

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

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Marital Rape and the Imperative for Criminalization of Sexual Assault within Marriage

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ABSTRACT

Marital rape remains a contentious issue in India, where it is not classified as a criminal offense despite international norms. This article examines the legal landscape, focusing on the exception within Section 375 of the Indian Penal Code. The exception grants husbands legal immunity for non-consensual sexual acts with their wives, raising constitutional, ethical, and human rights concerns. Arguments against the exception emphasize violations of fundamental rights, unreasonable classification, and the need for change. Recent legal developments include a split verdict by the Delhi High Court and a Karnataka High Court ruling challenging the exception's validity. The Indian government's stance defends the exception but acknowledges the need for broader deliberations. The international context highlights India's deviation from global norms, while data from the National Family Health Survey underscores the urgency of addressing the issue. This ongoing legal battle represents a pivotal moment in recognizing women's rights and autonomy within marriage and the broader struggle for gender equality and human rights in India.

Keywords: *Marital rape, Indian Penal Code, legal exception, gender equality, human rights, India.*

I. INTRODUCTION

Marital rape, the act of non-consensual sexual intercourse by a husband with his wife, is a deeply contentious issue that continues to challenge legal and societal norms worldwide. This form of sexual violence occurs within the confines of marriage, where one might expect intimacy and trust. However, it raises critical concerns about the rights, autonomy, and physical well-being of women within the institution of marriage.

While many countries have recognized the gravity of marital rape and have taken legal measures to criminalize it, India, as of 2023, remains one of the exceptions where it is not classified as a criminal offense. This exception within the Indian legal system has garnered attention and

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criticism, both domestically and internationally. It underscores a complex legal and societal landscape surrounding issues of gender, consent, and women's rights within the country.

The absence of legal protection against marital rape in India is a matter of significant concern. It implies that women in India do not have the same legal safeguards against sexual violence within marriage as they do outside of it. This unequal treatment underscores the urgency of addressing this issue and reforming the legal framework to provide women with the protection they need and deserve.

The continued existence of these exceptions within the Indian Penal Code reflects an ongoing debate about traditional norms, gender dynamics, and the fundamental rights of women. This article aims to delve deeper into this complex legal landscape, examining the specifics of the exceptions within the Indian Penal Code, the arguments against them, recent legal developments, and the pressing need for reform. By exploring these aspects, we can gain a more comprehensive understanding of the challenges and opportunities in addressing the issue of marital rape in India.

II. THE EXCEPTION IN THE INDIAN PENAL CODE

The heart of the issue in India concerning marital rape is the exception outlined in Section 375 of the Indian Penal Code (IPC). This particular section is pivotal as it defines the offense of rape and outlines the circumstances under which sexual intercourse without the consent of the victim is considered rape. However, it's the exception within this provision that draws significant attention and criticism. This exception reads as follows: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."³

In simpler terms, this exception within the IPC effectively grants husbands legal immunity to engage in sexual acts with their wives, even in situations where their wives do not provide their consent or object to such acts. The exception is conditional in two ways:

- 1. Marital Status:** The exemption applies specifically to the relationship between a husband and his wife, thus providing legal immunity to married men engaging in non-consensual sexual activities with their spouses.

- 2. Age Criterion:** The exception mentions that the wife must not be under eighteen years of age. In other words, if the wife is above the age of eighteen, even non-consensual sexual acts within the marriage are not considered rape under Indian law.

This exception has generated substantial controversy and has been widely criticized for several

³ The Indian Penal Code, 1860, §375, Exception 2

reasons. Critics argue that the exception violates the principle of equal protection under the law. It creates a legal distinction between married and unmarried women, denying married women the same protection against sexual assault that unmarried women enjoy. ⁴By allowing husbands to engage in non-consensual sexual acts with their wives with legal impunity, this exception is seen as a violation of women's rights and bodily autonomy, as it essentially condones sexual violence within the confines of marriage.

The exception perpetuates traditional gender roles and power imbalances within marriage, where women are viewed as subordinate to their husbands and devoid of the right to withhold consent to sexual activity. The IPC, dating back to 1860, reflects the norms and values of the time it was written. Many argue that these exceptions do not align with contemporary principles of gender equality and justice. India is a signatory to international conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which obliges countries to address and prevent gender-based violence, including marital rape. The existence of this exception conflicts with these international obligations.

In conclusion, the exception within the Indian Penal Code is at the heart of the issue of marital rape in India. It provides husbands with legal immunity to engage in non-consensual sexual acts with their wives, as long as the wife is over the age of eighteen. This exception has been met with criticism and has spurred calls for reform, as it denies women within marriages the same legal protection from sexual assault that is provided to women outside of marriage.

