
MARRIAGE IS NOT A LICENSE FOR SEXUAL ACCESS

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ABSTRACT

Marital Rape means forced sexual intercourse that a man does with his wife in the silence of wife's consent. The author examines the status of criminalization of marital rape and the protection of woman's marital rights. While decriminalization proponents argue for the protection of family structure and prevention of legal misuse, human rights advocates maintain that criminalization is essential to uphold women's bodily autonomy, personal liberty, and constitutional equality. Consent is of paramount importance in any sexual relationship, including marriage.

Marital rape should be considered a crime as it is a betrayal of trust, even with one's own intimate partner, which has a psychological impact on the woman. It is an Intimate Partner Violence. This article analyses the legal concepts and judicial challenges of marital rape and advocates against the normalization of coerced sex in the name of marriage. The author focuses on the fact that sexual consent is the most vital thing, which is revocable for every sexual encounter. This article also delves into a comparative analysis of the status of marital rape in other countries. Marital Rape exemption is morally wrong and cannot be supported constitutionally just because it lacks sufficient evidence.

Ultimately, this paper concludes that the criminalization of marital rape, while an essential statutory step, must be paired with progressive judicial interpretations to effectively recognize and penalize marital rape as a distinct crime in India.

Keywords: Marital Rape, Bodily Autonomy, Sexual Consent, Intimate Partner Violence.

I. INTRODUCTION

Marital rape implies any act of sexual intercourse between former spouses against the will of the other person through force, coercion, intimidation, threats or by using the vulnerability of the individual who lacks the capacity to consent. Existing laws fall short of punishing marital rape adequately as a separate crime. According to existing laws, ordinary laws against rape cannot be applied to wives over the age of 15 since rape does not become a crime unless the spouses are divorced legally. In addition to this gap in legislation, it is difficult to prove marital rape because such crimes usually take place in private.

Societal misconceptions regarding this matter historically acted as an effective shield that helped cover up the truth about marital rape, based on the premise that marriage automatically entitles one to sex. It is almost like the institution of marriage automatically grants people the right to abuse each other and degrade themselves.

In the Indian Penal Code, 1860, Exception 2 to Section 375 recognized the marital exemption, stating that sexual intercourse by a husband without his wife's consent would not amount to rape if she was more than 15 years old. The reform of the Indian criminal code through the introduction of Bharatiya Nyaya Sanhita (BNS), 2023, created an opportunity for doing away with this colonial legacy. However, Section 63, Exception 2 of the BNS has maintained the essence of the marital exemption, but only increased the age limit to 18 years in line with the Supreme Court ruling in the matter of *Independent Thought v. Union of India*¹.

As both a social and legal institution, marriage establishes a partnership rooted in mutual trust, respect, and shared responsibilities. Society must recognize that this union does not grant unconditional, unilateral sexual access.

The validity of the marriage is entirely dependent on the ongoing consent provided voluntarily by both spouses. Personal freedom, physical inviolability, and human dignity are becoming more recognized in contemporary law as unalienable basic rights of individuals that continue beyond marriage. Considering marriage as a guarantee that sexual intercourse can take place permanently means that one's partner is deprived of these rights, making the person nothing but a possession. In fact, everything that concerns violence within marriage, sexual abuse, and

¹ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

liberty has its roots in one thing: every individual possesses total control over one's body.

II. THE LAW AND MARITAL CONSENT

One of the most important developments that have come about regarding family law and human rights law is the introduction of the notion of consent in marriage. Traditionally, legal systems used laws and principles that did not allow married women to be considered individuals with a personal legal existence. The most illustrative example would be the doctrine of coverture.

Gender based violence remains one of the most pervasive human rights violations globally, driven primarily by the systemic exploitation of women and girls.

Sexual autonomy is about the ability and power of making independent and coerced choices about one's sexual activity. Sexual autonomy becomes an essential element of personal freedom and dignity.

Marriage is not an institution that amalgamates two persons into one being that operates on an irrevocable and permanent consent. On the contrary, such consent should remain revocable at all stages of marriage.

The consequences of marital rape extend far beyond sexual abuse, directly infringing upon a victim's reproductive rights. Reproductive autonomy guarantees the right to decide if and when to engage in sexual relations, alongside the freedom to make coercion free choices regarding contraception and procreation.

The Constitution guarantees to secure the fundamental rights to equality before the law, equal legal protection, and life and personal liberty, which inherently encompasses the right to live with dignity. Furthermore, the constitutional framework explicitly prohibits discrimination against any citizen based on religion, race, caste, sex, or place of birth.

Article 14 of the Indian Constitution states "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." This establishes a foundational democratic principle for the individuals who are similarly situated and must receive identical legal treatment, completely free from discrimination based on religion, race, caste, sex, or place of birth.

In the context of non-consensual sex within marriage, this statutory framework raises a critical constitutional question that whether a legislative classification based solely on the marital relationship between the offender and the victim is legally viable?

