
MARITAL RAPE THROUGH THE LENS OF JUDICIARY IN INDIA

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ABSTRACT

It's ironic that people consider keeping women secure in streets, marketplaces, and everywhere else but other than their own homes. Marital rape is a criminal act committed within the context of marriage against married women, however, it is yet to be recognized as an unlawful act by both the society and legal systems including India. The legislature does not believe it to be necessary to discuss. However, Indian judiciary tried to discuss this heinous crime against women and made progressive observations upholding the dignity and bodily integrity of women in various judicial decisions. This research study attempts to focus on the position of marital rape law at global and national level along with the important judgment of various High Courts and Apex Court of India on marital law exception enshrined in Indian Penal Code (**Bharatiya Nyaya Sanhita 2023**).

Keywords: Marital rape, bodily integrity, judicial decisions etc.

1. INTRODUCTION

The advancement of women in every field of human activity in recent era is appreciable, however, Women in 21st century are still fighting for their most basic rights; including the right of choice. A woman is not even allowed to take decisions about her body, motherhood is forced on her, and many countries have restrictive abortion laws. In a free and equal environment it is requisite that a woman should be given freedom to decide about her marriage or having children, this kind of freedom is ideally consider as bench mark for a civilized society. However, till date, crime like marital rape is not considered as crime in many countries including India.

Marital rape, or spousal rape, stands for the act of engaging in sexual activity with one's partner without her consent which means a husband is allowed to force his wife to engage in sexual activities with him and law will not consider this particular force as rape unless the wife is less than 15 years of age which has now been raised to the age of 18 in **Bharatiya Nyaya Sanhita 2023** in India. Section 375 of the Indian Penal Code, 1860 (now **Section 63 of Bharatiya Nyaya Sanhita 2023**) deals with the provisions relating to rape to which Exception 2 states that when a man indulge into sexual activities with his partner, and the partner being above the age of eighteen, is not rape. The **exception 2 of Section 63 of Bharatiya Nyaya Sanhita 2023** not only violates the principle of equality as enshrined in Preamble, Article 14 and Article 21 of the Indian Constitution guarantees the right to life and personal liberty but also denies women the right over her body.

The exception 2 of Section 63 undermines consent of a women based on her marital status, however;

“A woman is woman before and after marriage, and a rape is rape, it does not matter how the victim and assaulter are related to each other”.

A number of cases have been filed in the court challenging the validity of exception 2¹. However, the Apex court is yet to deliver its final verdict on marital rape, meanwhile, in the famous marital case of RIT Foundation v. Union of India², Delhi High Court on May 11th gave a verdict in marital rape case where one judge stated that the exception 2 of Section 375 of the

¹ Section 63 of Bharatiya Nyaya Sanhita, 2023

² 2022 SCC OnLine Del 1404

IPC is unconstitutional. The central government defended the exception and said that the striking of the exception 2 of Section 375 may lead to the possible misuse of the provision by wives and can make the institution of marriage dysfunctional.

2. GLOBAL SCENARIO OF MARITAL RAPE

There was a concept of charge for assault in case of any physical abuse, however, there was no concept of marital rape within a marriage because it was presumed that once a man and woman are married, sexual intercourse is being sanctioned both socially and legally and there is an implied consent from both the side. Forceful intercourse with the wife was in existence in every society across the world and the society did not recognize this as an offence and so there was no concept of marital rape. The reason for the existence of marital rape is unequal status of women and men in a marriage, once a marriage is solemnized; wife is being treated as the property of her husband and as such subservient to him. This type of recognition comes from the very notion that women are inferior to men and that is why women were considered as *chattel* in almost all the religions of the world.

