
NEED OF A LAW GOVERNING CONSENT IN MARITAL COPULATION IN INDIA

by

Isha Kashyap

ABSTRACT

This research paper explores the legal and social lacunae in India's handling of marital rape, with a particular emphasis on the lack of express legal acknowledgment of non-consensual sexual intercourse within marriage. It discusses the historical, constitutional, and psychological aspects of the issue and reviews national and international case laws, legislation, and human rights paradigms. The research brings into perspective the effects of marital rape on the physical and psychological well-being of women, and deconstructs the exemption provided to marital rape in Indian law. It advocates for legislative change, social sensitivity building, and institutional assistance to promote consent and gender equality during marriage, making the laws of India consistent with constitutional and international standards.

Introduction

Rape is generally defined as a form of sexual abuse involving forceful penetration without their consent. According to Randall M and Venkatesh V. “Marital rape is defined as non-consensual sexual intercourse with one’s spouse.”¹ Consent forms one of the major elements of rape, absence of which leads to the commission of such heinous crime. India is among the thirty-six countries that still has no law governing marital rape. The crime seeks to hold a place under the umbrella of laws governing domestic violence. It is estimated that about 10% of the sexual abuse cases are reported.² This reveals that the unavailability of clear documentation pertaining to marital rape has not only reduced the knowledge about sexual assault existing within Indian society, but has also caused the lack of investigation on spousal sexual abuse psychic effects. More to the point, women victims of sexual abuse by a spouse frequently also experience other

¹ Randall M, Venkatesh V. The Right to No: The Crime of Marital Rape, Women’s Human Rights, and International Law. Brooklyn J Int Law [Internet]. 2015. Jan 1; 41(1). Available from: <https://brooklynworks.brooklaw.edu/bjil/vol41/iss1/3>

² Raj A, McDougal L. Sexual violence and rape in India. Lancet [Internet]. 2014;383(9920):865. Available from: <http://www.embase.com/search/results?subaction=viewrecord&from=export&id=L372542553>

forms of IPV: physical, emotional, and psychological, hence bearing a uniquely heavy burden of exposure and psychiatric risk. Domination is one of the aspects that triggers psychological distress and patriarchy is one the branches of domination.

“Patriarchy is not men. Patriarchy is where males and females both get involved. It prioritises the interests of the male gender over the bodily integrity, autonomy and the dignity of the female gender. It is delicate, deceptive, and never more harmful than when women passionately deny that they themselves are a part of it.” – Ashley Judd. The judicial recognition of marital rape against well-entrenched patriarchal principles that gives a spouse absolute rights over other's body changes the tide of societal attitude and belief that marriage does not give a license for sexual violence.

Historically, sexual intercourse within the confines of marriage was deemed a right of spouses; however, sexual intercourse without consent by one's partner is now recognized as rape by many societies around the world, international conventions annulling it and increasingly prosecuted criminally.³ The absence of legal protection points to the failure in the holistic recognition of women's rights in marriage. Incidents of marital rapes committed by a husband are still not dealt with, affecting the dignity and independence of women. Hence, a person's right to live with human dignity is fundamentally at odds with the idea of the marital exception that takes away marital rape from the classification of crimes. This exception allows the institution of marriage to violate a person's autonomy and well-being in general. Any statute or rule that violates her right to live with dignity violates the core foundation of a woman's autonomy by giving her partner the power to commit non-consensual sexual acts.

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³Bhagyashikha Saptarshi. Marital Rape and Law. Apr 9, 2024. Available from: <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

Conceptual Framework

Marital rape is another case of sexual assault that has evaded criminal law sanctions and human rights recognition. It is considered a form of sexual abuse and domestic violence. Exception 2 to Section 63 of Bhartiya Nyaya Sanhita (BNS) clearly 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.” Marital rape refers to rape committed when the perpetrator is the victim’s spouse.⁴ Such act may be done using factors vitiating free consent such as coercion and undue influence.

