

COMPARATIVE ANALYSIS OF ABORTION AND MARITAL RAPE LAWS

Sonakshi Singla*

INTRODUCTION

“Criminalising Abortion does not stop abortions, it just makes abortions less safe.”

- Amnesty International

In the era that includes *Dobbs v. Jackson*¹ and makes distinctions between the marital statuses of women who are raped, we recently saw a landmark judgment given by the Honourable Supreme Court where abortion rights were given to wives who were victims of marital rape. The bench in the present case held that Rule 3B of the Medical Termination of Pregnancy Act (MTP) and the MTP Rules, rape also includes marital rape. In a country where the female body has long been a symbol of patriarchy, the Supreme Court's recognition of her right to choose is historic. The inclusion of victims of marital rape under this right of abortion is a huge shift in judicial thought.

HISTORY OF ABORTION RIGHTS IN INDIA

Abortion was legalized in India under the Medical Termination Pregnancy Act, of 1971. It was amended in 2021 to allow certain categories of women, including widowed or divorced women, minors, rape victims, and mentally ill women, to obtain abortions up to 24 weeks which was up from 20 weeks previously. Medical Abortion Act (MPA) of 1971 ended the practice of performing and requesting abortions that could result in up to three and seven years in prison, respectively.² The only exception is when the pregnant woman's life is in danger.

As a result, India passed the country's first abortion law, making abortion legal with a doctor's prescription. While the act was not the result of the Indian women's movement; rather, it was a strategy to gain control of the country's rapidly expanding population, particularly in the lower socioeconomic regions. The legality of the 20-week gestational age limit has been challenged numerous times.³ In 1971, the court no longer felt a need to follow the 20-week

*BA LLB, THIRD YEAR, ARMY INSTITUTE OF LAW, MOHALI.

¹ *Dobbs v. Jackson Women's Health Org*, 142 S. Ct. 2228 (2022).

² Medical Termination of Pregnancy Act, 1971, §5(2).

³ All women irrespective of marital status entitled to abortion: Supreme Court, THE LEAFLET, (Sept 29, 2022), <https://theleaflet.in/all-women-irrespective-of-marital-status-entitled-to-abortion-supreme-court/>.

restriction because medical facilities had developed that permitted abortions at 20 weeks. The new MTP law came into effect in 2021 and, under some circumstances, permits abortions up to 24 weeks gestation. The new rule, which previously prohibited sexual assault victims, adolescents, widows or divorcees, disabled women, women who suffer from mental illness, and fetuses who have physical or mental abnormalities was expanded.

MARITAL RAPE IN INDIA

According to Legal Services India, the phrase "marital rape" refers to undesired sexual intercourse between a man and his wife that was either procured by physical violence, threats of physical violence, or force or when she was unable to consent⁴. The National Family Health Survey (NFHS)-5, which was released this year, found that spousal physical, sexual, or emotional abuse affected almost 30% of Indian women who have ever been married (NFHS-5).⁵ However, because the government refuses to acknowledge and criminalize marital infidelity, the topic that is a reality for many women in the nation remains taboo. According to IPC Section 375 of the Indian Penal Code, "Sexual acts or sexual intercourse by a man with his wife, the wife not being under the age of 18 is not rape."⁶

Journal of Legal Research and Juridical Sciences

Before 2017, if the wife was more than 15 years old, the marital rape exception applied to her. The Supreme Court decided that the phrase should read "the wife not being under the age of 18" in October 2017.⁷ The greater question of the adult marital rape exception was not addressed by this ruling, which was limited to making sure that the IPC was consistent with the age of consent, which is 18 years old. The criminalization of marital rape "may destabilize the institution of marriage in addition to being a simple instrument for harassing the husbands," the Center reminded the Delhi High Court in 2017⁸. Among other things, it stated at the start

⁴ Bhumika Saraswati, *India's Supreme Court Gives Equal Abortion Access to All Women*, THE DIPLOMAT, (Sept 30, 2022), <https://thediplomat.com/2022/09/indias-supreme-court-gives-equal-abortion-access-to-all-women/>.

⁵ Esha Roy, *30% women in India subjected to physical, sexual violence: NFHS*, INDIAN EXPRESS, May 8, 2022.

