

**2023**

## LICENSE TO RAPE: EXPLORING THE MARITAL RAPE EXCEPTION IN INDIA

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### **Recommended Citation**

Rashmika Ghosh, 'License to Rape: Exploring the Marital Rape Exception in India' (2023) 2 IJHRLR S.I. 199-205.

Available at [www.humanrightlawreview.in/vol-2-special-issue/](http://www.humanrightlawreview.in/vol-2-special-issue/).

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## **LICENSE TO RAPE: EXPLORING THE MARITAL RAPE EXCEPTION IN INDIA**

Rashmika Ghosh<sup>1</sup>

*“If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive”*; This observation was made by the Supreme Court of North Carolina in *State v. Oliver*<sup>2</sup> and subsequently, became the reasoning governing cases involving domestic violence. Quite evidently, this doctrine is no longer applicable in today’s society and a husband has no legal right to physically hurt his wife. However, it would be stretching it too far if one were to state that violence of any kind in a marriage is no longer tolerated. Marital rape is a very specific form of marital violence, that has largely been kept out of the purview of violence against women. In several countries, all over the world, husbands are granted immunity from prosecution by their wives on the charges of rape. The principle governing this exemption is presumed, irrevocable, matrimonial consent. This article will be exploring the origin and foundation of the marital rape exception, whilst focusing on the approach towards the same in the Indian scenario.

Marriage is a social institution aimed at regulating human sexual behaviour and personal relations. In most cultures, marriage is not merely a social contract, but also a sacred institution. A matrimonial relationship has also been construed as exclusive sexual access to one’s spouse; Insofar as, denial of sex amounts to mental cruelty which is a legitimate ground for divorce. In a patriarchal society, every relationship- be it political, professional or personal; is governed by an underlying power dynamic systematically skewed in favour of cis-

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<sup>2</sup> 70 N.C. 60 (N.C. 1874).

gendered, heterosexual men. Similarly, in case of a marriage, there is always a tendency toward the systematic domination of the wife by the husband. Hence, the husband who is entitled to unlimited, exclusive sexual access to his wife; is also entitled to claim his rights against the wife's will. Fundamentally, rape implies forced sexual intercourse, against the will of the person. Sir Matthew Hale, a noted English Barrister had proclaimed that it was impossible for a woman to be raped by her husband; this was because her relationship with her husband implied unconditional and irrevocable consent, hence, any sexual intercourse could theoretically never take place against her consent and amount to rape.

## **MARITAL RAPE AND THE INTERNATIONAL HUMAN RIGHTS REGIME**

Rape constitutes an act of violence that violates one's sexual autonomy and causes permanent physical and mental trauma. It constitutes a human rights violation under international laws. Article 1 of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), defines discrimination against women as "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status*". General Recommendation (GR) 19 of the CEDAW states that acts inflicting sexual harm upon women constitute discrimination against women. It also stated that the right to the highest standard of physical and mental health constituted fundamental freedom. Article 2(a) of the Declaration on the Elimination of Violence against Women (DEVAW), specifically includes marital rape under the ambit of "*violence against women*". The Marital Rape exception excludes rape by one's spouse from the ambit of sexual harm or violence and hence, discriminates against women on the basis of their marital status.

The immunity granted to a man for raping his wife enables violence against women on the basis of the women's marital status; which is not only discriminatory but also detrimental to the physical, sexual and mental well-being of married women. In India, Section 375(2) of the Indian Penal Code, 1860 (IPC) states that "*sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape*". Thus, it grants immunity to husbands who rape their wives and inflict mental, physical and sexual harm upon them.

Across cultures, marriage also holds sacramental and religious significance. One of the key rationales behind the marital rape exception is to promote marital reconciliation and protect marital privacy. Therefore, in order to ensure that the private lives of two spouses, share a sacred relationship- their sexual relations are kept outside the purview of regulation.