III. THE ARGUMENTS AGAINST THE EXCEPTION

Several compelling arguments have been put forth against the marital rape exception in the Indian Penal Code (IPC). These arguments highlight the legal, ethical, and constitutional issues associated with the provision. Here are some of the key arguments against the exception:

1. Violation of Fundamental Rights:

- The most prominent argument against the exception is that it violates fundamental rights guaranteed by the Indian Constitution. Critics argue that it contravenes the right to equality (Article 14), the right to life with dignity (Article 21), the right to personhood, and the right to personal autonomy and sexual autonomy. These rights are essential components of an individual's constitutional protections and encompass the right to be free from sexual violence and abuse.

⁴ Rebecca M. Ryan, *The Sex Right: A Legal History of Marital Rape Exemption*, 20 *Law and Social Enquiry*, 944 (1995).

2. Unreasonable Classification:

The exception creates an arbitrary and unjust classification between married and unmarried women. It effectively strips married women of their right to give or withdraw consent to sexual activity, whereas unmarried women enjoy full legal protection against sexual assault. This differentiation is seen as a clear violation of the principle of equality before the law.

3. Consent is Not Irrevocable:

Courts have recognized that consent is not irrevocable, and it can be withdrawn at any point during or between sexual acts. This means that the idea of "consent in perpetuity," as implied by the marital rape exception, is legally flawed. Women should have the right to withdraw their consent to sexual activity, whether they are married or not.

4. Constitutional Challenge:

The historical origin of the provision, dating back to the IPC enacted in 1860, raises questions about its constitutionality. The Indian Constitution, which came into force in 1950, introduced significant changes in India's legal framework, including fundamental rights and principles of equality. The exception in the IPC may be incompatible with the spirit and values of the Indian Constitution, as it treats married women differently from unmarried women in matters of sexual violence.

5. Recommendations for Change:

In 2013, the J.S. Verma Committee was formed in the aftermath of the infamous Nirbhaya gang rape case to review and recommend changes to India's laws concerning sexual offenses.⁵ The committee recommended the removal of the marital rape exception, recognizing it as a significant impediment to women's safety and equality. However, despite these recommendations, legislative action to amend the law has not been taken.

In essence, these arguments against the marital rape exception in the IPC emphasize the need for legal reform to ensure that women, regardless of their marital status, are afforded equal protection from sexual violence. The exception has been widely criticized for being discriminatory, outdated, and incompatible with the principles of gender equality and constitutional rights, and it remains a central issue in the ongoing discussions surrounding marital rape in India.

⁵ Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law

IV. LEGAL DEVELOPMENTS ON CRIMINALIZATION OF MARITAL RAPE

1. Delhi High Court Split Verdict (May 2022)

In May 2022, the Delhi High Court delivered a significant split verdict on the issue of marital rape. Justice Rajiv Shukla, in his opinion, declared the marital rape exception in the Indian Penal Code (IPC) unconstitutional. He emphasized that the right to withdraw consent is fundamental to a woman's right to life and liberty. However, Justice Hari Shankar, in contrast, upheld the exception, arguing that it was based on a reasonable "intelligible differentia." This split decision highlighted the complexity of the issue and led to calls for further legal review and reform. It also served as a catalyst for renewed attention to the urgent need to address marital rape.

2. Karnataka High Court Ruling

In a separate case, the Karnataka High Court made a significant decision by refusing to quash charges of rape brought by a wife against her husband. This ruling challenged the validity of the marital rape exception by allowing the prosecution to proceed. The court's decision indicated a shift in judicial perspectives and suggested that the historical legal immunity granted to husbands in cases of marital rape might be reconsidered.

V. GOVERNMENT'S POSITION ON MARITAL RAPE & SEXUAL ASSAULT WITHIN MARRIAGE

The government has defended the marital rape exception, citing concerns about potential misuse of the law by wives and the preservation of the institution of marriage. It argues that there may be false allegations in marital disputes, and criminalizing marital rape may have unintended consequences. Despite defending the exception, the government has acknowledged the need for broader deliberations on the issue. It has pointed to the establishment of a committee by the Ministry of Home Affairs in 2019 to review criminal laws as a sign of its commitment to addressing the issue.⁶ This suggests that the government is open to discussing the matter and potentially considering changes.

The Delhi government has defended the law by suggesting that married women who may be subjected to rape by their husbands have other avenues for legal recourse, such as filing for divorce or a case of domestic violence. This viewpoint raises questions about whether these alternatives provide adequate protection and justice for victims of marital rape.

⁶ Standing Committee on Home Affairs, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45

In summary, the recent legal developments in India, including the Delhi High Court's split verdict and the Karnataka High Court's ruling, have brought the issue of marital rape to the forefront of legal discourse. The government's position remains complex, as it defends the exception while acknowledging the need for broader discussions. The debate over marital rape in India continues, with ongoing advocacy, legal challenges, and calls for reform.

