



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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The Unheard voices of Married women Subject to Marital Rape

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Received 24 June 2022; Accepted 13 July 2022; Published 18 July 2022

Marital rape is not a crime in India, i.e. The Indian penal code has not criminalized the act of the husband forcing the wife into having non-consensual sexual intercourse and it is considered legal. In the ancient period, wives were considered the property or chattel of husbands as there was no law on the criminalization of marital rape, this conception more or less remains the same in India even in the 21st Century. Women have been given the right to seek protection from the law, however, when it is the husband who is the perpetrator of rape, such protection is made unavailable by the same law. This article primarily aims to throw light on the issues of marital rape and arguments that are advanced for and against the criminalization of marital rape. Besides, it also discusses the initiatives that were taken by the law commissions to criminalize marital rape and the challenges to the exception. Overall, this article provides an overview of the concept of marital rape and the current legal framework of marital rape in India.

Keywords: *marital rape, sexual violence, consent, fundamental rights, discrimination.*

INTRODUCTION

“They are all innocent until proven guilty. But not me. I am a liar until I am proven honest.”

- Louise O'Neill

Marriage is considered a sacred bond between two people promising to treat each other with utmost love, affection, and care. Therefore, it is clear from this view that there is no space for

violence in the marital relationship. However, what is happening at present is disheartening that the law has turned blind eye to marital rape. Marital rape refers to the act of the partner having forceful sex with the wife against her will and without her consent, yet India is one of those countries that have not criminalized marital rape. It is to be noted that the term 'rape' has been defined under the Indian penal code, but at the same instant, the law does not recognize marital rape as a crime. In this era, it is hard to believe that the act of committing sexual violence upon the wife by the husband is still legal and acceptable by law. The reason behind this notion dates back to the period when the wife was considered the property of the husband having all the rights over her body. In addition to it, another ideology is that the wife's consent at the time of marriage confers the right of the husband to have sexual intercourse.

Though marital rape has drawn the attention of the public, criminalizing marital rape remains ineffective to date. In a country where marital rape is considered the license to rape, married women are denied the equal protection of the law guaranteed by the constitution of India. As society always suppress the victims to shut their mouth and stay within the marriage no matter how much ever worse it is causing so many mental and physical traumas to the victims who are forced to live with perpetrators who view wives as mere sex slaves.¹In the 21st Century, where marital rape has been recognized as a criminal offense in several countries, there is an immediate need for the criminalization of marital rape in India.

THE CONTROVERSIAL EXCEPTION TO MARITAL RAPE

Though many heart-breaking events have brought enormous changes to the Indian rape laws, marital rape has not still been included within the definition of rape under section 375² of IPC. There has been no progress in the matter of penalizing marital rape even after it has gained considerable attention. However, Section 376B³ considers non-consensual sexual intercourse as a crime if the partners are living separately during judicial separation. There is a prevalent

¹ Chaithanya B Ampadi, 'Marital Rape: Lifting the veil of sacred Institution' (2019) 9 *Supremo Amicus*, 4 <<https://supremoamicus.org/wp-content/uploads/2019/01/A11v9.pdf>> accessed 10 June 2022

² Indian Penal Code, 1860, s 375

³ Indian Penal Code, 1860, s 376B

marital rape exemption rule laid down by Sir Mathew Hale in the 17th CE which was, later on, expected to emerge worldwide.

He stated that “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”⁴The second exception of section 375 under IPC states that “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”⁵ It says that non-consensual sexual intercourse committed upon the wife by the husband is not raping if the wife is above 15 years of age. The exception provided in section 375 violates the fundamental rights of married women as it discriminates between married and unmarried women because the fundamental rights especially the right to equal protection of the law, the right to live with human dignity, and the right to privacy enshrined in the constitution of India are recognized as the basic human rights of the citizens. The following are some of the cases that deal with the fundamental rights of the women subject to sexual and physical violence:

CASE NO	CASE NAME	THE DECISION OF THE COURT
1.	Independent thought v Union of India & Anr ⁶	The exception has been to some extent altered in this case which can be considered as the beginning of many more changes concerning marital rape. The Hon’ble Supreme Court held that rape in the course of marriage where the wife is below the age of fifteen as provided in the second exemption of section 375, has been extended to the

⁴ Matthew Hale, *History of the Pleas of the Crown* (1st edition, London Professional Books 1972) 629

