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Should Marital Rape be Criminalized in India

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ABSTRACT

The criminalisation of marital rape in India is a critical issue that underscores the intersection of legal, moral, and societal norms. Despite advancements in addressing sexual violence, Section 375 of the Indian Penal Code exempts non-consensual sexual acts between married partners if the wife is over 18, reflecting patriarchal and colonial legacies that disregard women's autonomy. This article advocates for the criminalisation of marital rape, citing ethical, constitutional, and human rights considerations.

It highlights the violation of consent and bodily autonomy, the unequal protection of women under the law, and the severe psychological and physical harm caused by marital rape. The article underscores India's failure to fulfil its international commitments and the need to challenge patriarchal norms within marriage. Counterarguments, such as concerns over misuse of the law and threats to marital sanctity, are addressed and rebutted, emphasising the primacy of consent and individual rights over outdated traditions.

Criminalising marital rape would uphold the principles of equality and dignity, empower women, and align India with global human rights standards, fostering a more just and equitable society.

I. INTRODUCTION

The intricate intersection of legal, moral, and societal norms is at the centre of the Indian debate over the criminalisation of marital rape. The act of having sex without the spouse's consent, usually within the context of marriage, is referred to as marital rape in countries where the law is still out-of-date and discriminatory. India maintains a contentious provision under Section 375 of the Indian Penal Code (IPC)², which decriminalises non-consensual sex between married partners if the woman is older than 18 years old, despite considerable advancements in the country's criminal code regarding sexual violence. This antiquated clause originates from a patriarchal worldview that sees marriage as a contract in which women essentially give up their ability to freely consent.

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² National Crime Records Bureau (NCRB), *Crime in India Report 2021* - Statistics on sexual violence in India.

The subject of whether marital rape should be criminalised has evolved beyond a simple law reform debate to one of fundamental justice, autonomy, and protection from harm for all people. This article will make the case that marital rape should be made a crime in India. It will do this by citing ethical, legal, and human rights arguments to show how the current legal system falls short of protecting women's fundamental rights³. It will be clear from an analysis of constitutional protections, comparable international norms, and the negative effects of non-recognition that criminalising marital rape is essential for a society that is more just and equal.

II. HISTORICAL AND LEGAL CONTEXT OF MARITAL RAPE IN INDIA

(A) The Existing Legal Framework

Section 64 of the Indian Penal Code⁴, which deals with sexual offences, is governed by the Bharaitya Nyaya Sanhita (BNS). Non-consensual sexual contact is defined as a crime in the definition of rape, although there is a notable exception to this rule: "Sexual intercourse by a man with his wife, if she is over 18 years of age, is not rape⁵." This exception, which results from the long-held notion that marriage automatically grants consent to sexual contact, legally legitimises rape during marriage. As a result, if a wife is older than 18, her husband cannot be charged with rape.

The historical settings that saw marriage as an irreversible contract and women as their husbands' property are strongly ingrained in this legal exemption. The exclusion essentially creates a discriminatory divide between married and single women's rights by depriving married women of their ability to legally reject sexual approaches from their spouses. This leads to a risky legal loophole where a husband is exempt from punishment for coerced sexual behaviour, even when it may cause his wife physical or psychological distress.

(B) Colonial Legacy and Societal Norms

Indian law's exception to marital rape dates back to the British colonial era⁶, when the subcontinent was forced to adopt Victorian legal norms. The notion of a husband having "conjugal rights" over his wife was widely recognised under British common law, and several nations under colonial administration, notably India, formalised the exception against marital rape. This era gave rise to the idea that a wife is her husband's property and has no control over her own body. Indian law continues to uphold these antiquated restrictions, despite the eventual

³ United Nations Office on Drugs and Crime (UNODC), *Global Study on Violence Against Women*, 2018.

⁴ Government of India, *Bharaitya Nyaya Sanhita (BNS) Bill, 2023* - Proposed revisions and their implications.

⁵ Indian Penal Code, 1860, Section 375 - Explanation on the marital rape exception.

⁶ John Stuart Mill, *The Subjection of Women* (1869) - Discussion on the historical roots of gender inequality.

abolition of marital rape exemptions in nations such as the UK. This indicates the ongoing impact of colonial laws on India's legal framework.

But the upholding of these regulations is not just a legacy of colonial⁷ control; Indian society as a whole is profoundly ingrained with patriarchal attitudes. In India, marriage is customarily regarded as a sacrament that validates a husband's dominance over his spouse, encompassing their sexual interactions. The legal continuation of this patriarchal system, which contributes to pervasive violence against and control over women in the private realm of marriage, is made possible by the exception for marital rape.

