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Nautiyal



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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CRITICAL ANALYSIS OF THE MARITAL RIGHTS AND THE RIGHT TO PRIVACY

AUTHORED BY - K. KANISHA,
2ND YEAR LAW STUDENT AT SASTRA UNIVERSITY, THANJAVUR.

ABSTRACT:

The word privacy never appears in the Indian constitution. Only in the last century have legal scholars attempted to define privacy as “the right to be let alone”. The need of people for privacy turned into a fundamental right. Article 21 of the Constitution embraces the right to privacy and human dignity. The Supreme Court observed that any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing.¹ Marital privacy refers to the right of individuals to maintain personal boundaries and space within marital relationships. It involves protecting personal information, thoughts, and physical space from unwanted intrusion or violation by a spouse. The right to privacy is considered the most cherished right of all and is guaranteed, but more and more lately it is coming into conflict in the courts with the marital relationships. This paper attempts to explain how the right to privacy belongs to a person as an individual and is not lost by marital association. In addition, the paper tries to highlight the concept of marriage under different religions and the scope of the right to privacy when it comes to issues like adultery, marital rape, child marriage etc.

KEYWORDS: Marriage, Right to privacy, Child marriage, Marital rape, adultery.

1. INTRODUCTION;

Religious diversity is a defining feature of India and is known for its rich history of various religions coexisting and contributing to its social fabric. India being the most diverse country, especially in religious affairs tends to have different personal laws for different religious communities. The distinguishing feature of India is the right to freedom of religion which is guaranteed under the Indian

¹ Govind v State of Madhya Pradesh (AIR 1975 SC 1378)

constitution.

Family is the basic unit of the social fabric, united by the ties of marriage, blood, or adoption. Marriage and family are the two important institutions and go hand in hand with the stability and prosperity of civilization. Marriage is the union of male and female. It is considered to be a secondary institution devised by society to sanction its union and matting of male and female. The basic idea behind marriage is the procreation of children. Also, the Supreme Court ruled that the intrinsic part of Article 21 of the Constitution would be the freedom of choice in marriage².

Marriage is always diverse and it has its own customs, traditions, and beliefs which vary with each religion. In modern days, new concepts like live-in-relationships, same-sex marriages, and LGBTQ rights arose within marriage which emphasizes new laws and reforms are the need of the hour. The concept of the Uniform Civil Code which is the directive principle of state policy³ has been a controversial debate in India since its independence. The idea behind UCC is to replace all the religious personal laws and legislate a single common code for the entire population.

Marriage and privacy go hand in hand in the society. After marriage, the basic idea is that they are considered as a single soul rather than two individuals. Both husband and wife have certain marital obligations and responsibilities over each other. The right to privacy comes into the picture when one's right supersedes the other which results in sexual abuse, domestic violence, breakdown of marriage, and reproductive choice. The need for modern laws that aims to protect the privacy of individual within marriage, addressing the latest issues is increasing day by day.

2. DEFINITION OF MARRIAGE;

Marriage has been, since ancient times, one of the most important social institutions in all societies and it forms the basis of civilization and social structure. Marriage is said to be a contractual agreement that formalizes and stabilizes the social relationship which comprises the family.

‘Marriage is an institution to save us from the tyranny of sex and also for the progression of the human

² Lata Singh v. State of Uttar Pradesh, (2006) 5 SCC 475

³ Article 44 of the Indian Constitution

race. This is the status of the Institution of marriage. The institution cannot be degraded. The institution cannot be denounced and it is the duty and obligation of every generation to try and to sustain the institution'⁴.

Being the foundation of the family institution, it is governed by personal religious laws in India. This institution needs adequate attention because of the maintenance of which the public at large is deeply interested.

2.1 MARRIAGE LAWS IN INDIA;

Marriage primarily in India is governed under personal laws like The Hindu Marriage Act, The Muslim Marriage Act, The Christian Marriage Act, the Parsi Marriage and Divorce Act, 1936 and the Special Marriage Act, 1954.

Marriage under Hindu law is performed as per Section 5 of the Hindu Marriage Act, 1955. Marriage is a sacred bond between man and woman. Hindu, Sikh, Buddhist and Jain communities are governed under this Act.

Marriages between Muslims are regulated by Muslim personal law. The Muslim personal law is not a codified law, but it is based on the sources of Islamic law, especially the Quran and the Hadiths. As per Muslim personal law, the minimum age of marriage for girls is when the girl attains the age of puberty. The registration of Muslim marriages is done as per the Muslim Marriages Registration Act, 1981.

