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BREAKING THE SILENCE ON MARITAL RAPE

Sana Sachdeva

INTRODUCTION

Marriage is considered a sacred union between the couple and their families, especially in India. The deeply rooted traditions and patriarchal norms were immune to scrutiny for a very long time, especially in matters of sexual autonomy. One of the most bizarre things is the non-recognition of marital rape as a criminal offence under the Bhartiya Nyaya Sahita. Rape, being a heinous act of sexual intercourse with a woman without her consent, is punishable, but when a husband rapes her wife, then it is not punishable.

As marital rape has been defined, it is forced sexual intercourse with one's wife without her consent. The absence of consent is the most essential element. Marital rape is deemed to be a form of domestic violence and abuse.

Even though, in earlier times, it was considered the right of the husband, but now, being involved in the act without the consent of the wife is viewed as rape by many other societies and countries, and progressively criminalised as well. India stands among the handful of nations that still provide immunity to the husband for committing rape against their wives. This is enshrined under Section 375 exception (2) of the IPC¹, 1860, and now Section 63 of the BNS, 2023. It effectively legitimizes non-consensual sex within marriage and denies married women the basic right to bodily autonomy and dignity.

¹ Indian Penal Code, § 375 & Exception 2 (1860) (India).
Bhartiya Nyaya Sanhita, § 63 (2023) (India).

This article explores the social, legal and historical dimensions of marital rape. Analyzing the arguments for and against its criminalization and the need to recognize and penalize marital rape in India.

GLOBAL PERSPECTIVE Over 100 countries have criminalized marital rape. Countries like the United Kingdom, Europe, and Canada have recognized that consent is central in any sexual relationship, regardless of marital status.

STATUS OF MARITAL RAPE IN INDIA

India is one of the countries that has still not been able to recognize marital rape. Exception 2 of Section 375 states that if a woman has “non-consensual sexual intercourse with her husband and she is over 15 years, it doesn't amount to rape”. It is presumed that a woman has given her consent forever to her husband for the act of sexual intercourse. In India, almost 83% of married women aged 15-49 have blamed their husbands for sexual violence. This is the reality that husbands force women to enter into sexual intercourse and also indulge in sexual acts and if they don't comply with the same, they are threatened and so many women have approached the judiciary to protect their rights, but justice has not been granted to them.

Isn't it ambiguous and devoid of logic? When the consenting legal age for marriage is 18, can the same law provide for the legal age of protection from sexual abuse, only to those up to the age of 15? Beyond the age of 15, would the women be considered remediless?

In the case of ²*Harvinder Kaur v. Harmander Singh*, the Delhi High Court held that the Constitution should not intervene in domestic matters, as it would undermine the institution of marriage. The court also stated that articles 14 and 21 don't play any role in the privacy of the home and married life.

After the Nirbhaya case in 2012 *Justice Verma Committee*³ had suggested criminalizing marital rape, but the legislature ignored this suggestion

² *Harvinder Kaur v. Harmander Singh Choudhry*, AIR 1984 Del. 66 (India)

³ Justice Verma Committee Report on Amendments to Criminal Law (Jan. 23, 2013), available at <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>.

In ⁴Independent Thought v. Union of India, the Supreme Court was compelled to revisit with theoretical suppositions on which the marital rape exception is based, as it infringes the constitutional rights of girls aged between 15-18 years. The SC read down the age of consent to 18 years, thereby criminalizing sex with minor wives.

In⁵*Anuja Kapur vs. Union of India* Through Secretary, 2019, a PIL was moved by Anuja Kapur requesting the Court to order the Government of India to publish some guidelines and legislation regarding marital rape. But the Supreme Court bench led by Justice SA Bobde and Justice BR Gavai rejected the petition and stated that the job pertaining to the framing of the laws is that of the legislature and not the judiciary and the court is more concerned with the interpretation of the law than drafting it.

Then, the *High Court of Karnataka* stated that *marital rape is a ground for divorce* as it amounts to cruelty on the wife and she was forced to have sexual intercourse in different situations, even in front of their daughter. So the court believed that this is emotionally and mentally draining for a woman and she has been fighting for justice for the last 12 years, and it's high time now that we recognise this.

The *Delhi High Court* also gave a split verdict in which the *Division Bench of Rajiv Shakdher and C. Hari Shankar*, JJ., laid down their opinion on “Should a husband be held criminally liable for raping his wife who is not under 18 years of age?” They both had different opinions. Justice Rajiv Shakder was of the view that if a sex worker has the power to say no in the eyes of the law, then this right is possessed by a married woman as well and he said that irrespective of who the perpetrator is, forced sex is physically, psychologically, and emotionally draining. Justice Hari Shankar was of the view that this is a legitimate expectation of a husband from his wife and a healthy sexual relationship that is integral to a marital bond.

