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Intimacy, Consent and Boundaries: A Closer Look at Marital Rape

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This discussion delves into the complex issue of marital rape, exploring its definition, historical roots, and legal status in India. The term ‘marital rape’ refers to non-consensual sexual acts by one spouse against the other within marriage. The historical context reveals a perception of women as property, with the notion that marriage implies consent. In India, the legal framework on rape, outlined in Section 375 of the Indian Penal Code¹, has exceptions, including one related to marital rape. Notably, the Supreme Court increased the age of marital consent but didn’t explicitly strike down the marital rape exception. While over 150 countries criminalize marital rape, India has not recognized it, leading to a global concern.² The discussion highlights conflicting opinions, recent court judgments, and government perspectives. The complexity of the issue is further explored in the context of criminalization, weighing the positive aspect of empowering survivors against potential misuse. Finally, the importance of evolving laws to protect individual rights and address societal changes is emphasized, underscoring the need for a balanced approach.

Keywords: *marriage, rape, rights, consent, sexual intercourse.*

¹ Indian Penal Code 1860, s 375

² Anurag Dash and Swetangi Das, ‘Jurisprudential Analysis of Criminalisation of Marital Rape - A Global Outlook on Its Legality’ (2022) 4(2) Indian Journal of Law and Legal Research <<https://doi.org/doi/05.2022-61581635/IJLLR/V4/I2/A169>> accessed 17 February 2024

INTRODUCTION

When we hear the term ‘marital rape,’ for many of us, the immediate reaction is often questioning how such an act can occur within a marriage. The prevailing notion often suggests that a husband inherently possesses the right to engage in sexual relations with his wife. Here lies the contention: if a man genuinely possesses such a right, then why should it be considered as ‘rape’? What does marital rape mean?

According to the general definition, ‘Marital rape refers to non-consensual sexual acts or intercourse committed by one spouse against the other within a marriage.’³ When a husband engages in sexual intercourse with his wife forcefully and without her consent, it is considered ‘marital rape.’ Now, the question arises: from where did this concept originate?

Throughout history, women have been perceived as the property of their fathers before marriage and of their husbands after marriage. The prevailing assumption was that once a woman was married, everything became consensual. The notion that a husband could not be charged with raping his wife was articulated by ‘Sir Matthew Hale, the then British Chief Justice’, in 1736. This perspective, also known as the Doctrine of Hale, asserts that a husband cannot be deemed guilty of rape, as ‘by their mutual matrimonial consent and contract, the wife has given up herself in this kind to the husband.’⁴

POSITION IN INDIA

More than 150 countries have criminalized marital rape, yet according to a UN report, India is among the 30-odd countries that have not recognized it.⁵ In India, the legal framework pertaining to rape is primarily outlined in Section 375 of the Indian Penal Code (IPC), which

³ ‘Marital Rape in India: A Comprehensive Examination’ (*Century Law Firm*, 10 July 2023) <<https://www.centurylawfirm.in/blog/marital-rape-in-india-a-comprehensive-examination/>> accessed 17 February 2024

⁴ Priyali Prakash & Dhriti Mankatalia, ‘Marital Rape in India: The History of the Legal Exception’ *The Hindu* (09 January 2023) <<https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece>> accessed 17 February 2024

⁵ ‘India Among 30 Odd Countries That Have Not Criminalized Marital Rape’ *NDTV* (11 May 2022) <<https://www.ndtv.com/india-news/india-among-30-odd-countries-that-have-not-criminalised-marital-rape-2967547>> accessed 17 February 2024

delineates the elements that constitute rape.⁶ However, there are exceptions, and the second exception in Section 375 is particularly noteworthy. It states, ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.’⁷ The presence of such an exception in the Indian legal system has been a subject of controversy and has drawn attention from international bodies, including the United Nations. The UN report highlighting India's non-recognition of marital rape as a criminal offense reflects a global consensus on the need to address this form of violence within the confines of marriage. Despite the evolving understanding of consent and bodily autonomy, the legal provisions in India have lagged behind in acknowledging marital rape as a punishable act.

JUDICIAL INSIGHTS

A significant turning point in addressing the issue came with the landmark case of *Independent Thought v UOI*,⁸ where the Supreme Court of India took a decisive step. The case centred around the minimum age for marital consent, and the court, in its judgment, raised the age from **15** to **18**. This decision was grounded in constitutional principles, as the court argued that exempting marital rape of minors contradicted articles 14,⁹ 15,¹⁰ and 21¹¹ of the Constitution.¹² Article 14 of the Indian Constitution guarantees equality before the law, emphasizing that ‘the state shall not deny any person equality before the law or equal protection of the laws within the territory of India’. Article 15 forbids unfair treatment based on religion, race, caste, gender, or place of birth. In the context of marital rape, the exemption based on marital status could be seen as discriminatory, as it discriminates against married women by treating them differently from unmarried women when it comes to protection from sexual violence. Article 21 of the Constitution guarantees the right to life and personal liberty, and the Supreme Court, in the

⁶ Indian Penal Code 1860, s 375

⁷ *Ibid*

⁸ *Independent Thought v Union of India and Ors* AIR 2017 SC 4904.

