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UNVEILING THE PLIGHT OF MARITAL RAPE

AUTHORED BY - SHREERANGAM BARAI

Introduction

In India, marriage is traditionally regarded as a union between two individuals, wherein it is commonly assumed that both partners have implied consent to engage in sexual intercourse at any time following the marriage ceremony, regardless of their personal desires or volition. This perspective, which aimed to uphold the sanctity of marriage, has inadvertently concealed the distressing reality of certain crimes committed within marital relationships, including acts of domestic violence, spousal rape, cruelty, and marital offenses.

Spousal rape¹, a particularly grave offense committed against women within the institution of marriage, entails engaging in sexual intercourse without the woman's consent. The understanding of rape and the legal treatment of this crime in civilized societies or cultures involves an examination and delineation of what constitutes rape, including spousal rape, encompassing non-consensual sexual acts perpetrated against a woman. The absence of consent forms the fundamental aspect of this definition, which may encompass various contextual factors and does not necessarily rely on physical evidence alone. Disturbingly, statistics indicate that approximately 10-14% of married women in the United States have experienced rape at the hands of their husbands, with about one-third of women reporting instances of "unwanted sex" within their partnerships.

Throughout history, numerous rape statutes have endorsed the notion that a man's sexual coercion toward a woman, other than his wife, constitutes rape, while providing husbands with the entitlement to engage in such acts within the confines of marriage. However, on July 5, 1993, spousal rape was prevalent in all fifty states of the United States, with at least one of their gender-based legal codes acknowledging this exemption. Presently, twenty states, along with the District of Columbia and certain local jurisdictions, have eliminated any form of immunity from prosecution for husbands accused of rape. Nonetheless, thirty states still maintain exceptions allowing for the perpetration of spousal rape.

¹ [CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT \(manupatra.in\)](http://manupatra.in)

In the majority of these thirty states, the element of force is deemed unnecessary in cases where the wife is in a vulnerable state (such as mental or physical disability, unconsciousness, or while asleep) and unable to provide consent. Consequently, the perpetrator may evade criminal liability. Disturbingly, women subjected to rape by their husbands often endure repetitive victimization, frequently experiencing more than twenty instances of rape. Such acts of violation extend beyond vaginal penetration and may encompass forced oral and anal intercourse. Scholars and researchers generally classify marital rape into three distinct categories: forced rape, assault, and attacks.

Marital rape refers to the act of a husband engaging in sexual intercourse with his wife against her will and without her consent, using various means such as violence, intimidation, undue influence, and psychological manipulation to obtain compliance. When such an occurrence takes place, it is classified as spousal rape. Marriage, traditionally considered as the sacred union of two individuals, is unfortunately marred by the prevalence of criminal acts of a serious nature in certain instances.

Contemporary Discourse on Marital Rape: An Examination of the Ongoing Contention

In the context of a legal challenge, a crucial argument put forth before the high court asserts that the act of sexual intercourse is considered rape if it occurs just five minutes before the marriage ceremony, but as soon as the marriage is solemnized, the same act is no longer categorized as rape. This distinction prompts the court to contemplate whether such differentiation is arbitrary or permissible under constitutional grounds. Furthermore, the Delhi High Court is currently engaged in a deliberation regarding the constitutional validity of the immunity granted to marital rape under the Indian Penal Code.

Since this exemption essentially falls under Section 375 of the IPC, which outlines the circumstances under which non-consensual sexual encounters are classified as rape, various media sources have also provided their interpretations of the issue at hand. It is important to note that the provision contains a crucial exception, stating that non-consensual sexual activity between a married man and his wife, who is above 18 years of age, does not qualify as rape. Consequently, the primary clause under scrutiny before the Delhi High Court revolves around this particular aspect of the IPC.

The presence of an exemption for marital rape in various common law jurisdictions, which originated from the English legal system, has raised concerns regarding the compatibility of such immunity with the Indian Penal Code (IPC) enacted after the colonial era. This legal provision is currently being challenged in court, marking the first instance where its validity is under scrutiny. The opportunity for this challenge has emerged due to recent judgments by the Supreme Court of India, which have sought to restore gender balance and address issues favoring women.

The exception for marital rape was abolished by the House of Lords in the United Kingdom in 1991, while Canada enacted legislation to address this issue in 1983. South Africa also introduced legal reforms in 1993, and Australia followed suit in 1981, all of which involved modifications to the identical provision.

