
BEYOND CIVIL RELIEF - A SOCIO-LEGAL ANALYSIS OF LEGAL GAPS IN CRIMINALIZATION OF MARITAL RAPE IN INDIA

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ABSTRACT

Despite increasing awareness of women's rights and autonomy under Indian Constitutional Law and the international legal order, the Indian Penal Code (IPC) continues not to criminalize marital rape. This essay is a critique of constitutional and legal injustices that have emerged as a consequence of Section 375 IPC's Exception 2, withholding equal protection against sexual violence for married women. Denial of criminal channels for sexual violence in marriage and refusal to define consent in marriage quite evidently are two definitional failures by the analysis, which also illustrates how the legal system remains bogged down by the antiquated assumptions of presumed consent and male privilege. The research also explores current legal trends through case law, policy reports, doctrinal analysis, and international human rights law norms. The case of *RIT Foundation v. Union of India*, which has once again placed the issue in the limelight. The paper contends that civil remedies under the Domestic Violence Act are inadequate and that Articles 14, 15, and 21 of the Constitution are being violated by not criminalizing marital rape. Based on this analysis, the paper calls for gender-sensitive legal reform that grounds all consensual sexual activity, including marriage, on consent and eliminates the marital rape exception.

Keywords: Marital rape, Exception 2, Section 375 IPC, Bharatiya Nyaya Sanhita (BNS) Section 63, consent, bodily autonomy, Indian Constitution, Article 14, Article 15, Article 21, domestic violence, gender justice, criminalization of marital rape, implied consent doctrine, *RIT Foundation v. Union of India*, *Joseph Shine v. Union of India*, *Independent Thought v. Union of India*, legal reform, women's rights, sexual violence in marriage, patriarchal law, constitutional rights, CEDAW, Delhi High Court split verdict, bodily integrity, judicial activism, legal gap, civil vs. criminal remedy, human rights law, law commission report, NFHS-5 data, coverture doctrine.

QUESTIONS RAISED/ISSUES:

How does marital rape being treated only as sexual abuse under civil and its failure to be criminalized affect the right to justice of married women? No definite definition of consent within marriage, assumed as implied consent, affects how Indian law addresses sexual abuse amongst spouses.

INTRODUCTION

Definition of marital rape

Sexual abuse is often regarded as a moral and public crime against family and society, contradictory to its actual sense of being a violation of individuals' bodily integrity. Many Latin American countries have revised their penal codes. For example, the Turkish Penal Code in 2004 defined sexual abuse as a 'crime against the survivor' instead of a 'crime against the moral customs and society', wherein morality and it being considered a societal issue was eliminated.¹

Rape, being the most common form of sexual abuse, is defined as non-consensual sexual intercourse between a man and woman through a coercive or illegal manner, which focuses on evidence of penetration. Marital rape falls under the same circumstances but in the context of a marriage, where the offender is the victim's spouse. In such cases, proving the lack of consent becomes essential, the burden of which is borne by the victims. In cases of minors, it is pre-assumed that consent does not exist as the law does not view this section of society capable of consenting to sexual intercourse. But in contrast, the law presumes consent to exist regardless if the offender and victim are married, which contradicts the idea of marital rape.²

Legal Contradiction in Indian Law.

Indian Penal Code – Section 375, Exception 2:

The IPC Section 375 defines rape as a sexual act carried out by a man that involves penetration of the penis, any object or any other body part into the vagina, mouth, urethra or anus of any woman, or causing her to do the same with him or any other person; also involves oral contact with her genitals or anal areas. This is considered rape when performed against her will, without her consent, when consent was obtained through threats of harm or death, when consent was

given under the false impression that the marriage was lawful, or when she was intoxicated, mentally unstable, or under the influence of drugs to fully understand the nature of the act. Under which, consent is defined as a clear, voluntary agreement conveyed by words, gestures, or any other straightforward form of expression. Consent cannot be assumed based solely on the lack of physical resistance.³

But there exist exceptions to this definition provided by law: First, no medical procedure or intervention qualifies as rape. Second, as long as the wife is not younger than fifteen, a man's sexual relations or acts with his own wife are not considered rape. This exception creates a legal gap between married and unmarried women and exempts non-consensual sex between a married couple from being criminalized.⁴