Christianity is the second largest minority religion in India and the marriage between Christians is governed by the Christian Marriage Act, 1872. Section 4 of the said Act stipulates the necessary conditions for the marriage to be valid. The marriage is performed as per the customs and rituals which prevail in the religion.

The marriage between the members of Parsi is regulated by Parsi Marriage and Divorce Act, 1936.

⁴ Taken from compilation landmarks judgment of High Courts of India on family matters, Year of publication 2016, compiled By Jharkhand State Legal Services Authority.

Section 3 of the Act prescribes the essentials for a valid Christian marriage.

The Special Marriage Act, 1954 is meant for all religious people and it is the law that governs inter-religious marriage. Section 4 of the Act lays down certain conditions for a valid marriage which is analogous to Section 5 of the Hindu Marriage Act. Now this Act extends its application to marriage between an Indian and a foreigner where the marriage is solemnised in India.

3. RIGHT TO PRIVACY AND MARRIAGE;

According to the Oxford Dictionary of Law, the right to privacy means the right to be 'left alone.' It is the state of being alone or the right to keep one's personal matters and relationships secret. Any interference with this right affects their mental peace, family relations, reputation and confidence. People must be able to free themselves of ideas and emotions that trouble them and upset their relationships with others, which in many cases confuses and damages institutions. People do have a need to confess or let others know bits and pieces of their private lives. But if there is a need to reveal, there is also a need to protect and withhold.

The right to privacy which evolved in the K.S. Puttuswamy case, held that "the right to privacy, though a constitutionally protected right, was not an absolute right."⁵ It is one of the important rights which are necessary for the enjoyment of freedom given under the Indian Constitution.

This right extends to married couples and gives birth to some of the rights like reproductive choices, abolition of virginity tests, etc. This right exists even between the married couple, one of the parties is not entitled to tapping of conservation of the other⁶. After the marriage, the married couple gets some protection from disclosure of communication made during the subsistence of marriage in the form of privileges under the Indian Evidence Act 1872.

3.1 ADULTERY - A GROUND FOR DIVORCE;

The Hindu Marriage Act specifically recognized adultery as a ground for divorce. Therefore, it would not at all be in the public interest that the Court should on the ground of the right to privacy, come to

⁵ K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1 ('K.S. Puttuswamy')

⁶ Rayala M. Bhuvaneshwari v. Nagaphanender Rayala AIR 2008 AP 98

the aid of a married man who, during the subsistence of his marriage, was alleged to have indulged in sexual relationships outside his marriage.

It was in the case of *Preeti Jain v. Kunal Jain*,⁷ the husband appealed for divorce on the grounds of adultery by her wife. The evidence supported by her husband is video footage of the wife with somewhere man reentered with the help of a pinhole camera. The counsel said that the evidence is violative of Article 21 as it infringes on the right to privacy and does not satisfy the requirement of Sec 65 of the Evidence Act. In this case, the High Court upheld the lower court's order and rejected the evidence under Sec 14 of the Family Courts Act, 1984. Here Sections 122 and 65B of the Evidence Act were eclipsed by Sec 14 of the Family Court Act. It is important to note that the freedom to have a consensual sexual relationship outside marriage by a married person did not warrant protection under Article 21 of the Constitution and on September 27th 2018, the Court decriminalised adultery⁸. On January 31st 2023, the Court clarified that decriminalising adultery did not impact members of the Armed Forces.⁹

3.2 THE ABUSE OF MARITAL PRIVACY;

Section 122 The Indian Evidence Act, 1872 is about Communications during marriage.

“No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.”

This section gives the right to married couples not to disclose their communication which is the privilege given to married couples and is seen as the right to privacy of married persons. can be a hindrance in cases of child abuse by parents. If one of the parents abuses the child, it is common for the child would complain to the other parent. Next, a communication would take place between the two parents, but this communication as evidence would be inadmissible, which would prevent justice

⁷ *Preeti Jain v. Kunal Jain*, MANU/RH/0335/2016.

⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (‘Joseph Shine’)

⁹ <https://www.scobserver.in/cases/joseph-shine-v-union-of-india-decriminalisation-of-adultery-background/>, last visited, 10.11.2023.

for the child. In *Fatima v. Emperor*¹⁰, where the mother murdered her child. The husband had evidence of this, which would have aided in convicting the mother, but the evidence was rendered inadmissible under Section 122. Here, the section was going against itself, as it sought to protect matrimonial harmony that obviously didn't exist because one spouse killed their own child.