⁶ INDIAN PENAL CODE, 1860, §375.

⁷ Samiksha Sawant, *Story So Far: Recognition of marital rape in India*, INDIE JOURNAL, (Oct 01, 2022 9:09 PM), <https://www.indiejournal.in/article/story-so-far-recognition-of-marital-rape-in-india#:~:text=In%20October%202017%2C%20the%20Supreme,the%20adult%20marital%20rape%20excepti on.>

⁸ Priyanka Chandani, *SC's verdict on abortion gives women the right to reproductive choice: Can it pave the way to criminalise marital rape? Experts weigh in*, FREE PRESS JOURNAL, (October 04, 2022, 06:50 PM), <https://www.freepressjournal.in/india/scs-verdict-on-abortion-gives-women-the-right-to-reproductive-choice-can-it-pave-the-way-to-criminalise-marital-rape-experts-weigh-in>

of this year that misuse of the law and a lack of a mechanism to check that the consent stands withdrawn by the wife leads to difficulty in ascertaining marital rape in India.

While the Central Government has avoided the issue, India's judiciary has acknowledged sex- and gender-based violence against spouses several times this year. The Karnataka High Court refused to dismiss rape accusations brought by a wife against her husband, ruling that "rape is rape" regardless of whether it is done by a husband against his wife.⁹ In May of this year, after hearing numerous petitions calling for the criminalization of marital rape, two judges from the Delhi High Court gave a split verdict upholding the statute¹⁰. The Court recently ruled that wives who became pregnant as a result of their husbands forcing them into sexual activity will also be considered "survivors of sexual assault, rape, or incest" under Rule 3B(a) of the Medical Termination of Pregnancy Rules.¹¹

RECENT VERDICT BY THE SUPREME COURT

The court while pronouncing the judgment in the case of **X vs Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi**¹² held that women who have been married may also be survivors of rape or sexual assault. The word rape refers to sexual intercourse with a person without their consent. Non-consensual sexual intercourse performed by a husband on a woman may result in her becoming pregnant, regardless of whether it occurs in matrimony. The case involves interpreting Rule 3B of the Medical Termination of Pregnancy Rules, 2003 (the "MTP Rules")¹³ and Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (the "MTP Act")¹⁴. In the current case, an unmarried woman¹⁴ filed a petition after the Delhi High Court denied her request to terminate her 24-week pregnancy.

The MTP Act's Section 3(2)(a)¹⁵ allows for the termination of pregnancies where their duration does not exceed twenty weeks. For those categories of women "as may be stipulated by Rules issued under this Act," clause (b) of this sub-section enables termination when the length of the

⁹ Hrishikesh Sahoo v. State of Karnataka, 2022 LiveLaw (Kar) 89.

¹⁰ RIT Foundation v. UOI, 2022 LiveLaw (Del) 433.

¹¹ Padmani Sharma, Rape Includes "Marital Rape" For The Purposes Of MTP Act, Wife Conceiving Out Of Forced Sex Can Seek Abortion : Supreme Court, LIVELAW, (Sept 29 2022, 11:39 AM), <https://www.livelaw.in/top-stories/rape-includes-marital-rape-for-the-purposes-of-mtp-act-wives-conceiving-out-of-forced-sex-can-seek-abortion-supreme-court-210551>

¹² X vs Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi, 2022 LiveLaw (SC) 809.

¹³ Medical Termination of Pregnancy Rules, 2003, Rule 3B.

¹⁴ Medical Termination of Pregnancy Act, 1971, §3(2)(b).

¹⁵ Id.

pregnancy exceeds twenty weeks but does not exceed twenty-four weeks. The pregnant woman's physical or mental health or serious harm to the unborn child would be at risk if the pregnancy were to continue, according to at least two certified medical professionals.