England

According to British law, marital rape is an act of sexual assault that violates the Sexual Offences Act of 2003. Prior to 1992, marital rape was not unlawful, and a husband was able to enforce conjugal rights without the wife's assent. In 1991, the House of Lords comprised of five lords were presented with the case *R v. R*³, in which it was questioned whether a man can rape his wife.⁴

The fact in the case of *R v. R* is that the appellant married on August 11, 1984, and on October 21, 1989, she moved in with her parents leaving her matrimonial home owing to matrimonial disputes, and later both the husband and wife showed their intention to divorce. On November 12, 1989, the appellant entered his wife's residence and sought to have sexual relations with her against her will, assaulting her when she resisted. The main issues that arose in that case were can a husband rape his wife? Does marriage imply irrevocable sexual consent without

³ (1991) UKHL 12

⁴ Sonal Garg and Nivedita Singh, "Marital Rape: Historical and Comparative Analysis", My Lawman Socio Legal Review, Vol. 2, Issue 1 (2020).

further consent from wife?⁵

The Court found that the Common Law does not have any specific provision for marital rape. However, the House of Lords held him guilty for raping his wife. The spouse was given a three-year prison sentence for an attempt to rape and an additional 18 months sentence for sexual assault. Prior to the ruling in *R v. R*, the husband was not prosecuted for the offence of marital rape. This decision is a prime example of the development of a common law system in response to social, cultural, and economic changes. Prior to this verdict, marital rape was considered as a domestic violence. Now, if a person is found liable for marital rape, he is likely to receive a prison sentence ranging from four to nineteen years, depending on the circumstances of the case. Life imprisonment is the maximum punishment that can be given in such cases.⁶

Australia

The provisions of family law in Australia did not provide any remedy in case of forceful sexual activity by the husband towards his wife except the right to abandon him and live in peace but Section 73(4) of the Criminal Law Consolidation Act, 1953 provides “No person shall, by reasonably of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.” Few important factors including the social movements by the South Australian women, the case of *D.P.P. v. Morgan*⁷, decided by the English House of Lords and the report of the Mitchell Committee led to the enactment of law in Australia removing the privilege of not being prosecuted in case of forceful sexual intercourse by the husband with their wives.⁸

In 1975, the Mitchell Committee was established to propose amendments to the laws regarding sexual offences and rape. The report stated, “Consent is given for sexual relations at the time of marriage, cannot be revoked during the period of the marriage, is an age old concept which is not in accordance with contemporary thought. In today's society, it is incorrect to assert that a wife must have sexual relations with her spouse whenever he desires, regardless of her own wishes and consent”. Following the recommendations made by the Mitchell Committee, a substantive and procedural reform to the law of rape was made through the introduction of the

⁵ ibid

⁶ ibid

⁷ [1975] UKHL 3, [1976] AC 182

⁸ D Chappell; P Sallmann, “Rape in marriage legislation in South Australia”, *Australian Journal of Forensic Sciences* Volume: 14 Issue: 3, (March 1982) Pages: 52-69.

Criminal Law Consolidation Amendment Act, the Justices Amendment Act, and the Evidence Amendment Act in 1976. Depending on the severity of the offence, marital rape is punished with varying degrees of imprisonment, with a maximum of 15 years, unless the victim is under 15 years of age, in which case the maximum is 20 years. People, who commit these offences resulting in the death of victims, face a maximum sentence of 30 years in prison.⁹

U.S.A

Each of the fifty federal jurisdictions in the united jurisdictions has its own federal statutes and before the 1970s, marital rape was exempted from the various state rape laws in the United States. In the seventeenth century, Chief Justice Matthew Hale established irrevocable consent in marriage by stating,

"The husband cannot be held liable for a rape committed without the aid of a third party against his legitimate wife, for by their shared wedding assent and submission, the wife has given herself in kind unto the husband, from whom she cannot withdraw."

Emphasis added¹⁰

Thus, it shows that the concept of marital rape was absent in US jurisprudence and once a marriage is solemnized women were treated as property of her husband.

The Feminist movement of the 1970s resulted in favorable alterations to the law. The movement began with a different perspective, such as the consequences of unwanted marital intercourse that produces a child. This movement's support was based on moral and legal considerations. Eventually, the motivation shifted to the inherent rights of ownership and control over their own body.¹¹

In 1976, Nebraska was the first of the fifty states to criminalise marital rape. In all fifty states of the United States of America, marital rape became a crime by 1993. In South Carolina, those who have committed a first degree crime of rape, including marital rape, are subject to a maximum thirty-year penitentiary sentence. At the same time, those who commit assault and

⁹ Supra note 4

¹⁰ M. Hale, *Historia Placitorum Coronae* 636 (1736).

