

MARITAL RAPE: CROSS JURISDICTIONAL ANALYSIS AND NEED FOR REFORM

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INTRODUCTION

Marital rape is not defined in any statute/ laws. It is to be noted that while "Rape" is defined under Section 375 of the Indian Penal Code, there is no definition of 'Marital Rape' till now and there is no reorganization of marital rape under the ambit of Indian Law¹.

In India, marital rape exists *de facto* but not *de jure*. While in other countries, either the legislature has criminalized marital rape, or the judiciary has played an active role in recognizing it as an offence, in India, however, the judiciary seems to be operating at cross-purposes.

LEGAL PROVISIONS

The Indian Penal Code

Section 375, the provision for rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape."

Section 376 of the IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life, or for a term extending up to 10 years, and shall also be liable for a fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with a fine or with both.

¹ <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

Issues

Section 375 of the Indian Penal Code, 1860 (IPC) criminalizes rape. However, Exception 2 exempts a man who rapes his wife if she is not under fifteen years of age. This colonial-era provision stands in stark contrast with other provisions of the IPC, as well as several progressive laws that have followed since. For instance, Section 354 of the IPC prohibits sexual offences such as molestation, even if committed by a husband against his wife who is between the ages of fifteen and eighteen. The Protection of Children from Sexual Offences Act, 2012 (POCSO) criminalizes sexual intercourse with any child (defined as a person below the age of eighteen years) and carves out no exception with respect to marriage. This contrast is in effect a legal anomaly, since Section 42A of POCSO provides that in case of any inconsistency, the provisions of POCSO will have overriding effect².

ISSUES AND CHALLENGES

In Independent Thought v. Union of India, the Court specifically explained that marriage is personal and nothing short of the Indian State criminalizing marriage itself can destroy the institution of marriage. It said, if divorce and judicial separation have not destroyed the institution of marriage, criminalizing marital rape certainly cannot either.

Interestingly, the High Court of Gujarat also recently ruled that the non-consensual act of marital rape violates the trust and confidence within a marriage and that marital rape is what has damaged the institution of marriage.

- Implied Consent
- Misuse of Law
- Age
- *Partial Victory*

While Exception 2 was challenged in its entirety in the main petition, the scope of the issue was subsequently limited to girl children aged between fifteen and eighteen years. Therefore, the Court only sought to answer whether sexual intercourse between a man and his wife, aged between fifteen and eighteen years of age, is rape

Answering this question in the affirmative, the Court's decision hinged on two crucial reasons. First, Exception 2, to the extent that it applies to children, defies the spirit of several enactments that

² Ayushi Agarwal, "The Supreme Court of India Reads down the Marital Rape Exception: A Partial Victory for Women's Rights Advocates" (OxHRH Blog, 12 December) <<http://ohrh.law.ox.ac.uk/the-supreme-court-of-india-reads-down-the-marital-rape-exception-a-partial-victory-for-womens-rights-advocates>> [Date of Access]

either prohibit or create impediments to child marriage by legitimizing this regressive practice and thereby also signifying the State's acquiescence to it. Second, it creates an unnecessary, artificial and arbitrary distinction between married and unmarried girl children, since members of neither class can consent in law, yet husbands who have forcible sexual intercourse with their wives belonging to the former class cannot be penalized. This, the Court held, was an unreasonable classification under Article 14 (right to equality) of India's Constitution, as it had no rational nexus with any clear objective sought to be achieved. Thus, the Court read down Exception 2 to Section 375, holding that it violated Article 14 (right to equality), 15 (non-discrimination) and 21 (right to life) of the Indian Constitution. As a result, a man who rapes his wife is now exempt only if she is not below eighteen years of age.

Constitutionality of Marital Rape

In the leading case of *Independent Thoughts v. UOI*, the apex court has ruled on the matter of marital rape of girls between the age group of fifteen to eighteen years. However, the broader issue of marital rape of adult women has been categorically excluded.

The case was filed as a Public Interest Litigation by the non-governmental organization, Independent Thought, to protect child brides from marital rape. Exception 2 under Section 375 of the Indian Penal Code provides an exemption from rape for men having sexual intercourse with their wives under the age of fifteen. In *Independent Thought*, Supreme Court Justices Madan B. Lokur and Deepak Gupta rationalized that the Indian Penal Code, Section 375, Exception 2 should not apply to child brides between the ages of fifteen and seventeen. The Court held that Exception 2 creates an arbitrary and discriminatory³ distinction between a married girl child and an unmarried girl child. The Supreme Court offered well-supported and rational arguments to defend its decision to change the exception from "under fifteen years of age" to "under eighteen years of age."