“The impugned Exception does not, either directly or by necessary implication, state that, by reason of marriage, a husband has a right to have sex with the wife against her will or consent. All

4 *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India)

5 *Anuja Kapur v. Union of India*, W.P. (C) No. 284/2019 (SC) (India).

that it says is that, if he does so, he, unlike a stranger committing such an act, cannot be treated as a rapist. There is a clear, intelligible differentia between the two situations” stated Justice Shankar.

An SLP is pending in the Supreme Court, *‘Hrishikesh Sahoo v State of Karnataka*, that will decide if the marital rape exception to Section 375 of the IPC violates the fundamental rights of married women.

IMPACT ON WOMEN

Victims of marital rape *suffer in silence because of societal stigmas* and a lack of awareness and knowledge about their rights. Depression, anxiety, panic attacks, and post-traumatic stress disorders are common among these woman as they are hiding all their pain and suffering with this daily in their married life. As there are forced sexual acts, this can also cause physical injuries, unwanted pregnancies and sexually transmitted infections. As it has been seen, it causes a lot of emotional detachment, self-harm and suicidal tendencies

Women trapped in abusive marriages lack economic independence and have to be dependent on their husbands and marriage is considered a sacrament in society and coming out of this needs a lot of courage to deal with the societal pressure and also to justify the people about your decision.

ARGUMENTS AGAINST CRIMINALIZATION

1. Potential of Abuse

It has been argued that, if we were to criminalize marital rape, we would be creating a mechanism for false allegations and motivated lawsuits. The review of the literature provides no empirical basis for this argument. Every criminal law can be abused, but that does not negate the right of real victims to access criminal remedies.

2. Preservation of Family Institution

6 *Hrishikesh Sahoo v. State of Karnataka*, S.L.P. (Crl.) No. 2401/2022 (India) (pending).

Another claim is that these laws undermine the dignity of marriage and create an increase in divorce. However, the state exists to provide for the protection of individual liberty, not to protect dysfunctional institutions. The proposition that legalizing violence against women in marriage somehow maintains the integrity of the family unit is misguided.

3. *Existing Legal Remedies*

It is often pointed out that women have recourse to civil legislation like the Protection of Women from Domestic Violence Act, 2005⁷. However, the Act only provides for civil remedies (protection orders or residence orders), and not a criminal penalty for forced sex in marriage.

Also, while Section 498A of the IPC punishes cruelty, it is still narrow and does not specifically include non-consensual sex.

WHY IS THERE A NEED FOR LEGAL RECOGNITION?

Consent must be the cornerstone of every sexual relation, regardless of marital status. No relationship justifies any type of coercion or force. The notion of implied consent is outdated and also violates the bodily autonomy of women. Moreover, criminalizing marital rape would bring it under the constitutional promise of equality and also eradicate the difference between married and unmarried women and promote gender justice. This reform is not just a domestic imperative but also an international obligation. As a signatory to key treaties such as the *Convention on the Elimination of All Forms of Discrimination Against Women*⁸(CEDAW), the *Universal Declaration of Human Rights*⁹, and the *International Covenant on Civil and Political Rights*¹⁰, *India is bound to eliminate violence against women in all its forms*. Furthermore, enacting this reform is a major cultural shift and serves as a catalyst. Criminalisation of marital rape would help to address outdated reforms and also patriarchal beliefs about marriage, sex and women's rights and pave the way for a just and equitable society.

7 Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 (India).

8 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

9 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

10 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

RECOMMENDATIONS FOR A LEGAL REFORM

1. **Repeal** Exception 2 to Section 375 IPC so that consent is valid in all sexual intercourse, including within marriage.
2. **Amend** Section 375 IPC to clearly define non-consensual sex between spouses as a form of rape.
3. **Sensitize** the Judiciary and Law Enforcement to the harsh realities of marital rape by training, guidelines, and victim-centered strategies.
4. **Strengthen** Support Systems such as helplines, shelters, psychological counseling, and legal assistance for survivors.

CONCLUSION

The non-recognition of marital rape as a criminal offence is a gross miscarriage of justice and a stain on the principles of equality and dignity that the Indian Constitution upholds. Legal immunity for husbands effectively grants them a license to violate their wives, turning marriage into a space of terror and submission for many women.

Criminalizing marital rape is not about vilifying men or undermining marriage. It is about recognizing that consent is not a one-time contract but a continuous right. It is about affirming that women, whether single or married, are autonomous individuals entitled to respect, dignity, and justice. ***“A woman with a voice is by definition a strong woman. But the search to find that voice can be remarkably difficult.” Matilda Gates.*** The time has come for India to shed its colonial baggage and patriarchal biases. Recognizing marital rape is not just a legal necessity — it is a moral imperative.