VI. THE INTERNATIONAL CONTEXT

The international context surrounding marital rape is a crucial aspect to consider when discussing India's exception to this issue within its legal framework. As of 2019, marital rape has been criminalized in 150 countries around the world. This demonstrates a widespread recognition of the issue and the necessity to protect women's rights and autonomy within marriage. Marital rape is viewed within the international human rights framework as a human rights violation. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a central international instrument addressing the rights of women. CEDAW recognizes marital rape as a form of gender-based violence and a violation of women's human rights. Article 2 of CEDAW explicitly states that "violence against women shall be understood to encompass physical, sexual, and psychological violence occurring in the family, including marital rape."

The CEDAW Committee's General Recommendation 35 is a significant document in the context of addressing sexual violence, including marital rape.⁷ It urges states to characterize sexual assault, including marital and acquaintance or date rape, as a crime against the right to personal security and physical, sexual, and psychological integrity. The General Recommendation emphasizes the importance of freely-given consent and highlights the need for states to take effective measures to prevent, respond to, and provide redress for such acts. The global consensus against marital rape is a reflection of evolving societal norms and human rights standards. International organizations and human rights advocates have consistently pushed for the recognition of marital rape as a crime, highlighting the importance of women's autonomy, dignity, and security.

In the international context, India's exception to marital rape stands in contrast to the prevailing global trend. It places the country at odds with international norms and human rights standards, particularly those enshrined in CEDAW and its General Recommendation 35. This contrast underscores the urgent need for reform and aligning India's legal framework with international

⁷ UN Women, 2011-2012 Progress of the World's Women, 17, (2011) available at <http://www2.unwomen.org//media/field%20office%20eseasia/docs/publications/2011/progressoftheworldswomen-2011-en.pdf?v=1&d=20160810T092106>

standards to protect the rights and well-being of women within marriage. The global consensus against marital rape emphasizes the importance of recognizing and addressing this issue as a violation of human rights and a form of gender-based violence.

VII. THE DATA AND THE URGENCY

Data from the National Family Health Survey (NFHS), which is a comprehensive and nationally representative survey, reveals a disturbingly high prevalence of spousal violence in India. Spousal violence includes physical, emotional, and sexual violence perpetrated by a spouse, and it is often indicative of the broader problem of marital rape. According to the 2019-20 NFHS survey, one in three women aged 18-49 in India experiences spousal violence. This statistic alone illustrates the magnitude of the issue.

The NFHS data also highlights the occurrence of sexual violence within marriage. A notable percentage of women who experience spousal violence report instances of sexual violence. This data is significant because it underscores that marital rape is not an isolated problem but rather a part of the broader issue of spousal violence. The fact that women are subjected to sexual violence within their marriages further emphasizes the urgency of addressing this specific form of violence. It's important to note that these statistics likely underestimate the true extent of the problem. Marital rape is often underreported due to social stigma, fear of retaliation, and the absence of legal protections. Many victims remain silent, making it even more urgent to provide legal safeguards and encourage reporting.

Marital rape and spousal violence have severe consequences for women's physical and mental health. Victims may suffer from physical injuries, sexually transmitted infections, and long-term psychological trauma. Addressing marital rape is not only a matter of legal rights but also crucial for the overall well-being of women. Marital rape is a violation of human rights and a clear indicator of gender inequality within marriages. The urgency of addressing this issue is not only rooted in statistical data but also in principles of justice, equality, and the fundamental rights of women.

In conclusion, the data on marital rape and spousal violence in India reveals a disturbingly high prevalence of such incidents. The urgency of addressing this issue cannot be overstated. Legal reform to criminalize marital rape is essential to protect women from sexual violence within marriage and to bring India's legal framework in line with international human rights standards. The urgency also lies in acknowledging the physical, emotional, and psychological harm that women suffer and in dismantling the cultural norms and gender inequalities that perpetuate this form of violence.

VIII. CONCLUSION

The hearing by the Supreme Court of India on May 9, 2023, represents a watershed moment in the ongoing struggle to address marital rape. Criminalizing marital rape in India would signify a monumental step toward recognizing women's rights and autonomy within the institution of marriage. It is imperative to adopt a horizontal approach to constitutional rights, considering the hierarchical structures that persist in society, to ensure justice for survivors of marital rape.

As the legal landscape evolves, it is essential for lawmakers, the judiciary, and civil society to come together to address this pressing issue and provide women with the legal protection they deserve. Criminalizing marital rape is not only a legal imperative but also a moral and ethical one that aligns with the principles of equality and justice enshrined in the Indian Constitution. This ongoing legal battle reflects the broader struggle for gender equality and human rights in India, and the outcome will undoubtedly have a profound impact on the lives of countless women within the country.

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