

## MARITAL RAPE: SHOULD OR SHOULD NOT BE CRIMINALISED?

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### Abstract

*Marital rape has become a concern that requires to be addressed immediately. It continues to strip women of their bodily autonomy and dignity within the four walls of their homes as we do not recognise it as a penal offence under the Indian Penal Code. The patriarchal outlook plagues the legislative authorities, and marriage is still considered a sacred institution that validates husbands to have sexual intercourse with their wives irrespective of their consent or willingness. This article discusses all the aspects of the issue of marital rape. In order to achieve the same, it analyses the relevant case authorities to substantiate the stance that the author takes in this article, i.e., the second exception to Section 375 of the Indian Penal Code should be struck down, thereby leading to recognition of marital rape as a penal offence. The global perspective on marital rape, with a primary focus on the UK, is also discussed to understand their rationale for striking down the marital rape exemption and to emphasise the changing trends in this domain.*

### I. INTRODUCTION

This article discusses the position of law vis-à-vis marital rape in India and explores the erroneous justification of its existence as an act outside the ambit of penal offence. It delves into the societal perception associated with marital rape and challenges the justification by which marital rape is not recognised as an offence. It further goes on to challenge the constitutional validity of rape laws in India by analysing the relevant case authorities. It also considers the

global perspective on marital rape with a primary focus on United Kingdom's perspective and discusses their rationale for striking down the old law vis-à-vis marital rape, i.e., when it was not recognised as a penal offence. The article concludes with the salient lessons that can be learnt by India from the other countries in order to establish that marital rape should be penalised and its existence as a mere act with no legal ramifications cannot be justified in any way possible.

### II. DISTINCTION BETWEEN 'RAPE' AND 'MARITAL RAPE'

Section 375 of the Indian Penal Code ('IPC') deals with the rape law of the country. It defines the situations and circumstances under which sexual intercourse with a woman constitutes rape. Broadly, an act of sexual intercourse is rape when it is committed with a woman against her will or without her consent or by obtaining an invalid consent, i.e., when it was obtained, the woman was not in a position to give valid and informed consent due to various factors like intoxication, unsoundness, delusion, age etc. One of the exceptions to the application of this section is when a husband gets involved in sexual intercourse with his wife, who is not below the age of fifteen years, then irrespective of whether the sexual intercourse was with the valid consent of the wife or not, the act does not constitute rape.<sup>141</sup>

When a husband is involved in sexual intercourse with his wife (not below 15 years of age) against her will or without any valid consent from her for the same, it constitutes marital rape, and this non-consensual act is excluded by the second exception to Section 375 thereby, making it a mere act and not a penal offence like rape.<sup>142</sup> Rape comes under the category of heinous crime as it is a grievous act that egregiously breaches the right to one's own bodily autonomy and leaves an indelible mark of disgrace with a sense of mortification for the rest of her life.<sup>143</sup> As per the

<sup>141</sup> Section 375 in the Indian Penal Code, INDIAN KANOON, <https://indiankanoon.org/doc/623254/> (last visited May 30, 2022).

<sup>142</sup> *Id.*

<sup>143</sup> Kanchan Chaudhari, *Rape a heinous crime, there can be no leniency in conviction: Bombay HC*, HINDUSTAN TIMES, December 9, 2020, <https://www.hindustantimes.com/mumbai-news/rape-a-heinous-crime->

report, a significantly high percentage of cases involving sexual violence go unreported, and an average Indian woman is more likely to be a victim of sexual violence from their own spouse than any other person.<sup>144</sup> As a result, marital rape, being a kind of sexual violence in a private space, goes unattended as the wife does not have a legal remedy to resort to under the rape law of the country. Forced sexual intercourse within four walls has become an entrenched problem and exacerbated over time.<sup>145</sup>

### III. SOCIETAL PERCEPTION OF MARITAL RAPE

The deeply ingrained patriarchal mindset of the lawmakers and the society is reflected in the position of rape laws in India. Here, the solemnisation of marriage between a man and a woman entails that both the spouses have impliedly consented to sexual intercourse, and this consent is presumed to be of immutable nature notwithstanding any factor.<sup>146</sup> This perspective degrades the status of wives to mere objects with no agency or autonomy over their own bodies, thereby characterising them as property of their husbands.<sup>147</sup> Under the garb of the sacramental nature of marriage and the 'legitimate' expectation of sex, men continue to strip wives of their bodily autonomy, and the marital bond acts as a license to do the same.<sup>148</sup>