³ Indian Penal Code, 1860, s 375

⁶ *Independent Thought v Union of India and Anr.*, (2017) Writ Petition (Civil) No. 382/2013

		wives below the age of eighteen years.
2.	Justice K S Puttaswamy v Union of India ⁷	In this case, the right to privacy has been recognized as a fundamental right under Article 21 ⁸ of the constitution of India. The Hon'ble Supreme Court held that the women's bodily integrity falls within the ambit of her right to privacy. Therefore, forced sexual intercourse committed upon the wife would amount to a violation of her fundamental right.
3.	Suchita Srivastava v Chandigarh Administration ⁹	In this case, The Hon'ble Supreme Court held that the right to make choice in regard to sexual activity falls within the umbrella of Article 21 of the constitution of India.
4.	State of Karnataka v Krishnappa ¹⁰	The Hon'ble Supreme Court in this case recognized sexual violence as a violation of the right to privacy. Furthermore, the court treated non-consensual sexual intercourse as physical and sexual violence.
5.	Francis Coralie Mullin v Union Territory of Delhi ¹¹	The Hon'ble Supreme Court held in a set of cases that the act of rape infringes

⁷ Justice K.S. Puttaswamy v Union of India (2017) Writ Petition (Criminal) No. /2012

⁸ Constitution of India, 1950, art.21

⁹ Suchita Srivastav v Chandigarh Administration (2009) Civil Appeal No. 5845/2009

¹⁰ State of Karnataka v Krishnappa (1993) ILR 1994 KAR 89

		the right to life and the right to live with dignity of the victim of rape.
6.	State of Maharashtra v Madhukar Narayan ¹²	In this case, the Hon'ble Supreme Court held that every woman is entitled to protect her sexual privacy and it cannot be open to any or every person when desired.
7.	Bandhua Mukti Morcha v Union of India ¹³	The doctrine of marital rape exemption violates the right to the good health of a victim which has been considered as a part of Article 21. Such exemption results in serious psychological and physical harm in the process. It destroys the psychology of a woman and pushes her into a deep emotional crisis

CHALLENGES TO THE EXCEPTION

The legality of the second exception of section 375 was first challenged by an NGO, RTI Foundation. Subsequently, further petitions were filed in which the following crucial issues are discussed and argued at the court:¹⁴

Consent: consent has always been given great importance in marital relationships. The exemption specifies that the husband by virtue of matrimonial rights can exercise either consensual or non-consensual sex upon the wife. As a result, the exemption has been

¹¹ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981), AIR 746

¹² *State of Maharashtra & Anr v Madhukar Narayan Mardikar* AIR 1991, SC 207

¹³ *Bandhua Mukti Morcha v Union of India* (1984), AIR 802

¹⁴ Joshika Saraf, 'A Colonial Vestige, Why Marital Rape Exception Has Become Untenable' (*BehanBox*, 1 February 2022) <<https://behanbox.com/2022/02/01/a-colonial-vestige-why-marital-rape-exception-has-become-untenable/>> accessed 13 June 2022

challenged as unconstitutional as it considers the consent of women on the basis of marital status. The old ideology of women being considered property of husbands has no relevance in this era. Most importantly, every woman's right to say no is an inherent part of the fundamental right under the Constitution of India.¹⁵

Intelligible differentia: According to Article 14¹⁶, the test of the classification must be based on some intelligible differentia accompanied by the rational nexus. In the recent Delhi split verdict, Justice Shanker held by relying on this test, the exception to treat married women differently from rape laws is valid because it creates a reasonable classification between married and unmarried women as the legislation's main objective is to safeguard the institution of marriage.¹⁷ However, this could bring an impression on husbands that they can do anything they desire and put the wives in a position where they cannot speak up or file a complaint against them.

Other alternative remedies: Most of the time, victims of marital rape have been advised to seek other remedies that are available under the Protection of Women from Domestic Violence Act, 2005, Section 498A¹⁸ of the IPC, and the Hindu Marriage Act, 1955. However, it is argued that the availability of these remedies will not be sufficient, and a substitute for marital rape because being able to seek alternative existing remedies against husbands will not be the same as being able to file a rape case.¹⁹

ARGUMENTS FOR AND AGAINST THE CRIMINALIZATION OF MARITAL RAPE

A) *Criminalizing Marital Rape*

The second exception provided in section 375 of IPC not only violates the fundamental rights of married women guaranteed by the constitution of India but also breaches the principles and