Research Problem

Even after completing more than seven decades of independence and constitutional enactment the legal exemption of marital rape in India creates a dichotomy between the customary structure of marriage and the inherent right to personal dignity. Marriage is treated as a sacred institution in India which puts forward questions about right and consent. This underlines the need to address the whole gamut of women's rights within the institution of marriage, since the lack of legal protection emphasizes the compromise in the autonomy and dignity of women when husbands indulge in unregulated non-consensual sexual behaviour. The act of non-consented copulation in a marriage does not only violate women’s autonomy over their own body but also can cause major bodily harm, reproductive disorders, and psychological impairment, including depression and PTSD.⁵

Objectives of the Research

- To understand why there is a need of a law governing consent in marital copulation.
- To create a differentiating line between marital rape and other forms of domestic abuse.

Research Questions

- What is Marital Rape?
- How does non-consensual copulation in marriage affect the victim?
- Why is there an exception of marital rape to the general rule?
- Why is there a need of separate law governing consent in marital copulation?
- What are the possible solutions and outcomes of the law?

⁴ Raveena Rao Kallakuru & Pradyumna Soni. Criminalization of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impacts. 11 NUJS L.Rev. 1. 2018; 122

Review of the Literature

This section gives a comprehensive review of existing literature related to marital rape with the aim of elucidating the salient issues at stake. It begins by reviewing legal frameworks that govern rape and domestic violence in the Indian context. The part at that point goes ahead on investigating why there is a marital rape exception clause and why there is still no law governing the same. Further it explains how marital rape is affecting the victim and the institution of marriage.

1. In their study, Raveena Rao Kallakuru and Pradyumna Soni (2018) analyse the reasons behind the absence of legal provisions against marital rape in India; specifically, the BNS of 2023 does not recognize the act of a husband raping his wife as a criminal offense as Section 63 of BNS says 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, under the circumstances falling under any of the following seven descriptions: —
 - (i) against her will,
 - (ii) without her consent.
 - (iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
 - (iv) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
 - (v) with her consent when, at the time of giving such consent, by reason of mental illness or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(vi) with or without her consent, when she is under eighteen years of age.

(vii) when she is unable to communicate consent.

Explanation 1. —For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2. —Consent means 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.

Exception.1—A medical procedure or intervention shall not constitute rape.

Exception.2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

There are several factors behind this situation, such as the intent to maintain the sanctity of marriage and the presence of alternative legal remedies. They argue that the marital rape exception clause of the BNS, 2023, is entirely unlawful by examining Article 14 of the Indian Constitution. Besides, they observe the absence of alternative avenues for women to seek redress in case their husbands commit acts of rape against them.

2. In an article by Samridhi M. (2024)⁶ she explains how Protection of Women from Domestic Violence Act, 2005 is a protective instrument for the victims of marital rape. Under this Act, marital rape is recognized as a form of domestic violence. Such legislation allows women to file lawsuits for legal damages against marital rape and enables them to legally separate from their husbands. However, laws and processes intended to protect a victimized wife against marital rape are meagre and short of what should be done to address the gravity of such crimes.
3. Nending Sonia (2022)⁷ in her research analysed the cons of criminalizing marital rape. She explains that the second exception to section 375 of the IPC is founded on intelligible differences and does not contravene the constitution. It cannot be said that a wife who is forced to have sexual intercourse with her husband against her will on a particular occasion feels as outraged as a woman who has been raped by a stranger. Moreover, implicit consent to sexual intercourse among married women exists.

⁶ Samridhi M. “Marital rape in India.” Lawctopus.Com. January 30, 2024. Accessed December 15, 2024. <https://lawctopus.com/clatalogue/clat-pg/marital-rape-in-india/>.

⁷ Sonia. “International Journal for Legal Research and Analysis.” MARITAL RAPE: A COMPARATIVE LEGAL ANALYSIS 2, no. 6 (April 2022): 4–14. <https://www.ijlra.com>.

Already it has become a crime under the Domestic Violence Act and Section 498a of the IPC. Besides, making marital rape a crime is not so easy a thing to happen. The problem involves enormous sociological and social implications that cannot be dismissed.