¹¹ *ibid*

battery in the first degree face a maximum of ten years imprisonment. The punishment for rape and marital rape is the same, regardless of the relationship between the perpetrator and victim.¹²

3. STATUS OF MARITAL RAPE IN INDIA

In India, marital rape is not considered a crime, and the husband is permitted to engage in forced sexual relations with his wife, provided that the wife is not below the age of 18. Despite the fact that the Domestic Violence Act of 2005 included provisions to protect women in their homes and provided effective remedies for the various women victims, it has not included marital rape in its scope and provides only civil remedies for the same. As discussed previously, many countries have criminalized marital rape without considering the relationship between men and women. However, in India, it is believed that marriage itself provides consent to sexual relations after marriage, and the consent itself is the most significant distinction between rape and sexual relations.

In *Saretha v. T. Venkata Subbaih*¹³, the main issue involved wasS “whether Section 9 of the Hindu Marriage Act, 1955 which is relating to Restitution of conjugal rights constitutionally valid”, it was determined that the rights and responsibilities of marriage are not the provisions of any private contract between two individuals; otherwise, it would be comparable to creation and dissolution. It was further observed by the court that the Marital Association does not compromise privacy guaranteed under Article 21 of the Indian Constitution and reproductive choice is integral part of right to privacy.¹⁴

Section 375 of the Indian Penal Code (Section 63 of Bharatiya Nyaya Sanhita 2023) criminalizes the act of rape. It provides a broad definition that encompasses both sexual intercourse and other forms of sexual penetration, such as oral sex, within it.¹⁵ However, Exception 2 to Section 375 IPC (Exception 2 to Section 63) provides that if a man engages in sexual intercourse with his own wife, who is not under the age of eighteen years will not be considered as rape”. Thus, under Indian law, a wife who is raped by her spouse has no criminal recourse once she crosses the age of 18. In 1860, the Indian Penal Code (IPC) came into effect, with the exception for marital rape applicable to women over the age of ten. In 1940, the IPC

¹² Ibid

¹³ AIR 1983 AP 365

¹⁴ Sonal Garg & Nivedita Singh, Marital Rape: Historical and Comparative Analysis, My Lawman Socio Legal Review, Vol. 1, Issue 2 (May 03, 2022).

¹⁵ The Indian Penal Code, 1860, Section 375 as amended by the Criminal Law Amendment Act, 2013.

is amended to make the marital rape exception available to women above 15 years of age. In October 2017 in the case of *Independent Thought vs. Union of India*, the Indian Supreme Court raised the minimum age to 18, following the same the recent enactment *Bharatiya Nyaya Sanhita, 2023* made available the marital rape exception to women above the age of 18. However, the subsequent provision, section 376B of IPC (Section 67 *Bharatiya Nyaya Sanhita 2023*), somewhat fixed the damage done by retaining the exclusion by making it offence for a man to have sexual intercourse with his wife, who is living separately after a legal decree, without her consent.

4. MARITAL RAPE AND THE INDIAN JUDICIARY

The Supreme Court of India has decided numerous cases upholding the privacy, dignity and bodily integrity of women. The case of *State of Maharashtra v. Madhukar Narayan Mardikar*,¹⁶ recognized the right to bodily integrity in the context of privacy, stating that no one has the right to violate the person of another, including an unchaste woman. The Supreme Court affirmed women's right to withdraw herself from sexual activity at any time in the case of *Suchita Srivastava v. Chandigarh Administration*¹⁷ and it was observed that “rape is not only a crime against the body of woman, but it is also a crime against the entire society”. The Supreme Court stated in *State of Punjab v. Gurmit Singh*¹⁸, that “a murder destroys the physical body of his victim; a rapist degrades the very soul of the helpless female.” Then, later in the year 2017, privacy has also been recognized as a fundamental right inclusive of the right to exercise decisions with regard to intimate relations of all citizens in *K.S. Puttaswamy v. Union of India*¹⁹.

