



MARITAL RAPE: AN IMPEDIMENT ON WOMEN'S RIGHT IN INDIA

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Abstract

Women in India have not yet achieved equality or are able to fully exercise their rights as a result of the patriarchal structure of the country. The marriage relationship also reflects this imbalance which is a threat to gender neutrality and gender equality which our constitution aims to achieve. In Indian culture, there are many different types of violence against wives during marriage, one such is marital rape. In the affair of marital rape, consent is irrelevant. It is excluded from the Indian Penal Code's definition of rape in Section 375. In India, forcing a wife into sexual intimacy by a husband is therefore not illegal. Our judicial system ignores marital rape since the crime is not recognised as rape in a marriage, despite the fact that it is a severe problem that our legislature has failed to acknowledge. Marital rape has very serious repercussions that go far beyond just physical harm; they also cause emotional and psychological harm. In this paper, we will attempt to examine the idea of marital rape, how it relates to the idea of gender equality, and how it violates the constitutionally protected rights of women under the different dimensions of Art. 14, 15, 19 (1) (a) and 21.

Keywords: Consent, Constitution, Gender Equality, Indian Penal Code, Marital Rape.

Introduction

"Marriage Is Like An Unconditional Duties That One Decides To Perform."

-Bhagwat Gita

In India marriage is revered as a holy institution in society—a collaboration of two souls - a sacred bond based on trust, mutual love, and respect towards each other not to forget followed by bunch of rights and duties arising out of it. We have heard so many and so much of beautiful things about marriage but the flashpoint that now catches the attention of most people is whether the sanctity persists in such a celebrated sacred social establishment of marriage.

In India, over the past few years, the institution of marriage has been greatly questioned on the surface base that does marriage gives the ultimate rights in the hands of the man or the husband to dominate over the women or his wife (as they are considered to be weaker and stands on the lower footing) to get all his wishes and desires to be fulfilled either in a harmonious manner or by forceful imposition. A typical conservative and orthodox notion of the Indian society is that though marriage is a sacred institutional bond between a man and women but at the same time it is also a contract between the husband and the wife solely relying on the concept of 'consent', which is governed mainly by the customs, norms, values, morals and ethics that the society follows. As rightly observed by a British jurist, Matthew Hale: "Marriage was a legal contract by which a woman 'gave herself' to her husband for life."² It is because of this vague notion the sexual autonomy of a women gets diminished or comes to an end as it is considered that the women has surrendered herself to her husband and he has all the legal right over his wife which also means that by all legal means he is entitled to fulfil his sexual desires through his wife in accordance

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2. Ishita Singh, *State Of Women's Sexual Autonomy In India*, HUMAN RIGHTS PULSE, (Jun 18, 2022, 10:02 AM), <https://www.humanrightspulse.com/mastercontentblog/state-of-womens-sexual-autonomy-in-india>.

'with her will' in a peaceful manner or even 'without her will and against her consent' in a coercive manner by applying his force and establishing his dominance over her.

Marital rape, frequently referred to as conjugal rape, is when a partner engages in sexual conduct without the other person's consent.³ Marital rape is when a man engages in sexual conduct with his wife against her will, whether out of risk to their physical safety, out of a perpetrator's dishonesty, or for any other reason. Lack of authorisation is the most important factor; physical violence does not necessarily follow. Marital rape is the term used to describe acts of domestic abuse and sexual abuse that take place between married people. Although customarily acknowledged a right of spouses, sexual activity between partners is now widely seen as rape and is becoming more criminalised but India deviates it from the mainstream and takes a conflicting stand onto it and does not criminalises the immoral act of marital rape and over to that it exempts and safeguards marital rape from getting criminalised and penalised. India keeps marital rape outside the purview of "Rape" as defined under S.375 and S. 376 of the Indian Penal Code, 1860. Marital rape is put into exception under S. 375. This is despite the fact that rape is condemned by international accords.

Therefore, the consideration of marital rape as a legal act in India does not only inculcate the fear of insecurity into the hearts and the minds of the women but it also puts a dreadful impact on the women's sexual rights in India and gender equality. The non – penalising of marital rape which is a dreadful offence violates the sexual rights of women and overshadows the ideology of gender equality in India enshrined under Art. 14, 15, 19 (1) (a) and 21 of the Indian Constitution.

