

## INDIA'S STRUGGLE TO MAKE MARITAL RAPE A CRIMINAL OFFENSE

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### ABSTRACT

Marital rape is when there is any sexual activity between two spouses and one of them does not give consent, one partner is having sexual intercourse with the other without his/her consent or will, through threats, manipulation. Traditionally, the concept of marriage itself is so patriarchal that it gives a man complete independence to have sexual intercourse with his wife whenever he wants without taking the wife's consent, basically the concept of marriage associates with the idea of sexual entitlement. These type of abuse or violence raises questions about the basic human rights of the victim and also affects the mental and physical health of the victim. Sexual abuse within a marriage has been historically normalized and overlooked, and therefore sexual access is presumed as the right of the husband, this outdated thinking is contributing a lot towards the invisibility of marital rape in the country and the victims are suffering torture due to shame and fear of not getting any legal protection. The concept of marital rape challenges the special right or privileges a man enjoys. Historically, it protects or shields husband after raping his wife, there are mental effects of marital rape which often gets ignored because of no physical evidence of it. The mental trauma, depression, anxiety, feeling of being betrayed, not feeling safe in one's own house affects an individual badly.

### KEYWORDS

marital rape, consent, spouses, sexual intercourse, abuse, violence, human rights, betrayal, safety, shame, trauma, legal protection, normalization, threats, manipulation, sexual entitlement, invisibility, outdated thinking, mental health.

### INTRODUCTION

Marital Rape has been a crucial and long-ongoing debate in India since years. Currently Section 63 of BNS exempts marital rape in its definition of rape. It is a deeply rooted and multifaceted problem, sustained by gaps in the law, prevailing social norms, and systemic shortcomings. Nonetheless, efforts are being made to confront and dismantle this legal exception. India is one of the few countries where marital rape is still not criminalized and through this research paper, we shall discuss the reasons behind it and also cons to it. The stout line of demarcation between marital rape

and domestic violence has not been recognized and realized yet in the country where there are already many rape cases on a day-to-day basis. The daily average of 86 rape cases are reported daily in the country while we're sure many remains unreported<sup>317</sup>. The union government's opposition to striking down the marital rape exception highlights a deep-seated patriarchal attitude. Marital Rape is the ultimate violation of the self of a woman or man. The Supreme Court of India has described rape as 'deathless shame and the gravest

<sup>317</sup> <https://www.statista.com/statistics/632493/reported-rape-cases-india/>

crime against human dignity<sup>318</sup>. Marital rape is especially complex because the intricate, individualistic character of marital relationships makes it difficult for the victim to even consider herself as a victim, much less report the offending act to the authorities, hence Marital Rape is one of the highly under-reported violent offenses. Section 13, *Hindu Marriage Act 1955*; Section 2, *Dissolution of Muslim Marriage Act 1939*; Section 32, *Parsi Marriage and Divorce Act 1932*; Section 10, *Indian Divorce Act 1869*; Section 27, *Special Marriage Act 1954* lays down grounds for divorce. Section 85 of BNS states that husband or the relative of the husband if subjects the woman to cruelty shall be punished. Mental cruelty, as interpreted under Section 13(1)(i-a) of the HMA, Section 2(viii)(a) of Muslim Marriage Act, Section 32 (dd) of Parsi Marriage and Divorce Act and similarly in other laws that include acts that cause deep anguish, mental pain, or suffering so as to make cohabitation intolerable. Marital rape, though not labelled as a criminal offense under the BNS, qualifies under this criterion. However, Marital Rape still remains unrecognized as a form of criminal offense. In the case of *Nimeshbhai Bharat Bhai Desai v. The State of Gujarat*<sup>319</sup>, the Gujarat High Court emphasized that marital rape is a real and serious concern, not just a theoretical concept. It challenged the notion of 'implied consent' within marriage, asserting that such an assumption should be dismantled. The court stressed that the law must protect every woman regardless of her marital status in order to uphold her bodily autonomy.

#### OBJECTIVES OF THE RESEARCH

1. To highlight the pros (if any) and cons to not legalizing marital rape in the country.
2. To advocate and propose reforms regarding the same.
3. To argue that not legalizing marital rape violates the fundamental rights of men and women.

#### RESEARCH QUESTIONS

1. Whether there is scope for marital rape to be recognized as a crime in the near future?
2. How is it physically possible to prove Marital Rape in a court of law?
3. Does non-criminalization of marital rape effects the child of the couple as well? If yes, then how?
4. Is there a need of clarification to differentiate Domestic Abuse and Marital Rape? How is it important and related?

