
MARITAL RAPE AND CONSTITUTIONAL RIGHTS - BALANCING INDIVIDUAL AUTONOMY WITH SOCIETAL NORMS

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ABSTRACT

Marital rape remains one of the most overlooked and internalized problems faced by India, because of which advocacy and awareness had never been more acute in the world and at home as well. This paper has dealt with continuity of marital rape in the Indian socio-legal system, and has pointed out that the lacunae in the law have allowed marital rape to be tolerated, in keeping with patriarchal traditions. A critical juxtaposition of the Indian legislature with the world standards shows a big contrast especially since the engagement of Exception 2 under the Section 375 of the Indian Penal Code (Now Section 63 Bhartiya Nyay Sanhita), which exempts rape within a marriage.

The study also looks at why both consent and mens rea are central to the definition of sexual offences, as well as why a legal differentiation exists between minor and adult-married women that is not justified. It also highlights the more socially and psychologically profound ramifications of marital rape, which have been downplayed in the discussion of law. To fill these loopholes, the paper proposes comprehensive measures that would help shore up legal measures, increase psychological and medical assistance, as well as improve social protective measures. In conclusion, it states that this should be addressed through a rights approach where women have the freedom of choice, integrity of their bodies, and dignity in marriage.

Keywords: Marital Rape, Indian Penal Code, Consent, Gender Justice, Women's Rights.

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Introduction

Marital rape is not considered as a criminal offence in India though in much of the world, what carries the determination in determining between the difference between rape and a consensual sexual relation is the non-existence of consent on the part of the concerned individual. Progressive actions on the legalization of marital rape have taken place in several countries, such as Poland, the United States and the United Kingdom, which have adopted the idea that absence of consent is enough to prove the marital rape, and this means the establishment of the principle that the marriage factor cannot be used as a mitigating factor to sexual assault.

The Indian viewpoint, however is influenced by the orthodox view of conception of marriage as a sacrament and not a contract. This perspective gives priority to marital bond over the innate human characteristics of women thus down playing or even justifying the gravity of sexual violence within a marriage. Therefore, despite the fact that the definition of rape that is recognized general law does apply to the situation of forced sexual intercourse in marriage, it is not subject to criminal prosecution in India. The BNS, in Section 63, specifically says that the absence of consent to sexual intercourse by a husband may not constitute a rape when it is committed on his wife provided that she is the legal age of eighteen. This exception of the statute forms a discrepant classification and denies married women equal protection of law. Such modes not only contravene the constitutional guarantees of equality (Article 14) and the right to life and personal liberty (Article 21), but also put women in a second place position in marriage in justifying coercion and undermining female autonomy. The result is it legalizes force in the marital relationship putting adult married women at the mercy of the men and having no remedy to violations³.

This exemption is attributable to patriarchal undermaintains inherent in the legal structures, which regarded marriage as giving husbands unrestricted access to the bodies of their wife, in so doing denying woman the right to sexual and reproductive choice. The refusal to criminalize marital rape over the years represents not only the inability to trace the changes in legal practice and align them with modern constitutional values, but also the practice of gender subordination and injustice on the systemic level. It contravenes the personhood, hao, and constitutionality of so many women, and perpetuates antique notions of marriage as an institution of domination

³ Editorial, "As SC looks again at conjugal rights, recalling Rukhmabai", *The Indian Express*, July 18, 2021.

over marriage as a bond of collaboration⁴.

A renewed look at Indian jurisprudence should work to realign what it means to be in a marriage; rather than maintaining a sacramental idea of marriage as an inheritable relationship, a re-examination should emphasize human dignity, egalitarianism and consent as fundamental tenets of a marriage. Marriage has to develop into an institution that can be characterized by mutual respect, equity and autonomy as against one where dominance and exploitation is enshrined. Because not criminalizing marital rape would subject women to second-class status, criminalizing marital rape would not only put Indian law in line with international standards on human rights but also fulfil the promise of the Indian Constitution, which guaranteed justice, equality, and dignity of the individual. This cannot be achieved by penal reform alone, it is rather an essential step towards the dissolution of regressive social stratifications and the guarantee of women in India the complete protection by their entitlement rights establishment and maintenance. Such reform is the only way that society can put to rest this entrenched injustice and restore dignity and humanity to the women in the marriage⁵.

