

## MARITAL RAPE: A LEGALISED OFFENCE

Dristi Baranwal

Narsee Monjee Institute of Management Studies, Bengaluru, email:  
baranwaldristi@gmail.com

### Abstract

*Marital rape in India is considered as an exception under section 375 of the Indian Penal Code. On the contrary, this section considers rape as a crime. Since, our society considers women as a property of their husbands' and this has always been the notion of the patriarchal culture. The division of labour in patriarchal family represents that wife are not given much importance since they are not the bread winner of the family. In turn, this permits men to exercise power on their wives. However, the action of the husbands is not the result of the power but an imbalance in power. Nonetheless, women in the era of digital age are more than capable to give consent, be aware of the implications of their actions, can reason well, and are self-dependent. This study examines the reasons as to why the marital rape must be considered a grave criminal offence. and why there is need for revision in the current laws. An effort has been put to explain the legislative systems and the initiatives taken by the Courts and the MPs to change the current law.*

**Keywords:** Marital rape, Fundamental rights, Equality, Consent, Marriage.

### Introduction

In the eighteenth century, Justice Hale asserted: "Husband cannot be guilty of rape committed by himself upon his lawful wife."<sup>1</sup> Apparently, he was suggesting, the consent of the wife for carnal relationship is surmised to be given. The belief of Justice Hale did not represent merely his perspective but also from the way the eighteenth-century society was perceived. Since, at that time women were supposed to be subservient to their husbands.

Moreover, the description of rape given in Black Law's Dictionary represents the view of Justice Hale. The dictionary interpret rape as "unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will."<sup>2</sup> If we dissect this explanation into two parts then the former part expounds when a man actively engages in a sexual relation which he and his wife share in absence of her consent will amount to rape. However, the latter part does not consider non- consensual sexual relationship with wife as rape. Even the laws in

---

<sup>1</sup> 1 Matthew Hale, The History of the Pleas of the Crown (Payne 1800).

<sup>2</sup> Bryan A. Garner, Black's Law Dictionary 1374 (West 2009).

India concurs with the belief held in eighteenth century. As stated in section 375 of the Indian Penal Code (IPC), rape is “sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation, or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case, if she is under 18 years of age.”<sup>3</sup> The section covers every aspect as to what constitutes rape. However, it does not mention anything describes a husband and wife engaging in non- consensual sexual activity.

According to the explanation provided in section 375 of the IPC<sup>4</sup>, “Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.”<sup>5</sup> The word consent is not merely word, it empowers individuals to elect those things which they want. However, in the explanation of the aforementioned section nowhere is specified that the consent of married woman is immaterial. Although, the notion of presumed consent is unnatural since the legal ramifications of marriage do not represent the product of mutual agreements reached between the parties.<sup>6</sup> According to the second exception of section 375 — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.<sup>7</sup> On analysing the second exception we can infer that where the wife is below 15 years, rape occurs when a husband forces his wife to participate in sexual behaviour against her will. However, in the event when she is older than 15, her consent would be irrelevant.

### **Genesis of Law Not Considering Marital Rape as an Offence**

Later, in the eighteenth century the Commentaries on Laws of England by Blackstone were in the same vein of the comments made by Justice Hale. According to Blackstone: “by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything.”<sup>8</sup> With this statement, Blackstone wanted to convey to the society that husband and wife are treated as an

---

<sup>3</sup> The Indian Penal Code, 1860, § 375, No. 45, Acts of Imperial Legislative Council, 1860 (India).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Rape within Marriage, 40 (London: HMSO 1990), <https://www.lawcom.gov.uk/app/uploads/2015/06/cp116-Rape-within-Marriage.pdf>

<sup>7</sup> *Ibid.*

<sup>8</sup> William Blackstone, Commentaries on the Laws of England (Oxford, Clarendon Press 1765- 1769).

one unit after marriage. Also, the presence of a woman's will no longer be a reality after marriage and she is expected to be pliant and dutiful towards her husband.