Exception 2 to Section 375 of the IPC creates an unjustifiable divide between married and unmarried women. While the primary provision of Section 375 criminalizes non-consensual sexual acts to protect a woman's bodily integrity, the exception explicitly immunizes a husband from prosecution if his wife is over eighteen. By granting statutory impunity based entirely on the relationship between the parties, this provision fails the core constitutional test of Article 14. This categorization creates a profound legal contradiction, recognizing non-consensual sex outside of marriage as a severe criminal offense while shielding the exact same misconduct when perpetrated within a marriage.

Consequently, this marital exemption directly infringes upon Article 21 of the Indian Constitution, which guarantees the fundamental right to life.

III. JUDICIAL INTERPRETATION ON MARITAL RAPE

Amongst the thirty six countries, India is also one of them where the marital rape has not been criminalized. Marital Rape is something that is not talk about in public yet.

In many cultures, marriage happens in the motive of procreation. In these situations, the parties consent are not considered. This concept is followed and created thoughts in the people's mind that if consent is not part of marriage then it is not necessary for intercourse.

- Harivender Kaur v. Harmander Singh

It was held by the Delhi High Court in the case, *Harivender Kaur vs. Harmander Singh*² that “in the household matters the Constitution Of India cannot impede as it would obstruct the union of marriage”.

- The State of Maharashtra Anr v. Madhukar Narayan Mardikar

In, *The State of Maharashtra Anr vs. Madhukar Narayan Mardikar*³, the Supreme Court held

² Harivender Kaur v. Harmander Singh, AIR 1984 DEL 66 (India)

³ State of Maharashtra v. Madhukar Narayan Mardikar, (1991) 1 S.C.C. 57.

that “every woman has the right to privacy and it must not get infringed”.

• Shri Binodsattwa Gautam v. Ms Subhra Chakraborty

It was declared by the Supreme Court in the case, *Shri Binodsattwa Gautam vs. Ms Subhra Chakraborty*⁴, that “victim’s fundamental right to life and dignity get infringed as it violated the Article 21 of the Indian Constitution”.

• Mukesh & Another v. State (NCT of Delhi)

After the *Nirbhaya Rape Case*⁵ in 2012, it was proposed by the Justice Verma Committee that “criminalizing marital rape and the marriage does not mean an absolute consent to sexual acts. But this suggestion get neglected by the Government Of India”.

• The State v. Vikash Dahiya

It was come up with the judgement by the Special Fast Track in Delhi in the case, *The State vs. Vikash Dahiya*⁶ that “as the petitioner and respondent were legally married couple and declared as married couple, the petitioner was major (above age of 18 years), so the conduct of the forced sexual intercourse between two would not amount to rape”.

• RIT Foundation v. Union of India

A Public Interest Litigation in Delhi High Court was filed by the *RIT Foundation*⁷ summoning the immunization marital rape under “Section 375 of the IPC the violation of the fundamental rights that is Article 14, 15 and 19 and 21 of the Indian Constitution has been marked”.

• Independent Thought v. Union of India

However, in the *Independent Thought vs. Union Of India*⁸, the Supreme Court was compelled to recheck the some of marital rape exception as it is marked, it violates the natural rights of the married girls between the age of 15 and 18 years.

⁴ Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, (1996) 1 SCC 490.

⁵ Mukesh & Another v. State (NCT of Delhi), (2017) 6 S.C.C. 1.

⁶ State v. Dahiya, Sessions Case No. 07/2014, Unique ID No. 02401R0613972013 (Addl. Sess. J., Delhi, Apr. 26, 2014) (India).

⁷ RIT Foundation v. Union of India, W.P.(C) No. 284/2015, 2022 DHCO 2021 (Delhi HC May 11, 2022) (India).

⁸ Independent Thought v. Union of India, (2017) 10 S.C.C. 800.

“The Supreme Court ruled that Exception 2 to Section 375, IPC”, need to meaningfully read as:

“Sexual intercourse or acts by a husband with his wife, not being under the age of eighteen years is not amounts to rape. However, it will amounts to rape if a man have sexual intercourse with a wife, who have already married and living with her legal husband”.

- Nimeshbhai Bharat Bhai v. The State Of Gujarat

In the case of *Nimeshbhai Bharat Bhai vs. The State Of Gujarat*⁹, it was submitted by the Gujarat High Court that “the thought of “implied consent” in marriage should be erased because marital rape is not just a concept. Security must be provided by the law to every woman (married and unmarried) to safeguard her bodily independence”.

- Anuja Kapur v. Union Of India Through Secretary

In the case of *Anuja Kapur vs. Union Of India Through Secretary*¹⁰, Anuja Kapur filed a Public Interest Litigation requesting to make principles and laws on marital rape. But the bench of the Supreme Court headed by Justice SA Bobde and Justice Br Gavai rejected the petition and declared that “the work related to the formulation of guidelines” and “laws is of the legislature and not the judiciary and in interpreting law instead of drafting it, in which court is more involved”.