Exploring Perspectives on Marital Rape and Legal Reforms in India

Rape has many forms such as gang rape, marital rape, statutory rape, such types of sexual violence have patriarchal ties, which in the past viewed women as objects of ownership, as distinct from the autonomous beings. Most conservative and patriarchal communities treated women as belonging to their fathers and only to become the property of their husbands once they got married. Such patriarchal understanding of ownership holds its ground until it was mitigated by the changing legal systems stressing women autonomy and equality. This paper aims to discuss the problem of marital rape in India, paying special attention to such an exception as the one on the right provided in Section 63 of the BNS, 2023. The study presents a critical discussion of the views of key stakeholders on the compatibility of the immunity granted to marital rape to constitutional standards of equality and freedom of the individual. The interviews produced severe differences of opinion and this dimension has been a result of the highly contested and sensitive nature of this issue within the Indian legal and social

⁴ Vandana, "Marital Rape- Exemption under Indian Penal Code: Quest for Recognition and Liability", Vol. II *ILI Law Review* 10 (Winter Issue 2017)

⁵ Calcutta Govt. of India, "Report of the Age of Consent Committee 1928-1929" (Central Publication Branch, 1929) Refer to p.11 available at <https://archive.org/details/in.ernet.dli.2015.52906/page/n7/mode/2up> (Last visited on Aug 18, 2025)

discourse⁶.

Although comparative studies on global perspective indicate that many jurisdictions worldwide recognize and criminalize marital rape, as has been the case in India, statutory shields are still accorded to spouses which amounts to reducing or suspending their status as a criminal offense. Not only does it continue gender based subordination but also compromises the basic rights as enshrined under Articles 14 and 21 of Constitution of India. The paper concludes that taking care of the marital rape exception is essential in order to promote women rights and bring justice to the survivors. Instead of destabilizing marital relationships, lawyers said, legal reforms could actually strengthen marital relationships on relationship of consent, equality and mutual respect. Nonetheless, the way to reform is obstructed by deeply rooted sociocultural opposition and misguided notions about marriage, sexuality, and women autonomy. As such, the effects of legal change need to be complemented with awareness programs and consolidation of culture such that the interest and willingness to engage in intimate relations becomes the foundation of intimate relationships. Despite the fact that the study is based on a rather limited sample size, it involves both quantitative and qualitative aspects, and, therefore, presents balanced and evidence-based point of view. This paper can be used as a starting point in development of more detailed policy and as a guide in further evolution of the legal framework in India to solve one of the most burning gender justice concerns.

Importance of Studying Marital Rape for Law Reforms in India

There should be studies on marital rape in India so that the loopholes that exist in the current law may be eliminated and the aspirations of the Constitution relating to justice and equality can be achieved. Indian rape laws are currently not entirely gender inclusive. The statutory definition of rape excludes carnal knowledge to some extent and puts unreasonable disparities on age and marital status. Married women are thus deprived of the legal right of pursuing criminal prosecution on charges against their husbands arising out of acts that in any other circumstance would without error categorically fall under the purview of rape⁷.

Also, the current legal regime does not cover LGBTQ + and transgender people, which further

⁶ Oshin Nehru, "Behind the Exception Clause: A Study of Jurisprudence on Rape Laws and the reluctance to Criminalize Marital Rape in the Indian Context" Vol. 4 Issue 1, *International Journal of Law, Management and Humanities* 1854 (2021)

⁷ A. Srisamuthra & Shri. R. S. Rashmi, "Marital Rape: A non-criminalized crime in India", Vol. III Issue I *Indian Journal of Law and Legal Research* 4 (2021)

develops the outdated provisions of the system that were the criminalization of unnatural offences with a wife. These exclusions indicate the restrictive heteronormative understanding of sexual crimes under the Indian law and the necessity of changing it.

This study aims at analyzing the process of marital rape by addressing judicial and social dimensions of this issue that caused India to hesitate in order to criminalize marital rape. The analysis will augment the extraordinary types of exemptions created in law to qualify husbands to evade criminal punishment and it will discuss the consequences of such a *carte blanche* on the rights, human dignity and bodily integrity of women. The concept of victimology is also used in the study to determine the psychological, social and economic long-term effects of marital rape on persons subjected to it.