Blackstone's commentary is reflected in the Doctrine of Coverture<sup>9</sup>. As per this principle, wedded pair were considered as a single entity. However, it did not allow women to have their own property. And the most cold-hearted precept was that couples could not sue each other for crimes committed against one another. Crimes like rape, assault, robbery, etc. were not indictable if it was committed by a spouse to his/ her counterpart.

The government in the British era was responsible for the creation of the Indian Penal Code (IPC). Their frame of reference was the doctrine of coverture, and as a side effect, it did not acknowledge the rights that belong to a married woman. The result of this combination was that the rape within the context of a marriage was given the status of an exception under section 375 of the Indian Penal Code.<sup>10</sup>

### **Disparate Perspectives of Courts on Marital Rape**

In the case of *RIT Foundation v UOI*<sup>11</sup>, the division bench of the court gave decision which were poles apart. Justice Ravi Shukdhher opined that the marital rape should be criminalised and it should not be considered as an exception under section 375 of the IPC. On the contrary, Justice C. Hari Shankar refused to support the initiative to make marital rape a felony, stating that the legislature should make any changes to the legislation because the subject requires investigation into a number of different angles, particularly societal, historical, and political, to be taken into consideration.<sup>12</sup>

In *Sakshi v UOI*<sup>13</sup>, the court rather than extending the connotation of the word "rape," denied to accept a more liberal comprehension of the expression "sexual intercourse." Additionally, according to former Indian Chief Justice Dipak Misra, the act of committing a felony against a wife should not be made a crime in India since doing so would lead to chaos in Indian society.<sup>14</sup>

---

<sup>9</sup> Jone Johnson Lewis, *Law of Coverture*, ThoughtCo. (Feb. 24, 2019), Law of Coverture (thoughtco.com)

<sup>10</sup> *Supra n. 3*.

<sup>11</sup> *RIT Foundation v UOI*, 2022 LiveLaw (Del) 433.

<sup>12</sup> Soibam Rocky Singh, Jagriti Chandra, *Delhi HC delivers split verdict on marital rape*, The Hindu (May 11, 2022, 01: 29 AM), <https://www.thehindu.com/news/cities/Delhi/delhi-high-court-delivers-split-verdict-on-marital-rape/article65403832.ece>

<sup>13</sup> *Sakshi v UOI*, AIR 2004 SC 3566.

<sup>14</sup> *Marital rape needn't be an offence*, The Times of India (April 9, 2019, 12: 40 PM), Dipak Misra: Marital rape needn't be an offence: Ex-Chief Justice of India Dipak Misra | Bengaluru News - Times of India (indiatimes.com)

In *Nimeshbhai Bharatbhai Desai vs State of Gujarat*<sup>15</sup>, Justice Pardiwala emphasized: “A large population of women has faced the brunt of the non-criminalisation of the practice... Marital rape ought to be a crime and not a concept... It has long been time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”<sup>16</sup> According to Justice Pardiwala, the concept of ‘implied consent’ in marriage should be abandoned and law should allow every woman to form choices for their body. Marital rape as an exception is prejudicial for married women and it’s high-time that marital rape should be criminalised.

In *Independent Thought v UOI*<sup>17</sup>, the Supreme Court was of the view: “Marriage is not institutional but personal – nothing can destroy the ‘institution’ of marriage except a statute that makes marriage illegal and punishable.”<sup>18</sup> In India, marriages are considered to be a sacrosanct relationship between a husband and a wife. However, this conservative viewpoint should be altered and marriage should be considered as a personal relationship. Moreover, marital rape should be considered as inimical to marriage.

