
RIGHT TO SAY NO, MARITAL RAPE: VIOLATION OF WOMEN'S HUMAN RIGHT

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ABSTRACT

India is among the few countries that still allow marital rape, i.e., Exception 2 in Section 375 of the Indian Penal Code, 1860 specifically allows forced sexual intercourse by the husband without the consent of the wife. There are several arguments raised to justify this archaic law in several Law Commission Reports, Parliamentary Debates, and recent judicial decisions. In this paper, we will analyze why these arguments are not valid in the contemporary world and modern society. Through the analysis of Article 14 and Article 21 of the Constitution of India, we argue that the exceptional clause in our constitution is wholly unconstitutional and that this law is leading to severe violation of basic human and fundamental rights. We will also analyze the international scenario and convention and changing stance of the judiciary in the last few years concerning the law. Also, we will talk about some recent judgments and how it is already encouraging for women to come forward. We will conclude on the note that the exceptional clause should be revoked or declared unconstitutional, and criminalizing marital rape is extremely necessary. Further, we will propose a model and a few suggestions for the same.

1. Introduction

In India definition of marital rape indirectly means "implied consent."¹ Marital rape refers to rape committed when the perpetrator is the victim's spouse.² The general definition remains the same that is sexual intercourse or sexual penetration when there is a lack of consent.³ Rape is a rape irrespective of the person committing it, but sadly our laws do not recognize so.⁴ As per

Section 375 exception 2 of the Indian Penal Code, 1860, which states-

*“ Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape ”*⁵.

This exception in our laws shows the patriarchal notion which considers the wife as the husband's property which is still embedded deep in our societies.⁶

Statistics reveal that married women are more likely to face sexual as well as physical violence than anyone else.⁷ Within the total interviewed women for NHFS data, it was found that only 2.3 % of sexual violence was committed by men other than their husbands.⁸ Also, in the same study, it was found that there is around 83% of women aged between 18-49 accepted that their current husband is inflicting sexual violence. Moreover, about 13% of them reported their former husband as a perpetrator.⁹ These data reveal how archaic legislation combined with a patriarchal mindset is leading to great injustice.

¹ Srishti Bajpai & Kunwar Karan Singh, *Marital Rape and Legal Framework in India: A Critical Legal Analysis*, 22 *Supremo Amicus* [54] (2020).

² Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 *NUJS L. REV.* 121 (2018).

³ *The Indian Penal Code*, 1860, §375; *Id.*

⁴ Mansi Singh, *Marital Rape*, 12 *Supremo Amicus* 103 (2019).

⁵ *Supra* note 3.

⁶ Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

⁷ Cheta Sheth & Bedanta Chakraborty, *Economic Analysis of Marital Rape*, 3 *INDIAN J.L. & PUB. POL'y* 70 (2016); Ministry of Health and Family Welfare Government of India, *National Family Health Survey (NFHS-5) 2019-21*, MINISTRY OF HEALTH AND FAMILY WELFARE GOVERNMENT OF INDIA (last visited June 16, 2022, 10:10 PM).

⁸ Rukhmini S., *Marital Rape: the numbers don't lie*, *THE HINDU* (last visited June 16, 2022, 08:45 PM), <https://www.thehindu.com/data/Statistics-on-marital-rape/article60100071.ece>.

⁹ Ministry of Health and Family Welfare Government of India, *National Family Health Survey (NFHS-5) 2019-21*, MINISTRY OF HEALTH AND FAMILY WELFARE GOVERNMENT OF INDIA (last visited June 16, 2022, 11:14 PM).

While our country is trying to achieve safe streets for women, she is unsafe at the very place where she is supposed to be most protected. Our patriarchal mindset, combined with archaic laws, ensures the protection of the very man who broke every duty of husband as well as a dignified human. Regardless of the majority of laws being there to empower and uplift women in society, the most horrifying crime any woman can think of is happening within the four walls.¹⁰ The exceptional case pointed out in Section 375 affects not only bodily integrity, autonomy, and dignity of women but also has broad implications at the physiological aspects as well. The impact on any woman after getting raped again and again by her own husband is inconceivable. The amount of mental pressure, fear, loss of self-esteem, sexual brokenness, and so forth cannot be described in words.

Another major problem is a lack of social awareness among men as well as women in India. Although, women can easily file a case based on cruelty under Section 13 of the Hindu Marriage Act, 1955. However, these laws cannot be equated with the gravity of the crime and punishment. Furthermore, women's social and economic dependency on society makes it even more difficult for them to get justice. Also, they have little to no awareness of these laws. And no government has taken any significant steps to educate them about their rights and create social awareness for the same.¹¹ These combined are not only leading to procedural difficulties for women but, in most instances, no justice at all.

Since the beginning 20th century, most countries around the world have criminalized marital rape. However, India is among the few countries which expressly allows marital rape by their husband.¹² Our legislature is still trying to justify this archaic provision as valid on the basis of conjugal rights. However, conjugal rights should not be the basis to justify the amount of physical and mental torture inflicted.

2. Marital Rape: History of the Legal Exception

In order to understand more about marital rape, we need to look into its history and evolution. We need to understand what a relationship between male and female in marriage looked like at

¹⁰ *Supra* note 4.

¹¹ Shruti Tripathi, *Marital Rape in India and How Interpretation of Statutes Can Be Applied to Laws Governing It*, 1 *Jus Corpus L.J.* 297 (2021).

¹² Devisha Vythelingum, *There is no such thing as marital rape*, *THE AMNESTY* (last visited June 16, 2022, 5:43 AM), <https://theamnesty.wordpress.com/2020/01/30/there-is-no-such-thing-as-marital-rape-2/>.

that time, how women were treated and what was their social status within the society in that period, and the basis for enacting such a law.

