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Marital Rape in India's Legal Landscape and Societal Realities

ANANYA GOSAIN¹ AND UJJWAL KUMAR SINGH²

ABSTRACT

In India, marriage is largely revered as a sacrosanct institution, albeit beneath this idealization and the glorification of marriage as a sacred bond lies the grim reality of marital rape and its victims who suffer in silence. Their agony is further aggravated by the legal exemptions under Section 63 of the Bhartiya Nyay Sanhita, 2023, which recently came into force and earlier under Section 375 of the Indian Penal Code, 1860. This paper endeavors to critically examine the legal, social, and human rights dimensions of marital rape in India. Despite recommendations by committees like the 172nd Law Commission Report and the Justice Verma Committee in 2012 to criminalize marital rape, India is yet to criminalize marital rape shielding husbands from prosecution based on exceptions formulated on archaic patriarchal values.

Further, this paper analyzes and examines the persisting laws on rape in consonance with the constitutional mandate of the country particularly rights enshrined under Part III of the Constitution of India. Further, the paper indefatigably examines innumerable arguments against criminalization, including concerns predominantly over false accusations and marital stability. The paper subsequently counters these arguments by emphasizing the prevalence of marital rape and the urgent need for legal protection. Drawing on global human rights standards and India's constitutional principles, the paper asserts that criminalizing marital rape is not only a legal imperative but also a moral obligation to ensure justice and dignity for all women.

In conclusion, the paper calls for legislative reform to align with international standards and uphold women's rights in India, thus advocating for facilitating equality, freedom, and bodily autonomy of married women. By criminalizing marital rape, India can mitigate the severe impact of sexual violence within marriages and affirm its commitment to gender equality and human rights.

Keywords: *Marital rape, Bhartiya Nyay Sanhita, Indian Penal Code, gender equality, human rights, constitutional challenges.*

¹ Author is a student at Law College Dehradun, Uttarakhand University, India.

² Author is an Assistant Professor at Law College Dehradun, Uttarakhand University, India.

I. INTRODUCTION

Marriage is largely revered as a sacred institution in Indian society, that is perceived as a sacred bond of mutual respect and trust. However, beneath this idealized construct lies the gruesome reality of countless married women who endure the agony of Marital rape. Section 63 of the Bharatiya Nyaya Sanhita, 2023 defines rape, while the same was earlier defined under Section 375 of the Indian Penal Code, 1860.

Exception 2 of Section 63 reiterates that a married woman above the age of eighteen years of age does not have a legal right to seek protection against rape committed by their husbands. While Section 375 of the Indian Penal Code reiterated that sexual intercourse between husband and wife whereby the wife is not below the age of fifteen years shall not be deemed as rape. These exceptions are rooted in archaic patriarchal values perpetuate a system where married women are akin to the property of their husbands, devoid of any autonomy over their bodies. As per the World Health Organisation, sexual violence can be defined as ‘Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person’s sexuality using coercion, by any person *regardless of their relationship to the victim*, in any setting, including but not limited to home and work’³.

Globally more than 100 countries have criminalized marital rape, however, India falls among the 36 nations that are yet to criminalize the same⁴, women in such countries bear the brunt of an abusive marriage in silence, their ordeals and plight are hidden behind the sacrosanct of marriage. As per the National Family Health Survey, 2019-20 in the state of Bihar alone 40.6% and 39.9% of ever-married women between 18- 49 years in urban and rural areas respectively have experienced spousal violence which includes physical and sexual violence. The Supreme Court of India in its judgment has stated that rape is the ‘gravest crime against human dignity.’⁵ Victims of marital rape are at a greater risk of being ravished and assaulted multiple times as the victim lives with the assailant, its repercussions are profound as it adversely affects the emotional, mental, and physical well-being of the victim.

The instant paper seeks to examine and delve into the dynamics surrounding marital rape in India by examining it through the lenses of law, society, and human rights. Through a meticulous analysis of legal provisions, case studies, and empirical data, this paper endeavors to contribute to the ongoing dialogue on safeguarding the rights of married women in India, challenging entrenched norms and advocating for the urgent need to reform legal frameworks

³ World report on violence and health (Heise & Garcia-Moreno, 2002; Jewkes, Sen & Garcia-Moreno, 2002),

⁴ <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>

⁵ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922

on protection of women to align with constitutional guarantees of equality, dignity, and personal liberty enshrined in Articles 21, 19, 15, and 14 of the Indian Constitution.