### **Reports by Committee and Data on Sexual Violence**

In report of the Justice Verma Committee, it has been proposed that the exemption for rape committed against a spouse be removed. There is no bearing on the investigation into whether or not the victim agreed to the sexual intercourse on the nature of the relationship that exists between the suspect and the victim. It is possible that the perpetrator and complainant are married or otherwise involved in a relationship will not be considered for reducing the term of imprisonment.<sup>19</sup> The findings highlighted the fact that marital rape should not be recognized as less serious than rape solely due to the nature of their current relationship. The study continued on its path to emphasise the importance of educating and orienting society at large, and particularly judiciary and law enforcement agencies, regarding marital rape.<sup>20</sup>

As per the data of National Crime Records Bureau (NCRB), 2021<sup>21</sup>, most of the charges that were filed under the Indian Penal Code for crimes perpetrated towards women were submitted

---

<sup>15</sup> *Nimeshbhai Bharatbhai Desai vs State of Gujarat*, at [www.livelaw.in](http://www.livelaw.in)

<sup>16</sup> *Ibid.*

<sup>17</sup> *Independent Thought v UOI*, [2017] 10 SCC 800.

<sup>18</sup> *Ibid.*

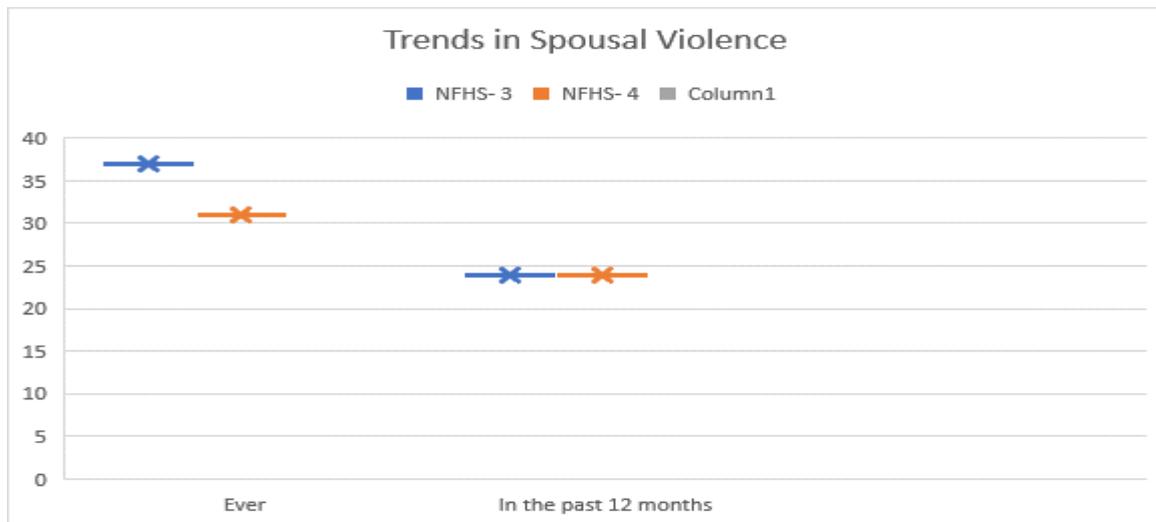
<sup>19</sup> Justice Verma, Report of the Committee on Amendments to Criminal Law (January 23, 2013).

<sup>20</sup> Indumathi S, *Marriage- A Licence to Rape*, 10 International Journal of Creative Research Thoughts 871, 880 (2022), <https://ijert.org/papers/IJCRT2202341.pdf>