Above all, this work proposes a substantive legal reform. The rape law should also be restructured into one that defines rape on a gender-neutral basis in such a way that equitably protects every person on a similar basis irrespective of their gender directives or sexual inclinations. Second, better personal laws are needed to specifically deal with minor wives including those laws that facilitate the annulment of child marriages when the wife reaches the majority age. These reforms will not only protect women and vulnerable communities against exploitation but it would also give alignment with the constitutional principles of equality, dignity, fairness and autonomy in the marriage relationship of the Indian criminal law. The decriminalization of marital rape and an extension of legal safeguards would be essential in the path towards breaking down systematic levels of gender inequality and protecting the universal rights of all persons in India⁸.

Legislative Framework: Marital Rape and its Legal Standing

Rape is purely a sexual crime of violence in which the consent of the victim does not exist, in which no legal label or technical exception can lay the matter out. However, in the Indian legal tradition the irresolvable incongruity remains true, even to this day: although it is recognized that married women are a party to what is, historically, the most contractualized form of sex possible, and yet, despite this, both procedurally and substantively, the laws that would protect an unmarried, non-sex-worker female against non-consensual sex, do not apply to them. Such a disparity in treatment, contravenes the entire purpose of equality before the law and

⁸ Shalini Nyer, "High-level panel slams legislature for failing to criminalise marital rape", *The Indian Express*, April 20, 2016.

contradicts the principles established in a variety of noteworthy rulings, such as *C.R. v. United Kingdom*⁹, *Independent Thought v. Union of India*, and *State of Maharashtra v. Madhukar Narayan Madikar*¹⁰. These cases reinforce that consent is a very necessary element in legal sexual relations, without reference to marriage.

The legislation of the recently enacted Section 63 of the BNS is keeping the tradition of marital rape exemption (MRE). It is based in the fact that the provision explicitly states that: Sexual acts by a man with his own wife the wife not being under eighteen years of age is not rape. This is paralleled by the previous loose provision of the Indian Penal Code (IPC) that spared husbands prosecution on rape cases where the wife was above fifteen years old. The BNS has merely aligned the minimum age with the ruling in *Independent Thought v. Union of India*¹¹, raising it from 15 to 18 years. Although this amendment makes the legal provision consistent with the age of consent, the gist of immunity offered to the husband in the face of non-consent intercourse is not eroded.

This continuity in the marital rapes exception has generated bitter critiques of legal scholars, women rights activists, as well as international human rights operatives. Introduction of the provision is argued to uphold a discrimination where marriage offers lifetime access to a woman as sexual object to the husband and denies her personality and agency. The current denial of marital rape the bracket of rape indicates a legal culture that is not keen to adapt to the new constitutional morals of equality, dignity and integrity of the body that the Indian Constitution has established with Articles 14 and 21 of the Indian Constitution.

The question of the existence of marital rape in India generates a conflict between the conventional approach and new jurisprudence. Whereas international law trends are taking full advantage of consent as the main pillar of sexual relations, the Indian legal system favors the matrimonial relationship above all the sexual relationship of women. As long as this exception is not repealed, Indian law will stand in conflict with its commitment to the constitution, as well as conformity to international human rights norms, leaving its female population with little protection of the law against a serious type of sexual violence.

⁹ (1995) 21 EHRR 363

¹⁰ (1991) 1 SCC 57

¹¹ AIR 2017 SC 4904

A. Why Marital Rape is Unconstitutional and Should Be Criminalized

A significant illustration is found in *Hrishikesh Sahoo v. State of Karnataka* (2022), where the Karnataka High Court dismissed a rape complaint on the reasons that the parties were married by law. In the process, the court recognised that the exclusion of marital rape by statute impairs the law protection to women and limits their fundamental rights. The judicial interpretation brings to spotlight the conflict between the written law that is outdated and the constitutional obligation towards gender justice¹².

B. Status of Marital Rape in India

In India, marital rape is not criminalized only in that Section 63 of the BNS excludes sexual intercourse of a man with his married wife as an offence when the woman is above 18 years of age. Such a statutory presumption of unchangeable consent in marriage propagates the inequality between the genders and directly opposes the right bodily autonomy of women. The situation is grim given the nearly 83 percent of married women aged 15-49 who report sexual violence perpetrated by their husbands as observed in figures presented by National Family Health Survey (NFHS-4).

Despite strong recommendations of the Justice Verma Committee (2013) in the aftermath of the Nirbhaya case, and judicial pronouncements such as *Independent Thought v. Union of India*, which questioned the constitutional validity of the marital rape exception, the law continues to remain unchanged. Courts have also voiced concern. In *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹³, progressive judicial observations stressed the urgent need to dismantle the doctrine of implied consent in marriage. Similarly, in *RIT Foundation v. Union of India* (2022)¹⁴, Justice Rajiv Shakti of the Delhi High Court emphasized that retaining this exemption after more than 162 years of the IPC's enactment would perpetuate a grave miscarriage of justice.