In India, the ongoing legal challenge marks the first instance where the concept of marital rape immunity is being contested in a court of law. The primary question at hand is whether the court can sustain this immunity indefinitely in light of the numerous arguments put forth. There exist valid considerations supporting the maintenance of such immunity.

The implications for the institution of marriage itself are a significant aspect addressed during the court proceedings. The potential consequences of allowing wives to bring forth rape charges against their husbands and the subsequent impact on the institution of the family are important factors under discussion. Undoubtedly, the elimination of marital rape immunity would have far-reaching effects on the traditional understanding of the familial structure.

During the hearing, the petitioner contended that the categorization of marriage as a determining factor is arbitrary and infringes upon the right to equality as enshrined in Article 14 of the Indian Constitution. Central to this argument is the notion that a wife, upon entering into marriage, provides perpetual and irrevocable consent.

Accordingly, this notion is rooted in the belief that upon marriage, a woman assumes certain obligations, including fulfilling her husband's desires and bearing children. It presupposes that a wife lacks the agency to refuse her husband's advances. These ideas appear to be remnants of outdated societal norms that have persisted since the formulation of the Indian Penal Code up until 2021. The crucial question at hand is whether the law should condone or prohibit such practices.

The government's involvement in this matter arises from its position on the issue of marital rape immunity. Both the Delhi government and the central government have advocated for the retention of this immunity. The central government is currently engaged in a criminal review process through a commission established by the Ministry of Interior.

While the central government believes that marital rape should be acknowledged as a sensitive matter and subject to further deliberation before any judicial decision, the Delhi government's main contention is that abolishing spousal rape immunity would lead to the creation of new criminal offenses. According to the Delhi government's argument, the Delhi High Court should refrain from lifting the immunity, as it is not within the court's jurisdiction to legislate and establish new crimes.

Given the contentious nature of this clause, the Supreme Court has taken the step of appointing two impartial barristers to preside over the court proceedings, recognizing the significance of the case. It can be argued by various states that the preservation of the institution of the family justifies the maintenance of marital rape immunity, despite the violation of women's rights that ensues.

Consequently, it becomes imperative for the court to thoroughly examine this matter. This holds significant importance as it sets the standard against which the court will assess the situation in order to strike a balance between these competing rights. Hence, if the state possesses a legitimate interest in a particular issue, such as national security, public order, or public health, and intends to enact legislation that may encroach upon the fundamental rights of individuals, the court must ascertain whether the state has a compelling justification to uphold such infringements or permit the curtailment of those rights. In the present case, the court must determine whether the preservation of the institution of marriage can be deemed a compelling reason for the state to maintain the status quo.

Exploring the Plight: Sexual Offenses Targeting Married Women

Incidents of domestic violence, including those occurring in India and various other countries, have been observed to escalate during periods of lockdown. However, quantifying and obtaining comprehensive data on domestic violence remains challenging, primarily due to underreporting. Various studies utilizing available statistics globally indicate that approximately 33% of women, if not more, have experienced violence at some point in their lives.

Within the realm of domestic violence, the issue of marital rape emerges prominently. Marital rape pertains to situations where a husband coerces his wife into engaging in non-consensual sexual intercourse, thereby violating her autonomy and consent. During the COVID-19 pandemic, an alarming number of over 3,582 incidents of domestic violence were documented. Reported cases of domestic violence often encompass mental and physical abuse, dowry-related conflicts, non-consensual sexual activity (sexual abuse), violations of matrimonial rights under Section 498A of the Indian Penal Code (IPC), and instances of adultery.

The Sexual Offenses Act of 2005 encompasses sexual assault within the broader framework of domestic violence. Referred to as family violence, domestic violence, or violence against married couples, the Act specifically addresses instances of sexual violence within marital relationships. However, it limits the recognition of marital rape to sexual violence without acknowledging it as rape or an independent offense. Consequently, the existing legislation pertaining to domestic violence fails to adequately address the crime of marital rape, necessitating the need for distinct legal provisions to address this issue.