Understanding the Concept of Marital Rape in India

Rape is rape, and marital rape is rape. These two concepts do not have much difference between them, other than the fact that the person in question who committed marital rape can only be the spouse and no one else.

When a consort/ male partner engages in non-consensual sexual activity with his wife, it is rape in the marriage. Similar to this, when a wife engages in non-consensual sexual activity with her husband, it counts as marital rape. So, although marital rape is a crime regardless of gender, it is almost never committed by the woman; instead, the husband is responsible in the vast majority of incidences. Few cases of wives raping their husbands have been publicly published anywhere in the world, although it does happen occasionally. Marriages inevitably involve sexual activity, yet marital rape is entirely antithetical to the concept of marriage.⁴

Rape occurs whenever someone engages in or an attempt to engage in sexual activity with a partner or mate without the partner's or mate's free consent. The Indian Penal Code, 1860 defines "rape" in the following manner:

"Section 375⁵- Rape – A man is said to commit—rape if he—

- a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

Firstly - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

3. Ishwar Singh, et.al, *An Insight To Marital Rape*, 2 INDIAN JOURNAL OF INTEGRATED RESEARCH IN LAW (2022).

4. Dr. Raj Kumar, Manish Dalal, *Marital Rape in India: A Critical Study*, (May 16, 2021,10:30 AM), <https://ssrn.com/abstract=3847118>.

5. Indian Penal Code, 1860, ACT NO. 45 OF 1860, Acts of Parliament,1860 (India).

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Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

Explanation -1. — For the purposes of this section, “vagina” shall also include labia majora. **Explanation 2.** — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. — A medical procedure or intervention shall not constitute rape.

Exception 2. — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Act 13 of 2013 changed Section 375’s definition of rape. The definition is broken down into three sections: first, the circumstances under which a rape will be considered to have occurred; second, the justification; and third, the exemption. While the entire section complies with the law, the exception 2 of the section breaches the fundamental rights of women. It violates a woman’s right to a dignified, healthy life and her equality before the law.⁶

When a husband engages in sexual activity with his wife, who is over the age of 15, forcibly or against her will, it is not regarded as rape under section 375, exception 2 of the Indian Penal Code, 1860. As a result, section 375 of the IPC permits marital rape. Indian marriage laws are a reflection of the heteronormativity of Indian culture, which supports patriarchy.

It is also because of the reason that Indian society has always been patriarchal or male-dominated. It is for this very reason that marital rape is often not regarded as a crime in Indian society since sufferers of matrimonial rape are typically women rather than men. Marital rape would have been illegal in India long ago if males had been the victims. There aren’t many people that advocate for outlawing and making marital rape a crime in India. The most crucial factor in the eradication of any social ill is society. A society cannot completely purge social evils unless the society as a whole rejects them. Marital rape continues to be practiced in India since the country’s society has not yet come out against it.⁷

Marital Rape and the Constitutional Provisions

The founding fathers of the Indian Constitution’s were extremely familiar with the injustices suffered by women and other socially vulnerable groups. They designed a constitution that not only protected women’s rights but also empowered the state to take affirmative action for their safety and advancement, keeping in mind the injustices women endured and their lowly standing in India’s patriarchal society.

The Indian Constitution’s Article 14 guarantees everyone’s “equality before the law and equal protection under the law”. Equal protection under the law entails that the state must not deny its citizens the same rights. On the other hand, “equal protection of the laws” refers to the obligation of the State to provide preferential treatment to people in certain circumstances. Both statements aim to attain status parity. In the opinion of Dr. Jennings: “Equality before the law” refers to the idea that “among equals the law should be equal and similarly applied, and that similar things should be

6. Prateek Mishra, *Marital Rape and Violation of Constitutional Provisions*, 2 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 1, 2 (2019).

