
THE IMPACT OF LEGAL AND SOCIO-CULTURAL FACTORS ON REPORTING AND PROSECUTION OF MARITAL RAPE CASES: A COMPARATIVE ANALYSIS

Saumya Pandey¹ & Tanushree²

ABSTRACT

A sexual intercourse without the consent of one-party amounts to rape, and when it is done within a lawfully wedded couple, it amounts to marital rape. This issue is often overlooked due to the concept of trust within a matrimonial bond. Under the Hindu personal laws, Marriage is considered as a holy union and a haven of trust. A situation like this often leads to a presumption that the other person is giving his/her consent and conceals situations wherein the consent is missing. In addition to this, gender inequality and cultural and societal norms further aggravate the situation.

Marital rape is a very complex and controversial issue pertaining to India due to the very nature of marriage in our society. Up till recently, marital rape was seen as an exception to rape. In order to tackle cases regarding the name, the statutes must ensure bodily integrity and autonomy for all. Even though some progress has been made, the laws are not always complied with due to the under-reporting of such cases.

By the method of qualitative comparative analysis, the author intends to understand the concept of marital rape while analyzing the impact of legal and cultural and societal norms on reporting and prosecution of marital rape cases in the Indian scenario. Through this research work, the author aspires to strengthen the Indian legal framework concerning marital rape.

Keywords: Marital Rape, Non-Consensual Intercourse, Societal Factors, Cultural Factors

¹ Saumya Pandey, GD Goenka University, Add – Ansal Esencia, Sector 67, Gurugram, Haryana

² Tanushree, University of Lucknow, Add – Sun City Enclave, Jankipuram Ext, Lucknow

INTRODUCTION

The term “rape” means sexual intercourse which is achieved via pressure, force, deception and terror. In other words, rape is a serious crime that usually involves a breach of a woman’s physical and mental integrity. Similarly, marital rape is an act of sexual intercourse between a marital couple but without the consent of one of the partners. Here, one partner forces himself or herself into the other person to engage in sexual activities against their consent. Due to the nature of marriage in Indian society, consent to marriage is very often mistaken for consent to sexual acts within the sacred union, while ignoring that person’s integrity and autonomy in making reproductive choices. In recent times, there has been a growth in the recognition of individual’s consent and rights in the context of marriage, resulting in the criminalization of marital rape. This puts emphasis on the importance of consent and individual rights within the matrimonial relationship. Consequently, marital rape is now being recognized as a criminal offence.

More often, women are the victims of such acts. The victim is usually left behind with physical as well as mental scars. These scars affect their self-esteem, reputation, and naivety, leading to emotional turmoil. As a result, rape is among the most heinous crimes since it not only violates fundamental human rights but also infringes Article 21³ which protects the most cardinal right, i.e., the right to life.

In the majority of societies throughout history, it has been considered normal for males to coerce their wives into having sexual intercourse against their consent. The majority of nations used to define rape as “sexual intercourse with a female, not his wife without her consent”. For the husband, this was “a license to rape” — a protection against prosecution for raping their wives.⁴ The idea of “irrevocable implied consent” served as the foundation for the marital rape exemption. According to this theory, a woman’s implicit agreement to engage in sexual activity is assumed to be irreversible once she marries a man.⁵ The common law doctrines that a woman was her husband’s property and that her legal existence was “incorporated and consolidated

³ The Constitution of India, 1950.

⁴ Indira Jaising, ‘*Marital Rape in India: An Exploration of Legislative and Judicial Initiatives*’ (2004) 12 J Gender Socy and L 315.

⁵ Bhavish Gupta, Meenu Gupta, ‘*Marital Rape: Current Legal Framework in India and the Need for Change*’ (2013) 1(1) GJLS 16.

into that of a husband” provided other conventional defence for the marital exemption.⁶