⁹ Constitution of India 1950, art 14

¹⁰ Constitution of India 1950, art 15

¹¹ Constitution of India 1950, art 21

¹² Aisha Akram, ‘The Decriminalization of Marital Rape: How India Continues to Refuse Justice to Its Married Women’ (*Oxford human Rights Hub*, 06 December 2023) <<https://ohrh.law.ox.ac.uk/the-decriminalisation-of-marital-rape-how-india-continues-to-refuse-justice-to-its-married-women/>> accessed 18 February 2024

Independent Thought case, interpreted this to include the right to live with dignity. Recognizing the impact of child marriages and the vulnerability of young brides, the court deemed it necessary to raise the age of marital consent to ensure that young girls have the autonomy to make decisions about their bodies.

While the Independent Thought case addressed the age of consent, it did not explicitly strike down the marital rape exception in Section 375. The broader issue of recognizing marital rape as a criminal offense remains a contentious topic in India, with debates around cultural norms, societal expectations, and the need for legal reform.

The exception in the abovementioned section limits a woman's freedom to express herself sexually. It prevents a woman from deciding whether or not she wants to engage in sexual activity with her husband. This creates two categories of women based on marital status and shields men from accountability for actions against their wives, thereby violating the right to equality. In the *Puttaswamy Judgment*¹³, the Supreme Court acknowledged the Right to Privacy as a fundamental right for all citizens. This right encompasses 'decisional privacy' allowing individuals to make personal choices regarding their sexual or procreative aspects and decisions about intimate relationships. Through various rulings, the Supreme Court affirmed that the right to choose not to engage in sexual activity is a fundamental right protected under Article 21 of the Constitution, applicable to all women irrespective of their marital status. Consequently, coerced sexual cohabitation is deemed an infringement of the basic right as outlined under Article 21.¹⁴ Despite all the infringement it has not been criminalized yet. However, civil remedies exist under the Protection of Women from Domestic Violence Act (PWDVA) 2005. This act stands as a crucial legal framework in India addressing various forms of domestic violence, including sexual violence.¹⁵ It offers 'civil' remedies for women facing domestic abuse,

¹³ Justice KS Puttaswamy (Retd) v Union Of India (2019) 1 SCC 1

¹⁴ Tiasha Mukherjee, 'Five Years Since "Puttaswamy", Criminalisation of Marital Rape Still Eludes Indian Law' *The Wire* (01 September 2022) <<https://thewire.in/rights/five-years-since-puttaswamy-criminalisation-of-marital-rape-still-eludes-indian-law>> accessed 16 February 2024

¹⁵ Saumya Uma, 'Women's Rights in the Balance as India Weighs Criminalising Marital Rape' (360, 29 November 2023) <<https://360info.org/womens-rights-in-the-balance-as-india-weighs-criminalising-marital-rape/>> accessed 17 February 2024

providing them with mechanisms to seek protection, monetary relief, and legal recourse against their abusers.

DIFFERENT PERSPECTIVES & OPINIONS

In a crucial decision in September 2022, the Supreme Court marked a significant milestone by acknowledging abortion rights for victims of marital rape. This means that if a married woman becomes pregnant due to forced sexual acts by her husband, it can be legally deemed as ‘Rape’ under the Medical Termination of Pregnancy (MTP) Act.¹⁶ The heart of the matter lies in the recognition that if a woman did not give her consent and still ended up pregnant, the law acknowledges the violation she endured as a form of rape. This decision strives to ensure that women have the right to make choices about their bodies, even within the confines of marriage.

However, the landscape isn’t entirely clear-cut. There’s an ongoing debate about whether non-consensual sex by a husband with his wife should indeed be classified as ‘rape.’ This difference in opinion reflects broader societal views on consent within marriage. While the court’s decision takes a step towards recognizing the autonomy and rights of married women, some perspectives may still question the application of the term ‘rape’ within the marital relationship.

