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## CRIMINALIZATION OF MARITAL RAPE IN INDIA

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### 1. INTRODUCTION

In India, marital rape is among the most heinous crimes that may occur. It is now the species of rape rather than just an offense, and marital rape is no longer just one kind of rape. The most horrible crime against women is rape, which was defined in "Section 375 of the Indian Penal Code, 1860 (IPC)" now in "Section 63 of Bharatiya Nyaya Sanhita (BNS)" as occurring "without the consent." However, marital rape is a taboo subject in Indian households and isn't specifically covered by any statutes or made illegal. The Constitution guaranteed women the same civil, political, and economic liberties as men. With the help of the Constitution, women now have more opportunities than ever before to have a say in the future of our country. There are still many areas where our nation needs to match with other countries despite women achieving remarkable progress and prospering in nearly every industry, including education, law enforcement, research, and technology.

The "National Crime Reporting Bureau" found that 86 new cases of rape were reported daily in 2021. The seriousness of rape as a crime against women is difficult to exaggerate. Indian society and the Indian legislature hold somewhat different views on the danger of rape in marriage. Several landmark decisions have demonstrated, however, that the Indian judiciary does not take a radically different stance on the morality of marital rape; on the contrary, it is universally in support of the practice's outlawry in India.<sup>1</sup>

As a crime, marital rape occurs when a husband or wife engages in sexual contact with another person against their will. The subject is sensitive and contentious. It is allowed for a husband and wife to engage in sexual actions if the victim is a lady over the age of 15, even if rape is typically outlawed in India. That rape within a marriage is not a crime in India is basically what the exclusion means.

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<sup>1</sup> Raveena Rao Kallakuru, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' (2018) 11 NUJS Law Review 121-150.

## 2. CRITICAL ANALYSIS

### 2.1 Why Marital Rape is not a Crime in India?

Customs and Culture: After marriage, the majority of women are socialized to feel that their husbands should control every part of their lives. Sociocultural customs, attitudes, and traditions have taught women that it is their responsibility to satisfy their husbands' sexual cravings at all times.

A commonly believed misconception is that "WITH MARRIAGE COMES CONSENT," which holds that because of ingrained patriarchy and prejudices, marriage constitutes a contract between two people. The agreement essentially says that the husband is allowed to have any kind of contact with his wife he chooses and that everything that happens within a marriage is a matter of permission. Without considering the girl's thoughts, the girl's parents arrange the marriage. Consequently, husbands believe that their wife has no say in sexual matters and that permission is meaningless when it comes to a concept as big as marriage.<sup>2</sup>

Most families place a great deal of strain on married couples. All they ask is that they grow their family and continue the family legacy. Indian households encourage women to have children regardless of their desire for children, as they prohibit women from using their right to self-determination on reproduction. The husband feels compelled by family pressure to force his wife to have intercourse with him in order to conceive her. Because of this, even if raping the woman was necessary in many circumstances, the families are happy that their family line has continued. The woman's welfare and mental state don't concern them.

A woman's financial reliance on her spouse and in-laws is another issue that falls under this category. Married women are compelled to put up with their husbands' violence since, historically, they were not supposed to leave the house, despite the fact that this mentality is gradually changing.

### 2.2 Public Perceptions and Legal Ambiguity

Damage to one's honour, identity, and reputation can result from any coerced sexual interaction. For women, "Women shall be especially protected against any attack on their honour; in particular against rape, enforced prostitution, or any form of indecent assault" "(Article 27, Fourth Geneva Convention)". "A woman's dignity" has replaced "family or

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<sup>2</sup> Vishnu Goel, *Rape Laws: The Heinous Crime Decoded* 96-106 (Lexis Nexis 2019).

husband's right" as the dominant narrative surrounding rape, which began in the last fifty years. For a long time, the idea of consent has been disregarded in weddings.

A person's ability to provide permission is nonexistent in some societies. The families who orchestrated the marriage promised her undying approval. Media stereotypes and rape myths continue to perpetuate this, despite multiple attempts to dispel them.

Considering a woman's virginity as a "commodity" that is acquired or relinquished when she gets married is one such risky idea. Since the husband is seen as "owning" his wife's sexuality, he is immune from charges of engaging in an intimate or sexual encounter without her consent. Another example of a cultural stereotype is the idea that sexual relations of any kind are "expected" as procreation is the only reason for marriage.<sup>3</sup>

Marital rape is less commonly seen as a criminal offence when compared to other types of rape. For roughly a third of the cases, the victim-perpetrator dynamic was the main factor in determining guilt and punishment. As the offender-victim relationship deepens in sexual assaults, the victim is more likely to be blamed, perceptions of harm decrease, and the occurrence is less likely to be deemed rape.

One "exception" to the rule against forced sexual encounters was a marriage partnership. Similar results have been shown in previous research, where students have been found to endorse "sex role stereotypical attributions" and hold attitudes that promote rape as the offender and victim become closer in acquaintanceship. Strangely, no new studies on marital rape or survivors were located as we were writing this editorial. The scant prior material is thus heavily biased in favour of Western countries.

