

---

## **JUDICIAL ATTITUDES TOWARDS MARITAL RAPE: ANALYSIS OF KEY INDIAN COURT CASES**

---

Shubham Verma, Ph.D. Scholar, Department of Law, Lucknow University

### **ABSTRACT**

The institute of marriage holds a sacrosanct nature in the Indian society. The relationship of marriage introduces certain presumptions, the biggest being expectancy of sex. The presumption that married couple will engage in sexual intercourse dilutes the power of a woman to say 'no' to such advances made by her husband. This presumption over and over again direct to the act of marital rape. India falls in the last 36 countries which have not yet criminalized marital rape. It implies that in India, a husband is not held accountable on the act of raping his wife or having non- consensual sexual intercourse with her. This creates a legal gap in protection provided to women within the institution of marriage. There is an urgent need to safeguard women's right in the institution of marriage.

*“Deifying women has no meaning if they are not empowered. They are our equal half; some would delightfully say our better half.”<sup>1</sup>*

- Justice Rajiv Shakdher

## Introduction

Sexual intimacy has always been a debated topic. It is the foundational essence that is essential in relationships, dynamics of couples, social bonds and matters relating to reproduction. One of the main components of sexual intimacy is consent. There must be free and unbiased consent among the partners in a sexual relationship. Consent for this particular act is defined as *“an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity”*. The lack of said consent makes the act of sexual intimacy a crime more commonly known as “rape”. Bhartiya Nyaya Sanhita<sup>2</sup> (BNS) defines rape in Chapter V under Section 63 as *“A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person...”*

The section further provides a list of seven descriptions of circumstances where the above-mentioned acts would be considered as rape, and it includes doing it without her consent or against her will or where such consent has been coerced.

---

<sup>1</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404

<sup>2</sup> Bharatiya Nyaya Sanhita, 2023, Section 63, No. 45, Acts of Parliament, 2023 (India)

However, the same section also provides an exception to the same, where in the second exception of Section 63 states that “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*”. The issue for discussion lies within this sentence. With this exception a separate class has been created where husbands have undeterred lawful permission to have intercourse with their wives even against their will. This act has come to be known as “marital rape”. In simpler terms, it represents the act of one having sexual intercourse with their spouse without their consent. Under the *Protection of Women from Domestic Violence Act, 2005*<sup>3</sup> (PWDVA) marital rape or spousal rape is categorized as a type of “domestic violence and sexual abuse”.

### **History of Marital rape**

In many countries around the globe, marital rape has been made a punishable offence. However, India is still against this stance. This legal position of India stems from the patriarchal society and the view of the role of wife as being subservient to the husband. This correlates to the fact that earlier the society was of the view that women do not have the power to enjoy any rights in a marriage. This could be understood with the understanding of ‘social construction theory’. It presents a cultural perspective of the roles each individual plays in making a society. This societal culture is the frontrunner of the practices and customs that emerge in the society. According to this theory marriage is often seen from a patriarchal viewpoint. In such understanding, the husband can never “rape” his wife as he would hold the position of master and the wife is dependent on him. Thus, the husband would have a right to enjoy the privileges of her body.<sup>4</sup>

Another reason for not criminalizing the act is that marriage is considered a pristine institution in India where the identity of a wife is merged with that of her husband. This creates a legal fiction where the wife does not hold an independent personality in the eyes of law. The ‘sex role socialization theory’ supports this viewpoint. As with the passage of time certain roles have become gender-specific and this has led to adaptation by women as per the needs and whims of their husbands.<sup>5</sup> When marriage is seen through this lens, women walk the lines of

---

<sup>3</sup> Protection of Women from Domestic Violence, 2005, No. 43, Acts of Parliament, 2005 (India)

<sup>4</sup> Ganesh Makam, ‘Marital Rape Laws in India: Bridging the Gap between Gender Equality and Criminal Justice’, (2023) SSRN <<http://dx.doi.org/10.2139/ssrn.4475468>> accessed 15 December 2024

<sup>5</sup> Indira Jaising, ‘Marital Rape in india: An Exploration of Legislative and Judicial initiatives’, (2004) 12 J. Gender, Soc’y&L 315

submissive roles and husbands dominate them.

In 2013, India was advised by the *UN Committee on Elimination of Discrimination Against Women* (CEDAW) to abolish the exception of marital rape. Article 1 of CEDAW, “discrimination against women” is differentiation based on gender which cuts into the ability of women to exercise and enjoy their human rights and freedoms irrespective of the marital status they adhere to. The General Recommendation 19 of CEDAW is in direct conflict with the marital rape exception (MRE) as the recommendation says that any kind of mental or sexual harm done against the women is a discriminatory act. Additionally, General Recommendation 35 says that for an act to constitute marital rape there has to be the existence of coercion and lack of consent given voluntarily.