4. Brisa Victorio (2023)⁸ in her paper talks about the effects of marital rape on women's mental health. They discuss how the victims develop PTSD, depression, and heightened levels of anger, anxiety, and shame and also start developing hatred for their bodies as well, which lowers their level of self-esteem. On the contrary, although it is believed that even though women are raped by their partners, they suffer less than others because they have offered their consent in the first instance, marital rape victims bear much more psychological trauma, and they take much longer compared to the victim who was raped or assaulted by a stranger.
5. Dr. Yogesh Kumar (2022)⁹ in his paper discusses how in the Indian context, marital rape is an abhorrent act that has damaged the institution of marriage. The decriminalization process of this practice has resulted in a disproportionate impact on women. Rape cases clearly expose the inadequacies of societal frameworks designed to provide increased security and self-esteem among people in a community. These organizations have at times not only failed to protect individuals from grave violations of their privacy and autonomy but have also implicitly legitimized such practices by endorsing them or failing to declare them illegitimate.

Significance of the Study

India is one of the 36 countries that have not criminalized marital rape yet. According to the report of National Family Health Survey for 2015–16, 83% of the women aged between 15 and 49 years reported their husband for committing sexual abuse, while 7% reported an ex-husband for committing such crimes. 4% of the women reported their husbands forcing them to have sexual relations, 2.1% requiring them to engage in sexual acts, and 3% threatening them when they didn't want to. It would owe primarily to the long history of traditionalism and conservatism in the culture of India, where this general social structure has been fundamentally male-oriented, thus making a more consistently lower status for the female visa-vis the male.

⁸ Brisa Victorio. "The Effects of Marital Rape on a Woman's Mental Health." *Themis: Research Journal of Justice Studies and Forensic Science* 11 (May 19, 2023): 1–14.
<https://scholarworks.sjsu.edu/themis/vol11/iss2/4>.

⁹ Dr. Yogesh Kumar. "MARITAL RAPE IN INDIA - A SOCIO-LEGAL ANALYSIS." *International Journal of Education and Science Research Review* 9, no. 3 (May 2022): 1–13.

Also, marriage has been treated as more of an institution due to which a society works more than a union between two people. Through this research I have tried to peep into the need of a law to govern marital rape and how it affects a spouse who has been the victim of the non-consensual act.

Research Methodology and Design

The inherent qualities of the present study make it specially challenging to carry out through experimental designs. In order to achieve the objectives of the study, the researcher has attempted to use quantitative descriptive research designs. Most of the study is based on secondary data collected from different sources, including books, journals, research papers, newspaper articles, and statistics published by the Indian government. The investigator utilized a range of previous research conducted in India and other countries to facilitate the analysis of the collected data.

Where did it all begin: History of Marital Rape in India

When we deeply study the history of marital rape, we come across societal factors giving rise to it. We also see some of the religious and cultural traditions reinforced the idea that marriage granted automatic consent to sexual relations.

However, the term “marital rape” started to come into light in mid-20th century with the feminist movements challenging traditional gender roles and emphasized bodily autonomy and consent, including within marriage.¹⁰ As awareness about domestic violence increased, protection towards spouses, in the form of marital rape, was called into question. Defenders began to highlight that marital rape inflicts enormous social, psychological, and physical harm. In India it started to cater attention when the Delhi High Court delivered a split verdict in a case.

Examples of instances and cases where marital rape got considered as an exception are:

- Christian doctrines, more particularly as expounded by St. Augustine, taught that a husband has the right to demand sexual intercourse within marriage.¹¹
- Islamic doctrine recognizes mutual rights and obligations involved in marriage, which may be termed as a marriage contract. In classical jurisprudence, husbands possess the right to sexual relations with their wives.¹²

¹⁰ Radha Kumar. *The History of Doing. Kali for Women*, 1993.

¹¹ St. Augustine. *De Bono Coniugali*. Oxford Academics.

