
MARITAL RAPE: A LEGAL DILEMMA

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ABSTRACT

This article provides a comprehensive insight into the complexities and implications of marital rape exceptions. The topic of marital rape has been a long-debated issue in legal and social circumstances, which are identified by a historic precedent that often said that consent for sexual intercourse lies within the marriage contract. Women in society play a vital role; it is difficult to imagine a fruitful society without them. They play a key role in all aspects of society. But in the current society, women are subjected to more violations and problems. When women play a major role in society and have such importance in nature, then why are they facing major issues in society? The present article discusses the marital rape exception, its historical origins, and existing laws across the world. This article is required to understand the consequences and the extent of this issue and to provide a justified solution for the victims. By analysing major cases and laws worldwide and offering recommendations to address current problems, this article can help address this issue.

INTRODUCTION:

Section 63 of the Bharatiya Nyaya Sanhita 2023, defines rape as a sexual intercourse with a woman by a man without her consent, against her will, by fraud or fear, by misrepresentation or when she is unable to give mindful consent due to intoxication or unsoundness of mind or when she is under 18 years of age or when she is unable to communicate the consent¹.

This section has an exception, exception 2 of this section, says that sexual acts with one's own wife when she is under 18 years of age is not considered as rape since the marriage contract implies consent for sexual acts². According to *Independent Thought vs Union of India*,³ sexual intercourse with a spouse when she is between 15 and 18 years of age is considered rape. But in the other cases where the spouse is above 18 years of age, that act is not considered as rape. Many victims across India faced Marital Rape but are unable to find a just solution.

In India, rape outside of marriage is considered a crime, while rape inside the marriage is an exception. Many victims are victimised by marital rape, but most of them do not report it due to the force and fear from their family members. This is not only affecting the fundamental rights of women but also their mental state and soundness of mind. It is important to focus on this debatable issue to minimise cases involving it, so that the fundamental and human rights of women are protected.

HISTORICAL EVOLUTION:

In the 17th century, Sir Matthew Hale stated in his treatise *Commentaries on the Laws of England* that a husband could not be guilty of raping his lawful wife, as marriage was presumed to imply permanent consent⁴. According to him, a marriage is a contract, and the wife entering into that contract will give up all her rights, including her consent to sexual intercourse with her husband. The matrimonial contract gives implied consent for sexual intercourse by the wife, and she cannot withdraw it. His statement was considered and followed as a justification of the marital rape exception for about 330 years. It also became the backbone for many verdicts for such cases in the United States since 1857⁵. According to Hale's thinking, the

¹ Ratanlal and Dhirajlal, *The Bharatiya Nyaya Sanhita, 2023* (37th edition 2025), 275.

² Ratanlal and Dhirajlal (n 1), 276.

³ *Independent Thought vs Union of India*, AIR 2017 SC 4904.

⁴ Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction* (Volume 43 1995) 353.

⁵ Ibid

marriage contract gave implied and irrevocable consent through which it is considered the husband's marital right to sexual intercourse with his wife whenever he wishes. This said, marital rape can never occur since the sexual intercourse within marriage is assumed to be consensual.

The Doctrine of Coverture in English Common Law describes that a married woman's legal rights are merged with her husband. And she was not considered to be an independent legal existence in society⁶.

Blackstone, in his Commentaries on the Laws of England, described the doctrine of coverture, under which a married woman's legal identity was merged with her husband's, limiting her independent legal rights⁷. This doctrine gives the idea of marital unity. This provides a view that marital rape cannot be considered, as husband and wife are considered to be one according to this doctrine, and a husband cannot be said to have committed rape on himself.

This doctrine lost its importance when the Married Women Property Act 1874 was adopted, which recognised women's legal rights to property, giving women a separate entity from a marital unity⁸. This gave them some provisions in legal backing, separating husband from wife and protecting their assets claimed by husband or any other relatives, maintaining their control over their own property. Later, in marital rape cases, some arguments were considered seriously once clearly examined according to the common laws made at that time; these arguments made it clear not to consider marital rape as rape. Arguments like **“Marital rape cannot be considered as a serious rape”**⁹ it is made because marital rape cannot be considered as an offence exactly, since this type of offence doesn't occur frequently in society. The aftermath effect on married women is less severe than that of unmarried women who faced rape, which includes the psychological state of the victims. Some women don't report the offence due to threats or family dignity. Hence, it cannot be considered as a serious issue. **“Proving a rape in marriage is difficult”**¹⁰, it said, the acceptance that the husband committed rape is difficult

⁶ Marital rape (Wikipedia, last modified 4 November 2025) <https://en.wikipedia.org/wiki/Marital_rape> accessed 6 November 2025

⁷ Sir William Blackstone, *Commentaries on the Laws of England, Vol 1: The Rights of Persons (1765) and Vol 2: The Rights of Things (1766)* (Clarendon Press, 1765–1766) <<https://constitutioncenter.org/the-constitution/historic-document-library/detail/sir-william-blackstone-commentaries-on-the-laws-of-england-vol-1-the-rights-of-persons-1765-and-vol-2-the-rights-of-things-1766>> accessed 4 November 2025.