2.1 Situation Before 2000s

In the 18th century, women and men in a relationship of marriage were treated as inferior and superior. The relationship of marriage was treated the same as the relationship of master and servant. Wherein men were the masters and women were treated as servants. As soon as women got into marital relations, they had to sacrifice all their rights in order to serve their husbands.¹³

In 1753, William Blackstone declared that when a man and a woman get married, their identity emerges as one, and they are no longer separate.¹⁴ This very theory undermines the individuality of women. According to this theory, women did not have a separate identity; they were only someone whose sole duty was to serve and obey their husbands. James Schouler famously said that it is for the wife to love, honour, and obey their husband, and the duty of the husband was to love, cherish and protect their wife.¹⁵ These arguments themselves show that women had far fewer rights and no independent identity after marriage.

Our statutes and laws also considered men superior as they were the protectors, as they had the duty to take care of the family and fulfill the domestic and financial needs, they were the ones who had the duty to protect the family, so ultimately, it became his wife's responsibility and duty to take care of his need and wants as he was the bread bearer of the family. In 1736, Sir Matthew Hale declared that a husband could not be guilty of committing rape upon his wife because by mutual consent i.e., marriage, the wife along with her body has also given her sexual will and consent to which she cannot retract.¹⁶ It was till this time marriage was considered a civil contract where women had to give their will in order to get love, protection, and respect in society.¹⁷ So, in the end, women had no option rather to just obey what their husbands say. Even in the 19th century sexual superiority of a husband was treated as the most basic right throughout the world, and declining the sexual matrimonial intimacy was considered a breach

¹³ Ryan & Rebecca M., *The Sex Right: A Legal History of the Marital Rape Exemption*, Law & Social Inquiry, vol. 20, no. 4, 1995, pp. 941–1001.

¹⁴ William Blackstone, *Blackstone's commentaries*, ed. George Sharswood, 325 (Philadelphia): (Lippincott Co. 1896) ("Blackstone, commentaries").

¹⁵ James Schouler, *A Treatise on the law of Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and World, Infancy, and Master and Servant* 35 (45th ed. Boston: Little Brown & Co., 1889).

¹⁶ Lord Chief Justice Sir Matthew Hale, *The History of the Pleas of the Crown* 629 (London: Sollom Emlyn, 1778).

¹⁷ *Supra* note 1.

of duty committed by the wife.¹⁸ She had no other option rather to just give her husband sexual pleasure even if she did not want to. However, things started to shift gradually with the discussion of individual rights among people.¹⁹ And with the rise of the feminist movements during the 1900s, people started arguing that women are not inferior but the same as their husbands and it is wrong for the law to treat husbands as masters and wives as slaves. Moreover, it was argued that the law should be equal for everyone and that everyone should have their individuality. Many feminists like Elizabeth Cady, Stanton John, Stautt Mill, and William Thompson supported this movement and claimed that women are nowhere inferior to men and that women possess the same level of individuality and equal treatment under natural law as given to any men.

Although people started talking about marital rape and started questioning it, still it was not able to garner much attention as a large part of the society viewed it as a private concern and was of the view that the husband and wife should deal with this personally and there is no need for any special law for that.²⁰ However, in the 1930s, this matter started getting limelight when several cases of marital rape came forward and people started paying attention to it. Furthermore, it became a very controversial topic in the late 20th century.

2.1.1 Position in India

The criminal law in India is based on the Common law doctrines which were prevailing at the time of codification of the Penal Code in the 19th century, therefore the common law exception of marital rape also travelled in the Indian criminal law.²¹ This exception was included in Section 375 and section 375-A under the Indian Penal Code, 1860. It stated that sexual intercourse by a man with his wife is not rape. However, the final draft of the Indian Penal Code limited this definition, it stated that sexual intercourse by a man with his wife is not rape as long as the wife is above 10 years. Later, this age group increased from 10 to 12²² and then from 12 to 15²³ through different amendments. And now, from the landmark case of

¹⁸ *Supra* note 3.

¹⁹ *Supra* note 1.

²⁰ Jill Elain Hasday, *Contest and Consent: A Legal History of Marital Rape*., vol. 88, no. 5, California Law Review, 2000, pp. 1373–505.

²¹ Nitish Nawsagaray, *Marital Rape Exemption - Adding Insult to Injury* , 2 INDIAN J.L. & Just. 134 (2011).

²² By the amendment to the Indian Penal Code in 1891.

²³ By the amendment to the Indian Penal Code in 1925.

Independent Thought v. U.O.I., the apex court increased the age limit to 18yrs.²⁴

The situation in India was no different from the situation in early America. The former Chief Justice of India, Honourable Deepak Mishra, has said that "I don't think that marital rape should be regarded as an offense in India because it will create absolute anarchy in families, and our country is sustaining itself because of the family platform which upholds family values."²⁵ In a nation where the sanctity of marriage destroys a spouse's sexual dignity in both the social and legal domains, this came as no surprise.²⁶

In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women. This declaration establishes marital rape as a human rights violation.²⁷ Still, in India, marital rape is considered an exception to rape.

2.2 Situation after 2000s

At the beginning of the 2000s, in the 172nd Law Commission Report, arguments were raised against the validity of the exceptional clause. It was argued that while the other instances of violence by husband towards his wife are criminalized, there is no reason why rape should be provided with an exemption. However, the Law Commission refuted this argument by stating that this would lead to "excessive interference with the institution of marriage."²⁸ However, in 2012, refuting all the earlier arguments, the J.S Verma Committee actively supported the criminalization of marital rape regardless of the victim's age.²⁹ A twofold recommendation was suggested. First, Exception (2) of Section 375 of I.P.C. should be revoked entirely.³⁰ Second, legislation must be enacted stating that non-consensual sex, even in marriage, and any other similar relationship, should not be the ground for defense for the accused.³¹ The report also

²⁴ *Independent Thought v. Union of India & Ors.*, AIR 2017 SC 4904.