¹² Imam Malik. *Al-Muwatta*. 4th ed. Diwan Press, 2014.

- The significant Delhi High Court case addressing the issue of marital rape is titled: *RIT Foundation v. Union of India, 2022*.¹³ Delivering a split verdict in the case in May 2022, the Delhi High Court said the exemption violated basic rights of women and agreed to treat marital rape as an offense, however Justice C. Hari Shankar maintained the exemption cautioning it can be misused and how its consequences can hit the couple when it was brought into marital law.
- In the case of *Independent Thought v. Union of India (2017)*¹⁴, The judgment mainly dealt with Exception 2 of Section 375 of the IPC, which protected sexual relations between a husband and wife between 15 and 18 years of age from being construed as rape. In the wake of the Supreme Court ruling on this issue that sexual intercourse with a wife who is less than 18 years of age constitutes rape, the age of consent to marriage is raised to 18 under the law.
The decision underscored the importance of consent and implicitly challenged the broader exemption related to marital rape, despite its specific focus on child marriage.
- The case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat (2018)*¹⁵, talked about how the lack of legal framework could not convict the perpetrator. It called for reforms in the law and laws governing marital rape.

What is Marital Rape?

Marital rape refers to engaging in sexual intercourse with one's spouse without consent. Lack of consent is a critical requirement and need not involve physical violence.¹⁶ Marital rape is the most neglected type of sexual assault among all types of rape. The social structure and criminal jurisprudence are two of the primary reasons for the present state of marital rape victims in our country.

The main problem with marital rape is that even women cannot imagine it. Because it is assumed that women gave their irrevocable consent to engage in sexual relations with their husbands at the time of marriage at his request, neither the public nor the judicial system view this as a crime.¹⁷

¹³ Rit Foundation and Ors. vs. The Union of India and Ors. (02.03.2022 - DEOR): MANU/DEOR/33708/2022

¹⁴ Independent Thought vs. Union of India (UOI) and Ors. (11.10.2017 - SC): MANU/SC/1298/

¹⁵ Nimeshbhai Bharatbhai Desai vs. State of Gujarat (02.04.2018 - GUJHC): MANU/GJ/0291/

¹⁶ Bhagyashikha Saptarshi. Marital Rape and Law. Apr 9, 2024. Available from:

<https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

¹⁷ "MARITAL RAPE IN INDIA — EXISTING LAWS AND NEED FOR CHANGE." *Madras Law Journal - Criminal* 1 (2014).

The history of violence showed that 91% of the women had been exposed to violence since marriage. When they presented themselves to the crisis intervention department, one-fourth of the women (25.6%) who had been married for less than a year were pregnant. They reported that due to their husbands' sexual control, they were not using any form of birth control. Eight percent of the women reported having "forced anal or oral penetration," and sixty-eight percent reported "forced sex," which is defined as forceful penile penetration. Only if marital rape were not excluded by exception 2 to the law would these coerced sexual actions be recognized as "rape" under Section 375.¹⁸

Forms of sexual violence disclosed to a counsellor

Forms of violence (multiple responses)	Total number of women	
	N = 828	%
Forced sexual intercourse	565	68
Withholding sexual pleasure	260	29
Not allowing women to use any contraceptive	79	10
Forcing her to have children	119	14
Forcing wife to perform sexual acts against her will (e.g. oral sex)	64	8
Sexual advances from other family members	30	4

Apart from coerced contact, the analysis of case files revealed several sexual violence types against women. Among these, reproductive coercion was reported by 24% of women, where the husbands forbade them from using any form of birth control and refused to use any. The family members of four percent of women had sexually abused them.

These events also act as a stark reminder that, in spite of all the high-sounding rhetoric of human rights and many laws that provide women with equality, rape remains a crime in the eyes of modern legal systems and criminal justice delivery systems, not because the offender brutally assaulted the victim's body or dignity, but merely because he did so to a woman who was not legally his. That is, women's sexual autonomy and their right to physical integrity are still far from being acknowledged by our society and democracy. But it also raises some fundamental issues about the nexus between rape and marriage, especially the integrity of marriage.¹⁹

¹⁸ Padma-Bhate Deosthali, Sangeeta Rege, and Sanjida Arora. "Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records." National Library of Medicine, March 29, 2022. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8967187/>.