The necessity of reform is also justified by the reasons given below:

1. Severe effects of Rape: Rape leads to severe physical injuries, mental imbalances and health-related problems. It is not fair and logical to assume that sexual intercourse on a permanent

¹² MANU/KA/1175/2022.

¹³ 2018, Guj 732

¹⁴ 2022 SCC OnLine Del 1404.

bond, coupled with the fact that the woman is married.

2. The law of consent is not affected by the marriage: Since there is nothing criminal about rape that is not affected by the lack of consent, this act of lacking consent cannot be muted by the marriage. The act of marriage cannot and should not be used as a shield to forced sex.

3. Discriminatory Legal Disparity: The law draws a purely arbitrary distinction between married and unmarried offenders. Section 67 of the BNS (previously Section 376B IPC) imposes a lower sanction to husbands who use force to have sexual intercourse with their divorcing wives, in comparison to other rape culprits. Notions like this are contravention of the constitutional right to equality under Article 14 and dignity under Article 21.

4. Exported Equality, Judicial Aspiration and Responsibility: Courts cannot ignore dealing with a provision that is unconstitutional on the pretext that it is difficult to prove marital rape. Endorsing forced sexual intercourse in a marriage is tantamount to legalizing rape which is in violation of a woman under the Constitution to the right to life, liberty and dignity.

Immunity on marital rape is a lapse both of the law and the society. It is only justice that the institution of marriage be legally reformed and that the attitude of the whole society towards sexual violence is changed to make the marriage not a kind of license. It is therefore high time that the issue of marital rape should be viewed as a crime, so that the constitutional ideals are fulfilled, the rights of women are safeguarded and an ancient injustice that demeans the dignity of a number of women in India is finally addressed¹⁵.

Findings And Suggestions for Law Reform on the Basis of Stakeholders

The controversy over whether or not marital rape should be criminalized in India has given rise to various opinions by different stakeholders such as law administration agencies, activists, court decisions, and the civil society. The constitutional guarantee of equality, dignity and personal liberty of women as enshrined in the Constitution creates a tension with the long held views in society as to who can get married and marry whom.

1. Divergent Opinions to Law Enforcement and Advocates: Urban and rural opinions were contrasted as the city police opinions were compared with the rural police opinions in Indore.

¹⁵ Bergen, R.K. (2004). Studying wife rape: Reflections on the past, present, and future. *Violence Against Women*, 10(12), 1407-1416

Urban officers openly stated that Exception 2 of Section 375 IPC (now Section 63 of the BNS, 2023) is a breach of the fundamental rights of women and they are treated as objects of marriage. Meanwhile, they cautioned about the practical challenges of investigation as well as the real possibility of abuse of such regulations, stating that they should have clearer purposes, balanced solution, and procedural protections so that justice is delivered.

The position taken by the proponents who feel that criminalizing marital rape can destabilize the institution of marriage as well as introduce the abuse of the law has been presented. They cite the available solutions under Protection of Women against Domestic Violence Act, 2005 and the state of cruelty under the Indian Penal Code as enough. Even among these voices, however, is recognition that there is need to redefine rape, including the necessity to clearly define rape within the context of marriage, to include consent. There is also the idea of taking a more complex approach to the problem, which consists of a combination of legislative immigration, education, informational programs, counselling and a greater attention paid to equity in marriage¹⁶.

2. Primacy of Consent in Marriage: The central argument in this line of debate is the fact that there is no implied consent to a relationship of marriage or a marital relationship is one which cannot be said to be eternally consensual. Testimonial evidence of the wife holds great importance especially when a documented history of sexual abuse exists in establishing the behavior of assault. Additional testimony by friends, family members or even medical professionals has a great weight of evidence also.

3. The Judicial Burden and Protection Concerns: Critics usually raise the problem of judicial burden and protection by making points that when rape in marriage is criminalized, then the courts will experience a huge backlog continuously. Nevertheless, this criticism can be addressed by increasing the judicial capacity by appointing more judges and also establishing heavy penalties over the baseless or malicious claims. These protection measures would achieve a balance between checking malpractice and availing justice to the real victims.