²⁵ Scroll Staff, *Former CJI Dipak Mishra says marital rape should not be crime in India*, S CROLL. IN (last visited on 15th June, 2022, 10:02 PM), <https://scroll.in/latest/919482/former-cji-dipak-misra-says-marital-rape-should-not-be-a-crime-in-india>.

²⁶ Shreyam Sharma & Preeti Akankshya Kujur, *Even a Wife Is Entitled to a 'NO' - A Call for Criminalizing Marital Rape*, 2 Jus Corpus L.J. 176 (2021).

²⁷ General Assembly resolution 48/104, *Declaration on the Elimination of Violence against Women*, United Nations Human Rights, (December 20, 1993).

²⁸ *Law Commission of India, Indian Penal Code, REPORT NO. 42 (June 1971)*, at <http://lawcommissionofindia.nic.in/1-50/report42.pdf>; *Supra* note 2.

²⁹ *Supra* note 6.

³⁰ *Ibid.*, at 79 (i).

³¹ *Ibid.*, at 79 (ii).

talked about how the clause is based on the patriarchal notion and considers women as the husband's property after marriage.³² Nevertheless, these suggestions and views were ignored while enacting the Criminal Law Amendment Bill, 2012 (Amendment Bill, 2012).³³ The Standing Committee refused to enact this amendment by stating that "the entire family will be under greater stress and the committee may perhaps be doing greater injustice."³⁴ Therefore, till now, there is no such provision within our laws that criminalizes marital rape.

Although, in recent years, the Supreme Court started recognizing the importance of privacy and bodily autonomy of married women in sexual relations.³⁵ In landmark cases like *Independent Thought v. U.O.I.*, the Hon'ble Supreme Court held that "This leads to an anomalous and astounding situation where the husband could be charged with lesser offences, but not with the more serious offence of rape" for committing a marital rape. The court further held that there stands no ground on why the husband should be provided with such immunity. In contrast, no such exemption exists in other laws.³⁶ Here, the judges might not have directly stated that rape is rape irrespective of the person committing it, but we can clearly identify a somewhat change in stance as the judiciary started considering the importance of individual rights irrespective of the marital status of a person. Recently Karnataka High Court also allowed rape charges against a husband to stand despite Section 375, which stated that the institution of marriage does not provide male privilege and license to assault women. However, the court did not take any clear stance on the constitutional validity of the exceptional clause.³⁷ And, recently a two-judge bench of the Delhi High Court gave a split verdict on the constitutional validity of the law.³⁸ In the same case, Justice Rajiv Shadrekar viewed that "The right to withdraw consent at any given point in time forms the core of the women's right to life and liberty which encompasses her right to protect her from physical and mental being."³⁹ Now, the case is challenged in the apex court for the constitutional validity of the law. These cases show how the court is also changing its stance and is not happy with the current legislation to

³² *Ibid.*, at 72.

³³ *The Criminal Law Amendment Bill, 130 of 2012.*

³⁴ *Standing Committee on Home Affairs, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 47, (December 2015).*

³⁵ *Umang Poddar, Explainer: Why is marital rape is not a crime in India- and can the courts make it one, S CROLL. IN (last visited June 16, 2022, 10:33 PM), <https://scroll.in/article/1015495/explainer-why-is-marital-rape-not-a-crime-in-india-and-can-the-courts-make-it-on-e>.*

³⁶ *Supra* note 24.

³⁷ *Hrishikesh Sahoo and Ors. v. State of Karnataka and Ors.*, (2022) 2 KCCR 145.

³⁸ *RIT Foundation and Ors. v. The Union of India and Ors.*, 2022 SCC OnLine Del 1404.

³⁹ *Id.*

provide an exemption for such heinous crimes, and conjugal rights do not go to the extent of inflicting physical and mental injury to the victim.

3. Criminalizing of Marital Rape: Conflict of Arguments

There are numerous justifications offered regarding the validation of marital rape as an exception. First, women already have access to sufficient legal protections. Second, India and western nations have radically different cultures. Third, marriage entails implicit approval for a sexual relationship. Fourth, criminalizing rape within marriage will lead to misuse of the law. These are a few of the most critical points that were made. Let us examine the reasons they are invalid in contemporary society.

3.1 Already adequate legislation

The very first argument raised is that women already have adequate legislation like the Protection of Women from Violence Act, 2005, Section 498A of I.P.C., and several other personal laws dealing with marriage and divorce.⁴⁰ The Domestic Violence Act, 2005 gives a wide range of protection to a woman against domestic violence and provides civil remedies like judicial separation and monetary compensation.⁴¹ Also, Section 498A of I.P.C. gives criminal penalties to husbands and their relatives on the basis of cruelty.⁴² In Hindu Marriage Act, 1955, 'cruelty' is considered a ground for divorce.⁴³ The argument raised is that the present legislation is already enough, and there is no need for another legislation.⁴⁴

However, the primary drawback of these laws is that the majority only provide civil remedies and much less punishment for crimes as heinous as rape.⁴⁵ These laws cannot define and control a crime as serious as marital rape, where women repeatedly have to endure physical and psychological abuse. These legislations do give remedy to a certain extent, but it does not deter the husband's violent behaviour. Also, the person can marry again after divorce, and present

⁴⁰ *Supra* note 24.