4. CHILD MARRIAGE AND MARITAL RAPE: TWO SIDES OF THE SAME COIN;

Article 21 of the constitution states that every person shall have the right to live with dignity irrespective of her/his age. It includes the right to privacy. As per reports child marriage is common in India and this subsequently infringes on the rights of many women. The right to privacy also includes the right to prevent others from interfering with her body. She has the right to sexual privacy. No one can infringe her rights against her will and she is free to make decisions in her sexual matters. The right to privacy protects the essential aspects of our selfhood. Child marriage is seen as one of the root causes of marital rape in India.

4.1 CHILD MARRIAGE IN INDIA;

Marriages in India are governed by the personal laws of every religion. The law laid down that the minimum age for marriage for women is 18 and for men is 21, and it empowers courts to declare child marriages as voidable at the option of the aggrieved party. It also sets penalties for persons who perform, arrange, or participate in such marriages. According to a 2014 NCRB report, the most violations of the Prohibition of Child Marriage Act occurred in Tamil Nadu at 47, Karnataka at 44, and Kerala at 19.

This is because some personal laws allow marriages at an age earlier than the general law. The law does not characterize a marriage between a girl below age 18 and a boy below age 21 as “illegal,” but it recognizes such unions as voidable, providing grounds for challenging them in court. Only the party who was a minor at the time of marriage may seek nullification. If the party is still a minor, his or her guardian must file a petition for nullification. A party may also file upon becoming an adult but must do so within two years.

¹⁰ *Fatima v. Emperor*, AIR 1914 Lah. 380.

It is clear that the married minor is left with no legal rights in most situations. ¹¹UNICEF's State of the World's Children 2015 report noted that 47 percent of girls married before age 18. According to the report, women married as children contributed to the country's high infant and maternal mortality rates, and observers suspected that early motherhood contributed to the deaths of 6,000 adolescents.

4.2 MARITAL RAPE – A SERIOUS OFFENCE;

Rape is a serious offence and it is against humankind. A man is said to commit rape if he has sexual intercourse with a woman under the circumstances mentioned in Section 375 of the Indian Penal Code. The most debatable and controversial exception is present in Section 375 which is popularly known as “the marital rape exception.”

Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹²

The marital status and the religion of the victim had become one of the determining factors in order to punish the offender for rape. As per the exceptions, a husband cannot be held guilty of rape if he commits sexual intercourse with his wife, the wife not being under the age of 15, without her consent is not rape. This is because “Under the Indian Christian Marriage Act, 1872, Parsi Marriage and Divorce Act, 1936, Special Marriage Act, 1954 and Hindu Marriage Act, 1955, the minimum age of marriage for a man is 21 years and for a woman is 18 years. However, under the Muslim personal law in India, which continues to remain uncoded and unconsolidated, persons who have attained puberty are eligible to get married i.e. on attaining the age of 15 years, while they are still minor.”¹³ It can be inferred that the special legislation POSCO will have an overriding effect over all the personal laws for the protection of children from sexual offenders in the name of marital relationships.

¹¹ https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf, last visited, 12.11.2023.

¹² Section 375 of The Indian Penal code.

¹³ <https://www.thehindu.com/news/national/supreme-court-to-examine-whether-girls-aged-15-can-be-married-off-under-muslim-personal-law-when-statutes-make-it-an-offence/article66373319.ece>, last visited, 12.11.2023.

5. CHANGING DIMENSIONS OF MARRIAGE;

“Do not take a marriage for granted. There has to be an effort, there has to be an endeavour, and there has to be a constant attempt to sustain it. The moment people take marriage for granted, there is a disaster.”¹⁴

Live-in-relationship is the new concept of cohabitation of two individuals under one roof with consent. It can be termed a walk-in-walk-out relationship. This type of relationship is valid in India, but no law gives the couple rights. It was in the case of *Badri Prasad v Dy. Director of Consolidation*, 1978, the court held that when a man and woman live together for a reasonably long period the court is sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties.

The Indian society is still conservative and views it as an immoral act with respect to religions. Thus, the right to privacy of the live-in-relationship couple is not respected and protected like married couples. The right to maintenance and inheritance of property are some rights that are available for the couples. The woman is also protected under Domestic Violence Act, 2005.