The Court stipulated that the distinction between the married girl child and the unmarried girl child is contrary to the spirit of the Constitution of India ("the Constitution"), specifically Article 15(3) and Article 21. The concurring judgment also pointed out the equal protection clause under Article 14 of the Constitution. Similarly, the Court identifies that the Constitution and the Protection of Human Rights Act, 1993, guarantee liberty and dignity as protected rights, and to allow a man to engage in forced sexual intercourse with his child bride would be a violation of these rights. 39 The Supreme Court also recognized

³ *Independent Thought v. Union of India*, (2017) 382 SCC (India)

the importance of a woman's autonomy over her own body, her right to bodily integrity, and her right to privacy⁴.

International Law Obligations

India is a state party and has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Article 1 of CEDAW defines discrimination against women as “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status*”. Exception 2 of Section 375 of the IPC, which reads “*sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape*”, permits violence against women on the basis of their marital status, and is therefore inconsistent with Article 1. Gendered violence is itself discrimination, prohibited by Article 1. Although the Declaration on the Elimination of Violence Against Women does not have the binding legal authority of a convention or treaty, it is universal in coverage and a strong statement of principle to the international community. Article 2 (a) of the DEVAW categorically encompasses marital rape as violence against women.

Further, state parties to CEDAW are obligated to exercise due diligence to combat violence against women. This obligation is set out in general recommendation (GR) 19 of CEDAW, which interprets the Convention as requiring that state parties implement effective legal measures, *including penal sanctions*, civil remedies, and compensatory provisions, to protect women against all kinds of violence. Building on GR 19, the General Legislative Measures provided in Paragraph 33 of GR 35 require states to “ensure that the definition of sexual crimes, including marital and acquaintance/date rape, is based on lack of freely given consent, and takes account of coercive circumstances”. State failures to criminalize marital rape represent an encouragement or de facto permission for this crime, and fall foul of the due diligence obligation.



Rejection of repeal of Exception 2 by the Law Commission

It is pertinent to mention that the Law Commission of India in its 172nd report rejected a suggestion that Exception 2 be repealed.⁵ In its response, the commission defended the provision and said, “We are not satisfied that this exception should be recommended to be deleted since that may amount to

⁴ Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 42 Fordham Int'l L.J. 1519 (2019).

⁵ <http://www.lawcommissionofindia.nic.in/rapelaws.htm#chapter7>

excessive interference with the marital relationship.” The Criminal Law Amendment Act 2013 failed to amend the law to recognize marital rape as rape⁶.

The Criminal Law Amendment Act 2013 failed to amend the law to recognize marital rape as rape. Although the Supreme Court of India recently held that sexual intercourse with a *minor wife* amounts to rape, it has left open the question of the constitutionality of Exception 2. While it is difficult to gather official statistics on incidents of marital rape, the number of women sexually assaulted by their husbands is 40 times the number of women who suffer such violence from others. India is obliged to criminalize marital rape, not only because of the pressing social evil which it represents, but also because it is bound to do so by international human rights law, and the right to privacy contained in the Indian Constitution.

COMPARATIVE ANALYSIS

It was not until the last half of the twentieth century that marital rape was even recognized as a legal problem. Prior to that time, most believed that it was impossible for a husband to rape his wife⁷. This was justified under three separate theories: the implied consent theory, the unities of person theory, and the property theory⁸.

United Kingdom

The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice of England, during the 1600s. He wrote, “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind to the husband, whom she cannot retract⁹.”

The Hale dicta faced ambivalent opinions from the UK courts, whenever it was brought into question. However, in the landmark judgement of *R v. R*¹⁰, the House of Lords removed the exception of marital rape from the Common law and held: 8 Marriage is in modern times, regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale’s proposition involves that by marriage, a wife gives her irrevocable consent to sexual intercourse with her husband under all

⁶ Surya Rajkumar, “International Law, Right to Privacy and Marital Rape in India” (OxHRH Blog, 26 February 2017) <<http://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india>> 6 Aug 2020

⁷ Melisa J. Anderson, Note, Lawful Wife, Unlawful Sex-Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland, 27 GA. J. INT’L & COMP. L. 139, 139 (1998).

