



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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BREAKING THE SILENCE: THE URGENT NEED TO CRIMINALISE

MARITAL RAPE

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INTRODUCTION:

In 1736, Sir Matthew Hale asserted that a husband could not be held accountable for raping his wife, citing their marital consent as an irrevocable bond. This historical perspective, often called "Lord Hale's Ghost," raises a poignant question: should we rid ourselves of this outdated notion? Hale's stance was influenced by coverture, a legal concept where a married woman's rights were subsumed under her husband's.¹ However, times have changed, and women are now recognized as independent individuals capable of making their own decisions. Despite this progress, when it comes to intimate relations with their spouses, women's autonomy is often disregarded, questioning the actual value of their consent in such situations.

Rape as a crime is defined in Article 375 of the Indian Penal Code and includes two exception clauses. The second one prevents marital rape from being included in the ambit of said law. The Supreme Court has yet to decide whether the exception conflicts with the fundamental rights of women in *Hrishikesh Sahoo v State of Karnataka*. It is indeed disappointing and morbid how the new crime laws introduced as *Bhartiya Nyaya Sanhita Bill (BNS)*, 2023 continue to follow the Victorian standards of morality and refuse to turn an eye to the much-unheeded problem of sexual assault in marriages.

¹ R v R [1991] UKHL 12

The National Family Health Survey reported that 29% of married women experienced physical or sexual abuse from their husbands (Ministry of Health and Family Welfare, 2021). The default implication of consent for any sexual act when one agrees to enter into a marriage is a distorted notion, one which finds its strength from the ideological gender bigotry so ingrained in society as a whole.

One significant case that emphasizes the urgency of eliminating the marital rape exception is the landmark judgement in *Independent Thought v. Union of India*. In this case, the Supreme Court of India ruled that sexual intercourse with a minor wife, even within marriage, constitutes rape under the Protection of Children from Sexual Offences (POCSO) Act. The court recognized the inherent vulnerability of child brides and affirmed that marital status should not serve as a shield for perpetrators of sexual violence.² This confirms that the violation of marital status is not such an inevitable task.

JUSTICE VERMA COMMITTEE REPORT:

The Justice Verma Committee report, released in the aftermath of the brutal gang rape and murder of a young woman in Delhi in December 2012, had a significant impact on India's legal landscape and societal discourse regarding gender-based violence. Led by former Chief Justice J.S. Verma, the Committee was tasked with reviewing laws related to sexual violence and suggesting amendments to strengthen them. The report mentions that the Committee is conscious of the recommendations made by the UN Committee on the Elimination of Discrimination against Women ("CEDAW Committee") in February 2007 in respect to India. The CEDAW Committee had recommended that the country should "widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape...."

The recommendations proposed by the Committee were as follows:

- i. The exception for marital rape be removed.
- ii. The law ought to specify that:
 - a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;

² *Independent Thought v. Union of India*, MANU/SC/1298/2017

- b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
- c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.³

However, these recommendations were rejected by the Parliamentary Standing Committee on Home Affairs, explaining that if marital rape were criminalized, "the entire family system would be under great stress." It is astounding to note that we aim to secure a family system where the safety and dignity of women can be overlooked to protect the image of the family or clan. It is this very family system that vanquishes a woman's authority over her own body as soon as she gets married and almost equates her as a property being handed over from one man to another.

JUDICIAL EFFORTS:

In 2021, the Kerala HC decided that marital rape was a sufficient ground for divorce. The court order said: "Merely for the reason that the law does not recognize marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce." In the case of *Hrishikesh Sahoo v. State of Karnataka*, the Karnataka High Court declared that "no exemption in law can be so absolute that it becomes a licence for the commission of a crime against society." A man is a man; an act is an act; rape is a rape performed by a man, the "husband," on the woman's "wife".⁴ This was the view taken by the Kerala High Court, whereas the Allahabad High Court, in December 2023, has observed that "protection of a person" from being charged in "marital rape continues in cases where the wife is of 18 years of age or more".

The constant battle of the judiciary to criminalise this exception clause is positively palpable, yet a large chunk of the society refuses to agree on how this clause deprives half the

³ Justice J.S. Verma (Retd.) Chairman, Reports of the Committee on Amendments to Criminal Law [2013]

⁴ First Post, 'Rape is rape, be it by man or husband: Karnataka High Court on marital rape' (September 29, 2022), <https://www.firstpost.com/india/rape-is-rape-be-it-by-man-or-husband-karnataka-high-court-on-marital-rape-10483101.html>.

population of this country of basic fundamental rights. While judgments can vary from case to case depending upon the nature of the facts, it is still equally absurd how an exception stands in complete violation of the fundamental rights of women under rights to equality and to life or personal liberty, as defined in Articles 14 and 21, still faces so much deliberation and debate. While the judiciary can encourage legislative action, the power to amend laws ultimately lies with the legislature. It would not be incorrect to assert that the legislative system of the country would instead protect a superficially sacrosanct idea of the institution of marriage and family and encourage misleading connotations of the same rather than delving into the heinous crimes that persist so ubiquitously yet stay hidden under covers across all sections of society.