After the split judgment given by the Delhi High Court in 2022,¹⁷ the Allahabad court, in Dec 2023, ruled that a man cannot be charged with ‘rape’ if his wife is 18 or above.¹⁸ However, just days later, the Gujarat High Court stated that, ‘rape is rape, even if committed by a husband against his wife.’¹⁹ However, the government’s stand is quite rigid here. In 2013, the Justice

¹⁶ Utkarsh Anand, ‘Court Grants Abortion Rights for Marital Rape’ *Hindustan Times* (29 September 2022) <<https://www.hindustantimes.com/india-news/court-grants-abortion-rights-for-marital-rape-101664474604464.html>> accessed 17 February 2024

¹⁷ Soibam Rocky Singh and Jagriti Chandra, ‘Delhi HC Delivers Split Verdict on Marital Rape’ *The Hindu* (12 May 2022) <<https://www.thehindu.com/news/cities/Delhi/delhi-high-court-delivers-split-verdict-on-marital-rape/article65403832.ece>> accessed 19 February 2024

¹⁸ ‘Marital Rape: Man Can’t Be Charged If Wife Is 18 or above, Says Allahabad High Court’ *The Mint* (11 December 2023) <<https://www.livemint.com/news/india/marital-rape-man-cant-be-charged-if-wife-is-18-or-above-says-allahabad-high-court-11702232741305.html>> accessed 19 February 2024

¹⁹ Sparsh Upadhyay, ‘Rape Is Rape Even If Committed By A Husband Against Wife’: Gujarat High Court, Says Need To Break Silence Over Gender Violence’ *Live Law* (17 December 2023) <<https://www.livelaw.in/high-court/gujarat-high-court/gujarat-high-court-marital-rape-husband-against-wife-need-break-silence-gender-violence-244741>> accessed 17 February 2024

Verma Committee proposed removing the exemption for marital rape. Nonetheless, the Parliamentary Standing Committee on Home Affairs rejected this suggestion, arguing that making marital rape a criminal offense would place considerable pressure on the entire family structure. Again, in 2016, the Women and Child Development Minister argued against having a law against marital rape, stating that marriage is a sacred institution.²⁰

Even the recently introduced *Bhartiya Nyaya Sanhita* (BNS) of 2023 echoes the existing provision for marital rape found in the Indian Penal Code (IPC). Section 63 of the BNS defines rape, delineating various aspects, with Exception 2 notably addressing marital relations. According to this exception, sexual intercourse or acts by a man with his wife, given that she is not under eighteen years of age, are not considered rape. This provision aligns with the historical perspective that once married, everything becomes consensual. The retention of such an exception raises questions about the evolving understanding of consent, bodily autonomy, and the need for legal reform to ensure the protection of individual rights, particularly within the intimate realm of marital relationships, as the discourse on marital rape continues to evolve.

RISKS AND REDEMPTION

Criminalizing marital rape could have both positive and negative consequences. On the positive side, criminalizing marital rape holds the promise of granting justice and protection to women who are genuinely subjected to the harrowing experience of rape within the confines of marriage. By recognizing marital rape as a criminal offense, the legal system could empower survivors to report such incidents without the fear of legal impunity for their spouses. This step aligns with the broader movement globally, acknowledging the fundamental right to bodily autonomy and protection from sexual violence, irrespective of marital status.

Moreover, criminalization could serve as a deterrent, sending a strong message that marital rape is an egregious violation of a person's rights and will be met with severe legal consequences. It would contribute to dismantling the societal notion that a marital relationship exempts one from

²⁰ Saumya Uma, 'Why the "Marital Rape Exemption" in Criminal Law Must Go' *The Wire* (30 November 2023) <<https://thewire.in/rights/why-the-marital-rape-exemption-in-criminal-law-must-go>> accessed 17 February 2024

accountability for sexual violence, fostering a culture where such acts are unequivocally condemned.

However, the prospect of criminalizing marital rape also raises concerns and potential negative consequences. Drawing parallels with the Domestic Violence Act, there is a legitimate apprehension that some individuals might exploit the legal provisions for personal gain. False allegations of marital rape could be made to secure divorce, alimony, or gain an advantage in custody battles. This not only poses a risk to the reputation and well-being of the accused husbands but can also lead to harassment for them and their families.

The balance between providing a legal remedy for genuine victims and safeguarding against potential misuse becomes a delicate challenge. Striking this balance requires a meticulous examination of legal safeguards and procedural checks to prevent false accusations while ensuring that survivors are not deterred from seeking justice.

CONCLUSION

As society evolves and understands the rights of vulnerable individuals, there should be laws that don't discriminate or infringe on someone's rights based on their marital status. These laws should be flexible enough to include provisions addressing important issues. Eliminating the marital rape exemption means establishing a clear rule for how people should behave in a marriage, aligning with the fundamental rights guaranteed by the Indian constitution. Currently, the exemption implies that certain non-consensual actions within marriage are acceptable, creating a gap in the law. Removing this exemption signifies that everyone in a marriage should adhere to the same standards based on individual rights, fairness, and respect. While criminalizing marital rape can safeguard women genuinely suffering, there's a need to carefully consider its potential misuse to protect innocent men. It's crucial to strike a balance to ensure justice for those in need while preventing the exploitation of the law for personal gain.