So, as IPC Section 375 suggests, non-consensual sex within a marriage is not rape due to Exception 2. But the Indian Constitution guarantees equality under Article 14 which 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. Further, as per Article 15 under the Indian Constitution, it restricts the State from discriminating amongst any citizen on the basis of their race, religion, caste, sex, or place of birth, ensuring equality and prohibiting discrimination based on gender. And in addition, Article 21 ensures right to life and property, including right to dignity, bodily autonomy and privacy. Considering the provisions guaranteed by the Indian Constitution under Articles 14, 15 and 21, is being contradicted under the IPC Section 375, where women are being ill-treated under Exception 2, which excludes them from legal protection against non-consensual sex solely based on marital status.⁵

Controversy and Ongoing Litigation:

The marital rape exception has been the most controversial and sensitive issue in the legal arena. The 2022 Delhi High Court judgment for *RIT Foundation v. Union of India* shaped the controversy's angle, where the bench gave a split verdict: Justice C. Hari Shankar upheld the marital rape Exception 2 mentioning legislative intent and concerns about misuse. On the other hand, Justice Rajiv Shakhder held that Exception 2 violates the right to equality, dignity and bodily autonomy.⁶ This contradiction led to judicial conflict considering societal background, preserving the traditional sanctity of marriage and implementing a consent-based legal system. It further led to the matter being referred to the Supreme Court, considering petitions challenging the constitutionality of the IPC Section 375 exception. The Central Government

yet needs to give out a concrete word rather than giving out repetitive extensions. The women's rights groups, lawyers, and survivors are all demanding the Court to fill out the gap between the criminal law and the constitutional rights guaranteed by the Indian law by criminalizing marital rape.

Methodology

This research follows a doctrinal methodology that examines the legal gap between criminal and constitutional law in the context of marital rape. The paper focuses on relevant laws concerning marital rape, particularly IPC Section 375 and its exception, and constitutional rights guaranteed under Articles 14, 15 and 21. Landmark judicial decisions under *RIT Foundation v. Union of India*, *Independent Thought v. Union of India*, and *Joseph Shine v. Union of India* examine courts' approach in terms of consent, equality, dignity and bodily autonomy.⁷ The study also uses legal commentaries, government reports, Law Commission recommendations, and international human rights instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to show scope of betterment. This paper is a legal reasoning rather than a statistical flow that advocates that marriage should not be regarded as an implied approval protecting sexual abuse from being criminalised.

Historical Background

Origins of the Marital Rape Exception and the Doctrine of Implied Consent

The roots of marital rape lie in the British colonial era wherein Thomas Macaulay, when drafting the Indian Penal Code in the 1860s, took inspiration from many Victorian-era British legal doctrines. The belief that a wife, after being married to a man, gives him permanent and irrevocable consent to a sexual relationship was one of them. This particular doctrine was highly influenced by the thoughts of English jurist Sir Matthew Hale, who stated in the 1700s that a husband could never be guilty of raping his own wife, as it was believed at that time that a wife's identity was merged with the husband's under the legal concept called 'coverture', meaning the wife's individual identity didn't exist in the legal arena and hence her consent was implied.⁸

This belief was affirmed by the Indian Penal Code Section 375, Exception 2, stating that a

husband cannot be legally prosecuted for raping his wife, provided the wife is not under the age of 15. The age was later increased in the Bharatiya Nyaya Sanhita (BNS) Section 63, which requires the wife to be 18 or older to consent to sexual intercourse. But the core idea of marital rape not being criminalized remains constant. This is primarily based on the doctrine of implied consent, meaning that the act of marriage alone consents permanently for sexual intercourse between the couple.

Many feminist scholars, as well as legal and human rights experts, have challenged this doctrine as it hinders a woman's dignity, integrity, and bodily autonomy, denying her of her constitutional rights guaranteed by the law and looking upon her as property rather than a partner.⁹

Past Law Commission and Parliamentary Views

The 172nd Law Commission Report (2000) stated that Exception 2 to Section 375 should be removed and marital rape should be criminalized.¹⁰ It put emphasis on the fact that marriage should not give the husband the right to force sex on his wife. Consent should be considered, as it can be withdrawn or changed at any time. But the report's recommendation didn't change anything. The government did not alter the law due to political and cultural influence in terms of changing patriarchy within marriage.

Not just the report's recommendation, but even after important landmark cases like *Suchita Singh* and *Joseph Shine*, the legislation didn't make any change regarding the exception.¹¹

Hence, Exception 2, long rooted since the colonial era, is now changed from IPC Section 375, Exception 2, to BNS Section 63, Exception 2. But both state the same thing, changing nothing. The definition of rape and Exception 2 still exist.