One of the most frightening cases of marital rape is the *Queen-Empress vs. Hari Mohan Maiti*,²⁰ popularly known as Phulmoni Devi case, where an eleven-year-old bride named Phulmoni Devi tragically lost her life when her husband, then in his forties, attempted to consummate their marriage. Due to the lack of a provision covering rape in a marriage, the husband was found not guilty, but the case ultimately led to the addition of an age proviso to the Indian Penal Code, of 1860.

¹⁶ AIR 1991 SC 207, (1991) 1 SCC 57

¹⁷ (2009) 9 SCC 1

¹⁸ 1996 AIR 1393 1996 SCC (2) 384

¹⁹ Writ Petition (Civil) No 494 Of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

²⁰ (1886) ILR 8 All 622

Moving forward, following the Nirbhaya case, on 23rd December, 2012, the Verma Committee, was constituted which recommended criminalizing marital rape stating that it abrogates the right to live a dignified life of women. The Committee also observed that “*women do face incidents of discrimination and violence in the household and workplace and many special and protective pieces of legislation have been enacted to protect a woman from such unwelcome incidents, and penal consequences have been provided for the safety of women, but no laws explicitly prohibit a man from raping his legally wedded wife except in exception stated in Section 375 and section 376B of the Indian Penal Code, 1860.*”

Then, in 2013, a child rights organization, Independent Thought filed a writ petition before the Supreme Court against Exception 2 to Section 375 of the IPC (*Independent Thought vs. Union of India*²¹ which immunizes a husband’s sexual intercourse with his wife between the age groups of 15-18 years with or without consent, since the consenting age for all other instances of sexual intercourse is 18. In this case, the Supreme Court narrowed the scope of Exception by rising the age of consent from 15 years to 18 years for marital sexual intercourse. The case brings to the notice of the Supreme Court the superficial distinction created by the exception between a married and unmarried girl, which has no rational nexus to the objectives of the provision and as such it is against the principle of the right to equality enshrined in Article 14 and right against discrimination enshrined in Article 15 of the Constitution and also it is violative of Article 21 as it undermines the basic human dignity of the individual. However, the issue of marital rape of women above the age of 18 years was excluded from its judicial notice.

In 2014, in the case of *Arnesh Kumar v. State of Bihar*²², the Supreme Court of India observed that “*it is the state’s fault that it is still unable to criminalize the acts of sexual assault and rape that happen with a wife, a woman and above all a human who has been promised a right to live a life with dignity.*”

In 2018, the Gujarat High Court made a remarkable observation in *Nimesh Bhai Bharat bhai Desai v. State of Gujarat*,²³ that “*husbands need to be reminded that marriage is not a license to forcibly rape their wives*”. It also opined that the faith and confidence in marriage has been severely damaged as a result of this heinous crime. The effects of decriminalization have been

²¹ AIR 2017 SC 4904

²² Criminal Appeal No. 9127 of 2014

²³ R/CR.MA/26957/2017

disproportionately felt by women. The court essentially reached the conclusion and made the observation that the husband does not own his wife's body and that the act of marriage does not violate the woman's human rights or the autonomy of her body.

In the case of *Dilip Pandey v. State of Chhattisgarh*²⁴, the complainant claimed that the applicant and his family had harassed, mistreated, and physically assaulted her in order to get a dowry. The husband had also engaged in sexually inappropriate behavior towards the plaintiff on many occasions. After receiving a complaint from the wife, police investigated and ultimately filed charges against the applicants under sections 498-A, 377, 376, and 34 of the Indian Penal Code. After hearing from both sides' counsel, the trial court filed the above sections against the petitioners. The petitioners thus prefer this criminal revision to the Trial court's ruling. The court based on the judgment given in *Nimesh Bhal Bharat Desai vs. State of Gujarat*²⁵ and by examining Section 375 and the exception to it, "held that any sexual act by a legally wedded husband (the wife not being under 15 years of age) is not a rape."

