
MARITAL RAPE IN INDIA: DECONSTRUCTING 'CONSENT'

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ABSTRACT

‘Sexual violence is an illegal invasion of a woman’s right to privacy and holiness, as well as a dehumanizing act’.¹

Marital rape has always been regarded as a taboo subject in India, but in recent times, it is gaining prominence among modern Indian society, with an opinion of wanting it to be criminalized. However, the door of the courts though has firmly been shut for marital rape survivors in India for the longest time.

In India, non-consensual sex without marriage is considered as a rape in India, but within marriage, it is not considered as rape. It is generally accepted that marital status gives an exemption for husband to have non-consensual sex with his wife as it is her duty to fulfill this marital obligation. So, it is one of the disputed questions, whether or not the wife implicitly consents to sex and whether marriage gives the husband an expectation of sexual intercourse. Will the elimination of this exception lead to the emergence of a new crime?

The customary belief that marriage gives a husband sole right over his wife, thus exempting him from prosecution for raping his wife, has been used to justify forcing a woman the right to consent to sexual intercourse in marriage. Consent is the complete antithesis of rape. Thus, examining the need for a married woman's right to consent, this paper examines the subsequent discrepancies that grant legal consequence to child marriages, create an unspecified inequity in the punishment for rape, and create variations in the age of consent and the age for accessing exception. This article examines these provisions, which demonstrate the patriarchal mindset that silences women's voices in the marital domain.

Keywords: *Marital Rape, consent, marriage, sexual intercourse, women’s right, child marriage.*

¹ The State Of Karnataka vs Krishnappa 2000 CriLJ 1793, JT 2000 (3) SC 516, 2000 (2) SCALE 610, (2000) 4 SCC 75, 2000 2 SCR 761, 2000 (2) UJ 919 SC

Introduction

“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”

-Sir Matthew Hale²

India is one of the few countries in the world where non-consensual intercourse within marriage is not considered rape. Marriage as an institution has always been considered as a sacrament which has the implication that is permanent, indissoluble, eternal and holy union, where wife is expected to perform spiritual as well as secular duties.

The institution of marriage is still in place because a significant majority of people "choose" to embrace it. But it's also true that a lot of people all around the world are questioning this institution and choosing to stay together for the rest of their lives without any restrictions or legal protection.

While many young men and women in India choose for live-in relationships and late marriages, there is a significant portion of boys and girls whose families do not give them a viable option for marriage. The law intervenes to support this decision by creating an entire ecosystem—a web of regulations to ensure protection of married partners' rights, particularly for women.

If a stranger assaults a married woman the police can register a crime. However, if the aggressor is a husband, it reduces this offence to a mere “domestic dispute” wherein the complaining wife is advised by the police just to go back and make it up. Why so? Why this indifference? Why discrimination is granting a remedy or enforcing the constitutional right? The law enforcers have no answer. They keep shut. And this has given a husband to understand that it is his right to assault and torture his wife in any way. The old 18th century discriminatory notions have to be given a go-by.

The Indian Penal Code (IPC), 1860's exemption for "marital rape" under Section 375, however, presents a challenge because it exempts non-consensual sex between married partners from the definition of rape. A long-running debate in India over the importance of consent and the

² Sir Matthew Hale, *History of the Pleas of the Crown* 629 (1736); see, s. Fredman, *Women and the Law* 55-57 (1997)

acknowledgement of women's agency in marriage has once again come to light in the context of the recent split decision from a division bench of the Delhi high court in the case of RIT Foundation vs Union of India³. It raises a more significant question: Does allowing marital rape genuinely protect the institution of marriage or does it weaken it?

Concept of Marital Rape

Rape is defined as a sexual assault on a woman that is committed without her permission. Force, abuse, or performing the act on a person unable to agree, like a woman who is asleep or intoxicated, are all possibilities. The Supreme Court has stated that "Rape is a deathless shame & the gravest crime against the human dignity."⁴

On the other side, forcing a woman to have sex with her husband only because they are married is referred to as marital rape. It is a physical assault committed against the woman by her husband that takes place inside the four walls of the home. Not only is it an assault and abuse, but it is also rape. The accused's status as the victim's husband is the only distinction in this matter.

