Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2025 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Dynamic Perspective of Spousal Rape: A Study of Recent Advancements of Jurisprudence Pertinent to Rape Post-Marriage in the Indian Subcontinent

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Received 09 September 2025; *Accepted* 09 October 2025; *Published* 13 October 2025

India, like its colonial rulers, does not penalise marital rape; that is to say that IPC,1860 does not consider the husband as the rapist of his wife. Jurisprudence over the same has witnessed a considerable amount of progress in the past few decades; however, these respondents on such an issue are still in a developing stage in India, as spousal rape is still considered as a part of a private affair, that is to say, behind the matrimonial door, where even the law does not penetrate. This article analyses the brief history of the emergence of such colonial doctrinal law and also deals with their current jurisprudential stand on this issue. Further, this article analyses the perception of India on such a dynamic subject in a two-fold manner - legislative approach and judicial attitude. Ultimately, concluded on the note that the jurisprudence over spousal rape is in a developing stage in India, despite the fact that it has shown is tea progress in favour of the penalization of marital rape and the shadow upon the same will become clearer after the pronouncement of judgement by the constitution Bench in the sub-judiced matter appertains to the constitutional validity of such exemption clause.

Keywords: *rape, ipc, marital rape, criminal law.*

INTRODUCTION: SPOUSAL RAPE: A BRIEF OVERVIEW

"He rapes her, and society makes her live with her rapist."

Derived from the *Latin* word '*rapio*', which means '*to seize or carry off*', rape is considered one of the most heinous offences as it degrades the integrity, dignity, and sacredness of a woman, and it becomes even more despicable when the same is committed by a woman's saviour, i.e., her husband. '**Marital rape**' refers to the act of forcible sexual intercourse by a man with his wife without her consent.[1] The general notion entrenched in the roots of the society that the nuptial bond bestows an implied consent for sexual intercourse and makes the husband licentious to engage in sexual activities with her wife (where the wife is supposed to be submissive irrespective of her will) is the prime reason behind the widespread acceptance of spousal rape in India. On the one hand, where the Constitution guarantees equality and the right to live with dignity to all irrespective of gender, on the other hand, conservatives think marriage is a sacrosanct institution and criminalising marital rape will intrude on the sanctity of the relation. Such a conservative, patriarchal, archaic, and colonial mindset is rooted in our society to such an extent that traces of the same do exist nowadays, and the same is used as a defensive tool in cases where the modesty of the woman has been outraged by her spouse.

Rape is treated as an abhorrent crime and dealt with under Sections 375 to 377 of the Indian Penal Code[2]. But, on the other hand, it is a well-recognised proposition of law that a husband can never be deemed as a rapist of his wife (being 18 years or more) even if he had sexual intercourse against her will. In simple words, this section decriminalizes rape post-marriage and acts as a license for husbands to establish forceful carnal relations with their wives. Rape always leaves a traumatising, ever-lasting scar on the victim's mind, but in the case where the *malefactor* is an unfamiliar person, then it is comparatively easier for the victim to banish those scary moments than in cases where those preposterous people are the husband, as the possibility of the act being done regularly increases. It is an irony that there is no recourse to victims against such a deplorable deed in a country like India, which is considered a champion of human rights. The maximum a wife can do when raped by her spouse is to take

[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 05 September 2025

[2] Indian Penal Code 1860, ss 375 - 377

a divorce or seek a remedy under the Domestic Violence Act, 2005[3], or under Section 498A[4] of the IPC.

Women activists and feminists are fighting long battles against society and laws across the globe to criminalise this form of rape. This decades-long struggle has resulted in the criminalisation of spousal rape in many countries, and the status quo is that only 32 countries are left where the form of rape is still not a crime, woefully, India being one of them. Various legal developments have taken place advancing the status of women in society; however, no such significant change has taken place in such a contentious issue except increasing the threshold age for such a show of dominance to 18 years in conformity with the POCSO Act.[5] In brief, the non-penalisation of marital rape shows the perpetuation of patriarchal, misogynistic and old-fashioned attitudes of society towards women's bodily autonomy.