IV. MARITAL RAPE: A COMPARATIVE STUDY OF LEGAL FRAMEWORKS

Section 375 of the Indian Penal Code only punishes rape when it happens outside of a marriage, completely overlooking forced sex between spouses. Although India originally inherited this penal code from England, the two legal systems have since split on this issue of the United Kingdom outlawed marital rape long ago, but India still permits it. In any other setting, the law clearly states that sex without consent is rape. Unfortunately, deep seated social views still treat marriage like an absolute permit for sexual access, completely ignoring whether a wife actually agrees to the act.

Many nations including the United Kingdom, Poland, Canada, Australia, and the United

⁹ Nimeshbhai Bharatbhai Desai v. Gujarat, 2018 SCC OnLine Guj 732.

¹⁰ Anuja Kapur v. Union of India Through Secretary 2019 SCC OnLine Del 12339 .

States—firmly protect a woman's right to choose by treating marital rape as a serious crime against human dignity. In contrast, India's legal system prioritizes preserving the marriage over protecting the wife, completely leaving her consent out of the legal definition of the relationship. This approach is deeply flawed. Consent is the most critical part of any sexual relationship, and a marriage license should never force a person to endure ongoing abuse..

A. In England

In Uk, marital rape has not been criminalize before as husband can have sexual access over his wife without her consent, this was happening in earlier 1992. India adopted IPC from England but cannot criminalise marital rape in its own country yet. In the case of Uk, *R vs. R*¹¹, the House of Lords held the husband convicted with the punishment of imprisonment of three years and for attempt to rape further imprisonment for eighteen years for sexual assault. The Court also held that under English Law exemption of marital rape has never valued.

B. In Poland

This country is one of the earliest countries to criminalize marital rape. The concept of Spousal Immunity was subtly erased from penal code in 1932. The change was made, and secured the protection of women and raised their value and considered that married women can also have the freedom from sexual acts with their husband, if they don't desire to. In the moral of humanity Poland government has criminalised marital rape as women are also humans and they should be given right to say no to forced sexual intercourse.

C. In Canada

The incentive for the criminalization of marital rape in Canada was laid down by the introduction of the Canadian Charter of Rights and Freedom in 1982. Marital Rape get criminalised in Canada in the year 1983. Punishment for marital rape is maximum of 10 years of imprisonment, and by using any item or weapon is 14 years of imprisonment and for causing disfigurement or any wound, punishment is life imprisonment. Marriage is should not be taken as a shield for sexual assault. Women also have their individual identity and dignity and that should be protected and secured.

¹¹ *R v. R*, 1 AC (App. Cases) 599 (House of Lords 1992).

D. In Australia

Through the procedure of state by state legislative in between the year 1976 and 1994, marital rape was criminalised in Australia. Australian States get introduced with the many reforms during the 1970s and had analysed the law relating to rape including other sexual offences. Australia is divided into seven different federal states which also have their different federal laws. Executing the conditions of Marital Rape, punishments is imposed on the accused with different classes by evaluating the offences that caused, how brutal the crime is, if the punishment is 20 years of imprisonment if the age is below 15 years, if their crime results to death of the victim then imprisonment upto 30 years will be imposed on the accused.

E. In USA

In earlier 1970s, rape laws are available in the different states of country from those marital rape was exempted from rape laws. Irrespective of the relationship between husband and wife, in 1976 Nebraska is the first state among the fifty states for the criminalization of the marital rape. In South California maximum thirty year sentence imposed on the first degree crime of rape, including marital rape. Punishment of imprisonment for maximum 10 years is imposed on the accused who assault and battery in the first degree.

F. In India

Marital Rape is still not considered as a crime in India. Although other laws and provisions are there i.e Domestic Violence Act, 2005 which provide the justice to the female victims for the offences happen inside a house then what is wrong to add marital rape as crime in the same scale. It is already come up with the report that victims between the age 15 to 20 years of age get exploited in forced sex, dowry death and beaten up with heavy assault. Marital rape has already been criminalised in other countries to keep woman's dignity and respect secure, keeping aside their marital relationship. But in India it is not till now, as here marriage is just a implied consent for the sexual access.

Women are suffering in India and going through a lot their marital rights and freedom should be protected. The point which should be focused is that "Marriage gives consent to sexual access" but women's withdrawal rights should not be snatched from them.

V. CONCLUSION

Marriage should never be used as an instrument to control a woman's sexuality, as her free consent should always be guaranteed. In the current state, India's legislation on rapes remains paradoxical. By refusing to enact necessary and efficient laws on marital rapes, India created a large legal gap where women can become vulnerable towards any forms of sexual assaults. The declaration of this kind of violence as a crime is a primary measure that will ensure women's basic human right and their freedom. With the adoption of such legislation, one can establish the instruments of law enforcement that will ensure that a real legal process takes place.

In the case of a democratic country, it is essential to guarantee equality before the law for all its people irrespective of their sex, social position, or marital status. Having ratified several treaties obligating the protection of such women's rights, India refuses to fulfill its international obligations and, instead of protecting victims, guarantees protection to their offenders.

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