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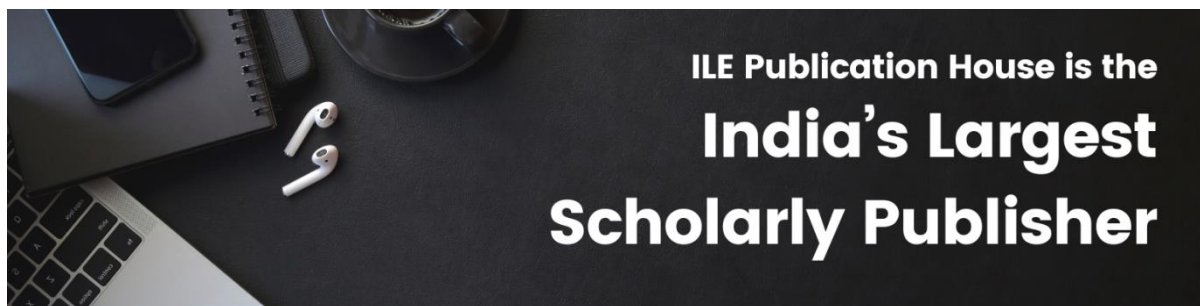
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MARITAL RAPE IN INDIA: LEGAL CHALLENGES AND EVOLVING JURISPRUDENCE

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Abstract

This paper critically examines the issue of marital rape in India, highlighting the stark legal, social, and institutional barriers that prevent its recognition and criminalization. It traces the historical justifications for the marital rape exception clause under Section 375 of the Indian Penal Code, rooted in patriarchal ideologies such as the wife's subordination and the legal theory of marital unity. The research draws attention to key legislative documents, Law Commission reports, judicial opinions, and parliamentary debates, all of which reveal a consistent reluctance to address marital rape due to concerns about preserving the institution of marriage. The paper analyzes significant court rulings and public interest litigations, including the recent split verdict by the Delhi High Court and the pending cases before the Supreme Court, that underscore the legal ambiguity and constitutional concerns surrounding marital rape. International perspectives, along with arguments from legal and human rights frameworks, are discussed to strengthen the call for reform. The paper concludes by recommending comprehensive legal recognition of marital rape as an offense under Indian criminal law, equal punishment as prescribed for other rape cases, and corresponding amendments in matrimonial laws to protect the bodily autonomy and fundamental rights of married women.

Keywords: Marital Rape, Domestic Violence, Sexual Autonomy, Gender Equality, Legal Reform, Constitutional Rights, Law Commission Reports, Public Interest Litigation

Introduction

Rape is a grave violation involving forced sexual intercourse with any individual, carried out without their consent. In the context of marriage, **marital rape**—also known as spousal rape—refers to engaging in sexual activity with one's spouse without their voluntary agreement. The lack of consent remains the defining factor and does not necessarily require the presence of physical force. It is important to understand that such an act not only infringes upon the survivor's bodily autonomy and personal dignity but also results in profound psychological and physical trauma. A rapist, in essence, assaults not just the body but deeply wounds the inner being of the victim. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer

destroys the physical body of his victim; a rapist degrades the very soul of the helpless female."

Meaning of Marital Rape

Marital rape is recognized as a form of domestic violence and sexual abuse. Although sexual relations within marriage were historically viewed as a marital right, engaging in such acts without the spouse's consent is now widely considered rape in many countries. It has been condemned by international conventions and is increasingly being criminalized around the world.²⁹⁵

Initial Justification for Marital Rape

Currently, only 52 countries have enacted laws that criminalize marital rape. In many parts of

295Bhagyashikha Saptarshi, Marital Rape and Law, Manupatra, <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>



the world, including India, both legal systems and societal norms still fail to acknowledge marital rape as a punishable offense. Even in countries where rape is criminalized, the law often does not apply when the offender is the victim's spouse—a legal provision known as the "marital rape exception clause." Historically, four main arguments have been used to justify this exemption. However, the first two of these justifications have largely lost relevance in modern discourse due to significant progress in gender equality and women's rights.²⁹⁶ The first justification stemmed from the understanding of the wife as subservient to her husband. Women were chattel to their husbands, and this meant that women did not have any rights in the marriage. In such a scenario, it would not be possible to fathom a husband raping his wife since the husband was the master to the wife, and enjoyed privileges over her body. Along with this justification, the unities theory also existed. This theory rested on the idea that after marriage, the identity of the woman merged with that of her husband. Therefore, law did not give the married woman a personality independent of her husband. This is linked to the previous justification in terms of looking at women as chattel of the husband²⁹⁷.