Though India has not signed the optional protocol of CEDAW, as a state party of CEDAW, India is still liable to respect the rights of women irrespective of their marital status.

It has also been seen that the MRE is in contradiction of the provisions of *International Covenant on Civil and Political Rights* (ICCPR) and *the Universal Declaration of Human Rights* (UDHR). The discriminatory nature of Exception 2 of Section 63 is violating the Article 1 of UDHR. Member states are required to protect the dignity and status of all their citizens and that include women too regardless of their marital status. The discrimination in this regard is created as a distinction is drawn between unmarried and married women.

The views on marital rape can be understood by the suggestions made by the *42<sup>nd</sup> Law Commission Report*<sup>6</sup> which was the first report to address the issue. While it did not provide any reasoning for the suggestions made, it said that in cases where there is judicially separation between a husband and wife, then non-consensual sexual intercourse in such a case will be rape as marriage has subsisted at the time that they started living separately. Secondly the report suggested to rearrange the provision of punishment for non-consensual sex between women aged twelve to fifteen years of age and her husband and separate it from the sections defining and providing punishment for “rape”. It shows the reluctance to categorize the act of marital rape as rape. This creates a differentiation of treatment between marital rape and rape as the former in the eyes of law does not hold the same significance as rape and it is generally

---

<sup>6</sup> Law Commission of India, Indian Penal Code, Report no. 42 (June 1971)

understood that a 'lower type of sexual misdemeanor' is the highest type of tag of offence that can be given to it.

The Justice JS Verma Committee in 2012 was responsible for formulation of amendments to be applied to the rape laws in India. The Committee was responsible for publishing the 'Report of the Committee on Amendments to Criminal Law'. Several recommendations of the Committee were accepted and implemented as *Criminal Law (Amendment) Act*<sup>7</sup>, 2013 but the recommendations regarding marital rape made by the Committee were rejected. The Committee suggested that marital rape must be criminalized. The Committee for the same provided with a two-step process- firstly, deleting the exception clause and secondly, making a specific provision that provides that a marriage or a relationship enjoying similar nature or status does not constitute a legitimate and suitable excuse while determining the existence of consent in case of a sexual offence.<sup>8</sup>

However, the Parliamentary Standing Committee on Home Affairs in the 167<sup>th</sup> Report, commonly known as the 'Standing Committee Report'<sup>9</sup> did not accept the said recommendation regarding deletion of the exception clause while reviewing the 2012 Amendment Bill. The following are the arguments presented by the Standing Committee Report:

1. The deletion of the exception clause would put the family system and institution of marriage under greater stress and hence the committee would perhaps instead of doing justice would end up doing more injustice.
2. There are other remedies available both in course of legal provisions and informal routes, i.e. the discussions about the bedroom of married couple must either stay between them or within the family. Further, the law provides a criminal law remedy in form of the provision of cruelty under Section 498A of the Indian Penal Code.<sup>10</sup> Also remedies under Protection of Women from Domestic Violence (PWDVA) are also

---

<sup>7</sup> Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013).

<sup>8</sup> Pamini Kasera, 'A Historical Analysis of Rape Laws in India', (2020) SSRN <<http://dx.doi.org/10.2139/ssrn.3619807>> accessed 20 December 2024

<sup>9</sup> Standing Committee on Home Affairs, 15<sup>th</sup> Lok Sabha, Report on the Criminal Law(Amendment) Bill, 2012, 167<sup>th</sup> Report, 45, (December 2015).

<sup>10</sup> Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India)

available to the aggrieved women.

### **Complexities of criminalization**

Whilst both rape and marital rape are essentially the same act involving the similar elements of crime except for one difference – in marital rape the offender is the husband. And it is this distinction that changes the whole dynamic of how law treats this act. The common consensus among the legislature and judiciary is that the sanctity of marriage must be protected and the administration should not meddle too much into the sacrosanct institution of marriage.<sup>11</sup> Since no reason is provided in the law for the exception that marital rape enjoys, it is possible that the exception works on the irrefutable presumption that when a relationship of marriage exists between the “victim” and “perpetrator”, marriage itself operate as consent.