⁴¹ *THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, §3, No. 43, Act of Parliament, 2005 (India).*

⁴² Rea Savla, *Trapped in Tradition's Prison: Why India is not ready to criminalize marital rape*, *B ERKELEY POLITICAL REVIEW* (last visited June 18, 2022, 10:15 AM) <https://bpr.berkeley.edu/2015/10/29/trapped-in-traditions-prison/>.

⁴³ *Supra* note 24.

⁴⁴ *Supra* note 39.

⁴⁵ Saptarshi Mandal, *The Impossibility of Marital Rape - Contestations Around Marriage, Sex, Violence and the Law in Contemporary India*, 29 *AUSTL. FEMINIST STUD. J.* 255, 256 (2014); *Supra* note 24.

legislation provides minor punishment, which is not on par with the gravity of the crime.⁴⁶ In the case of *Independent Thought v. U.O.I.*, the apex court was of the view that punishing a husband with a lesser offense for as severe an offense as rape is not justified in the eyes of the law.⁴⁷ Therefore, clearly, already existing legislation is not enough to control a crime of this gravity, and putting such an argument has no merit.

3.2 Cultural Differences

The second argument raised is that we have a different culture than western countries, and we should not make laws based on the other countries culture and practices. Also, criminalizing marital rape might destroy the institution of marriage itself. The primary reason behind this argument is that Indian culture has different moral principles than the western world, and we should not bring their standard practices to the Indian context.

However, we have to understand that there are two kinds of morality we envisage in India, and sometimes they contrast with each other. First is "public morality," which basically means what the general society at large believes is moral. The Supreme Court, in many cases, viewed that if specific speech is immoral for the public at large, then the court will consider that immoral.⁴⁸ Second, "constitutional morality" envisages the morality of the constitution, which might conflict with "public morality."⁴⁹

Moreover, considering the significance of public morality more than constitutional morality will lead to harmful consequences.⁵⁰ For example, take the revoking part of Section 377 of I.P.C to decriminalize homosexuality or legislation enacted to criminalize "Sati Pratha." These laws were revoked and implemented even when they were in stark difference from "public morality," but it was necessary to establish "constitutional morality."⁵¹ If we had only thought about "public morality," these constitutional and basic fundamental rights would never have been implemented, and society would have never been able to evolve.

⁴⁶ *Id.*

⁴⁷ *Supra* note 24.

⁴⁸ *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

⁴⁹ Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgement*, 2 NUJS L. REV. 445 (2009).

⁵⁰ *Supra* note 2.

⁵¹ *Ibid.*

The apex court also refuted these arguments in the case of *Independent Thought v. U.O.I.*, the honourable court stated that marriage is a personal matter, and state-making laws on marriage do not destroy the institution of marriage itself. The court further stated that if judicial separations and divorces are not violating the sanctity of marriage, then punishing marital rape certainly does not have the potential to destroy the sanctity of marriage.⁵² Moreover, Indian society has significantly changed through the years, and women now have their own distinct identities. We should examine whether marital rape should be an exception in light of women's increased independence and constitutional rights in our contemporary society.⁵³ Have we not reached the point where we must ask if we should prioritize the stability of marriage over personal freedoms and whether the idea of equality and rights is nullified the moment any female marries?⁵⁴

3.3 Implied Consent

The third argument is that marriage's sanctity gives "implied consent" to involve in sexual relations as a conjugal right. In 1726, supporting this argument, Sir Mathew Hale famously quoted that "the husband cannot be guilty of rape committed by himself upon his lawful wife, and by their mutual matrimonial consent and contract the wife has given herself up in this kind unto her husband which she cannot retract."⁵⁵ It shows that women were only viewed as property at that time. Furthermore, they were only on the whims and fancy of their husbands.⁵⁶ However, these arguments are directly opposed to the sanctity of marriage and our values in contemporary society. It creates a deplorable situation by violating the basic fundamental right of Article 21 and Article 14 of our constitution, i.e., the right to bodily integrity, personal liberty & right to equal treatment where women have no right to their own bodies.⁵⁷

Moreover, there is a clear distinction between "mutual consent" and "implied consent." If even a single partner in marriage says "no," it cannot be considered a mutual consent for sexual relation.⁵⁸ This creates an anomaly that wives have no right to own their bodies after marriage.

⁵² *Supra* note 23.

⁵³ Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 *GOLDEN GATE U. L. REv.* 717, 727 (1981); Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019).

⁵⁴ *Supra* note 25.

⁵⁵ *Supra* note 16; *Supra* note 23.

⁵⁶ Himanshi Bhatia, *Marital Rape: Rape That Shackled Women during COVID-2019*, 24 *Supremo Amicus* [526] (2021).

⁵⁷ *Id.*

⁵⁸ *Id.*

Furthermore, this is opposed to our value idea of “personal liberty” where women do not have the right to choose when they want to get into intimate relations. Also, it is not sound in a country like India, where marriage is considered irrevocable.⁵⁹ Therefore, it indirectly creates a situation where women after marriage have no say over her own body for a lifetime. Moreover, expression of love through sexual intimacy cannot be equated with forced sex.⁶⁰ Therefore, any argument that it gives the husband right to have forced sex is not only against the constitution but also a basic fundamental right of the women.