Legal Status in India

Several landmark cases have been pointing out the injustice of marital rape in India. In *Independent Thought v. Union of India* (2017), the Supreme Court stated that sexual intercourse with married women under the age of 18 is illegal. This marked a reform, but yet the laws for adult married women remained the same.¹²

In the case of *RIT Foundation v. Union of India* (2022), the Delhi High Court judges gave a split opinion. Justice Rajiv Shakhder opposed the marital rape Exception 2, stating that it

hindered the rights guaranteed by the Constitution under Articles 14, 15, and 21. On the other side, Justice Hari Shankar upheld the marital exception, saying that it is a decision to be made by the Parliament and the legislature, and it's not something that courts have to decide. So the case went to the Supreme Court and it's still ongoing.

Few more landmark cases such as *Joseph Shine v. Union of India* (2019), in which the Supreme Court struck down the adultery law, saying that marriage cannot take away a woman's right to make her own choices and cannot give the husband the control over her life.¹³ Other cases such as *Suchita Srivastava* and *Krishnappa* also supported the idea that a woman has the right over her own bodily autonomy and can deny sex even after being married.

Arguments For and Against Criminalization

There have been constant debates and conflicts around the topic of criminalizing marital rape. Many human rights activists and scholars who are in favor of the criminalization advocate that marital rape is a violation of a woman's right to her own bodily autonomy and dignity. They state that marriage acts as a blanket over sexual abuse which allows non-consensual sex, denying the married woman the protection that unmarried women receive. This exception contradicts the constitutional rights guaranteed by the Indian Constitution under Articles 14, 15, and 21, which unmarried women are guaranteed, and this creates a discrimination among married and unmarried women. India's international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Universal Declaration of Human Rights recognize marital rape as a human rights violation.¹⁴ The people who are in support of criminalization also cite surveys of National Family Health Survey-5 (NFHS-5), which states a majority of women who report sexual violence identify their husbands as perpetrators, which proves that marital rape is not imaginary or rare.¹⁵ They advocate that the current Domestic Violence Act only ensures protection, but criminal consideration is necessary.

On the contrary, opponents of the criminalization show concern for the potential misuse of the law. They fear the removal of Exception 2, especially in the cases of divorce and marital disputes. They advocate that due to lack of fitness in such incidents, false allegations could be made and it would be hard to prove them. In addition, they fear that the institution of marriage would be damaged and it would overburden the legal system.

There have also been judicial decisions that state that the verdict should be given by the Parliament and not the courts. Supporters of the criminalization argue that no other crime is ignored just because it might be misused. Pre-assuming women are lying about rape reflects deep gender bias and injustice against the victims of marital rape. The supporters also suggest that the fear of misuse should be addressed through a fair procedure and not just by denying proper justice to the survivors.

Socio-Legal Impact

One of the most damaging aspects about not making marital rape a criminal offense is that the law fails to acknowledge how much the victim is affected. Under current criminal law, a married woman who is raped by her husband is not even considered a victim. This leaves her unprotected and unable to voice her issues. A lot of women think that forced sex in marriage is normal or something they have to deal with. When they do speak up, they are often ignored or sent to family counseling instead of being treated as survivors of sexual violence.¹⁶ Cultural conditioning that sees marriage as a private space where the husband's authority is unquestioned makes this silence even stronger.

The Domestic Violence Act of 2005 recognizes marital sexual violence but provides only civil relief—protection orders—instead of criminal sanctions. Hence, the existing legal contradiction where women may be able to file for protection but not for justice. Cases of women being raped by their husbands over and over again, often during pregnancy or in the presence of children, with no recourse available within law, have been reported by non-governmental organizations such as Jagori and the Human Rights Law Network (HRLN).¹⁷ Marital rape is also easily forgotten since it is not counted by India's crime data (National Crime Records Bureau - NCRB). Even so, based on surveys like the National Family Health Survey-5 (NFHS-5), over 83% of the women who report sexual violence attribute the violence to their husbands.¹⁸ Due to this, marital rape is one of the most common forms of sexual violence, even though the law does not consider it. Women remain silenced and deprived of justice since they are not recognized by the law, data, and public policy.

