that courts have the authority to continue to develop the common law in accordance with contemporary values and international human rights obligations.

Australia, Canada, and several U.S. states, utilized a combination of legislative reform and judicial interpretation to eliminate the marital rape exemption. Although the timing and the mechanism of the elimination of the exemption varied, the overall direction of the reform effort was consistently directed towards moving away from immunity and toward the recognition that marital status does not negate the necessity of obtaining consent.

Although India possesses a common-law heritage and a constitutional commitment to equality, India has maintained the marital rape exception in statutory form.¹⁸ As such, India is an outlier

¹⁷ R v. R, [1992] 1 A.C. 599 (H.L.).

¹⁸ Indian Penal Code, 1860, § 375, Exception 2; INDIA CONST. arts. 14, 15.

among common-law democracies, and the retention of the marital rape exception creates concerns regarding whether the retention of the exception can be justified in light of both the evolution of the common law in other jurisdictions, and India's own constitutional commitments to equality.¹⁹

IV. FEMINIST JURISPRUDENCE AND INTIMATE VIOLENCE

Feminist legal scholarship has been instrumental in challenging the marital rape exemption and in developing new paradigms regarding how the law views and addresses intimate violence.²⁰ Feminist critiques exist on multiple levels, and they challenge the public/private distinction that shields family violence from legal interventions, they identify how seemingly neutral legal rules may promote and/or perpetuate gender inequality, and they focus on the experiences and perspectives of women when conducting legal analyses.²¹

A. The Public/ Private Distinction

One of the primary critiques of traditional criminal law by feminist scholars is how the law treats domestic and marital spaces as "private" realms where state intervention should be minimized. As a result of the public/private distinction, violence perpetrated within families was typically treated as less severe than violence committed by strangers. Domestic violence was seen as a private family matter rather than as a public crime, and therefore, legal intervention was either limited or discouraged in order to protect family privacy and autonomy.

The marital rape exemption exemplifies the dynamics described above. The law differentiated between sexual violence within marriage and sexual violence outside of marriage, creating a zone of immunity for husbands that did not have a counterpart for other perpetrators of sexual violence.²² The immunity provided to husbands was predicated on the concept of marital privacy and family autonomy. However, the effect of this immunity was to deny married women the same level of legal protection against sexual violence that unmarried women received.²³

¹⁹ R v. R, [1992] 1 A.C. 599 (H.L.); RIT Found. v. Union of India, 2022 SCC OnLine Del 1404.

²⁰ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989) Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996).

²¹ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (1999).

²² Indian Penal Code, 1860, § 375, Exception 2; *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

²³ *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465.

Feminist scholars contended that the public/private distinction was neither naturally occurring nor neutral. Rather, it was a legal/social construct designed to protect male power within families by preventing legal accountability for domestic violence. Additionally, the public/private distinction effectively denied women equal protection under the law, thereby leaving them vulnerable to abuse without viable legal remedies. Feminist legal theory argued that the public/private distinction should not be used to prevent the law from addressing violence that occurs wherever it occurs, and by whoever it occurs to.²⁴ The state has a duty to protect individuals from violence, and this duty does not terminate at the entrance to the home. While family privacy and autonomy are important values, they should not be used to immunize serious crimes from legal accountability.²⁵

B. Formal Legal Equality and Substantive Rights

Another area in which feminist jurisprudence places emphasis is that formal legal equality is inadequate unless law operates in ways that promote substantive equality. Laws that appear to be gender neutral on the surface may produce disparate results for women, or they may fail to address the structural inequalities that create disadvantages for women.

The marital rape exemption is illustrative of this issue. The exemption is formally gender neutral since it references husbands and wives, rather than explicitly referencing men and women. However, in reality, the exemption primarily impacts women since women comprise the majority of the victims of sexual violence committed within marriage. Therefore, the exemption promotes gender inequality, and supports patriarchal power structures within marriage.

²⁶Feminist legal theory posits that true gender equality can only be realized by removing laws that explicitly discriminate against women, but also by analyzing how laws function in practice, assessing the impact of laws on women's lives and autonomy, and by modifying laws that support women's subordination, even though they appear neutral.²⁷ Based on this view, the marital rape exemption is inconsistent with gender equality since it denies married women

²⁴ Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

²⁵ INDIA CONST. art. 21; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3 (Dec. 10, 1948).

²⁶ INDIA CONST. art. 15 Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1.