3.4 Misuse of the law

The fourth argument is that revoking the exception clause and criminalizing marital rape will lead to misuse of the law by the wives. The justification for this claim is that, in contrast to the western world, this nation differs from others in several ways, including diversity, poverty, education, and, most importantly, social attitude. Furthermore, if we outlaw it, there will be severe consequences.⁶¹ For instance, in the case of *Amresh Kumar v. State of Bihar* the apex court was of the view that Section 498A used as a weapon against their husbands.⁶² Similar arguments are being made in this instance that criminalisation marital rape may encourage husbands' spouses to abuse the legal system. Nevertheless, supporters of this theory provide little to no evidence.⁶³

There is always a potential risk of misusing every law. These laws do exist, nevertheless, because their benefits outweigh the risks.⁶⁴ Additionally, according to research carried out in eight states by the International Centre for Women (ICRW) and the United Nations Population Fund (UNFPA), one in three males acknowledged that they had at least once forced their spouses to engage in sexual activity.⁶⁵ This study also highlights that due to social standards and the patriarchal mindset of society, many women still lack the courage to speak about these

⁵⁹ S. Devika & T. Mohan, *Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades*, 3 Student ADVOC. 15 (1991).

⁶⁰ Ankita Jha & Amisha Raguvanshi, *Marital Rape: A Critical Study into the Need for Criminalization in India*, 1 LEXFORTI LEGAL J. 131 (2019).

⁶¹ PTI, *Criminalizing Marital Rape may destabilise institution of marriage, Centre tells HC*, THE HINDU (last visited June 18, 2022, 10:52 PM), <https://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece>

⁶² *Amresh Kumar v. State of Bihar*, (2014) 8 SCC 273.

⁶³ *Supra* note 43.

⁶⁴ *Supra* note 59.

⁶⁵ *Supra* note 7.

issues. However, only after some recent verdicts gave them enough courage to stand.⁶⁶ Therefore, only fear of the law being misused should not be the basis for violating basic fundamental rights.

4. In Transgression of International Law Obligations

Marital rape is criminalized in all European nations, South American nations, Oceanic nations, and North American nations except Haiti. India is among only ten countries that specifically allow forced sex within marriage.⁶⁷

Men and women should be treated equally in society, and even Indian laws consider women and men equal in every aspect. India is also violating international human rights norms by not outlawing discrimination against women and permitting marital rape. 'These are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being", and which are "inherent in all human beings" regardless of their nation, location, language, religion, ethnic origin or any other status.'⁶⁸ However, women have constantly been subjected to humiliation by men, and rape is one of the examples of the atrocities committed against women's consent and dignity.⁶⁹

International Human Rights law evolved significantly to protect individual rights from limitations their state may impose on them. The state is bound to follow the human rights of every individual, and the state will be accountable for any abuse of this right.⁷⁰ *Human rights* are the fundamental rights given to any person based on humanity and morality. It guarantees that everyone has individuality and identity. The Indian Constitution also guarantees equal rights for men and women. However, India is still seen as a patriarchal country where men are free to pursue their own interests after marriage.

⁶⁶ Yashee, *He does not beat, he forced sex to break my spirit: Three women 'raped' by their husband speaks out*, *INDIAN EXPRESS* (last visited June 18, 2022, 11:38 PM), <https://indianexpress.com/article/india/three-women-marital-rape-speak-out-7930328/>.

⁶⁷ Priyali Prakash & Dhriti Mankatalia, *Marital Rape in India: The history of the legal exception*, *THE HINDU* (last visited 27 June, 2022, 09:29 AM), <https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece?homepage=true>.

⁶⁸ *Supra* note 67.

⁶⁹ Rajat Gupta, *Human Rights Violation of Women*, 3 *Supremo Amicus* 651 (2018).

⁷⁰ Thomas, Dorothy Q. & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, *HUMAN RIGHTS QUARTERLY* 15, no. 1 (1993): 36–62.

India has been a signatory of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which has considered that gender base violence violates all rights that are guaranteed under international treaties.⁷¹ The basic requirement of CEDAW is to take all the basic measures to eliminate all forms of discrimination against women.⁷² CEDAW mandates all the states to make litigations to stop gender discrimination of many forms. But by making marital rape an exception Indian Legislation infringes the provisions of CEDAW in the following ways-

4.1 Right to not be subjected to torture, inhuman behaviour, or poor treatment

Marital rape satisfies all the acts of torture given in Article 1 of *CEDAW*, which is ratified by our country, as it gives the husband the power to inflict torture, inhumane behaviour, and poor treatment without any sanction.⁷³ The Indian Constitution discriminates against women by not making marital rape a crime. The defense that the victim is the perpetrator's wife should not be the ground for husbands to inflict torture, inhumane behaviour, and poor treatment to their wives because this not only violates fundamental human rights but also gives husbands the authority to *carte blanche* to treat their wives however they wish.

4.2. Right to life

Marital rape can have many serious consequences like miscarriage, childhood pregnancy, HIV, and bladder infections, which might lead to fatal outcomes.⁷⁴ At extreme, there are many cases where men kill their wives during sexual intercourse. Allowing men to force women into sexual intercourse puts danger to the very life of the wife by her own spouse without any sanction by the law.⁷⁵ The right to life is a very integral part of *CEDAW* and allowing this to happen is a significant violation of our commitment to eliminate discrimination between men and women and to uphold women's fundamental human rights.⁷⁶

⁷¹ Through General Recommendation No. 19 (19th session, 1992), art. 7.

⁷² Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2 [hereinafter *CEDAW*].

⁷³ United Nation General Assembly, Convention on the Elimination on the All Forms of Discrimination against Women New York, 18 December 1979, U N I T E D N A T I O N H U M A N R I G H T S (December 18, 1979).

⁷⁴ World Health Organization [WHO], *Understanding and Addressing Violence Against Women: Sexual Violence*, WHO/RHR/12.37, at 6 (2012).

⁷⁵ Sue Lees, *Marital Rape and Marital Murder*, *Home Truths About Domestic Violation: Feminist Influences On Policy And Practice* 57 (Jalna Hanmer & Catherine Itzin eds., 2000).

