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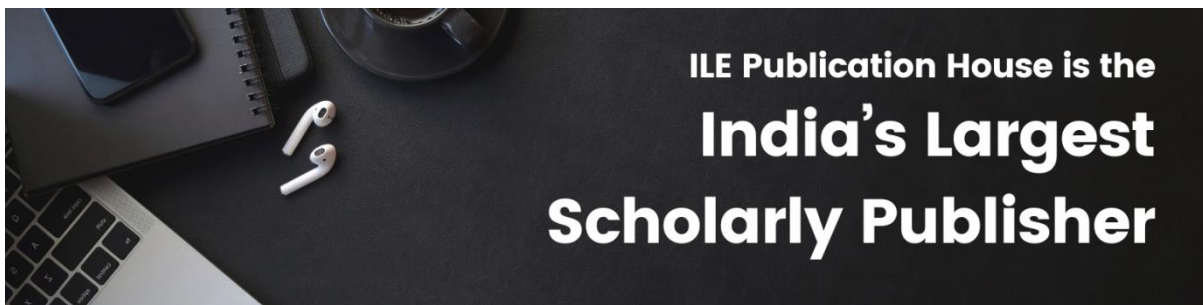
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JUDICIAL CREATIVITY IN INTERPRETING MARITAL RAPE: CRITICAL ANALYSIS THROUGH THE LENS OF FUNDAMENTAL RIGHTS

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Abstract

This article looks at the various judgments by the different High Courts and Supreme Court on marital rape through the lens of judicial creativity and the protection of Fundamental Rights of women. While the earlier judgments have plainly interpreted the MRE clause to acquit people who have had non-consensual intercourse with their wife, the more recent judgments have recognised that marital rape is an offence and that consent is important in marriage also.

Keywords - Judicial Creativity, Marital Rape, MRE, Fundamental Rights, Judicial Overreach, Article 14, Consent.

I. Introduction

Judicial creativity refers to the flexible aspect of the law. Typically, we view the law as a set of regulations created by the government. However, over time, these rules may become outdated and irrelevant. In such cases, judges use their judgment and understanding of justice to interpret the law in a manner that is appropriate for the current times and relevant to the specific details of the case.⁹⁹

Judicial creativity includes the broader responsibilities that have been taken up by the judiciary, where it operates within a space that is not regulated by the legislature. This approach aims to revitalize the legal system by providing individuals with a more accessible,

speedy, and affordable means of seeking justice.¹⁰⁰

The Supreme Court has time and again used judicial creativity to interpret the constitution—from Right to Property in *Kameshwar Singh v State of Bihar* to Article 21 in *Maneka Gandhi v Union of India*. In this paper, the focus is on judicial creativity employed by the higher judiciary in judgments related to marital rape. There are several High Court and Supreme Court judgments which have analysed the constitutionality of the Marital Rape Exception (MRE) under Section 375 of IPC.¹⁰¹

This exception states that non-consensual sex by a husband with his wife, who is above the age of 18, is not rape. This section has long been debated and currently, the Supreme Court is going to hear petitions related to criminalising marital rape in May this year. The two major verdicts regarding the same are those by the Karnataka and Delhi High Court. They have focussed on the constitutionality of this Section vis-à-vis Articles 14, 15, 19, and 21 of the Constitution.

II. Gujarat and Chhatisgarh High Court Decisions- lack of judicial creativity

A. Nimeshbhai Bharatbhai Desai v. State of Gujarat

The Gujarat High Court in 2018 in the case of *Nimeshbhai Bharatbhai Desai v. State of*

⁹⁹ P.K. Tripathi, *Rule of Law, Democracy and Frontiers of Judicial Activism* 17 J.I.L.L. 20, 17-33 (1975).

¹⁰¹ The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

⁹⁹ Coan Bullard, *Judicial Capacity and Executive Power*, 102 VLR 765, 765 (2016).

Gujarat¹⁰², had ruled that a wife cannot prosecute her husband for raping her. In this case, the wife had alleged that her husband had unnatural sex with her and his actions amounted to sexual perversity. The court here did not use judicial creativity. They interpreted the statute in a literal manner and held that even if the sexual activity is forced, the husband cannot be prosecuted as the law does not consider it an offence.

The court reasoned that the second exception in section 375 of the Indian Penal Code clarifies that sexual acts or sexual intercourse performed by a man with his wife, as long as she is not under 18, cannot be considered rape. In the present case, the accused's sexual acts with the respondent would be classified as rape according to section 375, but since they are lawfully married, the husband is protected. Even if the sexual activity was forced or against the wife's wishes, it would not be considered rape if the complainant is legally married to the accused.

B. Dilip Pandey v State of Chhattisgarh

In this 2021 case also, the complainant had alleged that her husband had unnatural sex with her inserted foreign objects in her vagina. The Chhattisgarh High Court again interpreted the statute in a plain manner and did not investigate the constitutionality of the Section.