²⁷ Joseph Shine v. Union of India, (2019) 3 SCC 39; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

equal protection, and deems their sexual autonomy to be less significant than that of unmarried women.

C. Centering Women's Experiences

A cornerstone of feminist methodologies in law is the importance of centering women's experiences and perspectives in law, and not just focusing on abstract legal principles or male centered assumptions regarding how the law functions. This approach asks: How do legal rules affect women's real lives? What harms do women experience that law ignores or fails to remediate? What would the law look like if it were to seriously consider women's experiences?

When feminist methodologies are applied to marital rape, they demonstrate the failure of legal systems to recognize and respond to the harms experienced by women as a result of marital rape. Married women who have experienced marital rape report having suffered severe violations of their dignity, autonomy, and bodily integrity. They report experiencing physical and emotional harm, a loss of trust, and a diminution of their sense of self. They report suffering further harm due to being informed that what they experienced was not truly rape since they were married to the perpetrator.

Legislative frameworks that exempt marital rape from criminal liability ignore the harms experienced by women, and provide little to no redress for those harms. Such frameworks convey a message that married women's experiences of sexual violence do not constitute "true" rape, and that the autonomy that married women enjoy in their marriages is secondary to protecting marital harmony and family privacy.

Feminist jurisprudence asserts that the law must take these experiences seriously and must afford equal protection to married and unmarried women. This does not mean that all sexual activity within a marriage should be criminalized, or that every marital conflict should be converted into a criminal case. Rather, this means that when there is sexual violence (i.e., when there is non-consensual sexual penetration), the law should recognize it as rape, regardless of whether the perpetrator is a husband or a stranger.

D. Intersectionality and Multiple Marginalization

Recent feminist legal scholarship emphasizes the concept of intersectionality, acknowledging that women's experiences are shaped by multiple aspects of identity, including gender, race,

class, caste, religion, disability, etc. Women who experience multiple forms of marginalization may be especially susceptible to intimate violence and may experience additional barriers to receiving legal protection and redress.

Therefore, intersectional analysis is essential to understand how marital rape impacts different women differently. For instance, women from marginalized caste communities, religious minorities, rural communities, and economically marginalized communities may encounter obstacles to accessing legal protection that are unique to their respective situations. They may have fewer avenues to access legal information, fewer financial resources to pursue legal remedies, greater societal pressure to maintain their marriages, and fewer sources of support from family or community if they seek to intervene legally.

An intersectional feminist analysis suggests that legal reform must take account of these differences and must contain provisions to ensure that marginalized women can obtain and utilize legal protections. Potential provisions could include providing funding for legal aid, ensuring that legal information is accessible in languages spoken by marginalized communities, developing culturally-sensitive support services for women experiencing marital rape, and addressing how caste, class, and other hierarchies shape women's experiences of violence and access to justice.

V. CONSTITUTIONAL MORALITY AND BODILY INTEGRITY

A related but distinct concept of constitutional morality has emerged which emphasizes rights against majoritarian/well accepted morals, even while the latter operate within limiting principles of constitutional morality. The idea is that the law should follow the values embedded in the constitutional text - equality, dignity, liberty, fraternity - over social compliance (though the distinction isn't always made so clearly). The marital rape exemption would seem to be such a case, where social "morality" dictates restraints around sex, wives' rights and obligations and so forth, married or unmarried. Is there any real reason to imagine that sex is a regulated activity only for those who aren't married to one another, that the freedom of marriage can include in its blessing, immunity to laws tackling sexual violence?

A. Bodily Integrity as a Constitutional Right

In Indian constitutional jurisprudence, bodily integrity has been recognized as an aspect of the

right to life and personal liberty under Article 21. Bodily integrity encompasses the right to be free from unwanted physical intrusions, the right to make decisions about one's own body, and the right to refuse medical treatment or other bodily interventions.²⁸

Core to bodily integrity is sexual autonomy the right to make decisions about sexual activity, the right to consent (or refuse consent) to sexual conduct, and the right to be free from sexual violence. These rights are not suspended or diluted by marriage. A married person possesses the same fundamental right to bodily integrity and sexual autonomy as a single person.