As a society, we would be negligent if we failed to accept the reality of rape and violence against intimate partners. It is quite terrible that the public has the idea that sex and gender-based violence are exclusively committed by strangers. Women have long experienced gender- and sex-based violence in the framework of the family. The concept of "sexual assault" or "rape" in Rule 3B(a) covers the husband's act of sexual assault or rape committed on his wife, the court ruled, despite the exception to Section 375 of the IPC.¹⁶

Married women can get pregnant as a result of their husbands "raping" them. Marriage does not change the characteristics of sexual violence or the parameters of consent. The answer to the query of whether a woman has consented to sexual encounters is unaffected by the institution of marriage.¹⁷ If the woman is in an abusive relationship, it could be very difficult for her to get medical help or advice. The court ruled that to request a pregnancy termination under the MTP Act, a woman does not need to demonstrate that a rape or sexual assault occurred. The bench observed, "The girlies may not necessarily take recourse to formal legal proceedings to prove the factum of sexual assault or rape to access the benefits of Rule 3(b)(a). Pregnant women are not required to wait until the offender has been found guilty under the IPC or any other criminal legislation currently in effect by Explanation 2 to Section 3(2) or Rule 3(b)(a). Furthermore, there is no necessity that the case is filed or that the rape accusation is established in court or another venue before the MTP Act can be applied to determine whether it is true."¹⁸ It should be noted that the Supreme Court is now considering petitions that question the legitimacy of the Indian Penal Code's exception to Section 375, which exempts marital rape from the rape offense.

¹⁶ X vs Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi, 2022 LiveLaw (SC) 809.

¹⁷ Anviti Rai, SC verdict on abortion & the question of gender justice, FINANCIAL EXPRESS, (October 7, 2022 1:45AM), <https://www.financialexpress.com/india-news/sc-verdict-on-abortion-amp-the-question-of-gender-justice/2702584/>.

¹⁸ Padmakshi Sharma, All Women Entitled To Safe & Legal Abortion, Distinction Between Married & Unmarried Women Unconstitutional: Supreme Court, LIVELAW, (Sept 29, 2022 11:04 AM), <https://www.livelaw.in/top-stories/all-women-entitled-to-safe-legal-abortion-distinction-between-married-unmarried-women-unconstitutional-supreme-court-210548>.

ABORTION AND MARITAL RAPE LAWS IN THE USA

All states in the United States now consider marital rape a crime, and many of them prosecute the perpetrator in the same way they would if the victim had been a married woman. However, the abortion situation is awful in the USA. The landmark *Roe v. Wade*¹⁹ decision, which was decided in 1973 and established the constitutional right to abortion in the US, was recently reversed by the US Supreme Court. A Republican-backed Mississippi law that outlaws abortion after 15 weeks was upheld by the Supreme Court in a 6-3 decision. *Dobbs v. Jackson Women's Health Organization*,²⁰ a highly contentious case in which the State of Mississippi sought to overturn *Roe v. Wade* and outlaw practically all abortions at and beyond 15 weeks of pregnancy, received this historic decision in Mississippi's favor.

The question of giving abortion rights to a victim of marital rape doesn't arise at all. India is far ahead of the USA in recognizing abortion rights to even marital rape victims upholding the right to choose which every citizen enjoys.

ANALYSIS OF THE LAW

The decision to become pregnant is solely a woman's, and each woman's circumstances—whether they be social, cultural, or economic—are different. The right to decisional autonomy allows women to direct their own lives. Unwanted pregnancies may have long-lasting consequences by interfering with her schooling or job or harming her mental health. According to the right to reproductive autonomy, every pregnant woman has the inherent right to choose whether or not to have an abortion without seeking permission from a third party. The right to physical autonomy of pregnant women will ensure social justice. Abortion is a decision that only the woman can make on her terms, free of external pressure due to complicated life circumstances. A woman has the right to terminate a pregnancy under Article 21 of the Constitution if her mental or physical health is jeopardized. The prohibition of activities that are demeaning to women's dignity is stated in Article 51A. Women's dignity would be violated if they were denied autonomy over both their lives and their bodies.

¹⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰ *Dobbs v. Jackson Women's Health Org.* - 142 S. Ct. 2228 (2022).

CONCLUSION

These changes are only currently applicable to the MTP Act. Although there is still a long way to go before Indian law would recognize these issues as legitimate in and of themselves, the fact that the Supreme Court bench has acknowledged them is a step in the right direction toward guaranteeing gender equity in the nation. Remember that the famous *Roe v. Wade* Decision was overturned by the top court of a developed nation like the United States, which has sought to revoke reproductive rights.