It is also significant to mention that whilst the act of marital rape in general is not criminalized, the law has yet again created an exception to this by criminalizing on the particular type of marital rape- when an estranged husband, where the spouses are living separately owing to the process of judicial separation, has sexual intercourse with his wife without her consent. This solidifies the theory that living together in name of marriage forms a presumption of consent and shows willingness of wife to have sexual intercourse.<sup>12</sup>

However, it is imperative to state that the issue in question involves civil liberties and fundamental rights provided to the human beings. The act of marital rape presupposes husband’s authority over the bodily autonomy of wife. It relies on the rudimentary understanding of the institution of marriage where woman was considered the “property” of the husband and there was a “legitimate expectancy of sex” that came with marriage. However, as the understanding of the society has developed and the Constitution of India became the supreme law, the act of marital rape violates the fundamental rights enshrined in Articles 14, 15, 19(1)(a) and 21.

The articles put forward the basic principle that people should be treated equally in similar situations without discriminating among them. They strive to promote equality and right to life. It does allow for a reasonable classification over intelligible differentia. The Exception 2 of

---

<sup>11</sup> Shilpi Jain, ‘The Marital Rape Exception: An Analysis in the Indian Context’, (2014) 2 Asian J. Leg. Stud. 11

<sup>12</sup> Vijay P Singh, ‘Judicial Approaches to the Criminalisation of Marital Rape’, (2022) 29(1) Indian Journal of Gender Studies, 10-32

Section 63 discriminates against women on the basis of their marital status. The Supreme Court as early as 1981 made a pronouncement of gender rights with the case of *Air India vs Nergesh Meerza*<sup>13</sup>, where provisions of service discriminating amongst women who are to get married or pregnant were said to be arbitrary. In the recent case of *X vs The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr*<sup>14</sup>., the apex court used purposive interpretation to ensure that the marital status of a woman does not entitle her for discrimination by the provisions of law. Therefore, it is safe to say that with various judicial pronouncements and legislative interventions, it has been ensured that unmarried single women should enjoy similar rights as of married women in areas such as adoption, succession and maternity benefits. So the question arises that on the other hand, why are married women being discriminated against and being robbed of their own choice? This conundrum of rights of women shows the two-faced legislature in place in India. Just as abortion or pregnancy is the choice of women as her bodily autonomy, so is sex with her husband.

It cannot be said that the judiciary does not understand the difficult stance a married woman is in because in the case of *Independent Thought vs Union of India*<sup>15</sup>, the Supreme Court has held sexual intercourse with a woman below 18 years to be rape irrespective of the fact that the woman was the legally wedded wife. The part of exception clause laying down provision regarding non-consensual intercourse with wife under age of fifteen was struck down by the Court. The Court agreed that marriage is not a proper ground for reasonable classification in this issue. However, the same was not applied in 2021 in the case of *Dilip Pandey vs State of Chhattisgarh*<sup>16</sup>, where it was held that “sexual act performed by a legally married spouse is not considered rape, even if it is done against the woman’s consent or under duress”.

The High Court of Gujarat albeit holds a different stance as seen in the case of *Namesbhai Desai vs State of Gujarat*<sup>17</sup>, as they were of the opinion that marital rape is a disgraceful offence. They understood the mental and psychological scares it can leave on a women as aptly put in the words that it “has scares the trust and confidence in the institution of marriage”.

---

<sup>13</sup> *Air India vs Nergesh Meerza*, AIR 1981 SC 1829

<sup>14</sup> *X vs The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr*, 2022 SCC OnLine SC 1321

<sup>15</sup> *Independent Thought vs Union of India*, (2017) 10 SCC 800.

<sup>16</sup> *Dilip Pandey vs State of Chhattisgarh*, CRR/117/2021

<sup>17</sup> *Namesbhai Desai vs State of Gujarat*, 2002 Supp(3) SCR 39

Similarly in *Hrishikesh Sahoo vs State of Karnataka*<sup>18</sup>, the exception of marital rape was said to be “regressive and violative of Article 14”.

The legislature and the judiciary have often avoided the issue of criminalization of marital rape or used the existence of the exception clause in the criminal law to avoid questions demanding answer to the fact of whether a husband had raped his wife. Broadly, the government, legislature and judiciary use three arguments against the criminalization. They are:

1. The institution of marriage holds a sacred ground in the Indian Society. The goal must always be the protection of this institution. To ensure this the least amount of interference must be made with it.
2. There are various alternative recourses available to aggrieved women through law such as ‘cruelty’ under Indian Penal Code, the provisions of PWDVA, 2005 and various other personal laws which deal with issues of divorce and marriage.
3. The cultural norms and values existing in Indian society also hamper from making marital rape a criminal offence.