4. The Urgency of Clear and Comprehensive Laws: It is imperative that in order to effect the necessary changes the law must clearly state that marriage can not be used as a defense against a rape. Section 63 of the BNS is thus to be repealed and definition of rape must be neutral to

¹⁶ Deborah Kim; Marital Rape Immunity in India: Historical Anomaly or Cultural Defence; Journal of Crime, Law and Social Change Volume 69, Pages 91–107 (2018).

gender i.e. it must cover everyone, regardless of sex or sexual orientations. Also, the issue of marital rape must be clearly provided as a ground of divorce in all the personal laws, thus, explicitly connecting the criminal liability with the matrimonial justice.

Some researchers have suggested developing a discrete subdivision of unlawful sexual behavior in the marriage, and others highlight the issue of uniformity by bringing the aspect of rape in marriage squarely under the definition of rape. Whatever the method, it should be outlined on guiding equality before the law and protection of bodily integrity of all women¹⁷.

5. Socio-Legal Reforms other than Criminalization: Legal reform should not only be supported by a comprehensive approach to provide institutional and social care to the as well as the victims. This will entail free access to medical, psychological, psychiatric support, economic and legal assistance so that the survivors can be helped to restore their lives and become independent of abusive marriages. The concept of sex education as a whole is also highly important in building awareness of consent, gender equality, and respect in relationships.

6. The constitutional and judicial trends: Section 63 of the BNS has been charged with being against Article 14 of the constitution because it creates an irrational distinction between married and unmarried women, and thereby they get denied equal protection under the law. There is no rational nexus in such a distinction with regards to the object of protecting women against sexual violence. It also poses a violation to Article 21 that grants the right to privacy, dignity and personal liberty.

The judiciary has found that there is no dissolution of the basic rights of a woman by marriage. A gradual move towards this has been the decision of the Supreme Court in *X v. The Principal Secretary, Health and Family Welfare Department, Delhi NCT Government* (2022), where the Court has stood in support that marital rape is one of such forms of rape that comes under the definition of rape under the MTP Act. Such a verdict meant that law could be used to terminate forced pregnancies conceived by marital rape thus protecting female reproductive autonomy, and the rights to bodily integrity.

7. New Possibilities: Same-Sex Marriages and Inclusion: If same-sex marriage is to be legalized in India in the future, it might be necessary that the legal definition of rape is used in

¹⁷ *Ibid.*

all case and situations regardless of gender and sexual orientation. The fact that the State took steps to criminalize criminal acts of domestic violence and dowry-related crimes is one evidence that marriage must not be considered as a realm which will be free of legal consideration.

India is at a critical point of legal and social development. By taking down the marital rape exemption out of the BNS and imposing wholesome legal, social, and institutional changes the government will play a crucial part in recognizing women as equal citizens whose rights to consent will be sacrosanct regardless of their marital status. Only with such comprehensive change of the State can it realize its constitutional commitment of justice, equality, and dignity of its women¹⁸.

Conclusion

Even though the BNS has reformed the exception limit as regard to the exception called Marital rape, it has not addressed the underlying constitutional and moral issues that surround the act of making the person that has been forced into an act of sexual intercourse within marriage exempted and not punishable under criminal law. Such perpetuation of exemption can be attributed to a lack of willingness to make principles of consent, equality and dignity the fundamental consideration of a just society. It is time therefore to superimpose this change in attitudes towards marital rape in an effort to ensure this is viewed as a crime against women and not a mandate of marriage.

Notably, in September in the year 2024, the Supreme Court of India started hearing a row of petitions that required putting rape within marriage under criminalization. These petitions literally challenge the legality defence accorded by the BNS where the law states that a husbands cannot be charged with raping his wife on the ground that she is over eighteen years old.

The future of such proceedings has great possibilities regarding changing the legal account of relevant marital rights and personal freedom in India. In the affirmative, the Court would stand to create history due to an unprecedented reversal of the chain of gender power in marriage where the wife is not only a subordinate member of the marital estate but an equal partner with

¹⁸ Ryan, R.M. (1996). The sex right: A legal history of the marital rape exemption. *Law & Social Inquiry*, 20(4), 941- 1001

the right to body autonomy and liberty. An order of this nature would not only entrench the constitutional provisions provided under article 14 (equality before law) and article 21 (right to life and personal liberty) but also would be a decisive stride towards making one of the most protracted forms of gender-based violence non-existent. By criminalizing marital rape, justice will arguably be served to many women in addition to consolidating the constitutional vision of dignity, equality, and freedom to all citizens.