Hrishikesh Sahoo vs. State of Karnataka,²⁶ in this case, the wife accused her husband, Mr. Hrishikesh Sahoo, of several offences under the Indian Penal Code, 1860 (IPC), including rape. In addition, he was charged with sexual assault in connection with the Protection of Children from Sexual Offences Act, 2012 (POSCO) for assaulting their daughter. Mr. Sahoo filed a writ petition at the Karnataka High Court pleading all the charges against him to be dropped as the case falls under Exception 2 of Section 375 of IPC. However, the petitioner's plea was rejected relying on a 2013 report authored by the Justice J.S. Verma Committee which recommended deleting the marital rape exception from Section 375 to restore the principles of Constitutional morality into our penal laws, in the words of Karnataka High Court "institution of marriage does not confer, cannot confer and should not be construed to confer my special male privilege or license for unleashing of brutal beast". Although the case before the Karnataka High Court was not challenging the constitutional validity of the exception under Section 375 of the IPC nor did the court strike down the said exception, the court on the other hand examined only a given situation and had sustained the charges of rape on the husband. Mr. Sahoo then filed a Special Leave Petition at the Supreme Court of India on May 10, 2022, challenging the High Court's decision on the ground as to how can the Karnataka High Court pronounce a judgment against the expressed words in the Penal Code. The Court held that the exception was regressive

²⁴ CRR/117/2021

²⁵ Supra note 23

²⁶ Criminal Petition No. 5515 of 2018

and violated the right to equality by treating the wife as subordinate to her husband. The High Court held, “no exception under law can be so absolute that it becomes a license for the commission of a crime against society”.

Meanwhile, on May 11, 2022, a bench comprising of Justices Rajiv Shakti and C. Hari Shankar, delivered a split verdict in the case *RIT Foundation vs. Union of India*²⁷, Justice Shakti stated that the exception was abridging the bodily autonomy and expression of a woman and Justice Shankar was of the view that engagement in consensual or non-consensual sexual relations within marriage is legitimate citing the exception to rape legal. Both Judges granted permission to the parties to appeal the decision at the Supreme Court. This is a case of 2015 where a petition has been filed in the Delhi High Court by RIT Foundation, All India Democratic Women’s Association (AIDWA) and two individuals to criminalize marital rape. In January 2016, the Delhi High Court issued a notice asking the Centre for its stand regarding the petition filed challenging the validity of Exception to Section 375. The Central Government refused to accept the existence of the concept of marital rape in the context of Indian society reason being India considers marriage as a sacrament union between two individuals. In August 2017, the Centre avoided the question of criminalizing marital rape again by stating that marital relation is of private nature and recognizing marital rape would lead to excessive interference with marital relationship and also it will destabilize the institution of marriage and it is difficult to collect the evidence hence there are chances of misusing the law by the wives.

In 2022, a fresh petition was filed at the Supreme Court challenging the exception to the provision of marital rape. In January, 2023 a Bench was constituted which clubbed all those petitions and the hearing was scheduled in the month of March, 2023 but the Supreme Court kept deferring the hearing on these pleas and it’s already 2025 but the Supreme Court is yet to hold hearing on marital rape and deliver its verdict on the same.

5. CONCLUSION

The assent and wish of an individual constitute the foundation of a sexual act. Marriage is regarded as a sacred institution, with each religion regards it as a union between two souls. However, the institution of marriage cannot violate an individual's autonomy over her own body and it does not include forced intercourse in it. It cannot allow a man to engage in forceful

²⁷ 2022 SCC Online Del 1404

physical activity with his married wife simply because they are married; doing so would be an affront to her dignity, bodily integrity, and a flagrant violation of her fundamental human rights.

The concept of marital rape in marriage is difficult to comprehend by the society where the marriage is considered as a sacred institution. Moreover, the incidence of forceful sexual activity does not arise in a healthy, normal marital relationship, yet, in troubled relationships between husband and wife, the husband may use the supposed consent for sexual activity as a means of exacting vengeance on the wife. The point that should be emphasised is that marriage provides consent to engage in sexual relations, but does not take away women's right over her body. However, the state has not recognized this basic right of women over her body in any legislation and as such women are still fighting for their social-legal justice, women are denied of their most basic human rights including autonomy over their own body.