A Comparative Voyage: Exploring Marital Rape Across Nations

The notion of marital rape has undergone significant transformations in both the United States and India, providing an interesting basis for comparative analysis². Historically, the United States maintained the marital exception, which allowed husbands to engage in non-consensual sexual acts without fear of legal repercussions. However, this exception was challenged and subsequently abolished in 1975. In contrast, India witnessed a similar shift in attitudes towards marital rape, with all states enacting legislation against this form of violence in 1993, influenced in part by the women's rights and equality movement.

The United Nations³, along with its member states, holds the firm position that any act of non-consensual sexual intercourse, whether perpetrated by a husband or another individual, constitutes rape. Consequently, spousal rape is considered a criminal offense, and offenders are prosecuted accordingly, paralleling the legal treatment of rape against unmarried women. However, it is worth noting that regional variations exist within the United States. For instance, in Southern California, the option to press charges for spousal battery may be limited if the incident is not reported to law

² Shalu Nigam

[The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities](#)

³ ["The Gap in Marital Rape Law in India: Advocating for Criminalization a" by Krina Patel \(fordham.edu\)](#)

enforcement within 30 days. In some cases, alternative approaches such as marital counseling or involvement in self-defense or personal empowerment programs may be offered as an alternative to traditional court proceedings.

In 1970, the feminist movement within the United Nations played a pivotal role in advocating for legal reforms pertaining to sexual violence against women. One prominent figure in this movement was Laura X, who notably served as an advisor during the 1978 case of John Rideout. This case marked a significant milestone as it became the first instance in which a man was brought before a United Nations court to face charges of raping his former spouse. Despite the outcome of John Rideout's case failing to establish marital rape as an illegal act, Laura X subsequently led a successful campaign in Oregon to criminalize marital rape, resulting in its prohibition in 1999.

Another notable case, the *Commonwealth vs. James K. Chretien*⁴, marked a significant turning point in the United States' legal landscape. It resulted in the first-ever conviction for marital rape on December 2, 1979. However, it is important to note that even in 2003, 26 states in the United States still retained some form of marital rape immunity, while 24 states and the District of Columbia had abolished such immunity for sexual offenses.

Until 2005, Tennessee had similar laws in place, which were subsequently repealed. In South Carolina⁵, there were stricter requirements for husbands to engage in violent behavior towards their wives. According to the legislation, if a husband caused severe harm to his wife during their cohabitation, he could potentially face charges of raping his spouse. However, the prohibition on marital rape was ultimately overturned in 2005, leading to the recognition of marital rape as a distinct form of sexual assault.

In India:

India is characterized by a patriarchal and male-dominated societal structure. Male communication holds significant importance in both family and work settings⁶. The prevailing view in India is one that upholds male superiority within this male-dominated framework. In the context of marriage, tacit consent is often deemed sufficient, with emphasis placed on mutual

⁴ [Commonwealth v. Chretien, 383 Mass. 123 | Casetext Search + Citator](#)

⁵ [Explained | Marital rape in India: The history of the legal exception - The Hindu](#)

⁶ [EVOLUTION OF MARITAL RAPE LAWS IN INDIA - Delhi vakil](#)

contractual agreements or understandings. Consequently, there exists an exemption for spousal or marital rape.

Historically, women were often treated as commodities and subjected to servitude and sexual exploitation. Despite the post-independence era, patriarchal ideologies and notions of privacy continue to persist, particularly within the realm of marriage.

In the context of assuming the wife's continual consent during any form of sexual contact, it can be inferred that the situation remains unchanged even when the husband and wife cohabit. Notably, the absence of legal consequences for a husband engaging in non-consensual sexual acts with his wife serves as the sole justification for judicial separation. Consequently, no legislative measures have been enacted to address this issue.

The concept of marital rape has not been recognized as a criminal offense or illegal conduct in India thus far. Under the current legal framework, specifically Section 375, Clause 2 of the Indian Penal Code, sexual intercourse between a man and his wife, provided she is above the age of 15, is not categorized as rape. This exception remains applicable solely in the context of marital relationships.

Judicial decision

The Karnataka High Court recently issued a significant ruling, granting permission to proceed with the charges against a husband involved in a case of marital rape. It is important to note that, despite this development, marital rape is not currently recognized as a criminal offense.