This raises concerns because such cases in low- and middle-income nations are frequently significantly underreported owing to factors such as a "lack of explicit legal protections, the use of marriage as a shield, apprehension about potential legal complications, isolation, and preconceived notions".

Most countries made it a crime to rape a spouse sometime in the 20th century or later. Several mechanisms have contributed to this, including rulings by courts, the elimination of "statutory exemptions," direct reference in legislation, and the establishment of a new crime of marital rape. Conventional wisdom holds that "marriage itself implying sexual consent" is no longer relevant, and a prevalent accusation is that the "promise of marriage" functions as an "unspoken

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<sup>3</sup> *Ibid.*

consent" for sexual encounters. Adults' voluntary sexual relations, motivated by feelings of love, trust, or want, differ from informed consent.<sup>4</sup>

Legal ambiguity, a lack of targeted legislation, cultural opacity, media portrayals of sexuality and marriage, misunderstandings of religious beliefs, gender norms, and, most significantly, an absence of studies addressing this issue all serve as promoters of marital rape. While it is true that marital rape is now a crime, this does not necessarily translate into its enforcement, and there are several loopholes. Perpetrators frequently get punishment, and public ignorance contributes to the problem. The gravity of marital rape is not demonstrated here. For instance, there has been a shortage of scholarly writing or social media debate on marital rape, even though incidences of intimate partner violence and marital discord have been on the rise throughout the current unparalleled COVID-19 pandemic.

### 2.3 Marital Rape in India

According to the Supreme Court's ruling in "*Bodhisattva Gautam v. Shubhra Chakraborty*"<sup>5</sup>, "rape is a crime against fundamental human rights and a breach of the victim's most cherished fundamental rights." The victim's right to life, protected by "Article 21 of the Constitution", was particularly mentioned by the court as having been violated. Put differently, the court determined that rape is a breach of the victim's deepest values. Nevertheless, this line of reasoning is contradicted by his assertion that there is no such thing as rape in marriages. Despite the fact that domestic violence laws in India have advanced significantly, most of these developments have only addressed physical assault and not sexual abuse. One can find a broad exemption to the Indian legislation regarding marital violence in Section 375 of the IPC of 1860.

Marital rape is not regarded as a crime in India. The "172nd Law Commission's" report suggested that the exception provided in "Section 375 of the IPC" be invalidated. It suggested that the fact that he is the spouse is not a legally recognized extenuating circumstance.

Additionally, the Justice Verma, who brought about a major modification to the Criminal Act of 2013, suggested that marital rape be made a crime and that a person's marital status should not be a mitigating circumstance. Judge M. Nagaprasanna declared in the case of "*Hrishikesh Sahoo v. State of Karnataka*"<sup>6</sup> that "A man is a man; an act is an act; rape is a rape, be it

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<sup>4</sup> Debanjan Banerjee, 'The Dark Shadow of Marital Rape: Need to Change the Narrative' (2022) 4(1) Sage Journals 125-131.

<sup>5</sup> 1996 (1) SCC 490.

<sup>6</sup> Writ Petition No. 48367 OF 2018.

performed by a man the 'husband' on the women 'wife'." If a man—who happens to be a husband—is held accountable for it.

While the Supreme Court is currently considering a petition to criminalize marital rape, the “Gujarat High Court” made a significant ruling in 2023, stating that "rape is a rape, whether it is performed by a man the husband against his own wife."

Marital rape is still not illegal in 36 nations, including India. There has been much back-and-forth over the years regarding the applicability of “Section 375's exemption to unwilling sexual intercourse between husband and wife (beyond the age of fifteen)”. Mediation and compromise, rather than legal debate, usually resolve legal ambiguities around "consent" in cases of sexual abuse inside marriage. Marital "obligatory sexual interaction" has been challenged because it violates the “Article 14 (Right to Equality) and Article 21 (Freedom of Expression)”.

Cruelty can be defined according to several criteria, including the nature of the marital relationship, the husband and wife's cultural background and temperament, their health, and how they engage daily. Additionally, the degree to which an individual is sensitive to and able to endure emotional cruelty differs from person to person. To rephrase, the determination of whether mental cruelty was proven depends on the specific facts of each instance.

"The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act" and "The Protection of Women from Domestic Violence Act, 2005" are just a couple of the laws that have been passed in India to ensure that women are better protected and safe in the workplace. More fuel has been added to the fire following the inhumane “Nirbhaya incident in Delhi and the failure of the Criminal Law (Amendment) Act (2013) to address the issue of marital rape. Numerous women's groups and human rights associations have also echoed the Justice Verma Commission's recommendation to criminalize this crime”.<sup>7</sup>

It is common for cultures to view marital rape as a socially sanctioned transgression that prevents women from achieving the good life, they want for themselves. This kind of abuse is, unfortunately, not an isolated incident but rather a standard component of violent relationships. Under the guise of marriage, society normalizes multiple sexual assaults that happen behind closed doors, and one can only imagine the wordless pain that results. Social and health services are frequently unable to alleviate the physical and mental suffering that results from this. As

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<sup>7</sup> Shikha Chhibbar, *Sexual Violence in Private Space: Marital Rape in India* 82-89 (Torkel Opsahl 2016).

one could expect, the rate of disclosure will be modest. In the end, marriage represents a social and emotional connection between people, including love, trust, and respect.