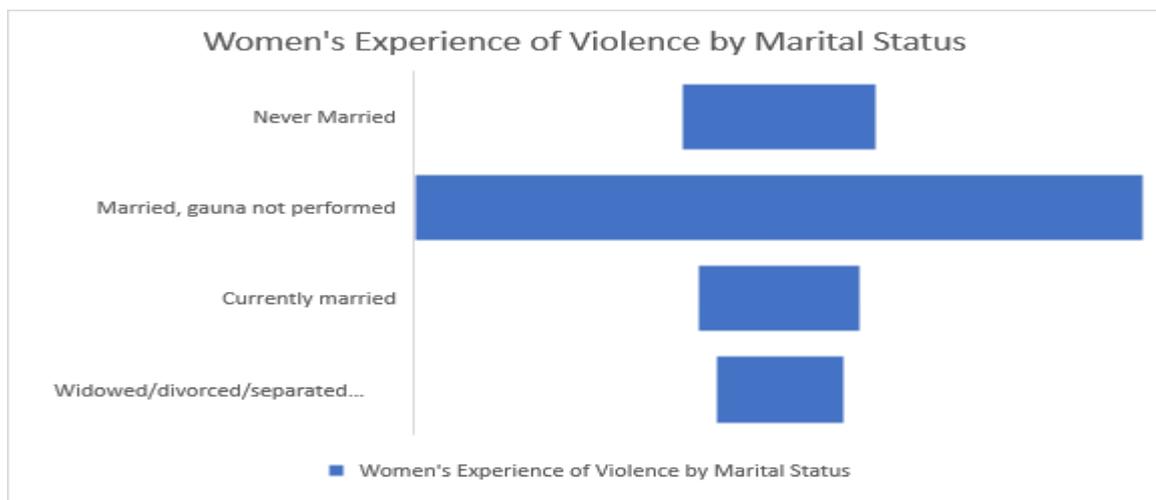
<sup>21</sup> Government of India, Crime in India, 2019 (Ministry of Home Affairs, 2019).

below the column named “Cruelty by Husband or His Relatives.”<sup>22</sup> However, it is not explicitly mentioned but this column may include marital rape with other kinds of cruelty.

On comparing the data of NFHS- 4 and NFHS- 3, we can observe that the number of spousal violence remains same.<sup>23</sup> Women who are married but their *gauna* are not carried out experience violence the most.<sup>24</sup> Again, spousal violence may include marital rape. Owing to the fact that rape within a marriage is not a criminal offence in India, a separate data on marital rape is not collected. And this is also a major drawback for not considering marital rape as an offence.



SOURCE- NFHS-4



SOURCE- NFHS-4

<sup>22</sup> *Ibid.*

<sup>23</sup> International Institute for Population Sciences, National Family Health Survey, 2015- 16 (December, 2017).

<sup>24</sup> *Ibid.*

## Marital Rape- An Infringement of Fundamental Rights

The marital rape exception reinforces the colonial idea that women are possessions and as a result, it violates several of the fundamental human rights and protections for women outlined in the Constitution of India.<sup>25</sup>

### *i. Article 14 and 15*

As per the Indian Constitution, everyone is equal before law and discrimination is strictly proscribed on the basis of sex, religion, caste, and creed. If Article 14<sup>26</sup> is read with the exception provided under Section 375 of the IPC<sup>27</sup>, then it can be reasonably concluded that married women are not being treated equally. Also, there is a gender bias that leads to discrimination against married women.

As per the Article 15 and 16 of CEDAW<sup>28</sup>, to which India is a signatory, in the eyes of the law, there should be no difference between men and women. Additionally, in a marriage, women and men possess equal protection under the law.

### *ii. Article 19*

Article 19 (1)(a)<sup>29</sup> of the Indian Constitution ensures every citizen the right to freely express. This right may also include the authority and freedom to make her own sexual choices. And not giving married women the right to consent is in violation of Article 19<sup>30</sup>.

### *iii. Article 21*

In the case *Bodhisattwa Gautam v Subhra Chakraborty*<sup>31</sup>, the Court propounded: “Rape is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”<sup>32</sup> The Court reasoned that rape is a violation against fundamental human rights, thus if a husband rapes his wife, it also undermines her right to life as a married woman.

---

<sup>25</sup> Vidhik Kumar, *Marriage or License to Rape? A Socio- Legal Analysis of Marital Rape in India*, 6 DIGNITY 1, 8 (2021) <https://digitalcommons.uri.edu/dignity/vol6/iss3/6/>

<sup>26</sup> INDIA CONST. art. 14

<sup>27</sup> *Supra n. 3*

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979, arts. 15, 16.

<sup>29</sup> INDIA CONST. art. 19.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Bodhisattwa Gautam v Subhra Chakraborty*, 1996 AIR 922.