II. LEGAL FRAMEWORK CONCERNING MARITAL RAPE IN INDIA

The term "rape" finds its etymological roots in the Latin word "rapio," denoting forcible seizure, a defining feature of the offence of rape. Simply put, it refers to non-consensual sexual intercourse with a woman by using coercion, fear, or undue influence. In essence, rape constitutes a profound violation of a woman's physical and psychological integrity, extending beyond individual harm to constitute a societal affront. It profoundly impacts the victim's psychological well-being, causing severe emotional distress.

Legally, in India, rape is defined under Section 63 of the *Bhartiya Nyay Sanhita* and it was earlier defined under the Indian Penal Code (IPC) as sexual intercourse under various conditions, including against a woman's will, without consent due to coercion, misrepresentation, or when the woman is incapacitated mentally or due to intoxication. The IPC also considers sexual intercourse with a woman under eighteen years old as rape, regardless of consent.

The 42nd *Law Commission of India Report* was the first report on Marital Rape.⁶ It was recommended in the report that in cases of judicial separation, the exception clause of Section 375 of the IPC shall not apply as the consent for sexual intercourse cannot be implied when the husband and wife are not living together. This report underscored that the presumption of consent persists when the husband and wife cohabit within a shared household. It further made a distinction between rape and marital rape, deeming the latter as a less severe form of rape synonymous with sexual misdemeanor. This report however did not delve into discussing the validity of the exception. The 172nd *Law Commission Report* however scrutinized the validity of the exception reiterating that when all forms of violence at the hands of the husband towards his wife are criminalized then there is no reason for rape alone to be shielded from the operation of law.⁷

In 2012, a pivotal shift in discourse occurred when a committee chaired by Justice J.S. Verma recommended that marital rape be criminalized. This committee, responding to nationwide protests demanding more effective criminal law frameworks against severe sexual offenses targeting women post the Nirbhaya Case, published the *Report of the Committee on*

⁶ Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> (last visited on December 15, 2017).

⁷ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on February 6, 2016).

Amendments to Criminal Law' (commonly known as the J.S. Verma Report). This suggestion encompassed two primary facets: first, the removal of existing exemption clauses, and second, the explicit stipulation that marital or similar relationships could not serve as a defense nor as a mitigating factor in determining consent or sentencing. The report critically assessed the historical rationale behind marital rape exemptions, highlighting their foundation in archaic perceptions of women as property, obligated to irrevocably consent to spousal sexual demands. It underscored that such exemptions had been phased out in numerous jurisdictions, asserting that in contemporary notions of marital relationships based on equality, such provisions were untenable.

Subsequently, the Criminal Law Amendment Bill of 2012 sought to broaden the legal framework by substituting 'rape' with 'sexual assault', yet it did not criminalize marital rape, diverging from the recommendations outlined in the J.S. Verma Report. The Parliament's Standing Committee on Home Affairs, in its *167th Report*, reviewed this Amendment Bill and conducted public consultations. Despite suggestions during these consultations advocating for the deletion of the exception clause, the Standing Committee declined to adopt this proposal on two principal grounds: firstly, concerns that such amendments could destabilize the foundational family structure and potentially create societal tensions; secondly, a contention that adequate redressal mechanisms already existed, with the family system itself equipped to handle such matters, and the recourse available under criminal law through provisions such as Section 498A of the IPC, addressing cruelty within marital relationships.

Despite subsequent amendments in 2013 and 2019 enhancing punishment for rape, the marital rape exception persists under IPC Section 375, which excludes sexual acts by a husband with his wife above fifteen years old from the definition of rape.

Furthermore, societal perceptions and legal frameworks around consent have evolved, emphasizing the importance of unambiguous and voluntary agreement in sexual activity. Despite legal reforms and judicial interventions, challenges remain in addressing the complex issues of marital rape and protecting the rights of women, particularly those in vulnerable circumstances such as underage marriage.

III. CONSTITUTIONAL CHALLENGES TO EXCEPTION 2 OF SECTION 375 IPC

Article 13 of the Constitution of India reiterates that all laws inconsistent with and in derogation to the rights conferred under Part III of the Constitution shall be void to the extent of the

contravention.⁸ Part III confers the fundamental rights which are inalienable rights conferred to every citizen, particularly those under Articles 14, 15, 19, and 21, encompassing fundamental freedoms and protections including equality, non-discrimination, freedom, and personal liberty. The constitutionality of the said exception is subject to vehement scrutiny on several grounds which are discussed hereinbelow.