#### NON- RECOGNITION OF MARITAL RAPE AS A CRIME IN INDIA

Section 63 of the *Bharatiya Nyay Sanhita* defines rape and the very next section outlines the punishments to rape. However, the section 63 (b)(iv) states the exception to rape that if it happens- with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is *or believes herself to be lawfully married*. The origin of this legal exception is deeply rooted in colonial and patriarchal ideologies. British-era laws were based on the *doctrine of "coverture"* where a woman's legal identity was merged with her husbands upon marriage, implying that she could not refuse him sex. This outdated notion was never fully dismantled in India post-independence.<sup>320</sup> In a society where marriage is often considered sacred and indissoluble, any attempt to question the dynamics within it—especially around consent—is met with resistance. In 2015, the argument was reiterated by the Ministry of Home Affairs in reply to a bill proposed by a Member of Parliament which aimed to criminalise marital rape. The press release stated that it "was considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context". There are now numerous countries that have enacted marital rape legislation, abolished marital rape exceptions, or passed legislation that does not

<sup>318</sup> *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922

<sup>319</sup> *Nimeshbhai Bharat Bhai Desai vs. State of Gujarat*, 2018, Guj 732

<sup>320</sup> Re-examining the Presumption: Coverture and Legal Impossibilities in Early Modern English Criminal Law, Emily Ireland, *Married Women's Property Act 1882* (45 & 46 Vict., c.75).

differentiate between marital rape and regular rape. Such countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Marital rape was criminalized in 2005 by Turkey, Mauritius and Thailand in 2007. Criminalization of marital rape in these nations both in Asia and globally signifies that marital rape is being accepted as a human rights violation. In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 nations and India is not among them. Although marital rape is common in India, it is concealed in the sacrosanct robes of marriage. While the Protection of Women from Domestic Violence Act, 2005 recognizes sexual abuse as a form of domestic violence, it only provides civil remedies like protection orders or shelter—not criminal consequences. The non-criminalization of marital rape is in direct violation of a woman's *fundamental rights* enshrined in the Indian Constitution. It violates the right to life and personal liberty (Article 21), the right to equality (Article 14), and freedom from discrimination (Article 15). Marital rape disregards a woman's autonomy over her own body and implies that consent is a one-time act at the time of marriage, which cannot be revoked. Under Section 377 of the *Indian Penal Code, 1860*, 'sodomy' is an offence, irrespective of the consent of the parties. The phrase 'non-consensual sodomy' therefore might appear as superfluous and confusing. The phrase is used by the courts to distinguish between cases where the husband commits non-vaginal penetration with the wife with her consent and cases in which it is without the wife's consent. Only the latter—that is, 'non-consensual sodomy'—is a valid ground for divorce under Christian divorce law. *Rafique v. State of UP*<sup>321</sup>, where Krishna Iyer, J. made the observation that—*hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless*

*there are very strong circumstances militating against its veracity. None we see in his case, and confirmation of the conviction by the courts below must, therefore, be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry.* Marital rape is still one of the most brutal acts of violence against a woman, particularly when it is legalized and kept quiet. With changing society and an increasing demand for gender justice, legal codes should also change. Making marital rape criminal is not just a legal requirement—it is a moral and humanitarian imperative. In the matter of *Anuja Kapur vs. Union of India Through Secretary*<sup>322</sup>, 2019, a PIL was filed by Anuja Kapur requesting the Court to instruct the Government of India to publish some guidelines and legislation regarding marital rape. But the Supreme Court bench led by Justice SA Bobde and Justice BR Gavai denied the plea and indicated that the job pertaining to the creation of the laws is of the legislature and not the judiciary and the court is involved with interpreting the law than creating it.

#### CHALLENGES IN PROVING CONSENT OR LACK THEREOF IN A MARITAL SETTING

Consent is the cornerstone of any sexual act. However, in the context of marriage – particularly in India – proving the absence of consent becomes extremely complex. Unlike stranger rape or assaults by known individuals outside the marriage, the intimate and private nature of marital relationships makes evidentiary standards difficult to meet. One of the most significant challenges is the presumed consent embedded in the institution of marriage. Proving lack of consent in a marital setting is not just a legal hurdle – it's a societal and psychological challenge rooted in outdated norms and structural inequalities. Recognizing that consent is required in all relationships, including marriage, is the first step. Unlike stranger rape or sexual assault by acquaintances, marital rape usually occurs in private, often repeatedly, without leaving visible injuries. This lack of physical evidence creates significant difficulties for