Acts of violence against women are now widely acknowledged to constitute violations of human rights. However, approximately one-third of the countries in the world do not criminalise or support marital rape, which is a specific type of gendered violence. This legal opacity gives males who sexually abuse or rape the wives or intimate partners of those men legal impunity, legalising this specific type of violence against women. This is a human rights issue that begs for resolution on both a legal and social level.

In India, raping a partner while you're married is not a crime. Section 375 of the Indian Penal Code states, "A man's sexual intercourse with his wife, his wife who is no less than 15 years old, are not rape" (IPC). According to article 376 of the Indian Penal Code, the rapist should be punished with jail or imprisonment for a period that may extend to life imprisonment or up to 10 years, in addition to the fine, unless the raped woman is the husband and is not less than 12 years old.

Since the punishment is less severe, marital rape is only taken into consideration if the victim

³ RIT Foundation vs Union of India 2022 SCC OnLine Del 1404

⁴ Rafiq vs State of U.P (1980) 4 SCC 262, 1980 SCC (Cri) 947

is under the age of 15. The spouse has no legal protection after the age of 15, which is against international human rights standards.

According to the IPC, the offence is punishable by up to two years in prison, a fine, or both if the wife is between the ages of 12 and 15; if the spouse is younger than 12, the offence is punishable by up to ten years in prison and fines. Rape of a spouse who is legally separated can result in up to two years in prison and a fine, but not rape of a wife who is older than 15 years old.

Legal Provisions for Marital Rape Victim in India

As Marital rape is not considered as an offence according to the IPC, but there are few provisions on which the marital rape victims can rely upon. They are:

1. Section 498A of the Indian Penal Code, 1860

*“Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. The offence is Cognizable, non-compoundable and non-bailable”.*⁵

The word “cruelty” in common English acceptance denotes a state of conduct which is painful and distressing to another. Torture is a question of fact.⁶

Also, “cruelty” in this section includes acts which can possibly drive the woman to commit suicide, cause injury or danger to her life or her physical and mental health. According to which, Marital rape can be considered as a part of cruelty against her.

2. Section 354 of the Indian Penal Code, 1860

*“Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*⁷

Marital rape victims can rely to this provision since it punishes anyone who physically assaults or offends a woman's modesty. Till recently, it was unclear what ‘outraging the modesty’

⁵ Indian Penal Code, 1860, Section 498A

⁶ Arvind Singh vs State of Bihar, (2001) 6 SCC 407, 2001 SCC (Cri) 1148

⁷ Indian Penal Code, 1860, Section 354

exactly meant. However, in the case of *Raju Pandurang Mahale vs State of Maharashtra 2013*⁸, the court defined the modesty of a woman as her sex by stating:

*“The essence of a woman's modesty is her sex and the accused culpable intention is the crux of the matter. It is a virtue which attaches to a female owing to her sex. The act of pulling a women, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman”*⁹

In a recent case of *Nimeshbhai Bharatbhai Desai vs State of Gujarat*¹⁰ where the husband raped his wife and even compelled her to engage in sexual intercourse in public, the court held that husband can also be charged of outraging the modesty of his wife under section 354 of the IPC, 1860.

3. The Hindu marriage Act, 1955

Section 13 (1) of the Hindu Marriage Act, 1955 states that *“Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party- (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty.”*¹¹

The marital rape victims can resort to section 13 (1) for filing a divorce case against their husband if the husband has treated her with cruelty¹². Marital rape itself is a cruelty.

4. The Protection of Women from Domestic Violence Act, 2005:

Section 3 of this Act states: *“any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it - (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.”*¹³

⁸ *Raju Pandurang Mahale vs State of Maharashtra* 8 (2004) 4 SCC 371

⁹ *Ibid.*

¹⁰ *Nimeshbhai Bharatbhai Desai vs State of Gujarat*, 2018 SCC Online Guj 732

¹¹ The Hindu marriage Act, 1955, Section 13 (1)

¹² *Supra note 5*

¹³ The Protection of Women from Domestic Violence Act, 2005, section 3

Although this provision does not include marital rape as a criminal offence but it does consider it as a form of domestic violence. The victims can use this provision to obtain a judicial separation from her husband.¹⁴

We can say that although marital rape is not an offence under the criminal law¹⁵, there are legal remedies¹⁶ which are available to marital rape victims but the problem is that these remedies has been developed by the judiciary on case-to-case basis and so there is a lot of judicial discretion¹⁷ in marital rape cases. Also, there is no legislative sanction to marital rape. Further, because “marital rape” is not considered as rape there is a difference in the punishments which is given to the husband accused of marital rape and which is given in the other rape cases.¹⁸

5. Reports of the Law Commission of India

i) 42nd Law Commission Report¹⁹:

This report's significance is limited to comprehending the perspective that the Law Commission has on marital rape. This report offers two crucial recommendations.