¹⁹ M.S. Raste. "RAPE AND MARRIAGE: REFLECTIONS ON THE PAST, PRESENT AND FUTURE." Journal of Indian Law Institute (JILI) 48 (2006).

Effects of Non- Consensual Marital Copulation on Women

According to the National Coalition Against Domestic Violence, marital rape is four times more common than stranger rape. Apart from experiencing psychosocial and physical pain, battered women often suffer sexual violence. The effects on the psychosocial level are mostly notable due to how rapid their behaviour becomes. Social life, professional life, academic life, as well as all ties of friendship and family, are all affected by this. Many researches contain very strong evidence that marital rape has very adverse effects on someone's physical, sexual, reproductive, and mental health. When women experience repeated mistreatment from people who were trusted, their health effects of marital rape are very severe.

Health outcomes involve a higher risk of contracting sexually transmitted or reproductive tract infections (STIs/RTIs) and HIV/AIDS as a result of forced sex and the wife's inability to negotiate condom use by her husband. In a survey it was found that forty-one percent (339) of the women were referred to the crisis intervention department by the health system as they had come to the hospital for treatment of health complaints as a result of ongoing violence. The health complaints ranged from physical assault reported by 46%, attempted suicide by 28%, reproductive health complaints by 25% and attempted homicide by 1%. Mental health consequences were reported by 98% of women, among whom 26% had attempted to end their life while 29.4% reported thoughts of ending life (suicidal ideation). Other mental health consequences experienced by survivors included nervousness and tension (72%) and feeling afraid all the time (36%).²⁰

Why is There an Exception to Marital Rape?

Exception 2 of Section 63 of BNS, 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.” Many arguments and reasons exist for the provided exemption. Followings are some of the reasons for the above:

1. Consent: Various justifications have been advanced in order to establish the husband's immunity from the rape by his wife. Of prime significance is Matthew Hale's implied consent argument.²⁵ In *Byrne, J.*, the *R v. Clarke* case, it is written that:

The reason is that when a man and woman are married, the wife consents to allow her husband to exercise their marital right to have intercourse as long as

²⁰ Padma-Bhate Deosthali, Sangeeta Rege, and Sanjida Arora. “Women’s experiences of marital rape and sexual violence within marriage in India: evidence from service records.” National Library of Medicine, March 29, 2022. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8967187/>.

their normal relationship continues. In such cases, the marital rights of the husband are founded on the wife's consent at the time of marriage and not her consent at every act of sex, unlike in the case of unmarried couples.²¹

Though this argument is not applied uniformly and logically in a manner that excludes a married woman from protection against criminal prosecution for crimes other than rape that a husband can commit during sex. This argument is incompatible with the prevailing acceptance of sexual equality, even though it was initially justified.

2. False Cases: The exemption has been defended by reference to the difficulty of establishing a charge of rape between husband and wife and the risk of a false complaint being made by the wife against her husband. The suggestion that a clever wife could make a false complaint or threaten to sue her husband in order to force him to provide her with a good property settlement following a divorce is also unconvincing because it is inconsistent with the suggestion that she could still accuse her husband of other crimes.
3. Marriage as a sacred institution: In the case of *RIT Foundation v. Union of India, 2022* Justice C. Hari Shankar, highlighted the role of marriage in Indian society. Justice Shankar highlighted the distinctive nature of marriage in Indian society, where the institution is regarded as a sacred bond with certain cultural, religious, and social connotations. He contended that criminalizing marital rape may radically transform the institution of marriage into an adversarial one and could have unforeseen outcomes for the family structure. A similar stance was also observed in the case of *Harvinder Kaur vs. Harmander Singh*²².