⁸ Sonya A. Adamo, Note, The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries, 4 AM. U. J. INT’L L. & POL’Y 555, 557-60 (1989).

⁹ Priyanka Rath, Marital Rape and the Indian Legal Scenario, Indian Law Journal, https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html < accessed on 6 Aug 20>.

¹⁰ (1992) 94 Cr App R 216.

circumstances and irrespective of her state of health or how she happens to be feeling at the time. In modern times, any reasonable person must regard that exception as quite unacceptable¹¹.

Australia and New Zealand

South Australia became the first jurisdiction in the common law world to scratch the exception of marital rape in the year 1976. In 2012, the High Court of Australia reaffirmed the said abolition. It was followed by Canada in 1983 and by New Zealand in 1985.

The United States of America

The United States courts were less critical of Hale's dictum and it was only in the 1984 New York Courts of Appeal judgement in *People v. Liberta*, that the marital rape exception was held to be unconstitutional and the assumption of continuous consent was rejected. By the end of the 20th century, all states had eliminated the marital rape exemption. However, the criminal justice system continued to address spousal rape differently than non-spousal rape.

In the United States, there exist two types of laws, i.e., National Laws and State laws. There is no national law on rape, so each state has its own law concerning it. The offence of rape has been defined in the Uniform Code of Military Justice under Chapter 47X, Section 920, Article 120, and under this provision, marital rape is banned. That is, it cannot be used as a defense by the accused. The position of state laws is that, in all 50 states of America, marital rape is illegal. Initially, there existed the "Marital Rape Exemption", which allowed a person to rape a spouse without fear of facing any legal consequences. South Dakota was the first state to drop this exemption and North Carolina was the last one¹².

South Asia

It may be noted that, within South Asia, Nepal and Bhutan are the only two countries to criminalize marital rape.

¹¹ Shreya, Marital Rape in India : The effect of Independent Thought v. Union of India, ILI, <http://ili.ac.in/pdf/shreya.pdf>.

¹²Comparative Analysis of Position of Law on Marital Rape in India & USA By: Nishita Kapoor

<https://www.latestlaws.com/articles/comparative-analysis-of-position-of-law-on-marital-rape-in-india-usa-by-nishita-kapoor/>

Global Trends

According to the UN Women Report of 2011, only 52 countries out of 179 countries have made marital rape a criminal offense and concluded that more than 2.6 billion women live in countries where it has not been explicitly criminalized.¹³ As of today, 70 countries across the world have criminalized marital rape.

Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation, and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and, hence, condone such behaviour¹³.

UN urges India to end Marital Rape

According to the United Nations, the home is one of the most dangerous locations for women. In the prologue, Phumzile Mlambo-Ngcuka, executive director of UN Women, said, "We have witnessed considerable progress on removing discrimination against women in legislation, but it is no accident that family laws have been the slowest to change."

Many countries do not collect data on marital rape, despite the fact that it is not a crime and is rarely reported or discussed due to social constraints. Marital rape is a particularly sensitive family law issue in Muslim nations, according to Egyptian women's rights campaigner Marwa Sharafeldin, who spoke at the report's unveiling at the United Nations.

Need for Change in Law

The following reasons justify an imminent need for change in the regulatory regime.

Contravention of Other Laws

- Under the national laws of India, a husband can be held accountable for voluntarily causing hurt, voluntarily causing hurt by dangerous weapons or means, voluntarily causing grievous hurt, assault with the intention of outraging her modesty, sexual harassment, assault with the intent to disrobe, voyeurism, and stalking. If all these acts are criminal in the marital context, it is contradictory to purport that criminalizing marital rape is not feasible in India¹⁴.
- Maintaining the spousal exception is in contravention of the Protection of Human Rights Act of 1993. The Act defines human rights to include the right to life, liberty, equality, and dignity.

¹³ Priyanka Rath, Marital Rape and the Indian Legal Scenario, Indian Law Journal, https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html < accessed on 6 Aug 20>.

¹³ (1992) 94 Cr App R 216

¹⁴ Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 42 Fordham Int'l L.J. 1519 (2019).

- A similar argument can be made regarding the Protection of Women from Domestic Violence Act, 2005. Allowing the marital rape exception to stand even when it is shown to harm and injure women physically and emotionally directly violates the rights protected under the Domestic Violence Act.