- In such cases, where the husband and wife were judicially separated, the exception clause must not apply. It stated that “in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right”²⁰. It implies that consent is presumed in situations where the husband and wife live together and cannot be implied when they do not live together. It does not discuss the reason why this is not right.
- It was regarding non-consensual sexual intercourse between women aged between 12 and 15.²¹ It stated that the punishment for such offences must be put into a separate section and preferably not be termed rape.²²

¹⁴ Ibnlive.com, *What the law says on marital rape*, News18 (2015), <https://www.news18.com/news/india/what-the-law-says-on-marital-rape-985741.html> (last visited Jan 8, 2023).

¹⁵ The exception is section 376 B of the IPC, 1860.

¹⁶ Priyanka Rath, *Marital Rape and the Indian legal scenario*, India Law Journal http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html (last visited Jan 8, 2023).

¹⁷ Damayanti, *Role of Judiciary in Rape Cases*, Academike (2015), <https://www.lawctopus.com/academike/rape/> (last visited Jan 8, 2023).

¹⁸ Aishwarya Mishra, *India: Law on Marital Rape – A Much Needed Reform in Our Legal System* (2018), <http://www.mondaq.com/india/x/691482/Crime/Law+On+Marital+Rape+A+Much+Needed+Reform+In+Our+Legal+System> (last visited Jan 8, 2023).

¹⁹ Law Commission of India, *Indian Penal Code, Report No. 42* (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> ((last visited Jan 8, 2023)

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

This report highlighted the difference between marital rape and other rape, with the former being seen as less serious, and the assumption of consent that exists when a husband and wife live together. However, it made no comments regarding the exception clause itself, including whether it should be kept or removed.

ii) 172nd Law Commission Report on Rape:

The following suggestions for significant modification in the rape statute were presented in the 172nd Law Commission report. They are:

- i. 'Rape' should be replaced by the term 'sexual assault'.
- ii. 'Sexual intercourse as contained in section 375 of IPC²³ should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- iii. In the light of *Sakshi vs Union of India and Others*²⁴, 'sexual assault on any part of the body should be construed as rape.
- iv. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- v. A new offence, namely section 376E²⁵ with the title 'unlawful sexual conduct' should be created.
- vi. Section 509 of the IPC i.e., "Word, gesture or act intended to insult the modesty of a woman"²⁶ was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- vii. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband against his wife should be considered equally as an offence just as any physical violence or abuse by a husband against his wife. On the same justification, section 376 A was to be deleted.

²³ Indian Penal Code, 1860, Section 375

²⁴ *Sakshi vs Union of India and Others*, 2004 (5) SCC 518

²⁵ Indian Penal Code, 1860, Section 376E, Ins. By Act of 2013, sec.9 (w.r.e.f. 3-2-2013)

²⁶ Indian Penal Code, 1860, Section 509

viii. Under the Indian Evidence Act (IEA), states that where a victim is reported to have given consent to a sexual act but denies it, the court shall presume it to be so.

The Concept of Consent in Marital Rape

The principle of implicit consent was outlined in the 1736 publication *The History of the Pleas of the Crown* by Chief Justice Sir Mathew Hale²⁷. He asserted, "The wife has given herself to her husband with their mutual permission and marriage contract, which she cannot revoke, so the husband cannot be guilty of raping his legitimate wife." Both the British common law system and the legal systems of all former British colonies have accepted this theory. The idea of covering is another rule of common law that lent support to the hypothesis of implicit consent. According to this belief, a woman's legal rights were replaced by her husband's when she was married. This idea is supported by the theory of implied consent. It is a legal fiction to think that a husband and wife are the same person.²⁸

The concept of 'consent' as it has wide ramifications than just the marital rape debate in India. India is undoubtedly not the only country that is questioning the meaning of consent. A global movement is underway to establish a legal framework and a common concept of "consent." 45 nations, including the European Union, have ratified the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, also known as the Istanbul Convention²⁹, which was enacted in May 2011. According to Article 36 of the Convention³⁰, states that have ratified it must classify - 'sexual violence, including rape, explicitly covering all engagement in non-consensual acts of a sexual nature with a person.' In a similar manner, the Platform of seven independent United Nations and regional expert mechanisms on violence against women called on all states and relevant parties to take action against rape as a "form of gender-based violence and a violation of human rights, and to ensure that the definition of rape is based on the absence of consent, in accordance with international standards" in 2019.

