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## Whether Marital Rape Should be Criminalized or Not?

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# Whether Marital Rape Should be Criminalized or Not?

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## ABSTRACT

*This study addresses the contentious subject of criminalizing marital rape in India, considered it from legal, social, ethical, and psychological perspectives. Over 100 countries have recognized non-consensual sexual intercourse in the marriage context as rape. However, the Indian legal framework continues to maintain an exclusion in the Bharatiya Nyaya Sanhita, 2023, which protects husbands from indictment for raping their wives above the age of 18. Such exclusions arise from colonial and patriarchal ideologies of treating marriage as irrevocable consent, undermining the basic rights of women to bodily autonomy, dignity, and equality as guaranteed by the Constitution of India. The paper also discusses violations of the constitution that follow from this legal framework, along with important judgments like *Independent Thought v. Union of India* and *Maneka Gandhi v. Union of India*, while also addressing the responsibilities under various international human rights frameworks, i.e., the UDHR, ICCPR, ICESCR, and CEDAW. The paper also examines the trauma, depression, stigma, and socio-economic vulnerability that survivors of marital rape experience. Using a legal framework and comparing with international examples, this paper offers valuable support to the need for marital rape to be recognized as a crime in India in terms of remediating equality, human rights, and justice.*

## KEYWORDS

*Marital Rape, Sexual, Constitution, CEDAW, Human Rights.*

*“Marriage is for woman the commonest mode of livelihood, and the total amount of undesired sex endured by women is probably greater in marriage than in prostitution”*

- *Bertrand Russeell*

## 1. INTRODUCTION

The debate over whether or not to make marital rape a criminal offense in India raises questions about fundamental issues of consent, bodily autonomy, and gender equality. Over 100 countries have recognized any non-consensual sexual intercourse within marriage as rape. However, in India, even after the recent changes to the Indian Penal Code (which is now replaced by the Bharatiya Nyaya Sanhita, 2023) which included rape in the designation of sexual assault, as it is with so many issues in this country, we still have in law an exception to rape by virtue of marriage. This is based on the archaic notion that a woman in marriage has irrevocable consent to sex in marriage, no matter her agreement to a specific sexual act, and ignores a woman's right to say no.

In favor of making marital rape a criminal offense, supporters of the idea argue that no woman should lose any of her fundamental rights in a marriage, which includes the right to say no to sex. They emphasize that marital rape is still a form of sexual violence no matter the relationship. The legal exception to marital rape in India violates constitutional guarantees of dignity, equality, and personal liberty. Opponents of the change argue it could upset the family, and that it will open the floodgates to false accusations. There is also increasing judicial acknowledgement that adult married women have sexual autonomy, as the definition of rape is ever widening, yet there remain no legal protections for adult married women.

This research paper discusses the legal, social, and ethical dimensions associated with marital rape, its historical context, and the relevance of *Queen-Empress v. Hurree Mohun Mythee*.

## 2. BACKGROUND AND LEGAL CONTEXT

Marital rape has been a controversial issue in India with a historical and socio-legal justification that marriage takes precedence over autonomy. The legal doctrine and the social acceptance of wives as the "property" of their husband, whose wishes she is obliged to fulfill, has its genesis in the colonial system's legal writing, as well as the patriarchal ideologies surrounding the concept of marriage. Historically, English common law indicated a husband could not commit the crime of rape against his wife, as the legal assumption was that marriage operated as irrevocable consent. Other countries have abandoned that notion, but the exception for marital rape continues in India.

Under Indian law, rape is defined in Section 63 of the BNS, 2023. However, Exception 2 to this provision states that non-consensual intercourse by a man with his wife is not rape unless she is below 18 years of age, which means there is not the same criminal culpability for sexual violence against married women who are above the age of 18 as for unmarried women. This law reinforces the idea that marriage gives a husband sexual rights over his wife.

Indian courts have questioned the constitutionality of the marital rape exception, and it was ruled unconstitutional in the case *Independent Thought v. Union of India* (2017) by the Supreme Court specifically regarding minors in marriage. The government's contention has always been that criminalizing marital rape would pose a threat to the institution of marriage and could lead to misuse of the law. This position is contrary to international human rights frameworks and the call of UN (United Nations) bodies such as CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) for criminalization.

### **3. FUNDAMENTAL RIGHTS AND CONSTITUTIONAL VIOLATIONS**

Fundamental Rights, located in Part III of the Indian Constitution (Articles 12-35), are critical to safeguarding individual liberty, equality and justice. They set guidelines for restricting arbitrary action by the State and are the fundamental aspects of a democracy. The rights themselves are comprised of the Right to Equality (Articles 14-18), the Right to Freedom (Articles 19-22), the Right against Exploitation (Articles 23-24), the Right to Freedom of Religion (Articles 25-28), Cultural and Educational Rights (Articles 29-30), and the Right to Constitutional Remedies (Article 32).