The Way Forward

Removal of Exception 2 to Section 375 of the Indian Penal Code, legalizing marital rape by exempting husbands from criminal liability for rape of wives without consent (except where

the wife is under 15 years of age), is the most urgent legal change that is necessary. The provisions of Articles 14, 15, and 21, which guarantee equality, dignity, and personal liberty, are violated by this archaic exception. Removal of the same would provide married women no longer with a lack of legal protection against rape, but would not criminalize marriage.¹⁹ Gender-sensitive legal reform, making consent the central aspect of sexual relationships—whether inside or outside marriage—is urgently required in addition to repeal. Some of them include redefining sexual offenses, uniformly applying consent, with criminal penalties for sexual abuse under the Domestic Violence Act, and stopping the override of fundamental rights by personal or religious law. These amendments, on constitutional grounds and not on cultural hesitation, must be passed by Parliament.

Police and judicial training is also required. It is the usual tendency of most law enforcement personnel to overlook or downplay sexual violence cases in marriages simply because they are ignorant of gender justice. Trauma-informed care, understanding of abuse patterns, and concomitant court decisions such as *Joseph Shine*, *Suchita Srivastava*, and *Independent Thought* must be covered under capacity-building programs. Institutional reforms such as the creation of special cells to handle marital sexual violence are essential to effectively implement laws.²⁰

The principle of consent, which must be construed as being freely given, reversible, and inherent in all relationships—including marriage—is central to this debate. Refusal of criminalization of marital rape reinforces the belief that the wife owes sex to the husband. Rape, however, must be criminalized regardless of whether or not the offender is a spouse, just as other offenses like theft or assault are, without any consideration of the relationship. Criminalization of marital rape is a move towards protecting a woman's dignity and autonomy within the marriage, not a desecration of it.

Conclusion

Exception 2 to Section 375 of the Indian Penal Code provides a protective shield to perpetrators of marital rapes, thereby creating a huge chasm in the protection of married women against sexual offenses. This exemption of non-consensual intercourse by the husband from the offense of rape introduces an arbitrary classification of married and unmarried women, based solely on the criterion of marital status. This classification treats marriage as an extinguisher of the woman's right to autonomy over her body. This classification is symbolic and practical in

nature, inasmuch as it treats non-consensual intercourse between married couples as legitimate and justifies the commission of rape in the name of marriage. While there exist some provisions under other statutes like the Protection of Women from Domestic Violence Act, 2005, these provisions are limited in nature and only protective in character. Moreover, they fail to convey the symbolic and practical deterrent effect of criminal provisions. This classification of married and unmarried women in the context of Section 375 of the Indian Penal Code violates the constitutional guarantee of equality, dignity, and liberty, which have been interpreted to include sexual autonomy and decisional privacy. This classification violates the international human rights standards, which have evolved to negate the concept of immunity in the context of sexual offenses within the institution of marriage. The core of the issue lies in reiterating the importance of consent in all forms of sexual relations. This involves reiterating the fact that consent cannot be presumed to have been granted on an ongoing and permanent basis simply by reason of the fact of marriage.

Endnotes

1. Indian Penal Code § 375, Exception 2 (1860).
2. See *RIT Foundation v. Union of India*, (2022) (Del HC) (split verdict highlighting absence of consent-based approach).
3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; Law Commission of India, 172nd Report on Review of Rape Laws (2000).
4. *RIT Foundation v. Union of India*, (2022) (Del HC).
5. INDIA CONST. arts. 14, 15, 21.
6. UN Women, *Sexual Violence in Latin America and the Caribbean: A Desk Review* (2012).
7. Turkish Penal Code, Law No. 5237, art. 102 (2004) (Turkey).
8. Sir Matthew Hale, *The History of the Pleas of the Crown* (1736).
9. Madhu Mehra, *Marital Rape and the Indian Legal System: Towards a Gender Just Framework*, 52(4) EPW 38 (2017).
10. Law Commission of India, 172nd Report on Review of Rape Laws (2000).
11. *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1.
12. *Independent Thought v. Union of India*, (2017) 10 SCC 800.
13. *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
14. CEDAW Committee, Gen. Recommendation No. 19 (1992).
15. Ministry of Health and Family Welfare, *National Family Health Survey-5*, 2019–21 (India).

16. Human Rights Law Network, *Cases and Reports on Marital Rape*, (2018); Jagori, *Voices Against Violence* (2020).
17. Ibid.
18. NFHS-5 (2019–21), supra note 15.
19. Indian Penal Code § 375, Exception 2; BNS § 63, Exception 2.
20. *Joseph Shine, Suchita Srivastava, and Independent Thought*, supra notes 11–12.
21. CEDAW, supra note 3; INDIA CONST. arts. 14, 15, 21.