It is criticized that the concept of marriage as a "sacred bond" originates in patriarchal norms which historically subordinate women in marriage. Flavia Agnes, a feminist legal analyst, in her book "Law and Gender Inequality: The Politics of Women's Rights in India", illustrates how legal precepts linked with religious and cultural values tend to perpetuate gender disparity in marriage by overriding women's rights.²³ In the 2021 report of the United Nations Population Fund (UNFPA), it was highlighted that the consideration of marriage as "sacred" tends to lead to the normalization of domestic

²¹ M. V. Sankaran, "THE MARITAL STATUS EXEMPTION IN RAPE," *Journal of the Indian Law Institute* 20, no. 4 (1978).

²² *Harvinder Kaur vs. Harmander Singh* AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187

²³ Flavia Agnes. *Law and Gender Inequality: The Politics of Women's Rights in India*. 2001st ed. Oxford University Press, 1999.

and sexual violence in marriages since cultural norms are given precedence over human rights.

4. Availability of present remedies: Marital rape or spousal rape is a term used for sexual intercourse with one's spouse without consent. The absence of consent is the most important aspect and does not include physical violence. Marital rape is considered a form of domestic violence and sexual abuse. In 2005, the Protection of Women from Domestic Violence Act recognized marital rape as a form of domestic violence. This Act allows for legal redressal against marital rapes and provides them with a space to legally claim separation from spouses who are involved in such sexual abuse. These laws and mechanisms provide for the same, but not enough to define the seriousness attached to the occurrence. Also, Section 85 under the BNS which talks of cruelty is another significant provision that aims at protecting a woman against that particular act and is used similarly.

Need of Separate Law Governing Consent in Marital Copulation

There is still a lot of legal ambiguity about the punishment for this offense. This crime torments the women at a very deep level. Dealing with this in silence and going through the pain is intolerable and impacts women's mental health. All these aspects are impacted by social, emotional, psychological, and mental health in women. In India, almost 83% of married women aged between 15 and 49 have blamed their husband for sexual violence whereas 7% have called the bygone husband an offender, according to the report of 2015-16 released by National Family Health Survey. 4% of the women were forced by the husband to enter into sexual intercourse, 2.1% to perform sexual acts and 3% were threatened when the wife did not want to or wish to perform, as per the report, NFHS-4.²⁴

It has been contested that Exception 2 of Section 63 of BNS is violative of Article 21 of the Indian Constitution which is a fundamental right to life and personal liberty. In the case of *State of Karnataka vs. Krishnappa*, the Supreme Court held that “sexual violence is an unlawful interference with the right to privacy and sanctity of a female except when it is a barbaric act.” and held that raping without consent was sexual and bodily assault.²⁵ Living together in any sort of coercive sexual relationship is considered as violation of the basic right that is, of Article

²⁴ Bhagyashikha Saptarshi. Marital Rape and Law. Apr 9, 2024. Available from:

<https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

²⁵ The State of Karnataka vs. Krishnappa, (2000)4 SCC 75

21.²⁶ Thereafter, in the *Suchita Srivastava vs. Chandigarh Administration*, the Supreme Court has compared the right to select choices related to sexual intercourse with that of the right to liberty, dignity and bodily integrity in terms of Article 21 of the Indian Constitution.²⁷

It is also argued that this exception is also violative of Article 14 of the Indian Constitution which states “The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.” Despite the guarantees of equal protection of law for all people under the Indian Constitution, discrimination against women is practiced by BNS in respect of rape when committed by the husband. “Any classification under Article 14 is subject to a test of reasonableness which may be prescribed only when the classification has some reasonable relation to the object that the act sought to attain,” the Supreme Court ruled in the cases of *Budhan Choudhary vs. State of Bihar*²⁸ and *State of West Bengal vs. Anwar Ali Sarkar*.²⁹

However, Exception 2 defeats the very purpose of Section 63 of BNS, which aims to safeguard women and bring to book those who commit the inhuman crime of rape. That clearly is in total conflict with the aim if husbands are exempted from punishment.