A BRIEF CHRONICLE OF THE EMERGENCE OF SUCH DOCTRINAL LAW

The roots of such an archaic practice with regard to India can be found ingrained in the colonial doctrinal laws of England (our colonial ruler). In England, around the 16th century, a proposition by the name "Doctrine of Coverture" was developed, which principally holds that husband and wife are one person under the law and form the part of the same flesh and blood. It further states that after marriage, a woman's rights get merged with those of men, and she loses her autonomy, thereby becoming duty-bound to obey her husband as a ruler or lord. The above doctrinal law was prevalent in Europe, and the same is traceable in the views of Lord Hale's Ghost: *"But the husband cannot be guilty of a 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."*[6]

The proposition enumerated in the idea of Sir Hale became the accurate statement of law at that time. Lord Lane, in furtherance of the proposition, went a step further and traced the history subsequent to this proposition.[7] And Lord Byrne also upheld the basic proposition of Hale in a different language: *"Magistrates' order that a wife should no longer cohabit with her*

[3] Domestic Violence Act 2005
[4] Indian Penal Code 1860, s 498A
[5] Protection of Children from Sexual Offences Act 2012
[6] Sandra L. Ryder and Sheryl A. Kuzmenka, 'Legal Ray: The Marital Rape Exemption' (1991) 24(2) Marshall Law Review
[7] *Popkin v Popkin* [1794] 1 Hag. Ecc. 765n

husband put an end to husband immunity."[6] Also, the leading scholars like Archbold confirm the proposition that a husband cannot be held guilty of rape of his wife.[7]

For the very first time in the year 1988, in the case of ***R v Clarence***[8]**,** Judges showed a very progressive attitude by refusing to be submissive before this doctrinal law and opined: *"There may be many cases in which a wife may lawfully refuse intercourse, and in which if the husband imposed it by violence, he might be held guilty of crime."*[9]

Despite such a remarkable observation, this contentious rule persisted for several years until it witnessed a dramatic shift in the case of ***R. v C.***[9], where Simon Brown J. had outrightly negated Hale's view. This view was further substantiated by the *House of Lords* in the case of ***R. v R.***[10], where it was ruled that where the common law rule no longer accurately depicts the true position in contemporary society, it is the court's duty to change it.[12] The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.[13] Ultimately, in the year 1991, spousal rape was completely abolished in the case of ***Reg v J***[11]**,** where Lord Lane significantly ruled: *"…the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."* Thus, established that at present, even the mother of the troublesome provision, the UK, has overturned the spousal exception to rape, and nowadays any malefactor, including the husband, is liable for degrading the sacredness of a woman.

THE NOTION OF MARITAL RAPE IN CONTEMPORARY INDIA

Pari materia with the proposition of its colonial rulers is a well-settled proposition of law in the Indian sub-continent, where the husband's immunity regarding forceful cohabitation is recognised. Despite being the frontrunner in the field of human rights, the acceptance of such an archaic or arbitrary practice (which abridges the holiness of the woman) on account of apprehensive arguments or assumptions raises some serious questions on constitutional commitments and the intellect of the legislature and judiciary simultaneously. The condition of a victim of marital rape was rightly quoted in the case of ***State of Punjab v Gurmit Singh.***[12] Though the facts of the case in which the observation has been made were nowhere directly

[8] *R. v Clarence* [1888] 22 QBD 23
[9] *R. v C.* [1991] 1 ALL E.R. 755
[10] *R. v R* [1991] UKHL 12
[11] *Reg v J* [1991] 1 All E.R. 759
[12] *The State of Punjab v Gurmit Singh & Ors* 1996 (2) SCC 384

related to marital rape, the plight of a helpless wife raped by her husband cannot be different from this observation as follows: *"A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female."*[13]

However, due to the ongoing feminist revolution and evolving constitutional jurisprudence in the country, along with the recognition of human rights at the global level, India has also witnessed some significant advancement pertaining to spousal rape's jurisprudence in the few preceding decades. To analyse the recent developments, it is crucial to get acquainted with the dramatic shift marked in the attitude of the legislature as well as the judiciary at different time frames, especially the post-2000 era.

The Current Perception of the Legislature: More or less, the legislature has shown a static attitude with regard to spousal rape while responding to the changing needs of society. It still relies on the proposition that a husband can never be deemed a rapist of his wife. In other words, it upholds the anti-diluvial notion of the *implied consent theory* and the doctrine of unity, i.e., where husband and wife are the same person under the law, and the individual status of a wife gets submerged into that of the husband after marriage. Thus, the wife's autonomy of her bodily integrity (right to say no to sexual intercourse) gets banished.