(C) Judicial and Legislative Responses

The Indian judiciary has been sluggish to confront the problem of marital rape, frequently blaming the delay on the need to uphold the integrity of marriage. The Supreme Court of India made a progressive decision in cases such as *Independent Thought v. Union of India* (2017)⁸, wherein it raised the age of consent within marriage to 18 and criminalised having sex with a wife who is younger than that. Nevertheless, adult women who experience sexual abuse⁹ in marriage are not covered by this rule. The IPC's current exemption was upheld by the court, which refrained from addressing the more general issue of marital rape.

On the legislative level, there is still no political will to change the marital¹⁰ rape statute in spite of numerous public debates and demands from civil society. Critics of criminalisation sometimes claim that because of their worries about false allegations and the upheaval of conventional family structures, Indian culture is not ready for such a transformation. However, this resistance just helps to further marginalise women by preventing them from receiving the same legal protections as single women who experience sexual assault.

III. THE CASE FOR CRIMINALISING MARITAL RAPE

1. Violation of Consent and Bodily Autonomy

The idea of permission is one of the main justifications for making marital rape a crime.¹¹ In any sexual connection, consent is an unalienable right; marriage ought not to be any different. Legally and morally, marriage does not automatically grant eternal consent. Regardless of their

⁷ Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (2022) - Analysis of the colonial influence on Indian legal norms.

⁸ *Independent Thought v. Union of India*, (2017) 10 SCC 800 - Supreme Court judgment on marital rape involving minors.

⁹ Justice Verma Committee Report, 2013 - Recommendations for legal reforms in sexual violence cases.

¹⁰ Parliamentary Debates, India, *Lok Sabha Discussions on Marital Rape* (2022) - Insights into legislative reluctance.

¹¹ *R v. R* (1991) 4 All ER 481 (UK House of Lords) - Landmark case that criminalised marital rape in the UK.

marital status, women have an intrinsic right to be in charge of what happens to their bodies. Due to the exclusion of marital rape from the current legal framework, women are denied this right, creating a risky precedent that allows one partner to violate the autonomy of the other without facing repercussions.

By definition, consent needs to be passionate, freely offered, and rescindable at any moment. The idea that a wife is her husband's property and that her permission is not legally significant is reinforced by the failure to make marital rape a crime. Making marital rape a crime would uphold the idea that a woman's rights¹² over her body are unaffected by marriage. Additionally, it would bring Indian law into compliance with the international definition of human rights, which acknowledges that everyone has the right to autonomy and dignity.

2. Equal Protection Under the Law

The Indian Constitution forbids discrimination on the basis of gender under Articles 14 and 15¹³, which guarantee equality before the law. But by denying married women the same legal protections as single women, the marital rape exception really discriminates against them. The legal system distinguishes between two groups of women: married women, whose autonomy is denied, and single women, whose right to reject sexual approaches is recognised. In addition to being unlawful, this distinction upholds structural inequalities that exist between men and women in married partnerships.

In addition, courts have construed Article 21 of the Constitution, which guarantees the right to life and personal liberty, to encompass the right to a dignified existence. A woman's dignity is fundamentally violated by marital rape since it turns her into a sexual object in her marriage. Making marital rape a crime would protect these constitutional rights by guaranteeing women's equality as citizens in all spheres of life, including their marriages¹⁴.

3. Psychological and Physical Harm

Victims of marital rape suffer from serious physical and psychological damage. Sexual assault during marriage can have physical repercussions such as wounds, persistent agony, STDs, and unintended pregnancies. Psychological trauma, such as sadness, anxiety, PTSD¹⁵, and feelings of shame, is frequently experienced by victims as well. Marital rape, in contrast to other types of rape, is ongoing victimization inside a partnership that is meant to be built on respect, trust,

¹² United Nations General Assembly, Declaration on the Elimination of Violence Against Women (1993).

¹³ Constitution of India, Articles 14, 15, and 21 - Guarantees of equality, non-discrimination, and personal liberty.

¹⁴ National Human Rights Commission (NHRC), India, *Annual Report 2022-23*.

¹⁵ World Health Organization (WHO), *Sexual Violence Against Women: Impact and Interventions* (2021).

and love. Because she is frequently compelled to live with and contact with her abuser, this exacerbates the trauma.

In addition to denying victims of marital rape any legal remedy, the current legal system adds to their misery by normalising the violence. Marital rape¹⁶ victims frequently have no choice but to put up with the abuse in secret since they are aware that the law does not acknowledge their pain. Making marital rape a crime would give these women a crucial path to justice and help them leave violent relationships. Additionally, it would make it very evident that sexual assault of any kind is not acceptable, regardless of the victim's relationship to the perpetrator.

4. International Human Rights Commitments

India has ratified a number of international agreements and treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), that promote the preservation of women's rights. States must act under CEDAW¹⁷ to end discrimination against women in marriage and other spheres of life. International law recognises marital rape as a type of gender-based violence, and numerous nations have passed legislation making it a crime. India fails to meet its duties under these international frameworks by keeping marital rape out of the law.

