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Marital Rape in India: An Atrocious Offense

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Love thrives in consent, not in silence. In marriage let respect be the foundation and consent the language of intimacy.

The issue of marital rape in India remains largely unaddressed within legal frameworks, perpetuating a culture of silence and impunity. While rape is criminalized under Section 375 of the Indian Penal Code, an exception excludes non-consensual sexual acts between spouses. This exception, however, has faced constitutional challenges, particularly under Articles 14 and 21 of the Indian Constitution, which ensure equality before the law and the right to life and personal liberty, respectively. Despite efforts to criminalize marital rape, arguments against intervention in marital relations persist, citing concerns about cultural autonomy and potential misuse of laws. However, societal attitudes are gradually shifting, with increased advocacy for recognizing and addressing marital rape as a criminal offense. A comprehensive approach involving legal reforms, awareness initiatives, and support services is crucial to empower survivors and challenge patriarchal norms perpetuating such violence. Addressing marital rape requires a gender-neutral approach, acknowledging that both spouses can be victims and fostering a more balanced legal framework.

Keywords: *criminalization, gender-neutral, marital rights, inclusivity.*

INTRODUCTION

Marriage, traditionally regarded as a sacred bond, has long been seen as a cornerstone of societal structure, intertwining the lives of individuals in a union recognized by law and tradition.

However, within the confines of this institution lies a dark reality often veiled by silence and societal norms: marital rape. Defined as non-consensual sexual intercourse or penetration within the bounds of marriage, marital rape stands as a reprehensible violation of personal autonomy and dignity. Yet, despite its prevalence and profound implications, discussions surrounding marital rape in India have largely remained muted, overshadowed by cultural taboos and legal ambiguities.

Marital rape, a subject within the legal and societal fabric of India, remains a pressing issue that demands urgent attention. As we navigate through the complexities of this phenomenon, it becomes evident that silence shrouds the suffering of countless individuals behind closed doors. This article endeavors to shed light on the egregious offense of marital rape, contextualizing it within the broader framework of legal statutes, societal attitudes, and the harrowing experiences of survivors.

The cornerstone of legal discourse on sexual violence in India is Section 375 of the Indian Penal Code (IPC), which unequivocally condemns rape. However, a glaring exception within this provision exempts non-consensual sexual acts between spouses from being categorized as rape, perpetuating a legal blind spot that undermines the autonomy and dignity of married individuals. This exemption, embedded within the legal framework, has sparked contentious debates concerning individual rights and the sanctity of marital unions.

In this context, it becomes imperative to unravel the layers of silence and delve into the intricate fabric of marital rape in India. By exploring the prevailing legal landscape, societal attitudes, and the lived experiences of survivors, we can begin to confront this egregious offense and advocate for meaningful change. Love, respect, and consent should form the foundation of any marital relationship, and it is crucial to recognize and address the systemic issues that perpetuate marital rape. In doing so, we not only uphold the fundamental rights of individuals but also strive toward a society where every individual is valued, respected, and free from harm.

MARITAL RAPE AND RELATED LEGISLATION

Rape is a type of sexual assault involving non-consensual engagement in sexual intercourse or other acts of sexual penetration with an individual, penetrated without their consent. So, is marital rape a form of rape? Marriage is a legally acknowledged contract between a man and a woman, establishing a sanctioned relationship. Consensual sexual intercourse between spouses is lawful. However, the legal acceptance of marital sex can lead to situations where husbands may exert the right to compel their wives into sexual activity, potentially giving rise to marital rape. Although definitions of marital rape vary legally, it can generally be described as any non-consensual sexual intercourse or penetration involving force, threat of force, or without the wife's agreement.

In India, the existence of marital rape is observed in practice but not explicitly acknowledged in legal terms. While some countries have either enacted legislation criminalizing marital rape or seen their judiciary actively recognizing it as an offense, the situation in India appears inconsistent. The judiciary in India seems to be working in conflicting directions on this matter.¹

Section 375 of the Indian Penal Code (IPC)² addresses the offense of rape. Notably, Exception 2 to Section 375 provides an exemption, allowing sexual activity between a husband and his wife without her consent if she is not below the age of eighteen. Initially, the age of consent was fifteen, but in 2017, the Supreme Court of India, in the case of 'Independent Thought v Union of India,' raised it to eighteen. In this case, Justice Madan B Lokur and Deepak Gupta emphasized the continued human rights of a girl child, whether married or not, stating that these rights deserve acknowledgment and acceptance. However, the Supreme Court did not address the issue of marital rape involving individuals above the age of eighteen.³