<sup>32</sup> *Ibid.*

In *T. Sareetha v T. Venkata Subbaiah*<sup>33</sup>, it has been acknowledged that the right to privacy is an unrestricted right of an individual and is not rendered null and void upon the formation of a marital relationship.<sup>34</sup>

### **Position in UK**

In *R v Clarence*<sup>35</sup>, Hawkins J emphasised: “The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law.”<sup>36</sup> When it comes to the stipulations of the marriage contract, wives have no say in the matter. It is the duty of wife to have sexual intercourse with her husband even if she has not concurred to the act.

It was only during the latter part of the 19th century that people began to question whether or not it was legal for a husband to keep his wife confined in order to exercise his right to partnership.<sup>37</sup> Leaders and authors like John Stuart Mill and Bertrand Russell were some of the significant persons who campaigned to declare marital rape an offence in the United Kingdom in the first feminist wave.<sup>38</sup> “The personal is political” became the feminist credo which served as the core premise upon which the anti-rape campaign was incorporated.

In the seminal case known as *R v R*<sup>39</sup>, which was decided in October 1991, the court of England officially acknowledged marital rape as a punishable offense. In this case Lord Lane asserted: “The idea that a wife consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections, is no longer acceptable.”<sup>40</sup> It is not viable to assume that a wife will give her husband unconditional permission to have sexual relations with her regardless of her wellbeing or even the validity of her protests.

### **Suggestions**

In order to ensure the protection of a woman's fundamental rights, the legislative body ought to do away with laws that treat rape and marital rape in different ways. If rape within a marriage can be regarded a valid reason for dissolving a marriage, then it should also be considered a

---

<sup>33</sup> *T. Sareetha v T. Venkata Subbaiah*, AIR 1983 AP 356.

<sup>34</sup> *Supra* n. 25.

<sup>35</sup> *R v Clarence*, (1888) 22 QBD 23.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Re Cochrane* (1840) 8 Dow PC 630.

<sup>38</sup> Julie Bindel, *The long fight to criminalise rape in marriage*, ALJAZEERA (June 15, 2021), <https://www.aljazeera.com/features/2021/6/15/the-long-road-to-criminalising-rape-within-marriage>

<sup>39</sup> *R v R*, [1992] 1 AC 599.

<sup>40</sup> *Ibid.*

serious crime committed against women. In the Indian Constitution, Article 15<sup>41</sup> stipulates that there must be laws in place to safeguard the interests of children and women. And it is past time to eliminate the exemption for marital rape and the term 'rape' be blended with the term 'marital rape.' In today's modern culture, women are educated, independent, and capable of making the proper decisions for themselves. In addition, legislation must make laws which empower women and permit them to claim their physical autonomy.

In order to bring the frequency of rape cases down, rape within marriage should be treated as a severe crime and stricter sentences had to be handed out. The Justice Verma Committee<sup>42</sup> has made several recommendations, and the legislature ought to take them into consideration. Instead of lapsing the bills proposed by the Member of Parliaments like Women's Sexual, Reproductive and Menstrual Rights Bill, 2018<sup>43</sup> was set in motion by Dr. Shashi Tharoor. However, the rights of men should also be taken into account by the legislation. Consequently, laws should be developed that are gender-neutral.

### **Critical Analysis**

Once George Bernard Shaw mentioned, 'Unless, the law of marriage was first made human, it could never become divine.' Marriage legislation should be drafted to guarantee that both partners are treated fairly. This is the standard in most countries, including India, when it comes to family law issues including divorce, child support, custody, and property rights.<sup>44</sup>

In *State of Maharashtra and Anr vs Madhukar Narayan Mardikar*,<sup>45</sup> the Supreme Court had made the vehement remark: "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law."<sup>46</sup> The right to privacy of a woman should be protected regardless of her position in the society. No one could assault a woman's body without her consent. If her fundamental rights are being violated, she deserves the same legal protection as anyone else.