In addition to being physically and emotionally traumatic, sexual encounters that do not involve permission are fundamentally at odds with marriage and have several adverse biopsychosocial effects. Whether a case of domestic violence is isolated or part of a larger pattern, victims of marital rape suffer from the same devastating effects of trauma regardless of the outcome of the prosecution.

Child marriage and in-marital sexual assault were the pivotal subjects of the seminal Indian case "*Independent Thought v. Union of India*".<sup>8</sup> An NGO known as Independent Thought took legal action by suing to overturn a provision in the IPC that absolves husbands of rape charges in cases when the victim is a girl older than fifteen. The Apex court ruled in this case that having sexual relations with a girl under the age of 18, regardless of her marital status, is considered rape and carries the death penalty in India. The court found that child marriage violated fundamental human rights and that the IPC's exception was biased against children. This ruling marked a watershed moment in the struggle to end child marriage and the sexual exploitation of children in marriage in India. The court's decision addressed a significant loophole in the legislation. It provided a platform for children who had been victims of sexual abuse in the context of a marriage.

In this particular instance, the Delhi High Court ordered the government to contemplate passing new legislation criminalizing rape within a marriage seriously. Wives were discriminated against and the IPC exemption in section 375 infringed their right to life and personal liberty, the court decided. The court stressed the necessity to handle marital rape comprehensively in India's complex socio-cultural context. This case made marital rape a criminal in India, and lawmakers have now taken it seriously enough to pass new laws. Even though the court has ordered no marital rape prosecutions, the issue is still highly debated and supported by many Indian groups.

After the 2012 Delhi gang rape and murder of a young woman, the Indian government created the J.S. Verma Committee Report. J.S. Verma, a former CJI, led the committee that reviewed and improved sexual assault and other violence against women laws. Criminalizing marital rape was a committee priority. The committee ruled that the IPC's lack of marital rape charges

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<sup>8</sup> (2017) 10 SCC 800.

discriminated against women and violated their constitutional rights. Rape in marriage should be illegal regardless of wife age, according to the committee.

The J.S. Verma Committee Report advanced India's fight against gender discrimination and sexual assault. Many liked the committee's proposals since they advanced gender equality and women's rights. India still does not prosecute rape within marriage, hence the recommendations have not been fully implemented.<sup>9</sup>

### 3. CONCLUSION AND SUGGESTIONS

We can make use of the current laws while we wait for new ones to be passed. It may be possible to enact a new law that targets marital rape after a thorough investigation, or the International Criminal Code or the Domestic Violence Act may have pertinent provisions. Nonetheless, a number of criticisms have been leveled at this school of thought, chief among them being the claim that ending marital rape would be tantamount to attacking the concept of marriage and would thus be faced with intense backlash. Justice Krishna Aiyar said in "*Rafiq v. State of Uttar Pradesh*"<sup>10</sup>- "A murderer destroys the body, but a rapist kills the spirit." The state holds that this cannot be regarded as sacred since it is a private matter between the husband and wife. The state's current marriage laws address issues such dowry payments, adultery, cruelty, and divorce. The state believes that both the husband and the wife should make this decision on their own. It is impossible to overestimate the importance of spousal rape's inclusion on the list for India's mental health sector.

#### *Suggestions-*

- ***Equal Penalties for Single and Married Rapes:*** Differentiating penalties based on marital status perpetuates inequality, trivializing a married person's trauma. Equal penalties ensure justice for all victims, reinforcing that consent is vital, regardless of marital ties.
- ***Prohibition of Media Trials:*** Media trials often prejudice judicial proceedings, compromising the accused's right to a fair trial and the victim's dignity. Prohibiting them ensures unbiased justice and protects privacy.
- ***Marital Rape as a Ground for Divorce:*** Recognizing marital rape as a distinct ground

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<sup>9</sup> Lisa R. Eskow, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution' (1996) 48 Stanford Law Review 677.

<sup>10</sup> 1980 SCC (CRI) 947.

for divorce empowers victims to escape abusive relationships and seek justice, fostering personal dignity and freedom.

- ***Penalties for False Accusations:*** Punishing false accusations ensures the law isn't misused, maintaining its credibility and protecting the innocent from harm.
- ***Gender-Neutral Marital Rape Laws:*** Gender-neutrality acknowledges that all individuals, regardless of gender, can be victims or perpetrators, promoting inclusivity and equality in justice.

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