Constitutional Violations take place when state action, or law, violates these rights. For example, unlawful detention or censorship may violate the Right to Freedom. Actions by the government that discriminate against individuals may violate the Right to Equality. The Right against Exploitation may be violated when individuals are subjected to adverse conditions of labor. The Supreme Court ensures effective enforcement of these rights, notwithstanding restrictions, through the doctrine of judicial review. For example, in *Maneka Gandhi v. Union of India* (1978), the Court interpreted Article 21 (Right to Life and Personal Liberty) broadly.

The enforcement of Fundamental Rights is important to avoid unconstitutional state action. Citizens may approach the Supreme Court directly for redressal, see Article 32. In

safeguarding rights through the doctrine of judicial activism, the public can impose reasonable restrictions supporting public order, security and morality. In a democratic society, there must be continuous efforts to monitor a state to prevent a violation of the constitution, with the judiciary, civil society and citizens playing an important role.<sup>4</sup> International Human Rights Standards. International human rights law considers marital rape as a violation of basic rights and calls for its criminalization in order to preserve women's rights and bodily autonomy.

#### **4. INTERNATIONAL HUMAN RIGHTS STANDARDS**

The Universal Declaration of Human Rights (UDHR) (1948) establishes a right to safety, dignity, and equality for all people regardless of marital status. The International Covenant on Civil and Political Rights (ICCPR) (1966) requires that states provide protection against cruel, inhuman, or degrading treatment, which includes sexual violence within marriage. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) establishes the right to health, which is absent when marital rape is not a crime.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) is particularly important because it requires state parties to eliminate discrimination against women based on gender, including through laws to protect women from violence - meaning all forms of violence, rape in marriage included. The CEDAW Committee's General Recommendation No. 19 (1992) identifies marital rape as a form of gender-based violence. Moreover, the United Nations Declaration on the Elimination of Violence Against Women (1993) includes marital rape, without qualification, as a form of violence and calls on States to adopt simple and decisive measures.

The US, UK, France and South Africa have all criminalized marital rape, violating international obligations to protect women's human rights. The European Convention on Human Rights (ECHR) has ruled that countries which provide immunity for marital rape are violating human dignity and should amend their laws.

#### **5. SOCIAL AND PSYCHOLOGICAL IMPACT OF MARITAL RAPE**

Marital rape has severe social and psychological consequences for survivors, often leading to long-term trauma, emotional distress, and social stigma. Unlike other forms of sexual violence, marital rape is frequently dismissed or normalized, which exacerbates its harmful impact on victims.

## **5.1 Psychological Impact**

Victims of marital rape often experience tremendous emotional suffering in the form of post-traumatic stress disorder, depression, anxiety, and suicidal thoughts. Coercion and betrayal in a relationship may elicit feelings of helpless, self-blame, and alienation. Survivors may experience the persistent effects of chronic stress, dissociation, and declines in mental health, self-esteem, and well-being, sometimes over the course of a lifetime.

Trauma may contribute to sexual dysfunction and sexual aversion, which may prevent the victim from engaging in consensual sexual intimacy. The psycho-social effects of marital rape impact the victim, but also may impact children who witness the rape, causing inter-generational trauma as well as psychological distress.

## **5.2 Social Consequences**

Survivors of marital rape frequently experience shame or stigma and victim-blaming that inhibits them from accessing legal remedies. In patriarchal culture, women are expected to submit to their husbands and taste resistance as disobedience, which reinforces silence, and normalizes the abuse of husbands. Survivors may be economically dependent upon their husbands and socially isolated to make it impossible to leave a sexually abusive relationship.

Marital rape may also create fractures in family relationships leading to divorce, estrangement of other family members, or sustaining patriarchal structural oppression of the marital rapist. Without legal recognition and protection the survivor remains in the cycle of abuse and sustains gender inequity. Legal recognition and support systems must be simultaneously addressed.

# **6. COUNTERARGUMENTS AND REBUTTALS**

## **6.1 Counterargument 1: Marital Rape Laws Will Undermine the Sanctity of Marriage**

One of the most common arguments against criminalizing marital rape is that it will disrupt marital harmony and weaken the institution of marriage by allowing unnecessary legal interference in private relationships. Critics argue that marriage implies implied consent, making the concept of rape within marriage legally and morally questionable.

✓ Rebuttal:

Although marriage is a social and legal contract, it does not supersede anyone's right to autonomy. Consent is not indefinite,

and an individual who forces another to engage in sexual intercourse without consent is violating their human dignity. Marital rape helps marriage by recognizing mutual respect and equality.

## **6.2 Counterargument 2: False Allegations May Rise**

Opponents claim that criminalizing marital rape may lead to misuse of the law, with false allegations being weaponized in marital disputes, particularly during divorce or custody battles.