<sup>321</sup> *Rafique v. State of UP*, 1981 SCR (1) 402

<sup>322</sup> *Marital Rape and Law*, Bhagyashikha Saptarshi, Manupatra

survivors. There may be no bruises or external trauma, especially if the act was not physically violent but psychologically coercive. The survivor may delay reporting the abuse due to emotional trauma, fear, or lack of support, thereby reducing the chance of collecting forensic evidence. In many cases of marital rape, especially where emotional coercion or psychological manipulation is involved rather than overt physical violence, there may be no visible signs of injury. Courts and law enforcement often expect signs such as bruising, cuts, or tears as indicators of non-consensual intercourse. The heavy reliance on physical proof, without considering the psychological, emotional, and circumstantial realities of survivors, severely limits access to justice. It was recommended in a report here that the Canadian approach be followed, according to which the 'sexual nature' of an act is established if: viewed in the light of all the circumstances... the sexual or carnal context of the assault [is] visible to a reasonable observer<sup>323</sup>. This emphasizes how an act is perceived from the standpoint of a "reasonable observer." However, sexual violence is an inherently subjective experience, and the trauma it induces cannot be fully captured by external observation alone. In marital rape cases, where coercion may be subtle, psychological, or emotional rather than overtly physical, the act may not appear sexually violent or coercive to an outsider, even though it was experienced as such by the survivor. This reliance on a hypothetical third-party observer may invalidate or diminish the victim's internal experience, particularly when visible signs of struggle or force are absent. Therefore, it is important that instead of relying solely on physical signs of resistance the *psychological and trauma-informed evidence* is used to corroborate claims of non-consent. The inclusion of *past patterns of abuse* that is emotional, physical, or financial to demonstrate a coercive environment where consent is not freely given. Establishing or refuting consent within a marriage context is complex by nature but not at all impossible. A wider focus on legal

transformation, survivor narratives, trauma-informed care, and sensitization of systems can ensure serious consideration of consent despite the institution of marriage. The law should shift away from archaic perceptions of marital duty and instead affirm the bodily autonomy, sexual agency, and human rights of everyone, including those who are married.

#### INTERGENERATIONAL TRAUMA AND NORMALIZATION OF VIOLENCE

Child sexual abuse has also been associated with women's experiences of intimate partner violence. Men who experience childhood emotional abuse and neglect, and childhood sexual abuse<sup>324</sup>, are also at increased risk of perpetration of rape, intimate partner violence, and sexual assault<sup>325</sup>. Children who grow up witnessing abuse are at increased risk of being physically and sexually abused themselves. The association between a man's experiences of child maltreatment and perpetrating physical intimate partner violence is mediated by his number of sexual partners, which suggests that one effect of child maltreatment on men might be to contribute to more sexually risky behaviour and models of masculinity that emphasise heterosexual dominance.<sup>326</sup> According to Bowen's family systems theory, emotional processes and behavioral patterns—including violence—are transmitted through multi-generational "emotional triangles" and role enactments. Marital rape reinforces imbalanced power structures within the household, which children often internalize as normal models for relationships. In homes where marital rape is neither named nor condemned, children—especially boys learn that sexual entitlement and aggression are acceptable. One of the most serious ramifications of unaddressed marital rape is the normalcy of family violence. When a

<sup>323</sup> Report of the Committee on amendments to Criminal Law, Justice J.S. Verma, Justice Leitha Seth, Gopal Subramaniam

<sup>324</sup> Differences between sexually victimized and nonsexually victimized male adolescent sexual abusers: developmental antecedents and behavioral comparisons- J Child Sex Abuse, 20 (2011), pages- 77-93

<sup>325</sup> Prevalence of and factors associated with intimate partner violence perpetration: findings from the UN Multi-country Cross-Sectional Study on men and violence in Asia and the Pacific- Lancet Glob Health, 1 (2013)

<sup>326</sup> Pathways between childhood trauma, intimate partner violence, and harsh parenting: findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific Emma Fulu, Stephanie Miedema, Tim Roselli, Sarah McCook, Ko Ling Chan, Regine Haardörfer, Rachel Jewkes, on behalf of the UN Multi-country Study on Men and Violence study team