Does the commission of the same act of sexual intercourse with a woman without her consent in a marital relationship completely change the character of the act and its effect on the woman? Do women lose their bodily autonomy after marriage? Unlike rape, marital rape is not considered a traumatic and dreadful experience that has a devastating effect on the physical, mental and emotional health of the woman. Marital rape continues to be committed unabated in

several households in the country, and the fact that the victims of marital rape have no legal remedy to resort to, they are compelled to live with and endure multiple traumatic experiences. This is an immensely serious matter that needs to be addressed immediately.<sup>149</sup>

### IV. CONSTITUTIONAL VALIDITY OF THE MARITAL RAPE EXEMPTION

In *Nimeshbhai Bharatbhai Desai v. the State of Gujarat* ('*Nimeshbhai Case*'), one of the issues that were raised before the court was whether the husband could be penalised under Section 376 for forcing oral sex with his wife. The court, taking into consideration the present facts and the current legal position, held that a man could not be penalised under Section 376 of the IPC for indulging in sexual intercourse with his wife, irrespective of whether it was consensual or non-consensual. The court even delved into the idea behind the existence of such a legal position and explicated that it is based on the idea that by marriage, a woman gives irrevocable implied consent to her husband to have sexual intercourse at any time on husband's demand. However, the court made some critical remarks accentuating the fallacious concept of 'implied consent' and stated that the law must respect and protect the bodily integrity and autonomy of every woman, regardless of their marital status. It suggested that the notion of 'implied consent' that stems from a patriarchal outlook must be discarded now.<sup>150</sup>

The case of *Independent Thought v. Union of India and Another* ('*Independent Thought Case*') dealt with the issue of whether sexual intercourse between a husband and his wife constitutes rape if the wife is a girl child whose age falls between 15 and 18 years. As per the second exception to Section 375 of the IPC, a man is not to be penalised for rape if he had sexual intercourse with his wife, irrespective of her age and whether it was consensual or non-consensual. In the *Independent Thought Case*, the

there-can-be-no-leniency-in-conviction-bombay-hc/story-E6tdJ7G5r8ot2i199m3XrI.html (last visited May 30, 2022).

<sup>144</sup> NATIONAL FAMILY HEALTH SURVEY-4 (2015-16).

<sup>145</sup> Anoo Bhuyan, *Government denies marital rape occurs, national survey shows 5.4% of married women are victims*, THE WIRE (2018), <https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims> (last visited May 30, 2022).

<sup>146</sup> Anirudh Pratap Singh, *The impunity of marital rape*, THE INDIAN EXPRESS, December 20, 2020, <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/> (last visited May 31, 2022).

<sup>147</sup> M. V. Sankaran, *THE MARITAL STATUS EXEMPTION IN RAPE*, 20 JOURNAL OF THE INDIAN LAW INSTITUTE 601, 594-606 (1978).

<sup>148</sup> Jennifer A. Bennice & Patricia A. Resick, *MARITAL RAPE: History, Research, and Practice*, 4 TRAUMA, VIOLENCE & ABUSE, 228-246 (2003).

<sup>149</sup> Vinayaka Raina & Ramesh Kumar, *SOCIETAL ISSUES RELATING TO MARITAL RAPE IN INDIA: AN OVERVIEW*, 32 TURKISH JOURNAL OF PHYSIOTHERAPY AND REHABILITATION, 3 (2022).

<sup>150</sup> *Nimeshbhai Bharatbhai Desai vs State of Gujarat*, (2018) SCC OnLine Guj 732.

constitutionality of the second exception was challenged to the extent it applies to the rape of a girl child of age between 15 and 18 years. The petitioner argued that Section 375 stipulates 18 years as the age of consent for sexual intercourse, i.e., a girl child below the age of 18 years cannot give valid consent for sexual intercourse, and therefore, the man involved in sexual intercourse with such a girl is guilty of rape. It further proceeded with the argument that the marital status of the girl child is not a germane factor to be taken into consideration for determining the imposition of rape charges on a person, and merely because the girl child is married, it does not dispute the physical, mental and emotional capabilities that a girl child of age between 15 and 18 years would have for indulging in sexual activity. To this extent, the petitioner argued, the second exception to Section 375 is inconsistent, inequitable and contradictory to the positive purpose that Article 15(3) of the Indian Constitution ('the Constitution') aims to serve. The apex court, in its decision, resorted to reading the second exception to Section 375 in a purposive manner in order to bring it in conformity with the pro-child legislation, human rights of a married girl child and the POCSO Act, thereby protecting the bodily integrity of the married girl child below 18 years of age. The larger issue of marital rape was left untouched as it was not raised before the court, but some of the arguments proposed, find relevance in the larger issue as well.<sup>151</sup>