---

<sup>41</sup> INDIA CONST. art. 15.

<sup>42</sup> *Supra n. 17.*

<sup>43</sup> Rupali Pruthi, *Bill to make marital rape a crime introduced in Lok Sabha*, Jagran Josh (January 3, 2019, 05:36 PM), *Bill to make marital rape a crime introduced in Lok Sabha* (jagranjosh.com)

<sup>44</sup> *Supra n. 20.*

<sup>45</sup> *State of Maharashtra and Anr v Madhukar Narayan Mardikar*, AIR 1991 SC 207.

<sup>46</sup> *Ibid.*

It might be contended that marital rape is just as unlawful as murder, culpable homicide, or rape. It turns a person into a lifeless body who constantly anticipates getting hurt. Medical research demonstrates that marital rape has serious and persistent effects on women.<sup>47</sup>

Legislators need to know that protecting the respect of married women is vital to preserve the integrity of the Constitution. By not holding offenders of marital rape legally accountable, the lack of criminal law safeguards has led to the normalisation of this kind of sexual abuse and has kept the crime concealed from the general public.<sup>48</sup>

## **Conclusion**

The Brahmanical patriarchal system is the source of misogyny. Several men assume that it is their divine right to inflict mental anguish and anxiety on women by casting a cloud of dread over their daily life.<sup>49</sup> In *Voluntary Health Ass. Of Punjab vs Union of India & Ors*<sup>50</sup>, the Court contended: “women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating, and leadership.”<sup>51</sup> The Supreme Court’s view on gender equality is praiseworthy as it will aid in forming laws which will cater equality in society. Furthermore, the perspective of the Court conveys that how women are in modern society and they should also be considered as an equal participant in the decision- making process.

The exception for marital rape is not only an antiquated and obsolete statute. In fact, it protects a substantial number of men from sexual assault charges and the notion that they are rapists. Large majority of their wives discover that they possess no legitimate or politically permissible right to deny unwanted intercourse. Consequently, the question of marital rape affects not only those women who are prepared to admit that their husbands have coerced them to engage in sexual contact not less than one, but ultimately every woman.<sup>52</sup> India is rife with contradictions for a nation that prides itself on being on the road to prosperity.<sup>53</sup>

---

<sup>47</sup> Shikha Chhibbar, Policy Brief Series 1 (TOAEP 2016), <https://www.toaep.org/pbs-pdf/52-chhibbar#:~:text=8%20In%20the%20case%20of,to%20seven%20years%20with%20fine>

<sup>48</sup> *Ibid.*

<sup>49</sup> Jean Chapman, *Violence against Women in Democratic India: Let's Talk Misogyny*, 42 *Social Scientist* 49, 61 (2014), <https://www.jstor.org/stable/24372976>

<sup>50</sup> *Voluntary Health Ass. Of Punjab vs Union of India & Ors*, (2016) 10 SCC 265.

<sup>51</sup> *Ibid.*

<sup>52</sup> Diana E. H. Russell, *Rape in Marriage* (Indiana University Press, 1990).

<sup>53</sup> *Supra* n. 44.

It is past time that we advance the fight over marital rape by taking some kind of action. Even the UN Committee on the Elimination of Discrimination against Women<sup>54</sup> in 2007 suggested that the denotation of rape in the IPC should be widened to more accurately depict the realities of female sexual assault and also the exemption for rape committed against a spouse ought to be done away with from section 375 of the IPC.<sup>55</sup> The fact that a woman is married should not be an excuse for denying her basic liberties. The legislation should not refrain from designating marital rape as an offence just because consent is difficult to prove in marriage. Authorities have either granted legal protection for marital rape or abstained from designating it an offense on the basis that marital relationship is a sacred, non-interfering domain.<sup>56</sup>

---

<sup>54</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, India* (February 2, 2007), <https://www.refworld.org/docid/45f90a982.html>

<sup>55</sup> *Ibid.*

<sup>56</sup> *Supra* n. 25.