(A) Section 375 of IPC and the Right to Equality -

Article 14 prescribes to all persons equality before law and equal protection of laws while *Article 15* prohibits discrimination based on sex inter alia.⁹ IPC was formulated during the time of British colonial rule, Exception 2 of Section 375 finds its roots in the “Doctrine of Coverture” which is based on the principle that husband and wife are a single entity. According to this doctrine, in marriage the wife loses her property rights, giving the husband exclusive power with regard to property matters.

Exception 2 is violative of *Article 14* as it discriminates between two classes of women by denying equal protection against rape merely on grounds of their marital status, thus, failing to pass the test of reasonableness prescribed in the case *State of West Bengal v. Anwar Ali Sarkar*¹⁰ whereby the classification made lacks intelligible differentia and a reasonable nexus between the classification and the object sought to be achieved by the statute. This exception is therefore repugnant to the very crux of Section 375 whose sole objective is to protect women against rape. Non penalizing husbands for committing rape against their wives encourages sexual violence in matrimonial homes, it puts the husband in a position of power giving him control over the body of his wife against her will. This is a clear violation of Article 15. In a landmark judgment given by *Hon'ble Justice A. Muhamed Mustaque & Hon'ble Dr. Justice Kauser Edappagath*, it was stated that “the Right to respect for his or her physical and mental integrity encompasses bodily integrity, any disrespect or violation of bodily integrity is a violation of individual autonomy.”¹¹

(B) Section 375 of I.P.C and the Right to Freedom –

The exception is violative of Article 19(1) (a) as it disrobes a woman off of her right to freely voice whether or not she wants to indulge in sexual intercourse without the fear of the use of any force against her. Justice Deepak in *Independent Thought v. Union of India* held that “can a woman be deprived of her right to say yes or no to having sex with her husband, even though

⁸ The Constitution of India, 1950

⁹ Supra Note 5

¹⁰ *Budhan Choudhary v. State of Bihar and State of West Bengal v. Anwar Ali Sarkar*

¹¹ https://www.livelaw.in/pdf_upload/marital-rapewatermark-398094.pdf

she has consented to the marriage? In my view, there is only one answer to this and the answer must be a resounding NO.”

(C) Section 375 of IPC and the Right to Life and Personal Liberty –

Article 21 of the Indian Constitution states that “no person shall be denied of his life and personal liberty except according to the procedure established by law.” in *Maneka Gandhi v. Union of India* of India it was held that in India “due process of law” is also implicitly followed as the essence of the Part-III of the Constitution is the Natural Justice.¹² Speaking of rape, it is a crime against the basic postulates of human rights and is an unlawful intrusion into the right to privacy and sanctity of a female.¹³ This idea of ‘obvious consent’ is pronounced in the marital rape exemption and masquerades as the ‘savior of marriages’ in criminal law in India. Section 375 of the Code of 1860 does not respect the rights of women which are naturally owed to them and hence, does not follow the due process of law.

The sagacious legal scholar, *Alan Westin* considered Anonymity, Solitude, Reserve, and Intimacy as an intrinsic notion of Privacy. Therefore, to recognize an individual as an autonomous being is to let that individual choose when that person wants to draw a line in intimacy. In innumerable cases, the Supreme Court of India has observed that the right to make a choice concerning sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity are guaranteed under Article 21 of the Constitution.¹⁴

Reputation is one of the multt graces of human civilization that makes life worth living. The Supreme Court of India has affirmed that the right to the enjoyment of private reputation is of ancient origin and a necessity to human society and a good reputation is an element of personal security and is safeguarded by the constitution, equally with the right to enjoy life, liberty, and property. By considering a woman as a mannequin whose sole purpose is to carry on the lineage and satisfy lust, we just make her inferior and deprive her of her reputation.¹⁵

Justice K.S. Puttuswamy (Retd.) v. Union of India the Supreme Court held that privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. This ruling does not distinguish between the rights of married women and single women and there's no contrary ruling stating that the

¹² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

¹³ *The State of Karnataka v. Krishnappa*, 2000 CriLJ 1793 and *The Chairman, Railway Board v. Chandrima Das-nkanoon.org/docfragment/113663/?formInput=chandrima%20das*

¹⁴ *Suchita Srivastava v. Chandigarh Administration* - <https://indiankanoon.org/doc/1500783/>; *The State of Karnataka v. Krishnappa*, 2000 CriLJ 1793

¹⁵ *Smt. Kiran Bedi and Ors. v. Committee of Inquiry and Anr.*, 1989 AIR 714

entity's right to isolation is lost by sexual intercourse.