Recently, a split verdict was given by a division bench of the Delhi High Court, comprising of Justice Shakti Dhur and Justice Shankar, in *Khusboo Saifi v. Union of India & Another*,<sup>152</sup> a case concerning the penalisation of marital rape. However, the bench has granted the certificate of leave to appeal to the apex court in the present matter as it fulfils the requirement of the presence of substantial questions of law. Justice Shakti Dhur ruled in favour of the criminalisation of marital rape, i.e., deletion of the second

exception to Section 375 of the IPC, whereas Justice Shankar ruled against the same.<sup>153</sup>

Justice Shakti Dhur, in his ruling, delved into the constitutional viability of the classification of married and unmarried couples in the context of the marital rape exception and stated that in order to determine the constitutional viability of basing the classification on the relationship between the accused (here, husband) and the victim (here, wife), it is essential to examine whether there exists an *intelligible differentia* between the classification made and the object aimed to be achieved by the main provision. The object is to protect a woman's bodily integrity, autonomy and agency. The existence of *differentia* between unmarried, married and separated couples is evident, but the *differentia* between married and unmarried couples does not have a rational nexus with the object to be achieved. The second exception fails to meet the requirements of the nexus test. In Justice Shakti Dhur's opinion, the classification is conspicuously unwarranted and arbitrary as it grants impunity to a man who has committed the most heinous offence of rape merely because it was done within the bounds of marriage. According to him, the classification being unreasonable is violative of Article 14 of the Constitution as it not only guarantees equality before the law but also guarantees the equal protection of laws to every person within the boundary of India. It is violative in the way that the second exception to Section 375 deprives a significant portion of the population of equal protection of laws. He also stated that the non-consensual sex strips a woman of her bodily autonomy, dignity and agency, thereby leaving indelible scars on her psyche. He also added that the question of 'Who is the perpetrator?' has no relevance as the rapist being her husband does not curtail the dehumanising impact of the sexual assault. He also held, "The woman's right to withdraw consent at any given point in time forms the core of the woman's right to life and liberty," thereby making the exception violative of Article

<sup>151</sup> Independent Thought vs Union of India and Another, (2017) SCC OnLine SC 1222.

<sup>152</sup> Khusboo Saifi v. Union of India & Another, (2022) W.P.(C)-5858/2017.

<sup>153</sup> Sofi Ahsan, *Delhi HC delivers split verdict on criminalisation of marital rape*, THE INDIAN EXPRESS, May 12, 2022, <https://indianexpress.com/article/cities/delhi/delhi-high-court-split-verdict-petitions-seeking-criminalisation-of-marital-rape-7911335/> (last visited May 31, 2022).

21 of the Constitution. He also held it to be violative of Article 15 for discrimination between married and unmarried women without any logical rationale, and Article 19(1)(a) as *the guarantee of freedom of expression includes a woman's right to assert her sexual agency and autonomy*. He said conjugal expectations out of a subsisting marriage could not be fulfilled at the expense of the wife's physical and mental condition.<sup>154</sup>

Justice Shankar's ruling was entirely opposite to what was held by Justice Shakti. Justice Shankar held that the classification is legit and not arbitrary, and there exists a rational nexus between the classification and the object that the exception aims to achieve; hence, it is not violative of any fundamental rights guaranteed in Part III of the Constitution. The object of the second exception, as defined by him, is to protect the institution of marriage. He held that carrying out the examination of the existence of rational nexus between the object and the *differentia* is beyond the powers accorded to a writ court under Article 226 of the Constitution. He also said that 'arbitrariness' is an abstract concept and cannot be the sole ground on which a legislative provision can be struck down or can be held violative of Article 14. He held that non-consensual sexual intercourse with a stranger could not be equated with the same act of a husband.<sup>155</sup>

Taking into consideration the analysis of the above-cited cases, it is evident that the exception is an element of the patriarchal outlook that objectifies women on an irrational basis of their marital status, thereby depriving them of their bodily autonomy, dignity and agency, standing in direct contradiction of Article 14, 15(3), 19(1)(a) and 21 of the Constitution.