The "United Nations Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW) of which India is a signatory, holds the view that such discrimination of women contravenes the precepts of equality of rights and respect for human dignity. Moreover, the Commission on Human Rights, at its fifty-first session recommended that marital rape should be criminalized.

Sakshi, a voluntary organization interested in the issues concerning women, in the year 2000, in its deliberations with fifteenth Law Commission of India, which was directed by the Supreme Court of India to review rape laws, pleaded that forced sexual intercourse by a husband with his 'wife' and 'separated wife' be treated as an offence just as any physical violence by a husband against the wife is considered an offence and hence, the Exception 2 to sections 375 and 376A which states “Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished imprisonment of either description for a term which may extend to two years and shall also be liable to fine.” be deleted from IPC, because the sentencing under

²⁶Govind vs. State of M.P, AIR 1975 SC 1378'; 'Kharak Singh vs. State of U.P, AIR 1963 SC 1295.

²⁷ Suchita Srivastava vs. Chandigarh Administration AIR [2008] 14 SCR 989

²⁸ Budhan v. State of Bihar, AIR (1955) SC 191

²⁹ State of West Bengal vs. Anwar Ali Sarkar, AIR (1952) SC 75

section 376A is comparatively less punishment (an imprisonment for a term not exceeding 2 years) than that which is prescribed for other types of rape (mandatory imprisonment for less than 7 years in non-custodial rape & an imprisonment not exceeding 10 years for custodial rape). Sakshi argued, 'there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years of age.'³⁰

Therefore, the notion of marital exception, which removes marital rape from the list of crimes, is essentially contradictory to the right of a person to live with human dignity. It permits the infringement of an individual's autonomy and well-being within the institution of marriage. Any statute or provision that violates a woman's right to live with dignity and allows her spouse to force upon her sexually without consent violates directly the tenor of the autonomy.

Possible Solutions and Outcomes if a law comes into play

As per 2019 there are 150 countries in the world that have penalized Marital Rape Article 27, Fourth Geneva Convention states, "Women shall be especially protected against any attack on their honour; in particular against rape, enforced prostitution, or any form of indecent assault."³¹ This reflects the shift of society in consent under marital copulation. Our country has a hybrid constitution functional where many laws has been adopted and implied in Indian Context. A same approach can be adopted in case of governing consent in marital copulation.

The UN Handbook for legislation on violence against women (UNDAW, 2010, p 26) recommends that legislation should remove any requirement that sexual assault be committed by force or violence.³² The Justice Verma Committee recommended removing the marital rape exception from Indian law, arguing that marriage should not be considered a valid defence against rape. The committee stated that the exception was regressive and violated the principle of equality.³³

Countries like Australia already have a law in place criminalizing spousal rape since 1981, where the maximum punishment is up to 21 years of imprisonment in states like Tasmania. Countries like the UK, Canada, and South Africa abolished the legal exemption that previously

³⁰ Vibhute, K.I. "RAPE" AND THE INDIAN PENAL CODE AT THE CROSSROADS OF THE NEW MILLENNIUM: BETWEEN PATRIARCHIAL AND GENDER NEUTRALIST APPROACH'. *Indian Law Institute* 43, no. 1 (March 2001): 32–35. <https://www.jstor.org/stable/43951752>.

³¹ Treaties, States Parties and Commentaries. *Convention (IV) relative to the protection of civilian persons in time of war*. ICRC. August 12, 1949. <https://ihl-databases.icrc.org/ihl/WebART/380-600032?OpenDocument>

³² Sylvia Walby and others, "Towards a Comprehensive Policy: Towards a Comprehensive Policy," *Stopping rape* (Bristol University Press; Policy Press) <https://www.jstor.org/stable/j.ctv4g1rd0.9>

³³ Justice JS Verma, "Amendments to Criminal Law" (2013)

allowed husbands to claim immunity from rape charges within marriage with the punishment ranging up to life imprisonment.