Almost 30 countries in the world recognise same-sex marriage ¹⁵but in the case of *Supriyo Chakraborty v Union of India*,¹⁶ the supreme court upheld the validity of the Special Marriage Act, 1954, and held that the right to marry is not a fundamental right for queer persons. There is a need for suitable amendments in the existing laws of India to recognise and protect the couples under this roof. The changing dimensions of marriage have created complexity in dealing with cases with respect to their privacy as there are no specific legal rights entitled to the parties.

6. RECOMMENDATIONS;

The author recommends that marital rape should be criminalised as the husband is exempted from criminal liability because marital rape is not an offence in India. It is against the right of the sexual

¹⁴ Taken from complication landmarks judgment of High Courts of India on family matters, Year of publication 2016, compiled By Jharkhand State Legal Services Authority.

¹⁵ <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>, last visited, 12.11.2023

¹⁶ *Supriya Chakraborty & Anr. v Union of India*, 2023 INSC 920

autonomy of women. Further childbearing is also a necessary consequence of marriage. The compulsion to bear a child from her husband or other family member is against the right of reproductive choices of a woman. Marital rape is a crime in more than 50 countries since 1993. It has been illegal in the United Kingdom since 1992 and is seen as a kind of domestic abuse.¹⁷ The same law should be implemented in India to safeguard the pious institution called Marriage.

Recently Supreme Court has stated that the husband is not the master of his wife, the relationship between husband and wife is based on mutual love and trust.¹⁸ Supreme Court in many cases dealt with the issues relating to matrimonial rights and the right of the wife to live the dignity. Courts are flooded with cases relating to matrimonial rights and the right to privacy of women. Any infringement of the right to privacy particularly in matrimonial issues which disturbs one's feelings, emotions and confidence should be considered a serious offence and punished.

7. CONCLUSION

Marriages in India have undergone a lot of changes from time to time. There is a need to amend the laws regarding marital rape and the abuse of marital privacy. It should be considered that the right should not be lost in the marital relationship and it can be taken away only on the grounds of public interest.

8. REFERENCES

1. Prof. G.C.V. Subba Rao's, Family Law In India, Updated 10th Edition, 2014.
2. Dr. J.N. Pandey, Constitutional Law of India, 59th Edition, 2022.
3. Prof. A. Nirmal Singh, Marriage and Divorce Laws.
4. <https://articles.manupatra.com/article-details/Right-to-Privacy-and-Family-law-Analyzing-the-Section-122-of-the-Evidence-Act-1872-within-the-Constitutional-conundrum>
5. <https://www.scobserver.in/journal/the-uses-and-abuses-of-marital-privacy/#:~:text=The%20Origins%20of%20Marital%20Privacy&text=Early%20Supreme%20Court%20decisions%20refused,21%20of%20the%20Indian%20Constitution>

¹⁷ <https://www.wionews.com/india-news/marriage-a-license-to-rape-indias-top-court-to-hear-pleas-on-marital-rape-these-countries-criminalise-it-576588>, last visited, 13.11.2023.

¹⁸ Joseph Shine v. Union of India, 2018 SCC Online SC 1676

6. <https://www.lsd.law/define/marital-privacy-doctrine>
7. <https://www.scconline.com/blog/post/2016/06/01/privilege-communication-between-husband-and-wife-is-not-available-in-family-court-proceedings/>
8. <https://www.livelaw.in/top-stories/wife-has-right-to-say-no-to-husband-marital-rape-exception-patriarchal-archaic-justice-deepak-gupta-235791?infinitemscroll=1>
9. <https://www.legalserviceindia.com/legal/article-7872-marital-rape-laws-an-international-overview.html>
10. https://m-thewire-in.cdn.ampproject.org/v/s/m.thewire.in/article/rights/five-years-since-puttaswamy-criminalisation-of-marital-rape-still-eludes-indian-law/amp?amp_gsa=1&_js_v=a9&usqp=mq33IAQIUAKwASCAAgM%3D#amp_ct=1696062702357&_tf=From%20%251%24s&aoh=16960626086514&referrer=https%3A%2F%2Fwww.google.com&share=https%3A%2F%2Fthewire.in%2Frights%2Ffive-years-since-puttaswamy-criminalisation-of-marital-rape-still-eludes-indian-law
11. <https://medium.com/the-%C3%B3pinion/marital-rape-in-india-is-india-ready-to-let-the-law-dive-into-the-privacy-of-marriage-by-making-baa92616f0fa>
12. <https://thewire.in/gender/marital-rape-and-child-marriage-two-sides-of-the-same-coin>
13. <https://timesofindia.indiatimes.com/blogs/legally-speaking/legal-status-of-child-marriages-in-india/>

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