## V. GLOBAL PERSPECTIVE ON MARITAL RAPE

<sup>154</sup> Khusboo Saifi v. Union of India & Another, (2022) W.P.(C)-5858/2017.

<sup>155</sup> Zeb Hasan, *Delhi HC's split verdict on marital rape: Highlights of what the 2 judges said*, THE WIRE (2022), <https://thewire.in/law/delhi-hcs-split-verdict-on-marital-rape-highlights-of-what-the-2-judges-said> (last visited May 31, 2022).

The marital rape exemption has its root in English law.<sup>156</sup> It was the landmark case of *R v. R* that discarded the exemption and made marital rape a criminal offence in England.<sup>157</sup> The House of Lords held that Lord Matthew Hale's proposition of marital rape exemption formed part of the common law of England at one point in time as it may have found relevance then, but the common law is open to evolving with changing socio-economic and cultural developments. It stated that Hale's proposition had lost its relevance in present times where women hold equal status as men in terms of rights (including marital rights), and marriage is symbolic of a partnership of equals. In modern times, the perception is not that wife must be a submissive chattel of her husband with no bodily autonomy. It held that it is unacceptable to consider marriage as an implied consent on the wife's part to have sexual intercourse with her husband on his demand, regardless of her physical and mental well-being. The appeal by R was dismissed, and he was convicted for raping his wife, thereby recognising marital rape as a penal offence.<sup>158</sup>

Many countries across the world have criminalised marital rape, including Poland and Russia, which were among the earliest to criminalise it. Many first-world countries, including the USA, the UK, the Netherlands, New Zealand, Israel, Ireland, Denmark, Norway, Sweden, Germany and many others, have criminalised it as well. Over the years, many small countries like Chile, Albania, Nepal, Venezuela, Comoros, Cuba, Ghana and Gambia, among many others, have criminalised it as well.<sup>159</sup>

Around 30 countries have not yet recognised marital rape as a criminal offence, and sadly India falls under this list along

<sup>156</sup> Deborah Stead, *In Britain, A Move to Make Marital Rape a Crime*, THE NEW YORK TIMES, December 28, 1990, <https://www.nytimes.com/1990/12/28/news/in-britain-a-move-to-make-marital-rape-a-crime.html> (last visited May 31, 2022).

<sup>157</sup> Julie Bindel, *The long fight to criminalise rape in marriage*, AL JAZEERA (2021), <https://www.aljazeera.com/features/2021/6/15/the-long-road-to-criminalising-rape-within-marriage> (last visited May 31, 2022).

<sup>158</sup> *R vs R*, (1991) 3 WLR 767.

<sup>159</sup> *India does not criminalise marital rape: Which are the countries where spousal rape is a crime?*, FIRSTPOST (2022), <https://www.firstpost.com/india/india-does-not-criminalise-marital-rape-which-are-the-countries-where-spousal-rape-is-a-crime-10485411.html> (last visited May 31, 2022).

with Pakistan, Afghanistan, China, Bangladesh, and Myanmar, among others.<sup>160</sup>

## VI. CONCLUSION

The article has attempted to cover all the aspects of discussion around the criminalisation of marital rape in the context of India by even taking into consideration the position of law in other countries. It has thoroughly analysed the relevant case authorities in order to comprehensively understand the arguments proposed, and judgment given and employ the same to substantiate the stance that the author takes in this article, i.e., the second exception to Section 375 must be struck down as unconstitutional and marital rape must be criminalised. The deeply entrenched patriarchal perspective has to be rooted out of the legislative body, and the old colonial patriarchal legislative provisions must be struck down to adapt to the evolving socio-economic and cultural developments of the society. In present times, marriage should be seen as a relationship between equals where one is not subservient to the other. A wife is not a chattel of her husband, and marriage as an institution is not meant to objectify women by depriving them of their bodily autonomy, dignity and agency. Marriage does not signify an irrevocable implied consent on wives' part to their husbands to have sexual intercourse at their husbands' demand, regardless of their physical and mental condition.

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<sup>160</sup> *Id.*

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