7. Harshika Mehta, *Marital Rape and the Indian Legal Scenario*, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 756, 760 (2021).

treated equally”.⁸ Absolute equality between persons is not recognized. Dicey described the initial phrase as follows: “With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without any legal justification as any other citizen”⁹

Courts in India have gradually expanded the scope of Article 14 by including the due process clause.¹⁰ Article 14's scope and reach encompass two aspects: it allows for appropriate classification that is based on discernible differences, and the differences must be rationally related to the goals being pursued.¹¹ Following an understanding of Article 14, it is simple to see how Section 375 Exception 2, of the IPC violates the idea of equality. In a bare reading of exception 2 of section 375 IPC, it is stated that a husband may engage in sexual activity with his wife (assuming she is not a minor) without first getting her agreement. Whether or not she agrees, the husband's actions do not constitute rape. So, a married woman can currently only file a complaint against her husband for molestation rather than rape. The goal of the current exemption is to preserve family unity; hence classification has been formed based on marital status (i.e., married and single women). This exception, which grants privilege to a class of people that was arbitrarily chosen, namely husbands, has formed a class of legislation rather than creating proper classification. This categorization is inherently arbitrary, and no justifiable function is fulfilled by it. The state must apologise for its treatment of married women discriminatorily.

Article 15 is another provision of the Constitution that is infringed by this exception under 15(3). Absolute equality may in fact be a cause of inequality, hence the authors of the Constitution decided to add an exception to Article 15(1), known as Article 15. (3). While article 15(1) forbids discrimination on the basis of sex, article 15(3) gives the State the authority to take positive action on behalf of women and children. In addition to being discriminatory and violating the spirit of Article

15(3) of the Constitution, Exception 2 to Section 375 of the IPC also violates Art. 14's definition of arbitrariness. In fact, married women are now at a significant disadvantage because to the statute's exception to Section 375 of the IPC, which has never been advantageous to women. Article 15(3) of the Indian Constitution's altruistic concept is clearly at odds with this exception. In the case of *Independent Thought v. Union of India*¹², it was unequivocally declared that Art. 15(3) could only be used to pass legislation that benefitted women, and that any measure that did the opposite would be in violation of this provision.

Everyone's right to freedom of speech and expression is guaranteed by Article 19 (1)(a). A married woman's right to refuse sexual contact with her husband is not recognised under the law's contested clauses. As a corollary, the contested provisions prohibit married women from consenting to sexual activity, in violation of both provisions of Exception 2 to 375 and Article 19(1) (a). In *NALSA v. Association of India*¹³, the Supreme Court noted in paragraph 69 that Article 19(1)(a) of the Constitution guarantees everyone the “right to freedom of speech and expression”, which encompasses the freedom to express one's self-identified gender. Gender expression can take any shape, including clothing, language, actions, and behaviour. With the exception of the limitations put forth in Article 19(2) of the Constitution, there can be no limits on one's individual person's appearance or choice of fashion. The marital rape exemption cannot be supported under any of the headings in Article 19(2), hence this alone makes the clause subject to being overturned.

The Supreme Court has frequently acknowledged that rape infringes on a victim's right to life and right to privacy. In *Bodhisattwa Gautam*¹⁴, it was mentioned that “rape violates the victim's most prized fundamental right, the right to life guaranteed in Article 21”, ruins the victim's entire psychology and sends her into a serious emotional crisis. Rape is also a crime vio-

8. 8 M.P. Jain, INDIAN CONSTITUTIONAL LAW 888 (Lexis Nexis 2018).

9. A. V. Dicey, LAW OF THE CONSTITUTION 193 (Oxford University Press 2013).

10. E.P. Royappa v. State of T.N., (1974) 4 SCC 3.

11. 7 M.P. Jain, INDIAN CONSTITUTIONAL LAW 881 (Lexis Nexis 2016).

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

13. *NALSA V. Association of India*, (2014) 5 SCC 438.

14. *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490: AIR 1996 SC 922.

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lating basic human rights. It was further established in *State of Punjab v. Gurmit Singh*¹⁵ that a rapist abuses a victim's privacy and personal dignity and causes substantial psychological injury in addition to bodily harm. The victim's entire personality is destroyed by it. Furthermore, the Supreme Court noted in that sexual assault is inhuman and an unconstitutional invasion of one's right to solitude and sanctity.¹⁶ Close vicinity of the victim and the perpetrator, as well as the nature of their shared relation, marital rape takes on new levels of heinousness as a crime. The mere fact that the attacker is the victim's spouse should not render rape within the boundaries of a married household constitutionally immune.