### **Intrusion into the private sphere**

Marriage is considered a personal affair and this creates a private sphere where the government and courts show a reluctance to interfere. This reluctance is owed to the fact that privacy of citizens must be respected and an intrusion will disrupt this delicate privacy. This is the reason why no compulsions to either marry or divorce has ever been made on account of the State. The State only provides for a minimum age of marriage for men and women. Another instance when the State interferes is when there is cruelty in the marriage and to protect the rights of women and provide her with a decent life, the State has made provisions for legal recourse.

Similarly, marital rape is also an act that violates the fundamental rights of a woman prescribed in Article 14 and 21 of the Constitution of India. The occurrence of marital rape happens in the “private sphere of marriage” and therefore it becomes the duty of the State to penetrate and interfere in this “private sphere”.

---

<sup>18</sup> *Hrishikesh Sahoo vs State of Karnataka*, MANU/KA/1175/2022

However, judiciary has often created a legal fiction in regards to the private sphere of marriage where it hesitates to introduce fundamental rights in the sacred institution of marriage. The judiciary is of the view that fundamental rights do not have any existence in a relationship of marriage. This leads to the reluctance of non- criminalization of the act of marital rape. But this reluctance often disappears when the judiciary makes the individuals cohabit in the guise of restitution of conjugal rights. It is meant as a remedy where the court compels a married couple by passing an order to live together. The same could be found within Section 9 of the *Hindu Marriage Act, 1956*.<sup>19</sup> In this instance also it is often seen that the women is at a disadvantageous position where she is compelled to resume relationship with her husband. The choice to have a sexual relationship and her bodily autonomy is transferred from the hands of women to the whims of State. This again begs the question whether it is constitutionally valid for a State to compel a woman to engage in sexual relationship with her husband.

In this regard, with *T. Sareetha vs T. Venkata Subbaiah*<sup>20</sup>, the Andhra Pradesh High Court was the first to hold that “*restitution of conjugal rights as provided in Section 9 of Hindu Marriage Act is unconstitutional and violative of Articles 14, 19 and 21 of the Constitution*”.

Not only is there no privacy in the ‘marital sphere’ for women in such cases of restitution of conjugal rights but also the women’s individual autonomy and sexual autonomy are violated. The same is the case in marital rape.

### **Existing alternative remedies**

The State often skirts around the issue of criminalizing marital rape by seeking the defense of alternative remedies already existing in law for an aggrieved women. Therefore, it becomes important to understand these alternatives and see how they are inadequate in addressing the issue of marital rape.

### **Alternative remedy in criminal law**

The most viable alternative available in Bharatiya Nyaya Sanhita is the provision of ‘cruelty’ enshrined in Sections 85 and 86. Though the provision exists to deal with cases of cruelty, it

---

<sup>19</sup> The Hindu Marriage Act, 1955, Section 9, No. 25, Acts of Parliament, 1955 (India)

<sup>20</sup> *T. Sareetha vs T. Venkata Subbaiah*, (1983) AIR1983AP356

falls short while dealing with cases of rape. This is because the elements of both the acts are quite different. The wording of the definition is, “*cruelty means:*

1. *any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
2. *harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”<sup>21</sup>*

The above definition is not wholly inclusive as what amounts to cruelty is very dependent on the facts from case to case basis. While it is true that rape is a kind of cruelty but it is quite different from any physical or mental violence as expressed in the definition of the offence. Also the evidence to be furnished to establish an offence of rape is different from that of cruelty. This is said as to constitute the offence of ‘cruelty’, it has to be proved that the abuse was so severe as to make the women contemplate taking her own life or to cause danger to life. However, such nuances will not exist if marital rape was a punishable offence as to prove it only the fact that there was non-consensual sexual intercourse is enough. Therefore, it is important to recognize marital rape as a separate crime.

Another inadequacy is that this alternative remedy posse is the misuse of this provision. One of the reasons for reluctance of criminalizing marital rape is the fear that it would become a tool for women to harass their husbands as is sometimes seen with cases of dowry and cruelty.

The third inadequacy arises in the face of punishment. The maximum punishment of cruelty under the law is three years, whereas the maximum punishment for rape is ten years. This difference clearly shows that one cannot be used as an alternative for another.

### **Alternatives in civil law**

A remedy under civil law would make the act a matter between the perpetrator and the victim,

---

<sup>21</sup> Bharatiya Nyaya Sanhita, 2023, Section 86, No 45, Acts of Parliament, 2023 (India)

reinforcing the public-private dichotomy. At the same time, it is also true that marriage is a relationship that exists between two individuals which exists within the ambit of provisions of family and personal law. Whilst law can criminalize certain acts within such relationship, it is important that such punishment and remedies exist harmoniously in both criminal and civil laws.