²⁷ Matthew Hale Et Al., *Historia Placitorum Coronae: The History of the Pleas of the Crown* (2007).

²⁸ 2019 TNN / Updated: Apr 9, Dipak Misra: *Marital Rape needn't be an offence: Ex- Chief Justice of India*, The Times of India, <https://timesofindia.indiatimes.com/city/bengaluru/no-need-to-make-marital-rape-an-offence-ex-cji-dipak-misra/articleshow/68785604.cms> (last visited Jan 8, 2023).

²⁹ *The Council of Europe Convention on Preventing And Combating Violence Against Women And Domestic Violence: A Tool To End Female Genital Mutilation* (2014), <https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence>.

³⁰ *Ibid.*

When a woman expresses her willingness to engage in a certain sexual act through words, gestures, or any other kind of verbal or nonverbal communication, this is referred to as “consent” in rape cases. In order for a woman to use consent as a defence against a charge of rape, she must voluntarily participate after fully considering her options for resistance and agreement. The absence of injuries to the aggressor or the aggressed may not be sufficient to determine whether permission was given or not; instead, this situation must be evaluated in the context of the other evidence.

The victim's consent must also be voluntarily granted; it cannot be interpreted as consent under Section 375 of the Code if the victim merely resigns helplessly in the face of inevitable compulsion while experiencing intense fear. Similarly, her assent would not be a defence if it was acquired by making her or anybody else in her life in fear of death or serious harm. There is a presumption that the woman did not consent to the rape, and the defence has the burden of establishing her innocence i.e., *‘Presumption as to absence of consent in certain prosecution for rape’*.³¹

Mens rea is the mental component essential for crime to occur, with the exception of strict liability offences. Legally, the presence of mens rea in rape cases can only be established if it can be proven that the man knew the victim did not consent to the conduct. He lacks the mens rea necessary to qualify as a rapist in cases where he has reason to believe that the victim gave her consent.³²

Unfortunately, the word "consent" is not defined very clearly in IPC, 1860. It merely describes what shouldn't be considered as consent under Section 90 of the Code.³³ Therefore, a person is only assumed to have consented when the consent was provided freely, voluntarily, and without the victim being under the influence of any fear, force, or deceit.

A person is unable to consent to an act if they are under the influence of drugs, alcohol (which prevents them from understanding the nature and implications of the conduct they are consenting to), anesthesia, unsoundness of mind, a coma, or paralysis. A mature and intellectual awareness of the nature and implications of the sexual act is required for there to be "consent" under Section 375. The need that the participation be willful and the consent be freely given are both stated in

³¹ Indian Evidence Act, 1872, Section 114A

³² DPP v Morgan [1975] UKHL 3, 1 East P.C. 434 and 1 Hale 627

³³ Indian Penal Code, 1860, Section 90

Explanation 2 of Section 375. Consent is unquestionably "an act of reason, accompanied by thought, the mind of weighing, as in a balance, the good and evil on either side".

*In State of Himachal Pradesh vs Mango Ram (2009)*³⁴, Supreme Court observed that, "Whether there was consent or not is to be ascertained only on a careful study of all relevant circumstances." For the purposes of Section 375, it cannot be assumed that a girl has given her consent if she passively accepts or does not object to the accused's advances out of fear. The prosecutrix's or the accused's lack of injuries does not by itself prove that she gave her permission. Proviso to Section 375 makes it clear that non-opposition should not be mistaken for consent.

Marriage is a social institution that was created to control excessive polygamy and polyandry and to govern human sexual behaviour. This implies that one's partner should have unrestricted and sole access to sexual relations. Conjugal pleasure for both parties—not just the man—was what was being considered, and it was intended to be enjoyable for both. Each party must appreciate the other's objections. You cannot expect them to accept irrational requests, one-sided eccentricities, or fantasies that the other spouse does not want. According to our courts, refusing sex constitutes mental cruelty, which is a reason for divorce.