The stance of the judiciary on the issue of marital rape

Despite the prevailing societal norms and traditional views surrounding marriage in India, the recent ruling by the Karnataka High Court signifies a significant shift in the judiciary's perspective on the issue of marital rape. This ruling acknowledges that marriage should not grant special privileges or provide a license for one spouse to engage in non-consensual sexual acts. The court categorically stated that engaging in sexual assault against one's wife without her consent can only be described as rape.

Following a thorough examination of the case⁷, the Karnataka High Court not only allowed the filing of a First Information Report (FIR) against the husband on charges of rape but also criticized the local police for failing to take appropriate action upon the wife's initial complaint. Subsequently, the court permitted the husband to be indicted under Section 376 of the Indian Penal Code (IPC), which deals with rape offenses. This decision by the Supreme Court sets a precedent for subjecting individuals to legal proceedings for marital rape, further underscoring the evolving judicial stand on this matter.

The Karnataka High Court emphasized that the principle of gender equality necessitates treating women and men as equals without any exceptions that may perpetuate inequality within the scope of rape laws. The court urged lawmakers to critically examine the existence of such disparities in the legal framework.

In light of this, the high court explicitly ruled that the husband involved in the aforementioned case cannot claim exemption or protection under Section 375 of the Indian Penal Code (IPC), but instead must face trial for the offense of rape⁸. This landmark judgment by the Karnataka High Court carries significant weight, and it refrained from delving into the broader discussion of exemptions granted to husbands under the law. The court emphasized that this particular decision is based on the facts of the case at hand, allowing the trial court to proceed accordingly.

Independent Thought v. Union of India⁹

The case in question involved the interpretation of Exception 2 to Section 375 of the Indian Penal Code (IPC) by a two-judge panel of the Supreme Court. This exception pertains to girls under the age of 18. While the court took a significant step in protecting underage girls by criminalizing sexual intercourse with a wife under the age of 18, it did not address situations where the interests of the other party were violated, nor were there any specific provisions for such cases. Children were also involved in the proceedings.

In the present hearing at the Delhi High Court, Rao argued that the state must provide a compelling state purpose for retaining Exception 2 to Section 375. According to Rao, he believes that no such purpose exists.

⁷ [Karnataka High Court: Rape is rape, even if man is husband \(indianexpress.com\)](https://www.indianexpress.com)

⁸ [Why Karnataka marital rape verdict is problematic- The New Indian Express](https://www.newindianexpress.com)

⁹ [Independent Thought v. Union of India - iPleaders](https://www.iPleaders.com)

Rao notably referenced the Supreme Court's ruling in the case of *Independent Thought vs. Union of India* during his arguments. In that case, the Supreme Court's two-judge panel restricted the scope of Exception 2 of Section 375 in relation to girls under the age of 18.

Although the issue of marital rape was not directly before the court, Rao contended that the *Independent Thought* case did analyze Section 375, albeit within the context of underage girls. He argued that the consequence of this exception is that consent becomes meaningless for the act of rape, contrary to the explicit statement in the statute.

Rao read a passage from the *Independent Thought* case that discussed the impact of the exception, stating that husbands of girls between the ages of 15 and 18 have complete freedom to engage in non-consensual sexual intercourse without it being considered rape under Section 375 of the IPC. Curiously, as highlighted by Sakshi, this means that a girl's child husband is not deemed to "sexually abuse" her according to the IPC when he assaults her.

Rao further argued that under Article 354 of the IPC, any act intending to undermine a girl's modesty can be punished, indicating that a man's non-consensual sex with his wife between the ages of 15 and 18 is not considered sexual abuse, but it is not permitted either. Surprisingly, this viewpoint is supported by the 172nd report of the Law Commission of India (LCI).

He pointed out that the Domestic Violence Act applies in such cases, and the husband does not enjoy immunity. There are numerous other offenses where the husband can be held liable or can be one of the accused. Except for Exception 2 to Section 375 of the IPC, the husband is not granted immunity under any other penal provision.

Rao argued that it is unreasonable to grant such immunity to the husband solely in cases of rape, especially when the "victim wife" is below 18 years of age, the legal age of marriage, and is not legally capable of giving consent to engage in sexual intercourse. Therefore, Exception 2 to Section 375 of the IPC is discriminatory and violates Article 14 of the Indian Constitution.

In conclusion, Rao contended that while the *Independent Thought* judgment did not directly address the issue of marital rape in general, its observations in that case remain applicable. He used these observations to support his argument for criminalizing marital rape.