Further in the year 2000, the legislature entrusted the task of scrutinising their tenets regarding spousal rape to the Law Commission of India. Accordingly, the commission published its 172nd Report[14] titled "Review of Rape Laws" in the year 2000, where they upheld the long-lasting belief of the legislature and opined that marital rape need not be criminalised in the following words: *"We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship."*

What we firmly believe is that the term "excessive interference" is very subjective, but any interference by the law that would protect the dignity and sexual rights of a woman being forced into intercourse by her husband cannot be excessive. Though it would be an arduous task to determine the use of force or absence of consent in an act happening behind the closed doors of a married couple and there would be high chances of the provision being misused

[13] *Ibid*
[14] Law Commission, *Review of Rape Laws* (Law Com No 172, 2000)

but these contentions are certainly not enough to distinguish a raped wife from any other raped woman and let her rapist roam freely without any guilt or remorse for the act being committed by him. Marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.[15] The court should not desist from examining the constitutionality of the impugned provisions only because it is impossible to prove the occurrence of marital rape as at times as it happens within the confines of a household.[16]

Again, a committee was constituted in the year 2012 under Justice J.S. Verma, who departed from the previous tone and strongly recommended the penalisation of spousal rape.[17] His two-fold recommendation was – the expurgation of the exception clause and manifest inscription in law that marital privacy is not a valid defence for the offence of rape post-marriage. This report comprehensively shows how the immunity granted to preposterous husbands derives its force from the doctrinal law of its colonial rulers. Further, it goes to show that such a kind of colonial immunity has vanished on a number of occasions.

However, despite such a recommendation, the legislature remained static in its attitude as the Criminal Law Amendment Bill, 2012[18], drafted in the light of the Verma Committee's recommendation, outrightly disregarded its recommendation on marital rape.[28] The justification for such omission advanced by the Parliamentary Standing Committee on Home Affairs in its 167th Report[19] is even more disgraceful. The outline of the two-fold justification broadly includes that for such an offence, sufficient remedies already exist under the Indian criminal law and section 498A IPC[20] was referred to as an example. This argument was again reiterated by the Ministry of Home Affairs in response to a private bill, moved by a member of parliament, to penalise spousal rape.

Hence, legislatures have consistently shown a passive attitude with regard to the expurgation of such an exemption clause, which confirms that they still believe in such an archaic, old-fangled, antediluvian, patriarchal notion.

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[15] *R. v R* (1991) 4 All ER 481
[16] *RIT Foundation v Union of India* 2022 SCC Online Del 1404
[17] Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (2013)
[18] The Criminal Law Amendment Bill 2012
[19] Standing Committee on Home Affairs, *The Criminal Law Amendment Bill, 2012* (Report No 167, 2015)
[20] Indian Penal Code 1860, s 498A

A BRIEF ARTICULATION OF THE JUDICIAL APPROACH'

In modern times, as society started developing and societal values changed, women and feminist groups started raising their voices against the mental and physical harassment a wife suffers from her consort, and this led to escalating demands for the criminalisation of marital rape across the country. However, there are no direct cases reported that specifically deal with the constitutionality of the exemption clause enumerated in section 375. But in the past few years, a plethora of cases came up with their axis revolving around the burning issue of marital rape penalisation, and there the courts gave either concurring or contradicting judgments expressing their views on the issue, along with the reasoning for delivering the same, which has more or less contributed towards the evolution of criminal law jurisprudence pertaining to spousal rape.

On the one hand, where Hon'ble Court showed a progressive and liberal approach in the case of ***T. Sareetha***[21]**,** where it was accepted that the restitution of conjugal rights takes away the right of choice to indulge in sexual intercourse from the woman to the state, and held such a proviso to be a violation of Article 21.[22] The court further emphasised the importance of sexual autonomy for a woman, meaning that indirectly it upholds the sexual autonomy of a wife in the nuptial bonds also. But the apex court in the case of ***Saroj Rani*** **v** ***Sudarshan Kumar***[23] took a U-turn and ruled that marriage acts as a basis of reasonableness.