SOCIO-LEGAL ASPECT OF CRIMINALIZING MARITAL RAPE

- **Human Rights Perspective:** The criminalization of marital rape is a human rights issue. It has been recognized by the Universal Declaration of Human Rights that every human being has the right to be free from cruel, inhuman, or degrading treatment, including torture. This right is violated by marital rape, which is why it needs to be made illegal in order to protect victims and uphold their rights.⁷
- **Legal Perspective:** Legislative amendments are necessary for marital rape to be made an offence in India. Currently, non-consensual sexual intercourse between a husband and wife is excluded from the definition of rape, except in the case of a minor bride. It is necessary to amend this section to recognize that having sexual intercourse without consent between spouses can also amount to rape.⁸
- **Social Perspective:** The institution of marriage is considered sacred in India, and the idea of marital rape is often viewed as a Western invention in conflict with Indian beliefs. Discussing about sexual violence in the context of marriage has a heavy societal taboo. Consequently, Public intervention is necessary to raise awareness of the prevalence and detrimental effects of marital rape.⁹
- **Gender Justice Perspective:** Marital rape is a type of violence that is motivated by gender and reinforces the disparity in power between men and women. It is common for women to believe that their permission is irrelevant and that they should yield to their husbands’ sexual demands. Making marital rape an offence would contribute to eliminating this power disparity and advancing gender equality. Since it acknowledges that sexual assault against women within the institution of marriage is a serious offence, the criminalization of marital rape is a significant step towards gender justice. It expresses the notion that sexual violence

⁶ Anne Dailey, *‘To Have and to Hold - The Marital Rape Exemption and the Fourteenth Amendment’* (1986) 99 Harv L Rev 1255.

⁷ Jainendra Kumar Sharma, *‘An Analysis of the Socio Legal Aspects of Criminalizing Marital Rape in India’* (2023) 3(1) Vishwakarma University Law Journal.

⁸ *ibid.*

⁹ *ibid.*

against women is not acceptable and that women have the right to bodily and sexual autonomy, even within the institution of marriage.¹⁰

- Psychological Perspective: The victim of marital rape may experience serious mental health issues such as post-traumatic stress disorder, anxiety, and depression. Marital rape victims frequently endure silent suffering because they fear societal disgrace or partner revenge. Making marital rape a crime will give victims a legal recourse and motivate them to get assistance.¹¹

INDIAN LEGAL FRAMEWORK

Rape has been defined under Section 375, Indian Penal Code¹² (hereafter referred to as “IPC”) as - having sexual intercourse with a woman in a number of situations, such as when it’s done against her will, without her consent (for example, by compulsion, deceit, or misrepresentation), or when she’s intoxicated, dishonest, or mentally ill. In addition, if the victim is a woman under the age of 18, it is considered rape. Moreover, lack of physical resistance is immaterial and has been expressly laid down in the section that the same cannot be regarded as consent.

After the Nirbhaya incident, the J.S. Verma Committee was established to bring reforms in criminal law. The Committee recommended the elimination of the marital rape exception in section 375, IPC as it gives immunity to the offender in case of marital rape, however, this suggestion was not taken forward. The main essence of this offence is the lack of consent but the matrimonial relationship is exempted from such a serious offence as long as the wife is not a minor.¹³ This exemption creates an unjust and arbitrary difference among unmarried girls, married underage girls and married major girls. Consequently, this exemption infringes the principle laid down in Articles 14, 15 and 21 of the Constitution¹⁴. If we remove the difference created by the marital rape exemption, all the wives will be subjected to section 375.

A bare reading of Section 375, IPC highlights the tradition that a girl is devoid of her bodily autonomy and how her husband has absolute authority over her body by permitting him to

¹⁰ *ibid.*

¹¹ *ibid.*

¹² The Indian Penal Code, 1860.

¹³ Satish Kumar Mishra, ‘Exploring Concerns Associated with Marital Rape in India: An In-Depth Legal Analysis’ (2023) 12(10) Eur Chem Bull 4705.

¹⁴ The Constitution of India, 1950.

engage in intercourse without the consent of his wife. The Legislature has time and again amended the provision regarding legal age for marriage and for giving consent. Presently, a girl below the age of 18 years cannot get married or give her consent, but the required legal age for consent in the case of a married girl is just 15 years. This is, in itself, contrary to the marital rape exemption as being violative of the rights of young girls.¹⁵

Taking into account the multilateral agreements (for example the Convention on the Rights of the Child and the Convention for the Elimination of all Forms of Discrimination Against Women), the text of the provision regarding marital rape suggests that child marriage is permissible, and hence this provision is violative of these multilateral agreements. Moreover, as discussed earlier, they are infringing the rights provided under Articles 14 and 21 of the Indian Constitution.¹⁶ Besides, the marital rape exemption displays internal inconsistency and also is in inconformity with the other prevailing laws.