¹ Apurva Vishwanath, 'Supreme Court to list marital rape petitions for hearing: What are the issues, arguments involved' *The Indian Express* (20 July 2023) <<https://indianexpress.com/article/explained/explained-law/sc-marital-rape-issues-and-arguments-8848358/>> accessed 20 January 2024

² Indian Penal Code 1860, s 375

³ *Independent Thought v Union of India* AIR 2017 SC 4904

EXPLANATION TO SECTION 375 OF INDIAN PENAL CODE (IPC)

A person is considered to commit 'rape' if they engage in the following actions with a woman under specific circumstances:

1. Engaging in penetration of the vagina, mouth, urethra, or anus of a woman with the male genitalia, or compelling her to do so.
2. Introducing any object or body part (excluding the male genitalia) into the vagina, urethra, or anus of a woman, or compelling her to perform such actions.
3. Manipulating any part of a woman's body to initiate penetration or compelling her to engage in such actions.
4. Applying the mouth to the vagina, anus, or urethra of a woman, or compelling her to perform such actions.

These actions are deemed as acts of rape under various circumstances. Firstly, if sexual activity occurs contrary to the woman's explicit wishes, it constitutes rape. Secondly, if the woman's approval is not present, whether explicitly denied or implicitly withheld, it qualifies as rape. Additionally, if the threat of harm or death coerces the woman's agreement, any ensuing sexual activity is considered rape. Moreover, if the woman provides consent under circumstances where she is unable to fully comprehend the nature and implications of the actions due to factors such as mental incapacity, intoxication, or the influence of substances, it is categorized as rape. Furthermore, if the woman gives her consent under the mistaken belief that the perpetrator is her lawful husband when, in fact, he is not, it still constitutes rape. The law also recognizes sexual intercourse as rape regardless of consent if the woman is below eighteen years of age, acknowledging the inherent vulnerability of minors. Lastly, in cases where the woman is incapable of expressing consent, such as due to physical incapacitation or unconsciousness, any sexual activity is deemed as rape. These delineations highlight the various contexts in which sexual activity can transgress into the realm of rape, emphasizing the importance of consent and autonomy in intimate relations.

Explanation 1: The term ‘vagina’ encompasses labia majora.

Explanation 2: ‘Consent’ refers to a willing agreement conveyed by the woman through words, actions, or any means of communication. The absence of physical resistance does not signify consent.

Exception 1: Medical procedures do not fall under the category of rape.

Exception 2: Engaging in sexual acts with one’s wife, provided the wife is not under the age of fifteen, does not constitute rape.

In a 2013 report, the Justice Verma Committee advocated for the elimination of the marital rape exception. Fortunately, in the *Independent Thought v Union of India* case, the Supreme Court declared Exception 2 to Section 375, IPC unconstitutional under Articles 14 and 21.⁴

PRIMARY FACTORS CONTRIBUTING TO MARITAL RAPE

Gender Inequality: Gender inequality in India has fuelled marital rape by perpetuating power imbalances. Discriminatory norms and attitudes marginalize women, denying them autonomy and control. This inequality contributes to an environment where consent is often overlooked, leading to an alarming increase in marital rape cases.⁵

Illiteracy: Illiteracy in India has exacerbated marital rape by perpetuating gender norms, limiting awareness of consent, and hindering communication. Some individuals continue to embrace traditional clichés that imply a woman’s partner is paramount, and they may perceive any critique of a husband as a rejection of divine creation. Lack of education also contributes to power imbalances, making it challenging for individuals to recognize and challenge abusive behavior, thereby increasing the prevalence of marital rape.

⁴ Jitendra Bhadouriya, ‘Marital Rape in India: An Undefined Crime’ (*Legal Service India*) <[⁵ ‘Marital Rape: What is Marital Rape, Reasons, Marital Rape, and Law’ \(*Infinity Learn*\) <<https://infinitylearn.com/surge/english/social/marital-rape/>> accessed 20 January 2024](https://www.legalserviceindia.com/legal/article-7187-marital-rape-in-india-an-undefined-crime.html#:~:text=Although%20the%20legal%20definitions%20vary,there%20is%20presumed%20matrimonial%20consent.> accessed 20 January 2024</p></div><div data-bbox=)

Male Dominance in Society: In India, a history of male dominance has created an unequal society. This has led to more marital rape as women often have less say and power in their marriages. When women's rights are not respected, it becomes easier for some men to use force and control, contributing to the problem of marital rape in the country. Apart from this, each society establishes some specific social norms to govern its members. Women face strict regulations, being labeled a lifelong spinster if they leave their husband's homes or experience rape. Additionally, failure to bear a male child and deviating from societal norms lead to rejection by the community.⁶

THE CONSTITUTIONAL LANDSCAPE

Rape laws in India are alleged to contravene Articles 14⁷ and 21⁸ of the Indian Constitution.