The choice of one's sexual partner, or sexual autonomy, is regarded as a component of individual liberty. According to Article 21, the right to life also includes the freedom to decide how to have children. Furthermore, the freedom to decline any sexual activity is regarded as an element of the right to reproductive health. The Exception eliminates a married woman's ability to exercise her right to consent to sexual encounters, asserts that a husband has complete sexual power over his wife, and shields him from legal action if he rapes her. In *Joseph Shine*¹⁷, it was decided that it would be disrespectful to a woman's liberty and dignity to assume that she consents to having intercourse with her husband during marriage.

One aspect of autonomy and privacy is a person's right to intimacy, including the right to intimacy or sexual seclusion. A person's self-affirming right to have sexual relations with another person of their choosing gives rise to the right to intimacy. An individual's sexual agency is being used. In *K.S. Puttaswamy v. Union of India*¹⁸, it was decided that maintaining personal intimacy, the sacredness of marriage, family, children, the home, and one's sexuality / gender identity all fall under the umbrella of privacy. The assumption made by Exception II—that a woman consents to having sex with her husband after marriage and that she loses her sexual agency—violates her right to privacy. An antiquated

and stereotyped view of a married woman's place in marriage underlies the exception. Its foundation is the idea that a husband has complete authority over his wife's sexual agency, which she acquires during marriage. Therefore, in this case it was felt that maintaining one's privacy promotes their ability to exercise important life-controlling freedoms and safeguards their right to personal autonomy.

Conclusion

The Indian government and society need to recognise that marital or spousal rape is the worst type of family-level abuse against women. By tolerating rape during a marriage, we are still tolerating the antiquated idea that women are possessions. Husbands do not possess wives for sexual purposes. We need to investigate how forced sex during marriage violates women's autonomy as individuals. Under the guise of marital privacy, women's fundamental human rights cannot be abused.

Any type of rape is demeaning, embarrassing, and detrimental to the women's health (both physical and emotional). The victim's privacy and personal dignity are violated during a rape. In addition to being physically violent, it frequently destroys the victim's entire personality. Marriage shouldn't serve as a defence for a rapist since they should be treated as rapists. "A rapist remains a rapist regardless of his relationship with the victim," according to the European Commission for Human Rights.¹⁹

In addition to being a crime against humanity, marital rape is also acknowledged as being a barrier to women's advancement.

Instead of just including marital rape in definitions of domestic violence and assault, it's time to recognise it as a violation of women's rights to bodily integrity and privacy. By reducing section 375 of the IPC, we acknowledge that rape committed within a marriage is only a sexual encounter and not a crime, and we regrettably tolerate this behaviour. It's time to understand that marriage is founded on mutual respect and trust rather than treating it as something sacred. Not marriage but

15. State of Punjab v. Gurmit Singh (1996) 2 SCC 384 16.

16. State of Karnataka v. Krishnappa, (2000) 4 SCC 75 17.

17. Joseph Shine v. Union of India, (2019) 3 SCC 39 18.

18. K.S. Puttaswamy v. Union of India, (2018) 1 SCC 809 19.

19. CR v. United Kingdom, ECHR, Ser. A.No. 335-C (1995).

rather a relationship is sacred. In a marriage, “no” also signifies “no.”

Way Forward

The conclusion that marital rape is an universal social evil that has severely affected India follows this lengthy and rambling explanation of every facet of marital rape. It is important that the same be eradicated from the nation. The crucial recommendations that can help you accomplish that goal are as follows:

- a. India needs to completely prohibit marital rape.
- b. Both rape and marital rape must result in the same sentence.
- c. In order to prevent marital rape from being considered as an exception to the crime of rape, Exception 2 of Section 375 of the Indian Penal Code must be repealed as it abridges Art. 14, 15, 19(1) (a) and 21 of the Constitution.
- d. Marital rape needs to be classified as a gender-neutral crime.
- e. Marital rape legislation must also include a mechanism for punishment of the accuser in the event that false accusations of marital rape are made.
- f. To handle cases of marital rape, special fast track courts must be established throughout India with female judges and employees. It must be forbidden to hold such instances in the media.

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6. Harshika Mehta, *Marital Rape and the Indian Legal Scenario*, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 756, 760 (2021).
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