Legality of the Exemption

The marital rape exception creates an arbitrary difference between a married girl and an unmarried girl as it implies that if a husband coerces his wife into sexual intercourse then such a rape will not amount to an offence, whereas an unmarried girl is given protection by the law in cases wherein she is raped by a man. As there is no connection between marital status and any implied consent for such acts, it can be contended that marriage alone cannot be taken as implicit consent for a woman to have sex with her husband. The exemption creates a distinction which is violative of Article 14 due to its arbitrary and discriminatory nature, in contravention to the Multilateral Agreements to which India is a signatory, and since it is not in the best interest of a married minor girl. Indian Constitution provides Fundamental Rights including the Right to Life, encompassing the freedom to grow into a healthy, intellectual and financially independent woman. Every female holds equal rights as enshrined in the Constitution and no law should be construed in a manner that violates the constitutional rights of a female.

Convention on the Elimination of all Forms of Discrimination Against Women (hereafter referred to as “CEDAW”) highlights the need to prevent child marriage and determines the minimum required age for marital relationships. As a signatory, India is bound to criminalize child marriage and take all the necessary actions to stop it. India has ratified the Convention on

¹⁵ Satish Kumar Mishra (n 11).

¹⁶ The Constitution of India, 1950.

the Rights of the Child (hereafter referred to as “**CRC**”) and the International Convention on the Elimination of all Forms of Racial Discrimination (hereafter referred to as “**ICERD**”) which states that non-consensual intercourse between a husband and a minor wife constitutes an infringement of her human right to liberty and dignity.

Indian statutes like Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter referred to as “**JJ Act**”), the Protection of Women from Domestic Violence Act, 2005 (hereafter referred to as “**PWDVA**”), the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as “**POCSO**”), and the Prohibition of Child Marriage Act, 2002 recognize that when sexual advances are made towards sexually immatures, physical and mental harm is caused to them.¹⁷ POCSO explicitly mentions that a girl below the age of 18 years cannot give her consent for sexual activities. Furthermore, POCSO also defines “penetrative assault” and outlines the aggravated version of it, even within a marriage. So, if the wife is between 15 to 18 years of age, the husband won’t be guilty of raping his minor wife under section 375, IPC, but will be guilty of aggravated penetrative sexual assault under POCSO.¹⁸

Even worse, the law’s contradiction is evident when it comes to assuming consent from girls who are legally incapable of giving it and dismissing the lack of consent from legally competent women. As per the Criminal Law (Amendment Act) of 2013, consent is defined as a clear and voluntary agreement for a particular sexual act. It excludes sexual encounters with other people and in case of subsequent acts. Thus, consent to engage in any kind of sexual activity is not always implied by marriage. Besides, PWDVA has defined “domestic abuse” as sexual abuse and states that such an act degrades women. In this manner, sexual intercourse in the absence of any consent falls under this definition, having the same effect on both, married as well as unmarried women, irrespective of their age. Ironically, IPC punishes husbands for offences like outraging women’s modesty and harassment. Interpretation of such provisions of IPC results in the legalization of marriage with a minor girl since it does not include non-consensual sexual intercourse with a minor wife as rape. This supports the adverse impacts of child marriage on minor brides, their children, and the community at large.

This lacuna was dealt with by the Supreme Court in *Independent Thought v Union of India and*

¹⁷ Satish Kumar Mishra (n 11).

¹⁸ A Tarafder, A Ghosh, ‘*The Unconstitutionality of the Martial Rape Exemption in India*’ (2020) Oxford Hum Rts Hub J 202.

*Anr*¹⁹. The 2013 Amendment of Criminal Law²⁰ had amended the provisions of Section 375 and consequently, the age of consent was increased to 18 years. However, the Legislature had failed to go through the exceptions of the said section which states that “sexual intercourse by a man with his wife of age 15 or above is not rape”. The main aim behind the amendment act was to bring IPC’s provisions in consonance with the JJ Act, POCSO and Prevention of Child Marriage Act, 2006. In all these Acts, the legal age is defined as 18 years and above. This anomaly led Independent Thought, a child rights organization, to file a PIL in the Supreme Court of India, challenging the constitutionality of marital rape exemption. The court, for the first time, recognized marital rape and held that even in the case of marriage, any sort of sexual intercourse with a minor, results in rape. It further observed that the exception was an infringement of the right to life, which protects one’s dignity, autonomy and safety. However, in order to harmonize the marital rape exception with the main provision, the court held that the exception should be read as “sexual intercourse with the wife above 18 years of age will not be rape”²¹. The court held that within the framework of Article 21, a woman’s right to life encompasses her ability to grow into an independent, self-sufficient adult in terms of her physical, mental, and financial development. This verdict by the Supreme Court leaves adult married women vulnerable in cases of non-consensual sexual intercourse with their husbands. The justifications given by the Supreme Court to declare marital rape exception as violative of fundamental rights should be expanded to include adult women and also men to ensure that the laws are gender neutral since equality should be maintained and the dignity of an individual should be given due importance in a relationship.