The government argues that the law of marital rape may also be misused by the wives and it would attack the sanctity of the marriage institution. However, the presumption of misuse of the marital rape law cannot be the reason for overlooking the gross violation of women's basic human right over her body and on these pretext women cannot be deny the fundamental right over their body. While only divorced women may file a complaint against their husbands for rape under the IPC, however, there is no remedy available for marital rape.

Initially the Judiciary also did not recognize the issue of marital rape; however, subsequently it developed the doctrine of marital rape and the judiciary paved the road for women to have control over their bodies by criminalizing marital rape through its various decisions. Yet, the judiciary has failed to convince the legislature for enacting the legislation on this matter; the only change the legislature has made is to raise the age requirement from 15 to 18. Though the husband's violent or non-consensual act of intercourse may entitle a wife to bring an action for criminal assault or injury or matrimonial relief, yet what is needed is the incorporation for the principle of liability for marital rape in our Penal Law. It is high time that India enacts a new law for criminalization of marital rape for victim above 18 years of age.

The discussion on marital rape is necessary for attaining true equality for married women because the lacuna in current criminal law in India undermines the Constitutional provisions that guarantee women with equality and autonomy. Across the globe, countries are making efforts to eliminate the outdated laws that permit marital rape. They are striving to recognise marital rape as a criminal offence and remove any exceptions to laws on sexual

assault and rape. Countries such as Australia, USA, Denmark, Sweden, Poland, and Norway have already implemented laws addressing marital rape, and many other countries are taking steps towards reforming their laws to make marital rape a criminal offence. However, India is yet to recognise the issue of marital rape. The provisions relating to marital rape should be analyzed through expertise research and should bring necessary changes regarding the same in order to protect and promote the socio-legal rights of women in India because women have the right to live and the right to live on their own terms. Feminism is not a pejorative; we should all be feminists as they say it's time for change, a meaningful change.

BIBLIOGRAPHY

Articles:

1. Rao Raveena Kallakuru & Soni Pradyumna, “Criminalization of Marital Rape: Understanding its Constitutional, Cultural and Legal Impact”, *NUJS Law Review*, Vol. 11, Issue 1 (2018).
2. Deep Purna, “Unveiling Marital Rape in India”, *Acclaims*, Vol. 3 (August 2018).
3. Dailey Anne, “To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment”, *Harvard Law Review*, Vol. 99, Issue 6 (April 1986).
4. Mehta Harshita, “Marital Rape and the Indian Legal Scenario”, *International Journal of Law Management and Humanities*.
5. Tarafder Agnidipto and Ghosh Adrija, “The Unconstitutionality of the Marital Rape Exemption in India”, *University of Oxford Human Rights Hub Journal*, Vol. 3(2), (2020).
6. Chappell D.; Sallmann P., “Rape in marriage legislation in South Australia”, *Australian Journal of Forensic Sciences*, Volume: 14 Issue: 3, (March 1982) Pages: 52-69.
7. Dr. P.K.Chaturvedi, A Legal History Of Marital Rape: The Erosion of Anachronism, *Indian Journal Of Law and Justice*.
8. Ishita Chandra, “Why Exception II of Section 375 of the Indian Penal Code needs to be declared unconstitutional”, *Manupatra* (November 17, 2022).

Websites:

1. <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/>
2. <https://www.firstpost.com/living/law-marital-rape-domestic-violence-act-reasonable-substitute-2223674.html>
3. <https://www.scconline.com/blog/post/2023/01/06/analysing-the-delhi-high-courts-approach-towards-presumption-of-constitutionality-in-marital-rape-case-rit->

foundation-v-union-of-india-a-case-comment/

4. <https://www.drishtias.com/daily-updates/daily-news-analysis/marital-rape-in-india-1>
5. https://www.legalserviceindia.com/legal/all_articles-48605-ananya-bhandari.html
6. <https://doi.org/10.53724/lrd/v4n3.03>