Fundamental to our constitutional understanding of bodily integrity is the idea that it is not negated by virtue of marriage. The marital rape exemption sits uneasily with this conception of bodily integrity. By locating the possibility of funneling brutality as permissible within marriage, it negates, in effect, a married woman's right to refuse to engage in sexual activity with her husband and her bodily integrity is rendered less worthy than the institution of marriage and her sexual autonomy is rendered wholly subservient to her husband's desires. From a constitutional viewpoint, this is problematic fundamental rights cannot be so easily extinguished. Marriage creates rights and obligations that's true but constitutional rights cannot be jettisoned by simply marrying.

B. Dignity and Equal Concern

The constitutional idea of dignity involves the idea of equal concern and respect and, accordingly, of law recognizing the worth of persons as human beings. Dignity is violated when persons are treated as things or instruments to be used rather than agents with lives of their own, whose purposes and lives, choices and possibly even experiences, are not to be intentionally ignored or denied, whatever their conceivable constitution. Sexual violence is a particularly grievous violation of dignity because it treats the violated person as an object for the violators contemplated gratification rather than as a person with its consciousness, will-character and worth. This is true independent of the relationship of perpetrator and victim husbands violate their wives' dignity no less grievously for themselves or for others when they violate their wives in sexual intercourse without their consent than do other unrelative who commit rape. The exemption of rape within marriage from the crime of rape clearly ignores this violation of dignity. By itself treating rape within marriage as a different crime, it implies

²⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

that married women's dignity and experiences of sexual violence are not as worthy of legal consideration and concern, are perhaps, in fact, not deserving of the same legal protection for their autonomy as those of others. But the constitutional idea is that of equal dignity, and equal concern.

VI. INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

A. International Legal Standards

Multiple international human rights instruments are relevant to the question of marital rape. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires that states parties "eliminate discrimination against women in all forms" and "ensure women the right to equality in the enjoyment of human rights and fundamental freedoms." The CEDAW Committee has found that "violence against women is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality" The Declaration on the Elimination of Violence Against Women states that "violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" and acknowledges that violence against women occurs in the family. The Declaration Urges States to "condemn violence against women and to pursue, through appropriate national measures and international cooperation, policies to eliminate violence against women."

Regional human rights systems have also addressed marital rape. The European Court of Human Rights recognizes that states have positive obligations to protect individuals from sexual violence, including within intimate relationships, and that failure to criminalize and to prosecute marital rape can implicate the state in violation of human rights obligations.

B. State Responsibilities

International human rights law recognizes that states have responsibilities not only to refrain from violating rights themselves, but also to protect individuals from rights violations by private actors. This includes duties to criminalize serious forms of violence, to investigate and prosecute it, and to provide remedies to victims. Applied to the issue of marital rape, this framework indicates that states do have obligations to criminalize sexual violence within

marriage, to ensure that such violence is investigated and prosecuted, and to ensure that support and remedy for survivors is available. Its maintenance in legal immunity for marital rape might be inconsistent with these obligations because it deprives married women of legal protection and indicates that sexual violence within marriage is not a great enough violation of rights to merit criminalization.

C. Relevance for India

So, India is a party to CEDAW and other international human rights instruments, and Indian courts have indicated that international human rights law may inform the interpretation of constitutional rights. International law is not binding on Indian courts in the same direct sense as Indian constitutional law, though the latter is also a product of international law, and provides persuasive guidance and indication of the 'evolving' standard of rights. The international consensus against marital rape immunity is relevant to Indian constitutional interpretation. If the international community is reaching a similar consensus that marital rape is a human rights violation which ought to be criminalized, this indicates that marital immunity is out of step not only with evolving standards of international law but with the constitutional commitments of dignity, equality and liberty.

VII. CONCLUSION

In sum, the conceptual and historical foundations of the marital immunity to rape have come to be undermined. The doctrine is rooted in several misconstrued assumptions present from the time of the common-law: the ideas of marital unity of coverture and of woman's subordinate position in law and society that is, of her failure to constitute a distinct person in contrast to man. Such bases are not to be found in existing common law, which recognizes women as full persons, endowed with equal legal capacity as well as basic human rights. As modern legal theory indicates, bodily integrity and sexual autonomy belong among the rights which without doubt constitute the common heritage of all humankind¹, and which cannot be extinguished on the ground of marital status. In this context, the persistence of marital rape immunity in Indian law represents a doctrinal anachronism a doctrine whose consistency someone should have questioned. The proper resolution of this question is not whether conceptual principles admit of the immunity (they certainly do not), but whether alternative considerations of the pragmatic, institutional or policy-based kind might offer support to a retention of the exception in spite of the apparent weakness of its concepts.