It reasoned that Exception II of Section 375 of the I.P.C. makes it plain that having sexual contact or engaging in sexual activity with one's own spouse who is not a minor is not considered rape. In this situation, the complainant is the legally divorced wife of the accused; hence, any sexual activity with her by the husband will not be considered rape, even if it were performed against the complainant's will or under duress.¹⁰³

III. Karnataka High Court- Rape is Rape

In the 2022 case of Hrishikesh Sahoo v State of Karnataka, Justice M. Nagaprasanna ruled that the exception listed in Section 375 is not "absolute," hence a husband who "rapes" a wife cannot claim protection under that section's exceptions. The court used judicial creativity and interpreted the validity of the section in a different manner. It was stated that no legal exemption may be so absolute as to grant permission for committing crimes against society. To quote the judge, a man is a man; an act is an act; and a rape is a rape, whether it is committed by a man, the "husband," on a woman, the "wife."¹⁰⁴

The court looked at Articles 14, 15, and 21 of the Constitution and other sections of IPC along with international convention to come to the conclusion that women have the same rights and protections as men in both factual and legal senses. This equality is evident throughout all the relevant provisions of the Constitution, the code, and the enactments. The purpose of quoting these provisions is to demonstrate how this equality is present without exception.

As mentioned earlier, the Constitution promotes equality for all, but the Indian Penal Code discriminates against women. While men who commit offenses against women are punished, Section 375 of the IPC contains an exception that treats women as inferior to men, which goes against the principle of equality. This regressive provision treats a woman as subservient to her husband. This is why many countries have made such acts by the husband punishable under the term of "marital rape" or "spousal rape."

It was observed that all the elements required for a rape charge were present in this case. If an ordinary person had been accused of such a crime, they would face punishment under Section 376 of the IPC. There would be no reason to exempt the husband. He must prove his innocence in court if he believes he has done nothing wrong. Halting the trial in light of the

¹⁰² Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

¹⁰³ Dilip Pandey v State of Chhattisgarh, CRR/117/2021.

¹⁰⁴ Hrishikesh Sahoo v State of Karnataka, MANU/KA/1175/2022.

complaint and charges would be a mockery of justice.

A. Critical Analysis- Judicial Creativity or Judicial Overreach

While the court refused to quash the charges against the accused, it is critical to note that the judge essentially penalised a person for an act that is legally not an offence under any existing statute, thereby violating other constitutional principles like that contained in Article 20(1). If an act was not considered a crime at the time it was committed, it cannot be made a crime through interpretation. Such interpretation would be unconstitutional, as it goes against the principles of Rule of Law.

In a case where a husband was charged with raping his wife, the court's decision went against the express words in the Penal Code, which is a concerning situation in terms of both statutory interpretation and constitutional adjudication. There is a significant difference between decriminalizing an act due to unconstitutionality and criminalizing an act based on unconstitutionality.¹⁰⁵ The former approach, as seen in the Supreme Court's decisions to decriminalize homosexuality and adultery, enhances citizen freedom and relies on the Constitution.

However, criminalizing an act that was not criminalized by statute not only violates Article 20 but also interferes with an individual's liberty, negating the Constitution. This action puts the court in the forbidden zone of penal legislation, which is beyond its judicial purview. The verdict in the Karnataka case was therefore convoluted and problematic, because it failed in protecting those rights of the accused that were guaranteed by the constitution.¹⁰⁶

IV. Delhi High Court- Split Verdict

In the RIT Foundation v. Union of India¹⁰⁷ case, a division bench of the Delhi High Court delivered

a split verdict regarding marital rape. Judge C. Hari Shankar believed that the exception was not violative of the Constitution because it was founded on an intelligible differentia, however Justice Rajiv Shakdher believed that the immunity given to men from the crime of marital rape was unconstitutional.

A. Article 14

As per the reasonable classification test, there has to be an intelligible differential on the basis of which a distinction is made between two classes of people, and there has to be a rational nexus between the classification and the object of the statute.¹⁰⁸

Justice Shakder stated that there is a differentia between married, unmarried, and separated couples. However, once these differences are accepted, the question arises as to whether the distinction between married and unmarried couples has a rational nexus to the objective of the main provision, which is to protect women from being the subject of non-consensual acts.

The exception for marital rape does not pass the nexus test since it allows the perpetrator to escape punishment solely because of their marital status with the woman. This means that an act that would otherwise be considered rape under the main provision is excused if committed within the bounds of marriage.

Therefore, this classification was held to be unreasonable and arbitrary, implying that non-consensual sex between unmarried people is "real rape," but the same act within marriage is something else entirely. This is unjust and violates the principle of equality before the law enshrined in Article 14 of the Indian Constitution.