Another argument is that the exception of marital rape denies a married adult woman a right to refuse to take part in a sexual activity just because of their marital status. This is an infringement of Article 21. The central issue with marital rape is the under-reporting of such cases and prosecution and addressing of marital rape due to legal drawbacks. In addition, looking at specific cases and the legal response to marital rape highlights broader legal and societal concerns about consent, gender equality, and the safeguarding of a person’s bodily autonomy in a marital relationship. The Supreme Court emphasized the necessity for amendments in the laws pertaining to sexual offences, such as marital rape, in *Sakshi v Union of India*²². The court

¹⁹ AIR 2017 SC 4904.

²⁰ Criminal Law Amendment Act, 2013.

²¹ *Independent Thought v Union of India and Anr*; AIR 2017 SC 4904.

²² (2004) 5 SCC 546.

observed that the government should take action to amend laws to address issues like marital rape and that women's rights were human rights.

In contrast to several countries, India lacks a specific legal framework that addresses marital rape as a distinct criminal offence. Rather, it is included in the more general category of marital sexual offences. The above-cited cases have played an important role in shaping the legal perspective on the issue of marital rape.²³

The Delhi High Court's Division Bench had delivered a split verdict in the case of *RIT Foundation v Union of India*²⁴. The case dealt with the validity of the marital rape exception as provided in the IPC. The Bench referred to various Supreme Court cases like *Navtej Singh Johar v Union of India*²⁵ to apply the test of "causal connection" while deciding on the issue regarding the exemption being violative of Article 14. The bench explained the test in the case as: "237. Therefore, the Court should eschew the proclivity of over-emphasizing the test of classification if Article 14 is to be applied with full vigour; which postulates affording equal protection of the laws to persons who are placed in similar and like circumstances. While doing so, the court should examine closely how the impugned statute/provision operates on the ground i.e. what is its real effect and impact on the persons who come within the sway of the statute/impugned provision. In doing so, the court should disregard remote and indirect consequences that may entail by virtue of the impugned statute/provision." By applying the same, the Court held that the law doesn't apply even-handedly to women who have similar circumstances and is bad in law as it violates Article 14. The Bench did not apply the test of reasonable classification to strictly scrutinize the nature of the rights that are being infringed by the exception provided in Section 375, IPC. Justice Harishankar held that the provision is valid and is based on "intelligible differentia", in contrast to Justice Rajiv Shakti who declared the provision to be unconstitutional and ordered the exemption to be struck down. Marital rape is still considered rape, according to Shakti J., and the challenged exemption under the IPC violates the wife's rights to equality, life, and freedom of expression.²⁶ He has further observed that the impugned exception does not pass the test of intelligible differentia, i.e., difference capable of being understood, accorded to Article 14's

²³ S Navas, 'Marital Rape: A Hideous Countenance of India's Criminal Justice System', (2021) 4 Intl JL Mgmt & Human 110

²⁴ 2022 SCC OnLine Del 1404.

²⁵ (2018) 10 SCC 1.

²⁶ Tishya Saran, *Analysis: Delhi High Court's Split Verdict on Marital Rape*, LawBeat (2022), <<https://lawbeat.in/news-updates/analysis-delhi-high-courts-split-verdict-marital-rape>>.

equality test. It appears from the findings that if this exception is maintained within a marriage, rape is not seen as “real”. To substantiate the same, he observed that, “Sex-workers have been invested with the power to say ‘no’ by the law but not a married woman. In a gang rape involving the husband of the victim, the co-accused will face the brunt of the rape law but not the offending husband”. Furthermore, J Shakti has found that arguments pertaining to “conjugal expectations” are unpersuasive. He claims that although having sex is a reasonable expectation in a happy marriage, a man cannot claim unrestricted access to his wife or a “marital privilege” over her. Justice Harishankar, on the other hand, opined that one of the inescapable occurrences of a marital relationship is a sincere expectation of sex, setting it apart from all other male-female relationships.²⁷ Both justices gave permission to seek an appeal with the Supreme Court, acknowledging the important legal ramifications of the case.