Legal documents to emphasis for removal of marital rape exception Clause

42nd Law Commission Report²⁹⁸

It has been observed that the exception under Section 375 does not apply when the husband and wife are judicially separated. While this recommendation received support, the rationale behind it remained vague. The statement suggests that since the marriage is still legally valid, a husband who engages in

non-consensual sexual intercourse with his wife during separation cannot be prosecuted for rape. This reasoning appears problematic, as it implies that consent is automatically assumed when spouses cohabit, but not when they are living apart—highlighting an inconsistency in how consent is interpreted based on marital status.

172nd Legislative Commission Report 2002²⁹⁹

This report questioned the validity of the exception under Section 375 of the Indian Penal Code, which does not criminalize marital rape. The report argued that marital rape should be recognized as a statutory offense, but the Law Commission rejected this argument. The Law Commission was concerned that criminalizing marital rape would compromise the institution of marriage.

Eighty-fourth Report on Rape and Allied Offences³⁰⁰

This report defined rape as "the ultimate violation of the self". The report also recommended that marital rape be removed from the scope of section 375 and placed as a separate offense. The Verma committee³⁰¹, constituted in 2012, recommended the criminalization of marital rape. The committee argued that the immunity for marital rape was based on an outdated notion that married women were the property of their husbands. However, the Criminal Law (Amendment) Bill, 2012, drafted after the Verma committee report, did not criminalize marital rape.

167th Report of the Parliamentary Standing Committee on The Criminal Law Amendment Bill, 2012

This report also witnessed a divergent opinion amongst its members on the issue of marital rape. Some members were of the opinion that

296 Saurabh Mishra & Sarvesh Singh Marital Rape — Myth, Reality and Need for Criminalization, <https://www.ebc-india.com/lawyer/articles/645.htm>

297 Raveena Rao Kallakuru & Pradyumna Soni, CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT, NUJS LAW REVIEW 11 NUJS L.Rev. 1 (2018), <https://nujslawreview.org/wp-content/uploads/2018/01/11-1-Raveena-Rao-Kallakuru-Pradyumna-Soni.pdf>

298 [https://www.advocatekhaj.com/library/lawreports/theindianpenalcode/26.php?Title=The%20Indian%20Penal%20Code&STitle=Earlier%20Report%20\(42nd\)%20of%20the%20Law%20Commission](https://www.advocatekhaj.com/library/lawreports/theindianpenalcode/26.php?Title=The%20Indian%20Penal%20Code&STitle=Earlier%20Report%20(42nd)%20of%20the%20Law%20Commission)

299 <https://feministlawarchives.pldindia.org/wp-content/uploads/Reposnes-to-the-172nd-Report-of-the-Law-Commission-of-India.pdf>

300 <https://lawcommissionofindia.nic.in/achievements-impact-of-law-commission-report/#:~:text=The%20Commission%20has%20made%20recommendations,age%20persons%2C%20and%20humanitarian%20reforms.>

301 <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>



there should be a room for the wife to take up the issue of Marital Rape, and they were further of the opinion that consent in marriage cannot be consent forever. However, the other members opined that penalizing marital rape had the potential of ruining the entire institution of marriage and putting the family system under great stress. they believed such non-consensual sexual intercourse can be dealt under the heading of Cruelty under section 498A of the IPC and other statutes such as the Domestic Violence Act, 2005³⁰².