⁷⁶ U.N. Human Rights Commission, *Concluding Observations on Colombia*, UN Doc A/52/40, para. 287 (1997); U.N.

4.3 Right of Equality in Family

From ancient times after marriage, as discussed previously, women were instructed to give their consent and will to their husbands. The wives were instructed to only obey their husbands and do whatever they say.⁷⁷ They lost their individuality in order to obey their husbands. And even today, this exceptional clause by allowing the husband to decide to be involved in sexual relations for both of them makes women inferior to men within the marriage. And allowing marital rape violates not only basic human rights but also the basic fundamental rights given to Indian citizens by the Indian Constitution under Article 14.⁷⁸

- **General recommendation 19 (GR-19)** deals with the right to life and provides the right not to be subjected to torture or any cruelty, the right to equal humanitarian treatment, and the right to equality in the family.⁷⁹ GR-19 defines human rights and fundamental freedoms, including “the right to the highest standard attainable of physical and mental health.”⁸⁰ Additionally, it states that rape has a psychological as well as physical impact on women and it deprives women of equal exercise of human rights. It also states that rape is an evil practice, no matter whether the victim is an unmarried woman or spouse.
- **General recommendation 35 (GR- 35)** updated GR-19 and included the prohibition of gender-based violence as a norm of international customary law. It expands the understanding of violence and includes violations of sexual and reproductive health.⁸¹ It identifies that rape is due to the lack of consent given by the victim.

Now, marital rape is justified even if the spouse is not giving consent freely, which undermines human rights.⁸² Hence in all ways, marital rape violates basic human rights and is against our

Human Rights Comm., Concluding Observations on Peru, UN Doc A/52/40, para. 167 (1997).

⁷⁷ Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 *BROOK. J. INT'L L.* 153 (2015).

⁷⁸ *IND. C. ONST.* art. 14.

⁷⁹ *U.N. Women, General recommendation No. 19: Violence against women, U.N.* (last visited 2 June 23, 2022, 9:13 AM), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf.

⁸⁰ Vaibhavi Patel, *Marital Rape in India: An international Human Rights Law Violation*, *B ERKELEY JOURNAL OF INTERNATIONAL LAW* (last visited June 20, 2022, 03:08 PM), <https://www.berkeleyjournalofinternationallaw.com/post/marital-rape-in-india-an-international-human-rights-law-violation>.

⁸¹ *Committee on Elimination of Discrimination against Women, Launch of CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, UNITED NATIONS HUMAN RIGHTS* (July 14th, 2017).

⁸² *Supra* note 11.

international commitment to uphold the right to equality and provide women with equal rights.

5. Violation of Fundamental rights

The following law explicitly allows the non-consensual sex of a husband with her wife. The law not only violates fundamental rights, human rights, and international agreements as well.

⁸³ We have already discussed how international laws and conventions are violated. Let us now examine how permitting forced sex in marriage constitutes a violation of fundamental rights.

5.1 Violation of Article 14 of the Constitution- Are Married Women not equal

Article 14 of our constitution has two aspects- 'equality before the law' and 'the equal protection of laws'. ⁸⁴ First, equality before the law means that there shall be no privileged person or class and that none should be above law." ⁸⁵ The Karnataka High Court summarised equality before the law and equal protection of the law as-

"All persons are equal before the law is fundamental to every civilized constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that everyone is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates on equal protection of all alike in the same situation and under similar circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed." ⁸⁶

Consequently, as per the above interpretation as well as other Supreme Court rulings, Article 14 means equal treatment among equals in the eyes of law. ⁸⁷ Furthermore, any arbitrary law, unreasonable and discriminatory provision is bound to be struck down. ⁸⁸ However, marital rape has been considered one exception. It does not only explicitly perpetrate arbitrary and discriminatory behaviour between men and women but also between married and unmarried

⁸³ *Supra* note 77.

⁸⁴ *Sri Srinivasan Theatre and Ors. v. Government of Tamil Nadu and Ors.*, AIR 1992 SC 999.

⁸⁵ *Id.*

⁸⁶ *Gorantala Butchaiah Chowdary and Ors. v. State of Andhra*, 1957 SCC OnLine AP 136.

⁸⁷ *Supra* note 1.

⁸⁸ *Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019).

women.⁸⁹ And any arbitrary or archaic law which infringes the rights according to contemporary society should be repealed.

Also, understanding that the argument is not about whether marital rape is unconstitutional or not but will it come under the ambit of reasonable classification. However, both Hindu and Muslim marriages have evolved over time to grant men and women equal rights within marriages. Therefore, non-consensual sex within marriage, which gives a man unreasonable power to decide to enter into sexual relations at his will, cannot be construed under this classification. Indian society has evolved significantly over the past decade.⁹⁰ We now not only recognize that wife has the Right to live with dignity but several other rights like Right to property,⁹¹ Right to a residence, Right to dignity and self-respect, and the maintenance of herself as well as her child.⁹² Nevertheless, a study by RAINN (Rape, Abuse, and Incest National Network), shows that rape by own family member or someone known has far more grievous psychological effects than rape by a stranger.⁹³ Therefore it does not only discriminate on the basis of “equal treatment before law” between men and women but also discriminates by assuming that married women’s rape is less grievous than unmarried women. Moreover, many women in our society are not independent and primarily dependent on their husbands for their financial assistance and many other needs.⁹⁴ This combined with their little to no knowledge of their rights makes it far more difficult to even approach the court.