Article 1 of the UN Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights.”¹⁶ Even the Preamble of the Indian constitution emphasized securing the dignity of every individual of the Nation. In *Kharak Singh v. Uttar Pradesh*, the court held that: By the term ‘life’ used in Article-21, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an armored leg or the pulling out of an eye, inter alia.¹⁷

After the heinous tragedy of the Jyoti Singh gangrape in 2012, Justice Verma Committee was constituted to strengthen the anti-rape laws in the country and stringent marital rape law was one of the recommendations put forth by it. The Committee stated that: “The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.” Albeit the recommendation was not considered by the government, it depicts the need for the marital rape law.

Article 21 does not only guarantee a vegetative existence where a person is just breathing. Undisputedly, the trauma and the pain that goes along with sleeping next to your rapist cannot be empathized. As per the reports of the Mental Health Organization of America, the victims of rape are at a greater risk of having Depression, eating, and substance disorders.¹⁸

IV. EXAMINING THE ARGUMENTS AGAINST CRIMINALISATION OF MARITAL RAPE

(A) Criminalization of Marital rape and False or Fabricated Complaints –

The Central government's reactionary stand on the criminalization of marital rape was the same would “destabilize the institution of marriage” and could become an “easy tool to harass husbands.”¹⁹ India is a welfare state wherein the well-being of the citizens comes first. Women are soft targets for crimes such as rape, victims of rape within marriage cannot be denied protection simply on the assumption that someone might be at risk of being accused of a false case. The criminal justice system is based on the principle that one is innocent until proven guilty thus providing umpteen safeguards to the accused. In societies such as that in India where sex education is stigmatized and where egregious sexual offenses against women are taboo, coupled with significant economic dependence of women on their spouses, the likelihood of

¹⁶ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

¹⁷ *Kharak Singh vs The State Of U. P. & Others*, 1963 AIR 1295

¹⁸ <https://www.mhanational.org/sexual-assault-and-mental-health>

¹⁹ *RIT Foundation vs Union of India*- <https://indiankanoon.org/doc/61569137/>

fabricated allegations of marital rape remains low. Instances of such false claims are expected to be minimal compared to genuine cases that necessitate legal recourse and societal redressal. This aspect cannot be dismissed outright.

(B) Legislative attention to marital rape is not required as it is an uncommon offence

According to a study conducted by the Joint Women Programme, an NGO found that one out of seven married women had been raped by their husbands at least once. It was subsequently found that more women are raped by their husbands each year than by strangers, acquaintances, or other persons, and over a third of the women in our country are battered and are reported to be sexually assaulted by their husbands. It is in the absence of legislation on marital rape that victims suffer in silence.

(C) Legislation on marital rape would lead to the destruction of the institution of marriage

The 172nd Report on Law Commission refused to pay heed to the rising demands for laws against marital rape on the grounds that the exemption of section 2 of the IPC would cause unnecessary interference and instability in the marital institution.

The fundamental object of the law is to ensure that the most intrinsic and fundamental rights of an individual are not infringed. Matrimonial laws aim at protecting and holding together the institution of marriage however this cannot be done at the cost of protecting and preserving the bodily integrity of an individual. Thus, withholding justice and denying equal protection for merely preserving marriages can be detrimental to the well-being of a married woman. The law must not protect a raping husband under the guise of sacrosanct of matrimony.

V. CONCLUSION

In conclusion, the debate surrounding the criminalization of marital rape in India reflects broader societal attitudes towards gender equality, bodily autonomy, and human rights. Despite progressive strides in legislative frameworks aimed at safeguarding women from domestic violence, the exemption of marital rape perpetuates a regressive notion that a woman's autonomy would destabilize the institution of marriage. This legal loophole not only denies married women the fundamental right to bodily integrity and sexual self-determination but also perpetuates a culture of impunity for perpetrators of sexual violence within marital bonds.

The criminalization of marital rape necessitates a paradigm shift wherein the legislature acknowledges and respects a married woman's individuality, agency, and entitlement to equal protection under the law. Such legal reform aligns with constitutional guarantees of life, liberty,

dignity, privacy, and bodily integrity enshrined in Article 21, thereby reinforcing India's commitment to upholding human rights standards. Moreover, addressing this lacuna in the legal framework is crucial not only for the immediate protection of victims but also for mitigating the severe and multifaceted consequences of marital rape on women's physical, mental, and reproductive health.

While the road to legislative reform may be fraught with challenges, including cultural norms and entrenched patriarchal attitudes, the imperative to criminalize marital rape stands as a moral and legal imperative. It is a critical step towards fostering a society where all individuals, regardless of marital status, are afforded equal protection and dignity under the law. Ultimately, the criminalization of marital rape is not merely a legal reform but a societal commitment to justice, equality, and the inherent rights of every individual.