Many nations have made progressive moves to make marital rape a crime on a global scale¹⁸. Countries including the United States, Canada, South Africa, and the United Kingdom have all acknowledged that rape is rape, regardless of whether the perpetrator is a spouse or not. The international consensus that sexual abuse within marriage is just as damaging and intolerable as it is outside of marriage is reflected in these legal developments. In addition to breaking its international obligations, India's refusal to make marital rape a crime excludes it from international human rights norms.

5. Empowering Women and Challenging Patriarchy

The inability to criminalise marital rape fosters the patriarchal assumption that males have the right to control women's bodies within marriage. This legal exception serves to support the notion that a husband has control over his wife's body and sexuality during marriage¹⁹, elevating her to a subservient position. Making marital rape a crime would emphasise that women have

¹⁶ Shruti Gohil, *The Hidden Cost of Marital Rape: A Study of Indian Women* (2022).

¹⁷ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 1979.

¹⁸ UN Women, *Progress of the World's Women 2019-2020: Families in a Changing World*.

¹⁹ UN Women, *Progress of the World's Women 2019-2020: Families in a Changing World*.

equal rights in marriage, including the ability to refuse sex, thus challenging these deeply rooted patriarchal practices.

Recognising marital rape as a criminal offence will also enable women to fight for their rights in marriage. As they feel they have no legal options, many women in violent relationships suffer sexual abuse²⁰. Making marital rape a crime would provide these women the support and legal protections they need to leave violent relationships and pursue justice. Additionally, it would support a larger cultural movement that views women as equal partners in marriage as opposed to objects of dominance and subordination.

IV. COUNTERARGUMENTS AND REBUTTALS

1. Misuse of the Law

One prominent argument against making marital rape a crime is the possibility of legal abuse. Critics contend that wives could fabricate rape allegations against their husbands in order to obtain advantage in divorce cases or as a personal grudge²¹. This argument, however, is biased and unjustified because it is predicated on the assumption that women are likely to utilise the law unfairly. Any legislation has the potential to be abused, but it shouldn't be an excuse for denying true victims of justice.

By implementing appropriate legal safeguards, such as extensive investigations and the necessity of proof, false accusations can be lessened. Furthermore, false charges in other legal contexts—such as dowry harassment²² under Section 498A of the IPC—are already handled by the criminal justice system. The law should recognise marital rape as a serious crime and provide measures to prevent false allegations, just as these laws are still in place despite the possibility of misuse.

2. Threat to the Sanctity of Marriage

Another argument against making marital rape a crime is that it would jeopardise the institution of marriage. Some who oppose the recognition of rape in marriage argue that it could cause a rise in divorce rates and upend the established family unit. This argument, meantime, is predicated on the false premise that maintaining a marriage²³ is more significant than each partner's rights and well-being. A union based on force and violence is not one that should be maintained.

²⁰ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (1999).

²¹ Indian Ministry of Home Affairs, *Report on Misuse of Dowry and Domestic Violence Laws* (2019).

²² Justice Malimath Committee Report, 2003 - Recommendations on addressing false allegations.

²³ Poonam Kataria, *Marriage and Consent: A Feminist Legal Perspective* (2020).

Sexual abuse should never be excused by the concept of "sanctity." Making marital rape a crime would not undermine the institution of marriage; on the contrary, it would make it stronger by guaranteeing that marriages are founded on equality, respect, and consent. Healthy marriages are not based on coerced sexual submission, but rather on communication and trust. Legalising marital rape would contribute to the advancement of a fair and equitable definition of marriage²⁴, in which each partner has an equal voice in the union.

V. CONCLUSION

One of the most important steps toward guaranteeing gender equality, defending women's rights, and respecting both international and constitutional human rights norms is the criminalisation of marital rape in India. The current legal system upholds a patriarchal system that devalues women's autonomy and dignity by exempting marital rape. Countless women suffer in silence while the law fails to recognise marital rape²⁵ as a crime, sending the message that sexual abuse is acceptable inside the marriage.

Making marital rape a crime would confirm that consent is essential to all sexual interactions, including those that take place within marriage. Married women would have legal protection, be given the ability to stand up for their rights, and be part of a larger cultural movement toward gender equality²⁶. The moment has come for India to let go of antiquated ideas of male entitlement in marriage and acknowledge that, whether or not a woman is married, her body belongs to her. Legalising marital rape would be a big step toward creating a society that is more equitable, just, and compassionate in India.

²⁴ Amartya Sen, *Development as Freedom* (1999) - Links between autonomy, freedom, and societal progress.

²⁵ National Family Health Survey (NFHS-5) Report (2019-21) - Data on domestic and sexual violence in Indian households.

²⁶ Justice Chandrachud, Speech at *Constitutional Ideals and Gender Justice* Conference, 2023 - Perspectives on evolving marital norms in India.