¹⁵ Apurva Vishwanath, 'The Debate Over Marital Rape' (*The Indian Express*, 23 January 2022) <<https://indianexpress.com/article/explained/explained-debate-over-marital-rape-7732470/>> accessed on 13 June 2022

¹⁶ Constitution of India, 1950, art.14

¹⁷ Jayna Kothari, No case for exception; Marital provision must go, it violates right to equality in marriage, family' (*The Indian Express*) (22 May 2022) 11

¹⁸ Indian Penal Code, 1860, s 498A

¹⁹ Vakasha Sachdev, 'Marital Rape Exception: Other Laws Like 498A Are No Substitute' (*The Quint*, 24 January 2022) <<https://www.thequint.com/news/law/delhi-hc-marital-rape-exception-498a-etc-not-substitute-for-375-offence-rebecca-john-amicus>> accessed 13 June 2022

provisions of international law obligations. The exception contravenes the very first Article 1²⁰ of the CEDAW which states that any distinction or exclusion based on sex would affect women's human rights and fundamental freedoms. In addition to it, the United Nations Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”²¹

The 42nd *Law Commission* was the first one to deal with the marital rape issue. Thereport highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape. However, the report did not include the exception that whether it should be kept or removed. In the 172nd Law Commission Report, it was argued when other forms of violence by the husband are penalized, there is no justification for rape alone to be safeguarded from the operation of law. This was completely rejected by the commission fearing the criminalization of marital rape would result in “excessive interference with the institution of marriage.”²²

As there were no effective legislations about marital rape, the Justice Verma Committee which was set up in 2012 after the Nirbhaya rape case, had strongly recommended that the exception should be removed and stressed upon the criminalization of marital rape, in addition, the irrevocable consent upon marriage by wife to the sexual acts should not be considered relevant. Further, the committee emphasized that rape and sexual violence are not merely crimes but expressions of power.²³ However, the legislators came up with defenses not to accept and implement the recommendation because the “entire family system will be under greater stress and the committee may perhaps be doing more injustice.” In India, there are

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, 1979, art.1

²¹ Anirudh Pratap Singh, ‘The impunity of marital rape’ (*The Indian Express*, 20 December 2020)

<<https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>> accessed 14 June 2022

²² Law Commission of India, *Review of Rape Laws* (Law Com. No. 172 2000) 3.1.2.1

<<https://lawcommissionofindia.nic.in/rapelaws.htm>> accessed 14 June 2022

²³ Justice J.S Verma Committee, *Report of the Committee on Amendment to Criminal Law* (23 January 2013)

<<https://prsindia.org/policy/report-summarises/justice-verma-committee-report-summary#:~:text=Justice%20Verma%20Committee%20was%20constituted,report%20on%20January%202013%202013>> accessed 14 June 2022

many laws regarding crimes, but there is not even a single provision that deals with the criminalization of marital rape. The act of having forced sex with the wife without her consent cannot be accepted nor entertained as it highly and unethically degrades the dignity of a woman.

B) Against Criminalizing Marital Rape

As there are sufficient and valid reasons for criminalizing marital rape in India, the legislators, on the other hand, have come forward opposing the same on certain grounds, particularly based on old beliefs that need to be changed in this 21st Century. The husband is not held guilty of raping his wife owing to the implied and irrevocable consent given by the wife upon entering into the marriage. As already stated, the concept of the implied theory is propounded by Sir Mathew Hale of England in the 17th CE. Another reasoning by the court is that it is arduous to prove the consent of the wife as nobody knows what happens behind closed doors due to which striking down the exception would lead to excessive interference in the private space.

While marriage is viewed as a civil contract and a sacrament in Indian law nevertheless it has high value and relevance in society. As it is linked with society, the states are of the view that intruding into the private domain would amount to a violation of the right to privacy. However, the same would happen in the case of marital rape if the state did not interfere in such a situation. In 2015, the home minister reiterated the statement in response to a bill proposed by a Member of Parliament when a question came up about the criminalization of marital rape. The press release specified that the concept of marital rape is not suitable to be applied in the Indian context. The reason given for such a view was the “mindset of the society to treat the marriage as a sacrament.”