✓ Rebuttal:

In situations involving alleged miscarriages of justice in criminal matters, such as alleged murder or sexual offences, not recognizing the potential of false allegations is a problem because the law as it relates to evidence produces safeguards to differentiate between a genuine and false allegation. By dismissing marital rape based on the potential for false allegations undermines the rights of such victims.

## **6.3 Counterargument 3: Existing Laws on Domestic Violence Are Sufficient**

Some argue that laws on domestic violence and general sexual offenses already provide protection, making a separate provision for marital rape unnecessary.

✓ Rebuttal:

Domestic violence rule doesn't consider non-consensual sexual intercourse in marriage as a criminal offense unless it is designated as such. There are many countries that do have separate marital rape laws that reflect its distinct form of sexual violence in marriage.

Criminalizing marital rape is not an attack on marriage but a step toward gender equality, bodily autonomy, and human rights.

# **7. LEGISLATIVE AND JUDICIAL TRENDS IN INDIA**

## **7.1 Legislative Trends**

India has not yet clearly criminalized marital rape in its law. Section 63 of the Bharatiya Nyaya Sanhita (BNS) (formerly IPC) refers to rape but retains the caveat that sexual intercourse by a man with his own wife is not rape if she is above 18 years of age. This means married women do not have the same legal relief from sexual violence as unmarried women. Although the law commissions, women's rights groups, and international bodies have recommended the amendment of this exception, every government that has been in power has not amended it due to

existing scruples about the sanctity of marriage and the potential for misuse of the law. Still, there have been some legislative changes that have made such progress possible.

- i. The Protection of Women from Domestic Violence Act (PWDVA), 2005 provides civil relief from sexual abuse within marriage, but it has not penalized marital rape by criminal law.
- ii. The Justice J.S. Verma Committee (2013) was set up in the aftermath of the Nirbhaya gang rape trial and made a strong recommendation that the exception for marital rape be removed, but the executive did not act upon the recommendation.
- iii. Parliament has seen repeated petitions for a marital rape offense, but the legislative process has halted in light of political and societal resistance.

## 7.2 Judicial Trends

While still permissible under penal law, the Indian judiciary has exhibited a greater willingness to define marital rape as a violation of human rights.

- i. *Independent Thought v. Union of India* (2017): The Supreme Court held that the constitutional exemption was unconstitutional because the exemption criminalized non-consensual sexual activity in a marriage for wives between the ages of 15-18 and subsequently violated their right to bodily autonomy. However, the exemption remains intact for a married woman over the age of 18.
- ii. *Delhi High Court Split Verdict* (2022): The Delhi High Court in *RIT Foundation v. Union of India* was split in its view as to whether marital rape was a criminal or uncriminal offense. One justice decided that the exemption was unconstitutional and the other justice believed that the Supreme Court should decide the issue.
- iii. *Supreme Court Considering Petitions*: The Supreme Court of India is mediating petitions on the issue of marital rape, and a ruling in regard to these petitions may help establish a new statute.

While the legislature does not recognize the importance of the origins of marriage as it aligns itself with punishable laws, the trajectories of judicial outcomes may reflect a potential to establish marital rape of a female spouse as an infringement of a woman's rights and potential to signal that the legal spheres in India may be changing.



## **8. CALL FOR LEGAL REFORM AND POLICY RECOMMENDATIONS**

The lack of laws that criminalize marital rape in India contravenes the constitutional guarantees of equality, dignity and bodily autonomy. A pressing need exists for legal and policy reform in order to provide justice for survivors and to harmonize Indian law with international human rights law.

### **8.1 Legal Reforms**

- Amendment to Section 63 of the Bharatiya Nyaya Sanhita (BNS): To acknowledge non-consensual sexual acts that take place in a marriage as rape, the marital rape exemption needs to be eliminated. Consent ought to be seen as independent of marital status to recognize equal status of married and unmarried women under the law.
- Inclusion in the Protection of Women from Domestic Violence Act, 2005: While the PWDVA recognizes sexual abuse, it should provide explicit legal remedies for marital rape victims, including protection orders, financial support, and rehabilitation.
- Strict Punishment and Evidentiary Standards: The same level of punishment for marital rape must be announced as another type of rape. Courts must take steps to protect the evidence for the survivor, but still enable a fair evidentiary procedure to reduce the incentive for misuse.

### **8.2 Policy Recommendations**

- Comprehensive Awareness Campaigns: Nationwide campaigns should educate people about consent, marital rape, and gender equality, challenging societal myths that normalize spousal coercion.
- Judicial and Law Enforcement: Judges, police and doctors should receive awareness programs on the handling of cases of marital rape.
- Adequate Support: Enhance domestic violence helplines, counseling services, and shelters for survivors of violence, offering confidential, safe and just redressal systems.