State Of Maharashtra And Another vs Madhukar Narayan

Mardikar (1990)¹⁰

The case dealt with a situation where the Supreme Court had to consider the credibility of a woman, Banubi, who was accused of being unfaithful. The court concluded that it would be unjust to allow the property and career of a government official to be put at risk solely based on the uncorroborated testimony of a woman known for her promiscuity, who openly engages in extramarital relationships. The court deemed such intimacy with multiple partners to be highly unreliable. Consequently, the defendant was acquitted of the charges.

The Supreme Court emphasized that even a woman with a promiscuous reputation is entitled to privacy, and her privacy cannot be violated at will. Just because someone has a questionable character does not give others the right to harm or infringe upon her rights. She has the right to protect herself when someone tries to harm her against her will, and she deserves legal protection as well. The court overturned the order of the High Court and reinstated the judgment of the Court of Appeals, which had exonerated the defendant and restored him to his government position.

Sreekumar And Anr. vs Pearly Karun (1998)¹¹

The case dealt with the issue of marital rape. The court established that if a wife continues to reside with her husband and engages in sexual intercourse against the husband's will, such an act does not amount to rape. Therefore, the court concluded that a husband cannot be held guilty of raping his own wife. The Kerala High Court, relying on IPC Section 376A, held that as long as a spouse does not live separately from the husband due to a formal declaration of separation, custom, or practice, the offense of rape does not apply, even if the sexual act occurs without the wife's consent or against her will.

Subsequent to the infamous Nirbhaya case, which led to amendments in the Indian Penal Code (IPC) to impose stricter punishments for rape, the laws pertaining to wartime crimes and marital rape mandated by the IPC remained unchanged. Consequently, there were no legal provisions specifically addressing these issues.

Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty¹²

¹⁰ [State Of Maharashtra And Another vs Madhukar Narayan Mardikar on 23 October, 1990 \(indiankanoon.org\)](#)

¹¹ [Sreekumar And Anr. vs Pearly Karun on 22 June, 1998 \(indiankanoon.org\)](#)

¹² [Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty on 15 December, 1995 \(indiankanoon.org\)](#)

The case involved the court's determination that the offense of rape should be regarded not merely as a matter of ordinary human rights but as a crime against fundamental human rights. The court recognized that rape constitutes a violation of the right to life, as enshrined in Section 21 of the Indian Constitution, and emphasized the need to provide compensation to rape victims in accordance with specific guidelines outlined in the Rape Act.

The Chairman, Railway Board Vs Chandrima Das¹³

The case resulted in a court ruling that classified rape as a violation of a woman's fundamental rights, distinguishing it from the ordinary rights enjoyed by all individuals. The court recognized that rape is not solely a crime against the individual victim, but also a crime against society as a whole. The act of rape infringes upon the rights that victims hold dear, including the right to life and the right to human dignity, which are protected under Article 21 of the Constitution.

Conclusion

In the absence of specific legislation, there is a lack of available data regarding reported cases of spousal rape. The implementation of reforms in this area remains distant in a country like India, where both the parliament and the judicial system have shown reluctance to bridge the gap between spousal rape and rape. This situation reflects the prevailing societal norms in India, which are characterized by male dominance, and the decriminalization of spousal rape perpetuates this perspective.

The Verma Judiciary Commission addressed the issue of spousal rape in its 42nd report, suggesting that the exception clause for legally separated husbands and wives should be eliminated. The commission proposed two recommendations: firstly, that non-consensual sexual acts or intercourse between a husband and wife, particularly when the wife is between the ages of 12 and 15, should not be excluded from the definition of rape; and secondly, that a separate provision should be enacted to address such cases.

The judicial authorities and courts may not consistently deliver adequate justice to the victims. Section 375 of the Indian Penal Code (IPC) lacks a precise definition of volition within its provisions, necessitating either a formal clarification within Section 375 or an amendment to establish a comprehensive definition. Given the escalating number of cases, this section has

¹³ [The Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors on 28 January, 2000 \(indiankanoon.org\)](http://indiankanoon.org)

become one of the most contentious aspects of married women's lives.

In a country like India, both the lawmakers and the judicial system appear unprepared to address the significant disparity between spousal rape and rape, thereby hindering the implementation of reforms that could safeguard the well-being of victims.