A similar statement has been shared by the minister for women and child development Maneka Gandhi against criminalizing marital rape; “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament, etc,” as

questions arose on criminalizing marital rape.²⁴The then-home secretary R K Singh said that “Marital rape is difficult to define. In India, marriage is a sacred institution, and to include marital discord and resultant abuses as offenses would be tantamount to delivering a blow to the social fabric.”²⁵

Another important facet of decriminalizing marital rape is that removing the exception would be used as a weapon by wives against husbands. In light of the observation by the Supreme Court on the misuse of section 498A, it is said that the criminalization of marital rape could become an “easy tool for harassing the husbands.”²⁶According to the report, false cases have been charged against men who then proved to be innocent after the completion of court proceedings. A study conducted by the Delhi Commission of Women in 2014 pointed out that 53.2% rape cases registered between April 2013 and July 2014 turned out to be fraud cases in which women were lying and falsely accusing men of rape and sexual assault.²⁷

CURRENT POSITION OF MARITAL RAPE IN INDIA

Marital rape has not been criminalized in India; it remains unsuccessful to date. It is shocking to believe how marital rape has been normalized in our society. Recently, the Delhi High Court passed a split verdict with regard to the challenge of marital rape. While Justice Rajiv Shakedher struck down the exception of section 375 holding that it is inconsistent and violates the women’s fundamental rights under Articles 14, 15, 19(1)(a) and 21²⁸, Justice Hari Shanker disagreed and held that the exception is not in violation of the right to equality of married women.

Justice Hari Shankar in his rulings stated: “*That what he is doing is wrong, no one can deny. The distinction between the two situations is that, where the parties are married, the woman has consciously*

²⁴ ‘Concept of marital rape can’t be applied in the Indian context’ (*The Indian Express*, 11 March, 2016) <<https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>> accessed 16 June 2022

²⁵ ‘Sex Assault in live in relationship is a tricky issue’ (*India Today*, 13 February 2013) <<https://www.indiatoday.in/mail-today/story/sex-assault-live-in-relationship-justice-j.s.-verma-committee-154340-2013-02-19>> accessed 17 June 2022

²⁶ Sanya Dhingra, ‘Marital rape can become a tool to harass husbands’ (*The Print*, 29 August 2017) <<https://theprint.in/report/criminalisation-marital-rape-may-become-easy-tool-harass-husbands-centre/8350/>>

²⁷ Nitin Joy, ‘False Rape Cases/Misuse of section 375’ (*Law Space*, 1 July 2021) <<https://lawspace.in/false-rape-cases-misuse-of-section-375/>> accessed 19 June 2022

²⁸ Constitution of India, 1950, art.14, art.15, art.19(1) (a), and art.21

and willingly entered into a relationship with the man in which sex is an integral part... She has, nonetheless, by her decision to marry the man, given, to him, the right to expect meaningful conjugal rights with her." In other words, it means the refusal of sex by the wife is viewed as a mere disagreement between them which need not be taken seriously.²⁹The case is now to be adjudicated by the Supreme Court as there are two contradicting verdicts. Furthermore, not so long ago, the Kerala High Court held marital rape as a valid ground for seeking divorce because it is equivalent to "the mental and physical cruelty."³⁰

CONCLUSION

If I was asked whether I support the criminalization of marital rape, my answer would be yes, I do, because why not? From the above research, it is clear that the law has failed to come up with provisions to criminalize marital rape. Rape is rape if it is committed upon married or unmarried women because marriage is never an excuse as long as it is rape. My suggestion is that since the law is highly concerned about the misuse of marital rape is criminalized, strict punishment must be given to those filing false cases. However, this cannot be one of the reasons to prevent the criminalization of marital rape. India is known to be a developing country, but the same country is a step short to recognize marital rape as a crime while other several countries have recognized the same as a crime. Although there are legal remedies that can be sought by women against violence, it does not provide nor recognize any remedy against marital rape. Therefore, it is high time marital rape must be recognized as a crime considering how women are being treated and victimized by men and society.

²⁹ Sofi Ahsan, 'Delhi HC delivers split verdict on the criminalization of marital rape' (*The Indian Express*, 12 May 2022) <<https://indianexpress.com/article/cities/delhi/delhi-high-court-split-verdict-petitions-seeking-criminalisation-of-marital-rape-7911335/>> accessed 21 June 2022

³⁰ Hannah M Varghese, 'Husband's Licentious Disposition Disregarding Autonomy Of Wife Is Marital Rape' (*Live Law*, 6 August 2021) <<https://www.livelaw.in/top-stories/kerala-high-court-upholds-marital-rape-as-a-ground-for-divorce-under-cruelty-179010>> accessed 21 June 2022