Parliamentary Discussions³⁰³

Discussions in the Parliament regarding marital rape have been negligible to say the least. It was not until 2015 that the topic was first breached in the Rajya Sabha by Mrs. K Kanimozhi, a Member of Parliament (MP) from Tamil Nadu. The MP raised a question to the Minister of State for Home Affairs Haribhai Parathibhai Chaudhary as to whether the government would amend the marital rape exception under section 375 of the IPC in light of the recommendations made by the United Nations.³³ In his reply, the Minister said that the concept of marital rape cannot be applied to India due to myriad of factors such as low levels of education, poverty, customs, values, societal mindsets like treating marriage as a sacrament etc. Further, he also said that even though criminalization was recommended by the United Nations Committee on Elimination of Discrimination against Women, but since it was not recommended by the Law Commission of India, the government did not intend to bring about an amendment to the IPC.³⁴ Further, in the year 2018, the Lok Sabha MP from Thiruvananthapuram, Mr. Shashi Tharoor introduced a Private Member's bill in the Lok Sabha titled Women's Sexual, Reproductive and Menstrual Rights Bill 2018 which proposed the abolition of exception 2 to section 375 of IPC³⁵ and to insert a proviso to explanation 2 of

section 375 in the following words:³⁶ Provided that the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity. The Bill however, did not exceed the phase of initial discussion and has been left pending in the Parliament ever since, which does not appear to be surprising, considering the recommendation of the 167th Parliamentary Standing Committee Report and later the reply by the Minister of State for Home Affairs. However, it indicates that given the extremely sensitive nature of the topic, the parliamentarians are not comfortable discussing the same.

Judicial Approach on Marital Rape

The Nirbhaya rape case in 2012, the Justice Verma Committee had suggested criminalizing marital rape and said that marriage didn't mean an irrevocable consent to sexual activities. But the Government of India neglected the suggestion. In the case of the State vs. Vishakha 2014, Special fast track court in Delhi stated that "the petitioner and respondent (accused) being a legally married husband and wife, the petitioner being major, the sexual intercourse between the two, whether forcible, cannot be considered as rape and no conviction can be fixed upon the accused." In 2015, the RIT Foundation filed a Public Interest Litigation in Delhi High Court summoning the immunization of marital rape in section 375 of the IPC on the grounds of violation of the fundamental rights i.e., Article 14, 15, 19, and 21 of the Indian Constitution. In 2016, Maneka Gandhi, then minister for Women and Child Development stated that due to illiteracy and poverty in India the concept of marital rape could not be applied here even if it is accepted and understood globally³⁰⁴.

However, in *Independent Thought vs. Union of India*³⁰⁵ the Supreme Court was compelled to

302 https://eparlib.nic.in/handle/123456789/737614?view_type=search

303 Harleen Kaur and Ayush Tripathi, EXCEPTION TO MARITAL RAPE IN INDIA: AN UNCONSTITUTIONAL INTRUSION INTO THE VICTIM'S RIGHT TO EQUALITY AND PRIVACY, IILJ Law Review Winter Issue 2022

304 Supra note 1

305 AIR 2017 SC 4904



revisit into some of the theoretical suppositions on which the marital rape exception is based as it infringes constitutional rights of girls who are married between the age of 15 and 18 years.

In the case of *Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat*³⁰⁶ the Gujarat High Court submitted that marital rape is not just a concept and the notion of 'implied consent' in marriage and should be collapsed. The law must provide security to every woman (married or unmarried) to protect her corporal independence.

In the case of *Anuja Kapur vs. Union of India Through Secretary*³⁰⁷, 2019, a PIL was filed by Anuja Kapur asking the Court to direct the Government of India to release some guidelines and laws on marital rape. But the bench of the Supreme Court headed by Justice SA Bobde and Justice BR Gavai refused the petition and said that the work related to the formulation of the laws is of the legislature and not the judiciary and the court is more involved with the interpretation of the law rather than drafting it.

Meanwhile, at the Delhi High Court, an NGO RIT Foundation³⁰⁸, collectively with other parties, filed petitions challenging the marital rape exception. On 11 May 2022, a Bench comprising Justices Rajiv Shakdher and C. Hari Shankar delivered a split in the case.

On the other hand, Justice Shankar held that in the institution of marriage, sexual relations whether consensual or non-consensual, are a legitimate expectation making the exception to rape legal. Both Judges granted permission to the parties to appeal the decision at the Supreme Court.