### **THREATENING THE SANCTITY OF MARRIAGE?**

Even in the 21<sup>st</sup> century, Indian society seems to prioritize the sanctity of marriage over the security and sexual autonomy of women. A marital relationship is deemed to fall within the private sphere of the husband and the wife. The understanding of the "*private sphere*" has been extremely pertinent in feminist studies, wherein, the public versus private distinction has been a critical point of debate. When we talk of the public/private distinction, it becomes necessary to structurally define the two spheres. A very rudimentary way of defining both would be as follows; 'public' sphere relates to the political realm, that involves decision making that deals with the larger public and the 'private' sphere has been concerned with decisions that promote private interests, such as economic decisions and family matters. 'The personal is political' is an argument that addresses the inequality of the genders and the oppression of women in a more wholesome manner. It refuses to limit women's empowerment in the field of politics and civil society

alone. In order for women to be truly empowered, their personal lives and the gender-based hierarchy that exists in the institution of a family cannot be ignored. Sexual rights, appearance, abortion rights, child-rearing and domestic work cannot merely be termed as 'personal' and excluded from the mainstream feminist agenda. Family is the most basic and foremost unit of society; the structure and working of a family cannot be considered independent of the structure of mainstream society. Carol Hanisch, a radical feminist, stated that personal problems are political problems; They cannot be solved without collective, driven political action. When a woman is subjected to domestic abuse within the four walls of her house, which is a traditional, a 'private' environment, the abuse can be traced back to the societal oppression of women and the patriarchal conditioning of the male; Thus, personal experiences of women are rooted in their political environment and social inequality cannot be excluded from political discourse on grounds of being located within the so-called private realm.

### **MARITAL RAPE IN THE INDIAN CONTEXT**

Section 375 and 376 of the IPC criminalize non-consensual penetrative and non-penetrative sexual intercourse by a man with a woman, but exception 2 to Section 375 states that the marital status of a woman becomes a defence to rape perpetrated by her spouse. This provision has led to differing opinions in the Indian Judiciary. Chhattisgarh High Court held that a forcible sexual act by the husband upon his wife would not constitute rape; whereas, the High Court of Kerala stated that marital rape could be construed as a valid ground for divorce. Gujarat High Court stated that the marital rape exception contravenes the principle of equal protection by the law and equality before the law, guaranteed under the Indian Constitution by discriminating against married women. Despite the differing approaches, the apex Court of the country has refrained from engaging in this discourse. However, the

Supreme Court has concluded that the sexual autonomy and reproductive rights of a woman fall within the ambit of her right to life and personal liberty under Article 21; if one were to draw a logical inference from this, marital rape would constitute a violation of Article 21.

Since January 2022, the Delhi High Court has heard numerous arguments debating the constitutionality of the marital rape exception. In May 2022, The Delhi High Court delivered a split verdict and recommended that the Apex Court look into the matter.

One of the primary arguments against the criminalization of marital rape, alongside the preservation of matrimonial harmony, is the emergence of evidentiary issues. In a marriage, it is presumed that the husband and wife have been involved in sexual intercourse multiple times, but, if the wife withdraws consent on a particular day, the act should constitute rape- here, the question arises, what sort of evidence would the Court consider? However, it can also be argued, that even in cases of stranger rape which do not showcase outwards signs of physical violence and take place in the absence of any witnesses, the same evidentiary issues arise. The Indian Evidence Act, 1872 has attempted to alleviate this concern through Section 114A, which places a presumption of non-consent when the woman states in her evidence that she did not consent. Additionally, one must question if the presence of difficulties with regard to proof constitutes a basis for retaining an injurious law.

## **CONCLUSION**

Marriage is a predominantly patriarchal institution. Women are still attempting to establish themselves as free, sexual beings with their own sexual autonomy- and not as objects of a man's desires. But the gendered pressures of being a woman are still omnipresent. As a result,

in a marriage, it is very likely that the consent for sexual relations stems from societal conditioning and is not necessarily an informed, loud, “yes”. Situational factors such as economic dependence in addition to the existing patriarchal power dynamic often result in consent due to undue influence. Hence, in conclusion, the criminalization of marital rape should be the first step toward the protection of married women in countries where the archaic marital exception is still prevalent; ideally, it should pave way for more difficult conversations concerning consent and sexual autonomy.