⁸ Lalenya Weintraub Siegel, The Marital Rape Exemption: Evolution to Extinction (Volume 43 1995), 357.

⁹ Ibid

¹⁰ Ibid

when they have had consensual sex many times before. So it is difficult to prove that the act is rape when it is between husband and wife. **“False rape charges can be made on the husband¹¹”**. According to this statement, a woman can falsely accuse her husband of rape if the exception is cancelled. She may actually accuse her husband of false rape charges for any other reason. It may also include the abuse from her husband and his family, so she may accuse her husband of revenge. This weakens the very primary motive of justice by giving punishments for innocent husbands. Other arguments, like the law should not invade the purity of marriage, and also other remedies exist other than harsh punishments for husbands like the real rapists, all these arguments made it difficult to see the actual legal provision for marital rape exceptions.

In 1977, the state of Oregon in the United States passed a law saying marriage cannot be used as a defence for rape. The case of *Oregon v. Rideout*¹² put this new law to the test. Greta Rideout accused her husband, John Rideout, of forcing her into sex against her will. Although the jury eventually acquitted him, the case was groundbreaking—it marked the first time in American history that a husband was tried for raping his wife while they were still married and living together. Even with the acquittal, the case sparked a national conversation about whether marriage should shield men from rape charges.

Similarly, in New York, according to the *People vs Liberta*¹³ case, the defendant argued that the marital exemption included in the rape statute would violate the Fourteenth Amendment of the Equal Protection Clause, where all offences are burdening him in this case, he is responsible for the whole act, and he also states that there is a rational basis for the exception. But the court clearly stated that there is no rational basis between marital rape and non-marital rape. A rape is a rape. A husband cannot invoke his marital rights and forcefully commit sexual intercourse with his wife without her consent. The court also said that it is now the law of the land that when a husband commits rape on his wife, then he will be guilty of rape in the first degree, irrespective of any relationship between the parties. It is another landmark judgement in New York which amounted marital rape as a rape itself.

¹¹ Ibid

¹² *Oregon v. Rideout*, 303 Or App 504, 465 P3d 255 (2020)

¹³ *People vs Liberta*, 474 N.E.2d 567 (1984)

After many attempts and cases, a national campaign was held in the 1980s in the US to make marital rape a crime in all states¹⁴. The campaign's first step was achieved, and now its goal is to abolish the remnants of this issue, which led to the raising of mainly 3 categories of Marital exception law.

The first category was adopted by four states: Kentucky, Missouri, Oklahoma, and South Carolina. The category states that the husband can be prosecuted for rape if he and his spouse are living separately, or they are legally separated or have filed for divorce or an order of protection. If a husband commits rape on his wife based on the above circumstances, then he can be made guilty of rape¹⁵. But if the couple is living under the same roof together and he forces his wife, then he will not be prosecuted for rape.

The second category was adopted by category: Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Nevada, Ohio, Pennsylvania, Tennessee, Washington, and Wyoming, California, Illinois, the category said that the husband can be prosecuted for marital rape only under certain circumstances and cannot be prosecuted in other situation for marital rape these cases under 'partial exemption' where husband will not be held liable when there is less force or no force during the act it can also be termed as less harmful form of rape. But it requires the wife to report the rape within 30-90 days of the incident¹⁶.

Wherein, another four countries adopted partial exemption as the husband shall not be prosecuted for marital rape in the case of high degree rape. Only rape involving less force or no force or threat shall be prosecuted as marital rape. Another set of states adopted partial exemption, saying that if a husband commits rape on his wife who is under the age of giving consent or if she is physically or mentally unstable, then he will be prosecuted for marital rape.¹⁷

The third category said there is no distinction between marital and non-marital rape. A rape is considered a rape whether it is inside marriage or outside marriage. Over 22 states have

¹⁴ Siegel (n 8) 367

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

completely abolished the idea of exemption for marital rape, stating there is no distinction between marital and non-marital rape¹⁸.

The other major changes in this issue are the Ohio House Bill 161¹⁹, which was signed into law in 2024, which eliminates the spousal exemption in the sexual violence act, including rape. This amendment was brought into effect to prevent spouses from being prosecuted under marital rape under many common laws and legislations that were in place before. This bill terminated the exemption given to marital rape and allowed the spouses to testify and be prosecuted for the act under sexual violence. The bill also gave charges for sexual offences like rape, sexual battery, gross sexual imposition, sexual imposition and unlawful sexual intercourse with a minor.