Breach of Article 14: Article 14 ensures equality before the law and equal protection under the law, requiring adherence to the criteria of intelligible differentia and rational nexus. Exception 2 to Section 375 is claimed to discriminate against married and unmarried women, impinging upon their constitutional right to equality as per Article 14. The legislation establishes a distinct treatment for married women above the age of 15 and those under 15, undermining women's freedom of choice in their personal lives. Section 375 IPC is argued to deprive women, regardless of marital status, of physical autonomy and personhood.⁹

Violation of Article 21: Exception 2 of Section 375 is asserted to violate Article 21 of the Indian Constitution, encompassing the right to life and personal liberty, including the right to privacy, dignity, health, and a safe environment.

Right to Physical Integrity: Following the precedent set in 'Justice K.S Puttaswamy v Union of India,' the Supreme Court recognized the right to privacy, emphasizing its role in intimate

⁶ *Ibid*

⁷ Constitution of India 1950, art 14

⁸ Constitution of India 1950, art 21

⁹ Bhadouriya (n 4)

decisions, particularly those of a sexual or procreative nature. This extends to safeguarding intimate relations.

Right to Human Dignity: In the case of ‘Bodhisathwa Gautam v Subhra Chakraborty’, the Supreme Court declared rape as a violation of fundamental human rights, including the right to live with human dignity. It is emphasized that even married women possess the right to live with dignity, privacy, and control over their bodies, which cannot be compromised by the institution of marriage.

Therefore, it is argued that Exception 2 not only infringed upon the right to privacy but also violated the right to lead a healthy and dignified life. The compelled sexual intercourse by a spouse is posited to adversely affect the physical and mental health of the wife, thereby rendering the law in violation of Articles 14 and 21 of the constitution.¹⁰

Apart from contravening the aforementioned articles, marital rape in India has also transgressed additional fundamental rights of women as we see further. The Delhi High Court was informed that the marital rape exception deprives a married woman of her right to refuse sexual intercourse. The counsel representing the petitioner NGOs, RIT Foundation and All India Democratic Women’s Association, argued on Wednesday that this exception excludes a specific group- husbands of adult wives- from being charged with the offense of rape, a situation that should not be allowed.¹¹

Advocate Karuna Nundy, representing the petitioner NGOs, argued that the exception prioritizes the ‘privacy of marriage over the individual’s privacy within the marriage’. This according to her, infringes upon various fundamental rights afforded to a married woman, including those outlined in Article 19(1)(a) of the Constitution.¹²

¹⁰ *Ibid*

¹¹ ‘Marital rape exception violates fundamental rights, Delhi high court told’ *The Times of India* (03 February 2022) <<https://timesofindia.indiatimes.com/city/delhi/marital-rape-exception-violates-fundamental-rights-hc-told/articleshow/89307955.cms>> accessed 21 January 2024

¹² *Ibid*

Violation of Article 19(1)(a): Article 19(1)(a) of the Indian Constitution¹³ guarantees the right to freedom of speech and expression to all citizens. Section 375 of the Indian Penal Code does not acknowledge a married woman's right to refuse sexual intercourse with her husband. This lack of recognition is considered a violation of Article 19(1)(a) as it restricts a married woman's freedom of sexual expression and behavior.

The Protection of Women from Domestic Violence Act 2005 offers civil remedies for violence against women, encompassing marital rape. Non-consensual sexual intercourse is deemed a violation of dignity and a criminal offense. Treating this violation as a civil offense, the act provides remedies like fines and protection, etc.¹⁴

SHOULD THE CONSENT OF THE WIFE MATTER OR NOT?

According to the Indian Penal Code, rape occurs when a man engages in non-consensual intercourse or obtains consent through fraud, misrepresentation, or coercion. The main question is does marital intercourse without the wife's consent fit this definition?

Inconsistently, sexual relations without consent within marriage are not legally defined as rape, raising concerns about the system's understanding. The Indian Constitution guarantees fundamental rights to all citizens, including the right to life, personal liberty, and dignity. The exception in Section 375 excludes certain acts from the term 'rape', emphasizing the age criterion rather than consent. The absence of explicit consent laws for women is a notable gap, as medical tests require consent.

Both rape and marital rape hinge on the concept of 'consent'. If a woman refuses, no one should violate her rights for personal desires. Consent is crucial for any joint act within a marital contract, debunking the notion of women as mere property.