The lack of legislative and legal recognition of marital rape not only violates women's rights but is a breach of basic human rights law that is yet to be enforced. Laws in India have to change and policies need to be built, so survivors are acknowledged and given justice.

## 9. JUDICIAL PRECEDENTS AND CASE LAWS ON MARITAL RAPE

Over time, Indian courts have increasingly recognized the criminalization of marital rape as a significant human rights issue but have not yet actually prosecuted it as such.

✧ Key judicial decisions include:

**9.1 RIT Foundation v. Union of India (2022):** High Court Split. In this matter, Justices Rajiv Shakdher and C. Hari Shankar had different opinions and thus delivered a split on whether marital rape should be criminalized. Their major contentions included the following:

➤ **Judge Rajiv Shakdher** (For criminalizing marital rape):

- ✓ Struck down Exception 2 of Section 63 BNS: he ruled that the exception which allowed husbands to be exempt from being charged with rape was unconstitutional.
- ✓ Violation of fundamental rights: he held that the exemption violated Article 14 (equality), Article 15 (no discrimination), Article 19 (freedom) and Article 21 (right to life and dignity).
- ✓ Consent is Deemed in marriage: he clarified that marriage does not create consent for continual sexual intercourse and that a wife has the distinct right to refuse or withhold consent.
- ✓ No justification for the exception: he found no basis for the argument that criminalizing marital rape would upend marriage itself and/or lead to abuse.

❖ **Justice C. Hari Shankar** (Against Criminalizing Marital Rape):

- ✓ Taxing Exception 2 of Section 63 BNS : Therefore, he decided that the courts should not intervene to criminalize marital rape.
- ✓ Legislative Sphere : He believed that the matter was one for the legislature to consider, not for the courts.
- ✓ Marriage as a Social Institution : He noted that marriage entails different expectations and obligations than other relations, and that courts should play no role in personal laws.

- ✓ Concern of Misuse : He expressed his concern that criminalizing marital rape would lead to the potential for misuse and false cases.
- ❖ Outreach of the Split Judgment: As the judges had differing opinions, the matter was referred to a larger bench of the Supreme Court, which has yet to give a verdict on the final matter.

### **9.2 Independent Thought v. Union of India (2017):**

The Supreme Court partially invalidated the marital rape exception applicable to girls aged 15 to 18, establishing that the penetrative sexual assault of a minor wife is defined as rape under the Indian Penal Code.

The court determined that child marriage cannot provide a justification for unlawful sex with a minor, reinforcing in its ruling that consent should always be treated as the paramount consideration in all offenses connected with the issue of consent.

### **9.3 State of Maharashtra v. Madhukar Narayan Mardikar (1991):**

Although the issue in this case did not specifically involve marital rape, the court ruled that every woman has a right to privacy and dignity in her body and that this right exists independent of whether a woman is married or unmarried. The case reinforced that every woman has the right to consent to sexual relations.

### **9.4 Sakshi v. Union of India (2004):**

The court in this case broadened the definition of sexual violence and stated that in any relationship, penetrative sexual assault, which does not involve the consent of the other person, constitutes sexual abuse. While the case may not specifically mention marital rape, it emphasizes that consent is required in sexual relations.

These decisions by the courts indicate a slow acceptance of marital rape as a violation of women's rights. The due decision in RIT Foundation v. Union of India on marital rape, as it relates to consent, could be significant for marital rape in India.

## **10. CONCLUSION**

The conversation about whether marital rape should be considered a crime in India is layered in terms of social, cultural and legal factors. For example, many modern legal systems outside of India would argue that marital rape, like any rape in which neither party is married or living together, grossly violates

an individual's bodily integrity and autonomy. The social and psychological aftermath of a rape has deep and lasting effects. There may be arguments in favor of inaction for legal (legislative inertia) and sociological (feminine victimization) reasons. Regardless, there can be no justification for violating the married woman's fundamental rights to liberty, which includes consent during a committed relationship with her husband (or fiancée).

Judicial decisions, such as *RIT Foundation v. Union of India*, have illustrated a move towards the conclusion that the marital rape exception has no constitutional validity. Immediate legislative reforms are necessary - changing the charges in Section 63 of the *Bharatiya Nyaya Sanhita*, enhanced prose for domestic violence, and programs for greater awareness - that are commonly considered as part of the constitutional provisions of equality, non-discrimination, and personal liberty.

Marital rape is an egregious violation of women's autonomy and dignity, and is recognized in the international framework of human rights as a crime under international standards. However, to appropriately criminalize this conduct—without proper definitions and implementation—could also mean misuse and false allegations occur. Thus, a system of proper legal tools should be constructed to offer protections for the genuine victims, as well as individuals who may be innocent and falsely accused; and to ensure fair treatment to all parties in the investigation and justice process.

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