INTERNATIONAL PERSPECTIVE:

This issue has become one of the major key issues across the world, which is now in confusion between criminalising marital rape or not. However some nations like Australia, Belgium, Canada, Bulgaria, Cambodia, Colombia, Cyprus, Denmark, Dominica, France, Germany, Italy, Mexico, Qatar, Singapore, South Korea, Turkey, United Nations, United States, Uruguay, Zambia and many more have criminalised it while keeping the view of human rights violations of women and many more perspectives while some countries like Bangladesh, China, Ethiopia, Iraq, Maldives, Myanmar, North Korea and many more did not consider it as illegal²⁰.

The decisions of each nation depend on the law and customs of their land. It is important to consider the rights of women in this issue and the extent of damage and effect of the act on the victim, and also respect the laws and traditions of each nation before discussing and making decisions on complex issues.

PENAL FRAMEWORK IN INDIA:

Section 63 of the Bharatiya Nyaya Sanhita 2023 defines Rape as a forceful sexual intercourse with a woman by a man without her consent. This section has an exemption saying that sexual

¹⁸ Ibid

¹⁹ Susan Tebben, 'Marital rape loophole closed by Ohio General Assembly, bill moves to governor's desk' (Ohio Capital Journal, 25 April 2024) <<https://ohiocapitaljournal.com/2024/04/25/marital-rape-loophole-closed-by-ohio-general-assembly-bill-moves-to-governors-desk/>> accessed 4 November 2025

²⁰ Marital rape (n 6).

intercourse acts by a man with his own wife, when she is not under the age of 18 years, will not be considered as rape²¹. The law to criminalise marital rape has not yet been adopted.

However, the marital rape violates Article 14 of the Indian Constitution, where all the people in India are equal irrespective of caste, creed, colour, race and sex²². If marital rape is exempted under the law, it would violate the right to equality between men and women. In accordance with earlier laws, the identity of married women is completely consumed by their husbands after marriage. This does not allow women to have their independent rights, which also violates their Right to have equal protection under the law.

This issue also violates Article 21 of the Indian Constitution, where a forceful intercourse with women without her consent would violate her right to life and liberty. This also includes violation of the Right to privacy, dignity, a safe environment and many more²³. It also means that the right to privacy includes freedom for a person to make all choices, including all the personal decisions, including intimate relationships, consensual sexual intercourse and many more.

In the case of *Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat*,²⁴ High Court of Gujarat made it clear that marriage does not give a man the right to force himself on his wife. Just because he is married to her. The concept of marital rape is not just an issue, but also the belief that there is implied consent to sexual intercourse with the wife, whether consensual or non-consensual. This idea should be collapsed, and it should be criminalised, and the women, whether married or not married, must be protected under the law.

COMPLEXITIES REVOLVING AROUND TO CONSTITUTE MARITAL RAPE AS AN OFFENCE :

The issue of marital rape is very complicated. Many case laws have passed many verdicts in favour of victims in this issue. But the parliament of India is still finding it difficult to criminalise it and adopt it as law. There are many complications in making it a crime, since the act of sexual intercourse between wife and husband takes place within the four walls of the

²¹ Ratanlal and Dhirajlal (n 1) 276.

²² Bhagyashikha Saptarshi, 'Marital Rape and Law' (Manupatra Articles, 9 April 2024) <<https://articles.manupatra.com/article-details/Marital-Rape-and-Law>> accessed 4 November 2025.

²³ Ibid

²⁴ *Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat*, 2018, Guj 732.

room, and this act shall be known only to the couple, but not others. It is difficult to prove whether the act is consensual or non-consensual. The couple may have undergone sexual intercourse many times before, and it may be consensual, but it is difficult to prove that. The particular act mentioned by her, accusing her husband of rape, is an act with or without her consent.

It is the very opinion of parliamentarians that criminalising marital rape would amount to the destabilisation of the institution of marriage, leading to an increasing rate of misuse of the penalising provision.

CONCLUSION:

Criminalising marital rape is like two faces of the same coin. Where one can be used for protection as a shield, and the same provision can be misused as a sword. The chances of both using it for protection and even for misuse are high. However, it is the contention of those who advocate against the criminalisation of marital rape that the very purpose of marriage is cohabitation and procreation. When the husband initiates to fulfil the same, how does it amount to rape? It may affect the rights of a woman and also her physical and psychological state while undergoing such acts by her husband at her marital home. However, it is necessary to consider in which aspect the act was done.

To consider marital rape as rape would be justified, especially when viewed against the arguments of those opposing it, by a plain reading of the definition of rape, namely, forceful and non-consensual sexual intercourse with a woman. Ultimately, the determination of the issue boils down to the fundamental question: Did the woman consent?

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