The Protection of Women from Domestic Violence Act, 2005, deems sexual intercourse without consent a civil offense, offering limited remedies. Whether pre- or post-marriage, non-

¹³ Constitution of India 1950, art 19(1)(a)

¹⁴ Bhadouriya (n 4)

consensual intercourse is considered rape, emphasizing the need for consent in all relationships. Just as a poisoned root taints the fruit, any offensive activity within marriage cannot be justified.¹⁵

SHOULD MARITAL RAPE BE CRIMINALIZED IN INDIA?

Arguments in Favour: Criminalizing marital rape in India acknowledges the fundamental importance of consent in relationships, fostering gender equality, and safeguarding the rights of individuals within marriages. This action sends a clear signal against violence in any form, upholding human dignity and personal autonomy, and failing to criminalize marital rape in India even contradicts the fundamental rights outlined in Article 14 (right to equality before the law) and Article 21 (right to life and personal liberty).¹⁶ Recognizing it as a crime is essential to uphold a woman's fundamental right to a healthier life. The underreporting of marital rape cases can only be accurately assessed once it is acknowledged as a crime.

Arguments against the Criminalization: While criminalizing marital rape is a complex issue, some argue against it in the Indian context. It has been contended that legal intervention in marital relations may infringe on cultural and familial autonomy and along with that implicit consent is presumed in marital unions, negating the necessity for legalizing marital rape. Advocates argue that marital rape legalization might undermine marriages, hindering reconciliation and the concern lies in the potential misuse by unhappy wives seeking revenge, posing a threat to innocent husbands.

THE SOCIETAL CONTEXT ON MARITAL RAPE

A complex historical and cultural background influences marital rape in India. The dominance of a patriarchal society historically restricted women's rights and independence within marriage, reinforcing male dominance. As a result, societal norms often overlook or dismiss the

¹⁵ *Ibid*

¹⁶ Marital rape exception violates fundamental rights, Delhi high court told (n 11)

significance of non-consensual sexual intercourse within marital relationships, disregarding women's autonomy and bodily integrity.

In recent times, India has witnessed an increased emphasis on women's rights and gender equality, bringing the issue of marital rape to the forefront. Advocates push for its recognition and criminalization, although efforts to change the law have faced gradual progress and controversy. Critics argue against criminalizing marital rape, expressing concerns about potential misuse of laws, interference in private matters, and damage to cultural values. While awareness about marital rape has improved, there remains a substantial need for legal reforms, shifts in societal attitudes, and enhanced support systems for survivors. A comprehensive approach involving legal changes, education, awareness initiatives, and support services is essential to empower survivors and challenge the patriarchal norms perpetuating such violence.¹⁷

CONCLUSION

Addressing the pervasive issue of marital rape in India requires a multifaceted and comprehensive approach. The existing legal framework should be revisited and reformed to explicitly criminalize marital rape, ensuring that survivors are granted the same protection as victims of other forms of sexual violence. The persistent exclusion of marital rape from the realm of criminal law perpetuates the notion of the wife as the exclusive property of her husband.

Recognizing the difficulties in changing laws about sexual offenses, especially in a diverse country like India with different personal and religious laws, leads to a question: Can the government get involved in private matters? The response is yes. While these issues may be seen as personal affairs, it is crucial to remember that the individuals involved are citizens of India. The action of a few can impact the broader Indian society, making it necessary for the government to intervene in matters of right and wrong and why to keep marital rape out of the

¹⁷ Asad Naushad Khan, 'Marital Rape: Understanding the Complexities and Addressing the Silent Epidemic' (*Juris Centre*, 24 August 2023) <[286](https://juriscentre.com/2023/08/24/marital-rape-understanding-the-complexities-and-addressing-the-silent-epidemic/#:~:text=Overall%2C%20the%20historical%20and%20cultural,equality%20are%20respected%20and%20protected.> accessed 22 January 2024</p></div><div data-bbox=)

government's reach, especially when the legal system already deals with issues like cruelty, divorce.

The immediate imperative is to include marital rape as a criminal offense in the Indian Penal Code. Mere legalization of such actions is not enough. There is a critical requirement to raise awareness and enhance the understanding of marital rape within the judicial system and law enforcement. A comprehensive approach is essential to educate the public about this crime.

Addressing the criminalization of marital rape, I advocate for a gender-neutral approach. In Indian society, there is a prevalent belief that marital rape primarily involves wives lacking consent. However, instances exist where husbands experience unreported marital rape, often concealed due to societal expectations around male reputation and strength. By recognizing that both spouses can be victims, a gender-neutral stance ensures fair protection under the law, acknowledging the complexity of intimate partner dynamics. This approach promotes inclusivity and encourages open discussion on marital rights, fostering a more balanced and just legal framework.