While there has been no such explicit repeal of existing marital rape laws across the globe but Turkey pulled out of the Istanbul Convention in 2021, combating violence against women, including marital rape. This withdrawal has caused concern and substantial protest by human rights institutions and women's organizations about the possible erosion of regulation against violence against women in Turkey. Activists say that leaving the convention undercuts actions to tackle gender-based violence and makes it easier for women to be subjected to abuse, including marital rape.³⁴

Conclusion

The continued failure of the Indian law to recognise marital rape as an offence is a stark anomaly with the State's avowed commitment, in its constitutional provision of equality (Article 14) and personal liberty (Article 21). Notwithstanding great progress in combating gender-based violence the notion that marriage renders a woman's right to consent null and void continues to uphold a legal and cultural standard wherein patriarchal control takes precedence over female agency.

This study has demonstrated that non-consenting sexual intercourse among marriage is a human rights violation and a serious public health issue with wide-ranging implications at physical, psychological, and social levels. Current law, as explicated in Section 375 of the Indian Penal Code and Section 63 of the Bharatiya Nyaya Sanhita, 2023, continues to deny equal legal protection to married women, in effect relegating them to the status of second-class citizens in terms of their sexual rights. The exclusion of law tacitly legitimizes coercive practices, legitimizes abuse, and strengthens the demand that marriage equals unlimited sexual access.

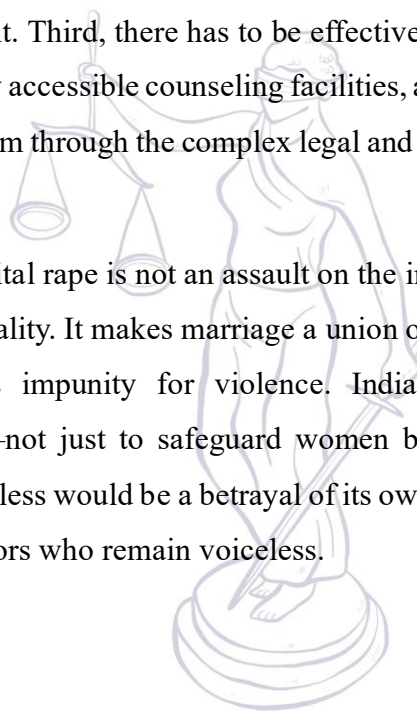
A comparison of global legal norms discloses a remarkable disparity: states such as Canada, the United Kingdom, South Africa, and Australia have long considered marital rape to be a crime, premising that consent would be ongoing, unambiguous, and spontaneous—regardless of marital status. India's continued resistance to criminalizing marital rape is not merely a matter of legal insufficiency but one of not keeping pace with global human

³⁴ The Advocates for Human Rights (ed), *TURKEY'S WITHDRAWAL FROM THE ISTANBUL CONVENTION* (The Advocates for Human Rights 2021)

rights norms, such as CEDAW and the UN Declaration on the Elimination of Violence Against Women.

The imperative of the day is a thorough reform that goes beyond the legal system to the entrenched societal attitudes as well. Legal recognition of marital rape has to be supplemented by sweeping measures to ensure effective enforcement and societal acceptance. First, there has to be across-the-board awareness programs for the law enforcement machinery and the judiciary to handle such cases with sensitivity, objectivity, and concern for the needs of the survivor. Second, there has to be specific awareness campaigns to demystify and dispel patriarchal myths that equate marriage with automatic sexual rights, inculcating a culture of mutual respect and consent. Third, there has to be effective support networks, including crisis intervention centers, easily accessible counseling facilities, and legal aid programs, to empower survivors and facilitate them through the complex legal and emotional aspects of marital sexual violence.

Finally, criminalizing marital rape is not an assault on the institution of marriage but a fight to uphold its dignity and equality. It makes marriage a union of mutual respect and choice, not an institution that condones impunity for violence. India needs to meet this moral and constitutional challenge—not just to safeguard women but to redefine justice itself in the intimate sphere. Anything less would be a betrayal of its own constitutional ideals and the lived lives of millions of survivors who remain voiceless.



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