*Hrishikesh Sahoo v State of Karnataka*³⁰⁹

In late 2022, Dalit activist Ms. Ruth Manorama filed a fresh petition at the Supreme Court

challenging the marital rape exception. On 9 January 2023, a Bench comprising Chief Justice and Justice these petitions and listed them all for hearing on 21 March 21 2023. On 21 December 2023, Parliament passed the Section 63 of the Act which deals with the act of "rape" also includes the same marital rape exception as found under Section 375 of the IPC. The case remained unheard for about a year until in January 2024 where it was listed for hearing before a bench of CJI Chandrachud and Justices and On 4 October 2024, the Union government filed an affidavit opposing the striking down of the marital rape exception. The 49-page affidavit is said to be filed where the Union has opposed the removal of the exception. The affidavit stated that while the husband has no right to deprive the fundamental right of a woman, describing this violation as "rape" under the "institution of marriage can be arguably considered to be excessively harsh and therefore, disproportionate." It stated that marital rape should be made illegal and criminalised as "a woman's consent is not obliterated by marriage... However, the consequences of such violations within marriage differ from those outside it³¹⁰."

English Law Commission Report-Difficulty to abolish the Exception³¹¹

Difficulty to assess whether the consent was there or not. difficult to investigate as no evidence as intercourse happen in secrecy. Majority of Society consider non consensus intercourse in marriage as grave to compare with outside the marriage. Sufficiency of matrimonial remedies. Detrimental to parties to marriage and institutions of marriage. Assessment of sentence in such case. There is also doubt whether such law shall be used actually. Risk of false accusations and blackmail.

306 2017 <https://indiankanoon.org/doc/158529176/>

307 https://lawbeat.in/sites/default/files/Mens_Welfare_Trust_Submissions_Marital_Rape_JSD_ADV_LINK_0.pdf

308 Supra Note 12

309 2024 Case Pending before Supreme Court of India, <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/amp/>

310 Ibid <https://www.scobserver.in/wp-content/uploads/2023/03/Counter-Affidavit-by-Union-Marital-Rape.pdf>

311 English Law Commission Report Sep 1993 <https://journals.sagepub.com/doi/pdf/10.1177/026975809300200405>



Suggestion for Marital Rape³¹²

1. Criminalization of Marital Rape under IPC:

- Parliament must **remove Exception 2 to Section 375** of the Indian Penal Code and recognize marital rape as a punishable offense under Section 376, at par with other forms of rape.
- The law must acknowledge that **marriage does not imply irrevocable consent**, and sexual autonomy continues to apply within marital relationships.

2. Uniform Application of Consent Standards:

- A **universal legal definition of consent** should apply regardless of the relationship between the victim and the perpetrator.
- Courts must be guided by **Section 375's Explanation 2** on consent, ensuring that absence of physical resistance is not misconstrued as consent.

3. Judicial and Police Training:

- Special training should be imparted to **judges, police officers, and forensic experts** to deal with marital rape cases sensitively and professionally.
- Judicial academies should incorporate modules on **gender sensitization, trauma-informed interviewing**, and marital rape jurisprudence.

4. Protection Against Misuse and Safeguards:

- False accusations exist in all criminal matters, and **marital rape should not be treated differently on this ground alone**.
- Implement safeguards such as **preliminary inquiries by a magistrate**, similar to procedures followed under laws like the Domestic Violence Act.

5. Separate Matrimonial Remedy for Marital Rape:

- A **specific ground for divorce** or judicial separation should be introduced where marital rape is proven.
- Marital rape survivors must be provided with **emergency shelter, legal aid, financial support, and psychological counseling** under expanded provisions of the Protection of Women from Domestic Violence Act, 2005.

6. Introduction of a Graded Punishment System:

- In cases where the husband and wife live together, the law may consider **graded sentencing** for first-time offenses or non-aggravated rape, while maintaining the full penalty for aggravated or repeated offenses.
- This could address judicial concerns about proportionality without excusing the crime.

7. Awareness and Education Programs:

- Launch nationwide campaigns to **raise awareness about sexual consent in marriage**, women's rights, and gender equality.
- Include **curriculum reforms** in schools and universities to teach students about bodily autonomy and respectful relationships.

³¹² Supra Note 3