5.2 Violation of Article 21

Article 21 of the constitution provides the Right to life and personal liberty.⁹⁵ This right does not mean only mere animal existence, it also comes with the right to live a dignified life.⁹⁶ In the case of *Suchita Srivastva v. Chandigarh Administration*, the Supreme Court held that right to make sexual choices was under the ambit of Article 21 of our constitution.⁹⁷ This article also provides Right to Privacy and includes decisional privacy within it. And in the case of *K.S*

⁸⁹ *Id.*

⁹⁰ *Supra* note 2.

⁹¹ *Pratibha Rani v. Suraj Kumar Ors.*, AIR 1985 SC 628.

⁹² *Hindu Maintenance Act, 1956*, §3, No. 43, *Act of Parliament, 2005 (India)*.

⁹³ *Supra* note 11; Rainn, *Intimate Partner Sexual Violence*, RAINN (last visited 27 June, 2022, 01:11 PM) <https://www.rainn.org/articles/intimate-partner-sexual-violence>.

⁹⁴ *Anvesha Kumar & Ipsita Mazumdar, Bride and Prejudice - Marital Rape and the Indian Legal Dilemma*, 2 NAT'L L.U.

DELHI Stud. L.J. [12] (2013).

⁹⁵ *IND. C ONST.* art. 269; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁹⁶ *The Chairman Railway Board v. Chandrima Das*, AIR 2000 SC 988.

⁹⁷ *Suchita Srivastva v. Chandigarh Administration*, AIR 2010 SC 235.

Puttaswamy v. Union of India that decisional privacy also includes the ability to make decisions related to procreation and sexual activity. This right also includes the right to abstain from involving in sexual relations.⁹⁸ However, marital rape does not allow a wife to take decisions for her own body. This leads to a clear and severe violation of Right to Privacy and bodily integrity provided under Article 21 of our constitution.

In the case of *Francis Coralie Mullin v. Union of India*, the court held that “Right to life includes right to live with dignity and goes beyond it.”⁹⁹ And marital rights are stabbing the basic human dignity of the women. In the case of *Harvendra Kaur v. Harmendra Singh Choudhary* the court held that conjugal right is just a part of conjugal rights, it is not the only thing that defines the marriage.¹⁰⁰ Therefore the right to conjugal rights should not be enforced at the cost of basic human dignity which is not only against our constitutional morality but also basic human rights. There are several other grounds that violate this Article like (a) equality and equal status under the law, which is conferred on all human beings, (b) dignity and bodily integrity, (c) personal and sexual autonomy, (d) bodily and decisional privacy (e) reproductive choices, i.e., right to procreate and abstention from procreation.¹⁰¹ In the case of *Moti Lal v. State of M.P.*¹⁰² and several other cases,¹⁰³ the court stated that rape does violate not only basic human dignity and privacy but also the bodily integrity of women. Considering and proving earlier that rape is rape, and in the case of marital rape, she has to endure even more trauma and have a severe psychological effect. It leads to a severe violation of basic human rights and constitutional rights provided under Article 21 of our constitution.

6. Conclusion

Freedom cannot be achieved unless women have been emancipated from all kinds of oppression.

— Nelson Mandela

⁹⁸ *K.S Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁹⁹ *Anvesha Kumar & Ipsita Mazumdar, Bride and Prejudice - Marital Rape and the Indian Legal Dilemma*, 2 NAT'L L.U. DELHI Stud. L.J. [12] (2013).

¹⁰⁰ *Harvendra Kaur v. Harmendra Singh Choudhary*, AIR 1984 Del 66.

¹⁰¹ *Supra* note 37.

¹⁰² *Moti Lal v. State of M.P.* (2008) 11 SCC 20.

¹⁰³ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 ; *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 ; *State of Haryana v. Janak Singh*, (2013) 9 SCC 431 ; *Z. v. State of Bihar*, (2018) 11 SCC 572 ; *Supra* note 27, *Supra* note 81.

Marital Rape is a most underrated and under-discussed topic today. Many people even now believe that Marital Rape is not a crime because when two people get married, there is no need for consent to get into sexual intercourse. According to most people in society, marriage in itself is consent for everything. It is believed that while marrying someone, the wife has already consented to all the sexual favours, which is why it does not amount to rape. After marriage, men are given the authority to do whatever they want to, and the wife cannot deny it. According to the reports by National Family Health Survey (NFHS-5), among married women aged between 18-49 who have experienced sexual violence, 83% report their current husband, and 13% report a former husband as a perpetrator.¹⁰⁴ Also according to the same survey, nearly 1 in 3 Indian women aged between 18-49 have suffered some form of marital abuse, and around 6% have suffered sexual violence.¹⁰⁵ Despite these numbers, Marital rape is an exception. Men consider women as their asset or commodity, and women, after marriage, are told to obey their husbands and husbands can do whatever they want even if the wife does not consent to it.

In a country like India, where the vices of patriarchy and misogyny are prevailing in society, removing the marital rape exception is very essential, and removing this will be a significant step for women's empowerment, especially for the upliftment of married women. It is essential to identify the major lacuna present today that defeats the constitutional provisions which are otherwise supposed to safeguard the autonomy, dignity, and respect of women.¹⁰⁶ To establish equality not only between men and women but also between married and unmarried women, the judiciary needs to remove this exception. Marriage is a beautiful concept where two people decide to spend their whole life together; marriage is loving and caring for their partner; it should not be an escape for having sex. Why is rape done by a stranger a crime but not if the same rape is done by his husband? Just because two people are married, it does not give them the authority to rape their partners.¹⁰⁷ Here, when marital rape is not a crime, the law facilitates and allows sexual assault in marriage by not giving the wife the right to consent or not for sexual conduct. They remove all the legal rem for married women if she reports non-consensual

¹⁰⁴ Parvathi Benu, *Most married women are sexually abused by their husbands, says NHFS data*, *THE HINDU* (last visited 26 June, 2022, 10:21 PM) <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece>.