Taking away a woman's ability to refuse something looks of paternalism, when the voice and decision-making of certain groups of people are ignored. Children, insane people, and animals are all deemed to be incapable of thinking for themselves and making moral judgements, hence the law itself denies them this power.

Stereotypes that demand that women be reserved and behave posh further intensify the issue by leading men to interpret a woman's rejection as a request for them to persuade and manipulate her into saying "yes." Additionally, fears about the abuse of "rape" accusations against spouses by unhappy wives as a form of coercion, blackmail, or punishment have prevented its criminalization.

It would be a contest between "her" and "his" words due to the private nature of the crime and the absence of witnesses in the bedroom. Medical evaluations in marriages would be useless unless the act was coupled with some form of cruelty. Furthermore, it would be challenging to pinpoint the precise moment that consent was revoked or rejected. This, coupled with gender-specific rape laws and existing evidence law rules like the presumption as to absence of consent and absolute

³⁴ State of Himachal Pradesh vs Mango Ram (2000) 7 SCC 224

reliance on the rape victim's sole testimony even in the absence of corroboration, makes it a powerful provision with a strong likelihood of abuse.

Judicial Recommendations on Marital Rape

Marital rape was declared illegal in 150 nations as of 2019, with the Soviet Union being one of the first to do so in 1922. India, on the other hand, is still being contested as being unconstitutional.

Marital rape has always been a highly complicated issue in India, where numerous laws and court rulings have been handed down over the years yet not changed. A husband cannot commit rape in the presence of his legitimate wife.

The courts in India have received several requests to make marital rape a crime, but the majority of these cases have been either dropped or dragged out for years without producing a conclusive decision.

In 2015, the Supreme Court rejected a woman's petition on the grounds that the law wouldn't change for just one woman. In *Arnesh Kumar vs State of Bihar*³⁵, the court had observed that criminalizing marital rape will be the collapse of the social and family systems amidst the already existing biased laws.

The criminalization of marital rape has frequently been seen by the Indian judiciary as a means of undermining the institution of marriage. The exception to Section 375, however, frequently conflicts with Section 498A, which deems cruelty committed against a wife by a husband or a husband's relative a criminal offence.

Maneka Gandhi, the Union Minister for women and child development, sparked controversy in 2016 when she asserted in Parliament that a legislation against marital rape was impossible since marriage is a "sacrament."

However, a 2013 amendment recognized rape of girls between the ages of 12 and 15 as a crime that was punishable by law, but it did not take into account the grave harm done to victims who were older or already married.

³⁵ *Arnesh Kumar vs State of Bihar*, (2014) 8 SCC 273

The Verma Committee also recommended modifying the laws regarding marital rape, arguing that marriage does not constitute "irrevocable consent to sexual intercourse."

Additionally, the Indian government was advised to make it a crime by the UN Committee on the Elimination of Discrimination Against Women.³⁶

Conclusion

Marital rape is not totally prohibited in India. It is without a doubt a significant instance of female abuse that calls for government action. Women who have been sexually assaulted by their husbands or spouses are more susceptible to many types of attacks and frequently experience chronic medical and psychological problems. In this case, a woman is forced to live with her abuser on a regular basis, making marital rape even terrifying for her. It is obvious that marital rape has to be made a crime due to how serious the effects are. In India, the law is improving for women, but more needs to be done to make social and legal improvements, such as criminalizing marital rape and altering views toward women in marriage.

The Indian court is taking a backward stance on the issue of marital rape by asserting that the Indian parliament is in charge of drafting laws and that the parliament has previously established that marital rape is not a crime in India. However, the government believes that making marital rape a crime will weaken the institution of marriage. The legal system and the government are not yet prepared to make marital rape a crime. In reality, the judiciary and the legislature are defending criminal behavior under the guise of preserving marriage, but they are actually protecting those who commit crimes.

Whether committed within or outside of marriage, rape must be punished. At the same time, our legislation must establish clearly defined types of rape sanctions that set them apart from offences involving physical assault, intimidation, or brutality. There cannot be a single standard used to determine punishment. To make sure that the guilty are punished and the innocent are not, we need to redefine marital rape and revise the associated sentencing and prosecution systems.

³⁶ *Criminalisation of marital rape: How India perceives 'sex in marriage'*, <https://www.outlookindia.com/national/criminalisation-of-marital-rape-how-india-perceives-sex-in-marriage--news-196162> (last visited Jan 8, 2023).