Violation of Constitutional protections

- Article 14 of the Constitution of India is an equal protection clause that guarantees equality before the law and prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. Furthermore, the test under Article 14 is one of reasonable classification made with the object of achieving a certain end. As such, legislation that is based on an unreasonable and discriminatory classification should be struck down under Article 14 of the Constitution. The marital rape exception, which is now applicable to married women eighteen years of age and older, can be seen as arbitrary and discriminatory as it provides for an unsupported distinction between married and unmarried women even though both may be subject to the exact same maltreatment.
- Article 15(3) allows the State to make special provisions for women and children. 10 1
- Article 21 of the Constitution establishes protection of life and personal liberty. 0 The Court affirmed that the right to life protected under Article 21 preserves the right to life with human dignity. The Supreme Court of India has additionally affirmed that rape infringes on the right to live life with dignity.

Issues with DVA, 2005

The much, awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies for what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things, in the definition of domestic violence, includes any act causing harm, injury, anything endangering health, life, etc., ... mental, physical, or sexual.

It condones sexual abuse in a domestic relationship, marriage or a live-in only if it is life-threatening or grievously hurtful. It is not about the freedom of decision of a woman's wants. It is about the fundamental design of the marital institution that, despite being married, she retains individual status, where she doesn't need to concede to every physical overture even though it is only her husband. Honour and dignity remains with an individual, irrespective of marital status¹⁵.

¹⁵ Priyanka Rath, Marital Rape and the Indian Legal Scenario, Indian Law Journal, https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html < accessed on 6 Aug 20>.

¹⁵ (1992) 94 Cr App R 216.

International Law Obligations

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")¹⁶. India is also a signatory to the Universal Declaration of Human Rights ("UDHR").

The obligation under Article 2 of CEDAW specifies that the state is required to take all appropriate measures to eliminate discrimination against women, not only on behalf of the Government, but also to eliminate discrimination perpetrated by any person or organization¹⁷. Under the international obligations regarding the prevention of violence against women, states are required to prevent, investigate, prosecute, and compensate with due diligence¹⁸.

Specific guarantees for the right to life can be found in the ICCPR¹³⁵ and the UDHR. ¹³⁶ Violence against women in the context of intimate partner violence has been recognized as a leading cause of death around the globe¹⁹.

Right to Privacy

On the 24th of August 2017, the Indian Supreme Court in the case of *Justice K.S. Puttaswamy and Anr. v. Union of India and Ors.* declared the right to privacy to be a fundamental right. This decision has far reaching consequences for a slew of laws, including those that criminalize homosexuality and legalize marital rape. It is submitted that the doctrine of marital exemption from rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her wishes. Thus, keeping in view the obligations imposed on India by CEDAW and the gradual change in the interpretation of civil liberties as enshrined in the Constitution of India, it is high time that India criminalized marital rape. Whether this happens through a judicial pronouncement or an act of parliament is left for time to tell.

¹⁶ Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, in NAT'L HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION 22-25 (2012), available at [http://nhrc.nic.in/sites/default/files/AHandbook on International HR Conventions.pdf](http://nhrc.nic.in/sites/default/files/AHandbook%20on%20International%20HR%20Conventions.pdf) [<https://perma.cc/A4VW-ZXQU>] [hereinafter A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS]

¹⁷ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/29/27, art. 22. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2 [hereinafter CEDAW].

¹⁸ CEDAW General Recommendation No. 19 (14th session, 1992), art. 24(b).

¹⁹ Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 42 Fordham Int'l L.J. 1519 (2019).

CONCLUSION

Changes in the notion of equality and widespread feminist movements have led to the realization that rape is still rape, whether or not the parties are married. One by one, countries have begun correcting the injustice of marital immunity, subjecting husbands to the same standards as unmarried men. In the majority of countries, judiciaries were responsible for the change, but in some countries, the legislature took the lead. India must take a cue from the world at large and amend this discriminatory and archaic provision.

In India, marital rape is not entirely criminalised. It is unquestionably a significant kind of violence against women that requires the attention of the authorities. Women who have been raped by their spouses are more likely to be subjected to multiple attacks and to experience long-term physical and emotional issues. Marital rape is considerably more distressing for a woman in this situation since she has to live with her abuser every day. Because the effects of marital rape are so severe, criminalizing the crime of marital rape is definitely necessary. In India, positive legal reform for women is taking place, but more efforts are needed to ensure that both legal and social change take place.