¹⁰⁵ *The Times of India*, *Nearly 1 in 3 women have suffered spousal sexual, physical violence: Family health survey*, *THE TIMES OF INDIA* (last visited June 25, 2022, 08:24 PM) <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshowprint/91491367.cms>.

¹⁰⁶ Atishya Ghosh, *Criminalisation of Marital Rape in India - A Boon or a Bane*, 3 *INT'L J.L. MGMT. & HUMAN* 1084 (2020).

¹⁰⁷ Anvesha Kumar & Ipsita Mazumdar, *Bride and Prejudice - Marital Rape and the Indian Legal Dilemma*, 2 *NAT'L L.U. DELHI Stud. L.J.* [12] (2013).

sexual contact. Eventually, a married woman has to give up all her fundamentals as well as the basic right that is given to every individual in this world.¹⁰⁸

Until now, there is no such law regarding the criminalization of marital rape, so, in order to ensure justice and equality, it is crucial for the judiciary now to interfere in marital relationships keeping aside all the stereotypes. Most countries worldwide, like the U.S., Australia, and the U.K., have already enacted legislation on criminalizing marital rape. However, India is among the few countries that explicitly allow this to happen, but now is the time when we should also make strong laws against it. However, making strong or formal legislation will not be enough; the government also needs to make efforts to aware the masses regarding marital rape. These topics should openly be discussed instead of making it just a private affair. Mass awareness and strong legislation against marital rape are the need of an hour and a true example of the preservation of women's rights and women empowerment.¹⁰⁹

7. Suggestions

This article finally concludes with some suggestions for the welfare of the victim and their family-

The exceptional clause (2) within Section 375 should be revoked, and marital rape should be criminalized- The first and foremost step towards this will be to remove this exception entirely from the penal code and criminalize marital rape. Marital rape should be treated as a crime, and the punishment for this crime should be the same as any other rape. This exception is a loophole in the Indian legislature, and many people are taking advantage of this exception. Today people believe that if you are married, you have the permit to rape your wife whenever you want. Legislative Authorities must eliminate Section 375 (Exception 2) of the IPC to bring marital rape under the purview of rape laws.¹¹⁰ The perpetrator shall not be ignored, should be treated as any other rapist, and should be punished severely for any such crime. Most laws in our society are against harmful and unsocial behaviours, but marital rape is still an exception.

¹⁰⁸ *Supra* note 74.

¹⁰⁹ Samyak Godha, *Legal Scenario of Marital Rape in India: A Critical Analysis*, 24 *Supremo Amicus* [1014] (2021); Anvesha Kumar & Ipsita Mazumdar, *Bride and Prejudice - Marital Rape and the Indian Legal Dilemma*, 2 *NAT'L U. DELHI Stud. L.J.* [12] (2013).

¹¹⁰ Akanksha Bhatt & Kuljit Singh, *Marital Rape: Existing Legal Framework in India - Quest for Recognition and Liability*, 4 *INT'L J.L. MGMT. & HUMAN.* 2025 (2021).

Moreover, making marital rape an exception not only provides marriage as a defence against rape allegations but also perpetrates stereotypes against married women.¹¹¹

Establishment of non-profit centres- Most women specially, women from the urban part are feared of separation because they do not have any other source of income. So, it is very important for the state government to establish such non-profit and help centres should be established. They should be well versed in bringing confidence and comfort to the victims.¹¹²

Efficient police practices- There is a high need to establish efficient police practices. A study conducted by Commonwealth Human Right Initiative (CHRI) and the Association for Advocacy and Legal Initiative (AALI) showed how ill-disposed and unsympathetic police officers discourage women from filing cases; they are either not interested or not experienced enough to handle these cases.¹¹³ The State needs to establish a standard procedure for police who will be handling cases related to sexual and domestic violence.

Moreover, special training should be made mandatory for those who will have the responsibility of handling these sensitive issues.¹¹⁴

Establishment of women's help groups- Since marital rape is still not a familiar topic to most people. Therefore, the government needs to establish women's help groups that will be counseling and helping victims in these cases. These women's support groups should be open for giving counseling and legal assistance to women who have been the victims of marital rape.¹¹⁵

Combating Stereotypes- Women will not report this issue because of the social stigma of society. Mostly, women have typically been held accountable for the breakdown of marriages. Most women fear reporting this issue because this will make people believe that they could not manage the marriage or make this marriage work.¹¹⁶ The main purpose of criminalizing marital

¹¹¹ Pranesh Prasad, *A Strategy For Criminalizing Marital Rape in India*, HUFFINGTON POST (Sept. 25, 2016); *Supra* note 24.

¹¹² *Supra* note 111.

¹¹³ Manoj Singh, *In UP, Rape Survivors Struggle to Get Police to Register FIRs, Let Alone Investigate Them*, *The Wire* (visited on 25th June, 2022; 22:15) <https://thewire.in/women/uttar-pradesh-police-rape-fir-discrimination>.

¹¹⁴ *Supra* note 85.

¹¹⁵ Sutirtha Sahariah, *Indian Courts Finally Consider Making Marital Rape Illegal*, GLOBAL CITIZEN (Dec. 1, 2017).

¹¹⁶ *Id.*.

rape is to remove the deep-rooted stereotype present in society. People should be made aware that no one is supreme in marriage and everyone is equal, and everyone has their own individuality and rights. But it is not just possible by making laws the government should take initiatives to educate women and men about it. This patriarchal mindset and misogyny can only be removed from its root by teaching more and more people. Men should also be encouraged to participate in these movements to combat marital rape. Efforts should be made by each and everyone in order to achieve the target of gender equality.