The grounds for divorce listed in Section 13 (1) of the Hindu Marriage Act expressly mentions cruelty as a ground. However, 'sexual violence' is not included in the definition of cruelty here but 'refusal to engage in sexual intercourse' forms a valid ground for husband to seek divorce under 'mental cruelty'. This puts women in an awkward and rather disadvantageous position where the right to say 'no' could very well lead to ending of her marriage. This in a way dilutes her choices and takes away her personal autonomy, leaving no place for consent.

As compared to this PWDVA, 2005 clearly includes 'sexual violence' in the definition of domestic violence. It also recognizes sexual assault as an offence against women. The Act applies in situations where a married woman faces exploitation and harassment. Civil remedies available for a victim of marital rape is to either seek judicial separation or compensation or protection orders. Hence, it is clear that the issue of marital rape does not find any mention in the Act.<sup>22</sup>

### **Proposing remedies**

To concentrate on the complex issue of marital rape that exists as an exemption in the legal framework of Indian law a multifaceted approach is required that would take into account the various legislative reforms required and the change of perspective in the societal attitudes.

The suggestions by Justice J.S. Verma Report form the basis of the current suggestions. The Report provided for a four-step routine, starting with deleting the exception clause. Secondly the Report suggested that it be specifically mentioned that marriage is no defense to have a non-consensual sexual relationship with one's wife. This is to ensure that there is no ambiguity in the language of law that would lead to arbitrariness. As the lack of not expressly mentioning the same would lead to judiciary interpreting the legal gap in its own way, which in turn could culminate as requiring additional evidence to constitute the offence or presuming the existence

---

<sup>22</sup> Swarati Sabhapandit, 'Criminalising Marital Rape in India', (2023) The India Forum <<https://www.theindiaforum.in/law/criminalising-marital-rape-india>> accessed on 26 December 2024

of consent in lack thereof. Thirdly, the relationship of marriage does not magically give a presumption of consent. For this purpose, it is important that a system be established to identify the presence of consent through evidence without putting the burden to prove it on either the victim (by assuming there was consent) or the offender (by assuming the lack of consent). This could be evidence suggesting use of force or signs of physical and mental cruelty.

And lastly, the offence of marital rape would carry the same quantum of punishment as rape. Marital rape would not automatically be a less serious offence just because there is a presumption that married couple will engage in sexual activities. Rape is rape, no matter if done by strangers or by the husband. The fact that the maximum punishment for marital rape when done by a husband living separately “from two to seven years, along with fine” shows the intention to show leniency to the husband.<sup>23</sup>

While understanding the role played by the judiciary in protecting the fundamental rights of women, the vertical approach often adopted by the judiciary will not yield much result. This is because it preserves a stringent public-private divide where constitutional rights are assumed to be safeguards against the State. Rather the horizontal approach in the case of *Indian Young Lawyers Association vs State of Kerala*<sup>24</sup>, where the Court held the exclusion of women from the temple was unconstitutional, shows a shift in the understanding of public and private spheres where ideals of liberty and equality with individual autonomy were applied.

## Conclusion

The legislature had an amazing opportunity to debate extensively on the topic of marital rape while overhauling the previous criminal laws with the new laws. This missed opportunity seems more like reluctance of the State to discuss the issue of marital rape. The resistance shown to recognizing the existence of non-consensual sex in a marriage and criminalizing it stems from the “traditional notions” of matrimony and interpretations drawn from religious teachings. The act of marital rape is gender-neutral i.e. it impacts both men and women though more frequently women are affected. Factors like cultural norms, societal beliefs and governmental policies have a helping hand in shaping an individual’s experiences which have influence over the issue. The State has used the argument of private sphere as an evading

---

<sup>23</sup> Bharatiya Nyaya Sanhita, 2023, Section 67, No. 45, Acts of Parliament, 2023 (India)

<sup>24</sup> *Indian Young Lawyers Association vs State of Kerala*, (2018) SCC SC 1690

technique as it often decides the impenetrability of the privacy sphere as it entered the same to de-criminalize adultery but shows reluctance to criminalize the act marital rape because of difference in ideology. The reason to shield marital rape when other violence by husband have been criminalized lies in the argument of “excessive interference with the institution of marriage” and the creation of “private sphere” which is impenetrable and shielded from the law, where all discussion ends as constitutionality of the act does not exist within that sphere. From Constitutional Assembly Debates it could be understood that the primary beneficiary of fundamental rights is the individual. Therefore, the focus must shift from private sphere to individual autonomy.