Classification between married and unmarried women and imposition of separate law upon them does not vitiate Article 14.[24] Analysing the same argument in reference to marital rape means that, despite rape being violative of Article 21[25]The same lens cannot be applied to marital rape, as, due to marriage, it amounts to a reasonable classification.

Further post-2000, in the case of ***Nimeshbhai Desai v State***[26], Hon'ble Gujarat HC pronounced a juxtaposed judgment by accepting the fact that marital rape is a disgraceful offence against women, but did not strike down the exemption clause, nor urged the government to do so. As a matter of fact, if a woman suffers physical violence in the country,

[21] *T. Sareetha v T. Venkata Subaiyah* (1983) SCC Online AP 90
[22] Constitution of India 1950, art 21
[23] *Smt. Saroj Rani vs Sudarshan Kumar Chadha* AIR 1984 SC 1562
[24] Constitution of India 1950, art 14
[25] Constitution of India 1950, art 21
[26] *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2017) SCC OnLine Guj 1386

she has the proper remedy available for the same, but if the same woman suffers sexual violence by her husband, she will have to take those remedies, which may not be proportionate to the amount of suffering she has gone through. Further, the Hon'ble Apex court substantiated the view in the case of ***Jaideep Verma v UOI*** and outlined different forms of marital rape, which are as follows:

- **Sexual Coercion without Use of Physical Force:** It includes the use of emotional tools and verbal tactics to drive an unwilling wife for sex. It has been regarded as least severe forms of rape least severe forms of marital rape.
- **Forceful Sex:** Involves somatic force to establish carnal relations with a non-consenting wife, further classified under 3 sub-heads:
- **Battering Rape:** Wives are abused or beaten severely either before, at the time or after the intercourse in this particular form of marital rape.
- **Force-only Rape:** only such an amount of coercion is necessary to be used for making the wife enter sexual intercourse.
- **Obsessive Rape:** here, sexual violence, along with previous acts, is done to fulfil the iniquitous fantasies of the husband.

Also, in the recent past High Court of Karnataka opined that the exemption clause is violative of Article 14 in the following words: *"Woman and man being equal under the constitution cannot be made unequal by the exception clause of section 375 of the IPC*[27]*. It is for the lawmakers to ponder over the existence of Such inequalities in law."*[28]

In addition to this, the view of *Justice Rajeev Shakhtar* in the case of ***RIT Foundation v Union of India***[29], where he advocated for the penalisation of marital rape, can be seen as a shift in the judicial attitude in dealing with such law.

Hence, still, the judicial stand is shaky on such an issue, and we don't have a manifest law in dealing with such an issue, as the jurisprudence over the same is in a developing stage in India. Hopefully, we will have a manifest jurisprudence over the matter once the Apex court

[27] Indian Penal Code 1860, s 375
[28] *Hrishikesh Sahoo v State of Karnataka* 2022 Live Law (Kar) 89
[29] *RIT Foundation v Union of India* 2022 SCC Online Del 1404

pronounces its judgment over the sub-judiced matter about the constitutionality of the exemption clause.

CONCLUSION

The perception of society that women are subservient to men has made women, be it a sister, mother, lover or a wife, suffer for centuries. Marital Rape is an attack on the sexual autonomy, or in simple terms, the right to say "NO" to indulge in intercourse with the husband, which is criminalised in many countries. The exemption is clearly based on a conservative patriarchal mindset, which has violated basic human rights of women, to be specific, wives, since its inception. When the Constitution was adopted, it recognised such basic human rights as fundamental rights which cannot be restricted from being enjoyed in general circumstances. The right to live with dignity, the right to equality and against discrimination, the right to sexual and bodily autonomy and many such rights, which are well-recognised fundamental rights, are violated when marital rape is committed against a woman.

Currently, India is going through a transition period. On one side, where there are views to maintain the current status regarding the existing provision, there also are views to strike down the exemption and criminalise the act. The situation of the judiciary is no different from that of society. A number of judgments expressing various views are coming up, giving reasons from both sides. Indian jurisprudence over the issue of marital rape is still developing, and after analysing the gradual but consistent shift in the mindset, we do not hesitate to say that hopefully the country will witness a change from exception to penalisation of the loathsome act someday, and the wives will enjoy the rights they own since the Constitution has been adopted in a real sense.