woman is sexually assaulted by her husband, and the act is discounted or explained away by society, it sets an ominous example. Children, who are passive witnesses, can then understand such acts as being a part of marriage. In patriarchal cultures, boys are taught to equate masculinity with dominance and control over women's bodies, and girls learn to adopt subservience, silence, and suffering as feminine ideals. Marital rape is no longer an exception and becomes a learned social behavior draped in the veil of tradition, obligation, or conjugal bliss. The psychological repercussions for children who grow up in environments of sexual and emotional abuse are profound. Numerous studies link childhood exposure to domestic violence with long-term post-traumatic stress disorder (PTSD), emotional dysregulation, impaired academic performance, and behavioral issues such as aggression or withdrawal. These children often struggle with trust, intimacy, and identity, which can severely affect their capacity to form healthy relationships later in life. Moreover, the trauma may manifest in two primary behavioral patterns: repetition and reversal. Some may repeat the cycle by becoming perpetrators or victims of abuse, while others may avoid relationships altogether, fearing vulnerability and loss of control. These patterns indicate that trauma is not merely remembered—it is *relived and reenacted*, often unconsciously. One of the most insidious effects of marital rape is the *culture of silence* it imposes on families. In many cases, survivors are unable or unwilling to report the abuse due to societal stigma, economic dependence, or lack of legal recourse. This silence is inadvertently absorbed by children, who learn that expressing pain, questioning authority, or seeking help is unacceptable. Over time, shame and emotional suppression become internalized coping mechanisms, passed down as behavioral norms. The household, which should ideally be a space of safety and support, transforms into a site of emotional repression and psychological harm.

#### DOMESTIC VIOLENCE AND MARITAL RAPE- INTERLINK

Domestic Violence encompasses a tension between the family and privacy and protection by

the state. Rape however is caught in the tension between consent and evidentiary proof.<sup>327</sup> According to Hindu marriage act 1955, it is said in section 13 that cruelty is one of the reasons for divorce. It is important to note that the Hindu Marriage Act only offers civil relief like judicial separation or divorce and does not criminalise sexual violence like marital rape, and immediate protection, need of the victims is not acknowledged. According to Section 12, the nullity of marriage can be sought for limited grounds such as fraud, unsoundness of mind, lack of valid consent at the time of marriage, but this sexual violence like marital rape that continues after marriage does not qualify for nullity. Protection under the Domestic Violence Act, 2005 says that protection of women from domestic violence and civil remedies are provided to women who are facing domestic violence like abuse, and sexual abuse is added to it according to the definition of section 3, which says that whoever encompasses any conduct of sexual nature, that humiliates, abuses or violate the dignity of a women or individual. Many countries like the United Kingdom, United States, Nepal have already criminalized domestic violence like marital rape, marital rape should be criminalized in India as soon as possible, The failure to criminalize marital rape perpetuates the notion that marriage implies irrevocable sexual consent, criminalizing marital rape serves a clear message to them that non-consensual sex is not acceptable within marriage. There is an urgent need for making new laws or legislative reform to respect the dignity of married women, their consent and justice for the married women's and to uphold constitutional principles, infringing upon the right to live a life with dignity.

#### CONCLUSION

Marital rape is a grave violation of human rights that challenges cultural beliefs, legal system and societal norms. Nowadays the discussion on marital rape has increased a bit, people have started talking about marital rape, there

<sup>327</sup> Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues, Morgan Lee Woolley, Hastings Women Law Journal

has been a lot of discussion on marital rape for the past few years, the very idea that marriage means giving unconditional sexual rights is a violation of dignity of the partner who faces it. The idea that once the marriage has taken place, it means that the consent of a partner is not required, in most cases we witness that the husband asserts all sexual rights over his wife, and the victim cannot not take any step against it because our legal system refuses to protect them. In most cases, the woman's own family members don't support her, and those people expect that the woman to adjust with the same man even after years of sexual and mental torture and live with him for the rest of her life because rape is not considered a factor for divorce. And if any woman raises her voice for crimes like marital rape there is absolutely nothing to back her up. While one must not undermine sexual consent of the man as well which calls for a gender-neutral law protecting both sides. In most cases however, the woman is the victim and she does not get justice. People have normalized crimes like marital rape, but this must change. In the patriarchal society we live in, men are kept on such a pedestal that they are taught to impose and asserts themselves in the house to be 'the man' of the house, however this is not only harmful to the woman but also to the man. Negative thoughts and practices do exist and are never challenged in the sections where it should not be. Marital rape is a serious human rights violation that goes against cultural beliefs, legal framework and societal norms. There has been a great deal of debate regarding marital rape over the last few years. Unconditional sexual rights are violative of all basic human rights. It is necessary to criminalize marital rape and provide justice to the victims and it is a welcome step towards gender equality. The idea of marital rape as legal impossibility originated in colonial British law, under which a wife was a man's property. India is one of the few countries that still clings to it. Cultural assumptions regarding the sacredness of marriage and the societal stigma related to the

mention of sexual issues, especially within the context of marriage, also delay advances in this area. Rape is not merely a physical assault, but is destructive of the whole persona of the victim.