When a woman is violated by her husband through rape, the law providing her with other remedies is not enough. If marriage becomes a form of tyranny, the state cannot justify protecting it. Therefore, the distinction between married and unmarried couples regarding

¹⁰⁵ Christopher Jon Sprigman, *The Creativity Effect*, 78 TUCLR 31, 50 (2011).

¹⁰⁶ *Why Karnataka marital rape verdict is problematic*, THE NEW INDIAN EXPRESS (Mar. 29, 2023, 11:24 AM) <https://www.newindianexpress.com/opinions/2022/apr/15/why-karnataka-marital-rape-verdict-is-problematic-2442098.html>.

¹⁰⁷ RIT Foundation v. Union of India, (2022) 3 HCC (Del) 572.

¹⁰⁸ TA Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CLR 629, 631 (2011).

forced sex is not only unequal but also fundamentally unjust.

B. Article 21

Justice Shakti Singh stated that regardless of the perpetrator's identity, the fact remains the same that the woman gets raped and suffers injuries. Therefore, he believed that the Marital Rape Exemption (MRE) violated Article 21 of the constitution. The act of sexual assault is equally harmful and dehumanizing, regardless of whether the offender is the victim's husband or not.¹⁰⁹ A woman's right to withdraw her consent at any time is essential to her right to life and liberty, which includes protecting her physical and mental well-being. Non-consensual sex violates a woman's bodily integrity, dignity, agency, and autonomy, and the right to choose whether or not to have children.

C. Article 15 and 19(1)(a)

The judge referred to Articles 15 and 19(1)(a) of the constitution and noted that the marital rape exception violates Article 15 by creating a discrimination between married and unmarried women. This discrimination takes away their sexual agency in relation to sexual intercourse and their right to decide whether to have children or not. Moreover, the judge argued that the MRE erodes women's ability to have a say in contraception, protect themselves from STDs, and seek a safe environment away from abusive partners.

Additionally, MRE also violates Article 19(1)(a) of the constitution, which guarantees freedom of expression, including the right of married women who are citizens of the country to fully express their sexual autonomy and agency.

V. Supreme Court Judgment

In *X v. Health and Family Welfare Department*¹¹⁰, a three-judge bench of the Supreme Court recognised marital rape for the purpose of the Medical Termination of Pregnancy (MTP) Rules.

The Court interpreted Rule 3B(c) of the MTP Rules to mean that it would be discriminatory to allow married women access to abortion while denying the same to unmarried or single pregnant women. The Court also extended the scope of Rule 3B(a) to include married women who are survivors of sexual assault, rape, or incest.

The Court explained that women who have been raped or assaulted or are victims of incest may face stigma and may not immediately realize that they are pregnant. Therefore, the delay in reporting the assault may lead to a delay in discovering the pregnancy, which may make it difficult for the woman to terminate the pregnancy before twenty weeks. The Court also recognized that marital rape is a form of sexual violence and that women may become pregnant as a result. The Court emphasized that the institution of marriage does not affect the issue of consent to sexual relations and that women in abusive relationships may face difficulties in accessing medical resources.¹¹¹

Therefore, in my opinion, the MRE should be done away with now that the Supreme Court has clearly stated that marital status does not affect consent. Even a husband should take consent from his wife for every sexual intercourse. Discriminating between married and unmarried women in this context and not providing the former with the same kind of legal recourse as the latter is definitely a violation of Article 14.

VI. Conclusion

While the Karnataka High Court bordered on judicial overreach, the Delhi High Court used judicial creativity in a desired manner to reach the conclusion that marital rape exception under Section 376 of IPC is unconstitutional. In my opinion, while using judicial creativity in interpreting Part III of the Constitution, the judges should ensure that they do not infringe

¹⁰⁹ AR Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CLR 519, 550-551 (2012).

¹¹⁰ *X v. Health and Family Welfare Department*, 2022 SCC OnLine SC 1321.

¹¹¹ SCC, <https://www.sconline.com/blog/post/2022/09/30/sexual-assault-rape-under-medical-termination-of-pregnancy-laws-includes-marital-rape-constitutionality-of-section-375-ipc-not-gone-into-supreme-court-abortion-legal-research-updates-news/> (last visited Apr. 2, 2023).

upon other Fundamental Rights. Therefore, the Karnataka High Court should not have interpreted Article 14 in a way that violated the accused's rights under Article 20(1) to not be punished for an act that is not an offense.

The creativity used by Justice Shakder is appreciable. He established the principle that differentiating between married and unmarried

woman for the purpose of rape is an unreasonable classification under Section 14. He further broadened the scope of Article 21 by stating that during marriage, the woman has the right to withdraw her consent under this Article. Further the Supreme Court decision rightly established the fact that consent is necessary even in marriage.

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