A fresh petition was filed in the Supreme Court challenging the exception, by Ms. Ruth Manorama. In January 2023, these petitions were clubbed together and the matter is still *sub judice*.²⁸

CHALLENGES RELATING TO MARITAL RAPE

India faces an extensive difficulty in dealing with marital rape, which has legal, social, and cultural implications. Social norms, patriarchy, power dynamics, customs of society, and traditional gender roles are some of the profoundly ingrained socio-cultural elements that impact marital rape. Combating and eliminating marital rape requires an understanding of and sensitivity towards these factors. In countries such as India, gender roles and patriarchal norms promote an unequal power dynamic, legitimizing sexual violence and undermining women’s autonomy and consent. Survivors are silenced and discouraged from seeking assistance by societal stigmas and victim-blaming.²⁹

First and foremost, the primary challenge is the lack of a consistent and clear legal definition of marital rape. Although there has been progress in identifying specific types of sexual violence in marriage, it is challenging to successfully prosecute offenders and safeguard

²⁷ S Iram, SK Patri, ‘*Is Marriage a Contract for Sexual Slavery? A Study on Marital Rape*’ (2023) NUALS LJ 60.

²⁸ *Hrishikesh Sahoo v State of Karnataka*, SLP (Cr) 4063-4064 of 2022.

²⁹ Asad Naushad Khan, ‘*Marital Rape: Understanding the Complexities and Addressing the Silent Epidemic*’, Juris Centre (2023) <<https://juriscentre.com/2023/08/24/marital-rape-understanding-the-complexities-and-addressing-the-silent-epidemic/>>.

survivors in the absence of a comprehensive classification. In cases of marital rape, this legal ambiguity may result in uneven verdicts and uncertainty. Secondly, societal prejudice and misconceptions surrounding marital rape are common in India. Many people mistakenly think that consent is given when two people get married, which can cause instances to go unreported. Changing social norms and bringing awareness to the idea of marital rape are important albeit exceptionally challenging tasks. Effectively resolving the issue requires eliminating these social barriers and educating the public about the significance of consent in a marital relationship. The under-reporting and lack of documentation of cases of marital rape represents the third major challenge. Many survivors opt not to inform authorities about their experiences because of social constraints, fear of retaliation and a lack of assistance. In addition to maintaining a culture of silence, this lack of reporting hinders attempts to determine the actual scope of the issue. Developing successful policies and interventions becomes difficult in the absence of reliable data and documentation.

Furthermore, survivors of marital rape still have limited access to legal remedies, even with recent developments in the law. Survivors may be denied justice due to a lack of specific laws addressing marital rape and difficulties in implementing those that do exist. Legal constraints can make it difficult to prove marital rape cases in court, such as evidentiary challenges and the difficulty of establishing a lack of consent in a private setting. These obstacles may deter survivors from going to court and demanding justice. Lastly, legislative reform and political activism are also necessary for addressing marital rape in India. Although there have been petitions for and discussions about modifications to the law, progress can be hindered by conflicting agendas, a hesitancy to question established practices, and arguments concerning the limits of marital privacy. Moreover, even in cases where laws are in place, uneven application of the law, and the attitude of law enforcers and the court can all be significant obstacles to survivors seeking justice. A thorough and coordinated effort including legal reform, education initiatives, assistance programs, and a cultural shift towards acknowledging the rights and autonomy of persons within marriage is required to overcome these obstacles.

CONCLUSION

In summary, social structures, judicial systems, and individuals, all need to take a thorough and humane approach to addressing the problem of marital rape. In order to remove the obstacles that support this type of sexual abuse, it is essential to recognize that consent is a continuous

process rather than a given in marriage. It takes proactive measures to address the power dynamics that are present in many marriages that are impacted by gender roles, cultural norms, and societal expectations in order to foster an atmosphere that is conducive to candid communication.

While criminalizing marital rape through legislation is a significant step in the right direction, it is insufficient on its own. To truly influence change, implementation, enforcement, and continual education are all equally important. It is necessary to launch public awareness campaigns, educational initiatives, and support systems in order to eliminate adversely impacting misinformation, give survivors access to resources for recovery, and advance a consent-and respect-based culture.