

Criminalization of Marital Rape in India: Constitutional Challenges and Judicial Trends

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ABSTRACT

Rape is a criminal offense but marital rape? It's a question that has raised contentious debate nationwide. Currently, marital rape has become an under reported offense as with societal perspectives, it's been tolerated and a non-criminalised crime in India. It's not a new concept but an ongoing legal issue. The exception mentioned in the criminal law that unconsented or forceful intercourse in wedlock doesn't come under the ambit of Rape is itself a violation of article 14, 15 and 21, the golden triangle of the constitution.

This paper is divided into six chapters. Chapter 1 defines and discusses the legal and social background of marital rape in India and the statutory exception governing it, Chapter 2 examines its historical evolution and judicial development, Chapter 3 analyses the constitutional challenges arising under Articles 14, 15, and 21, Chapter 4 presents a comparative analysis of the legal position of marital rape in other jurisdictions, Chapter 5 discusses the health impact of marital rape on women, and in Chapter 6 the paper suggests certain recommendations and seeks to ensure protection to women, their bodily integrity to aid them to lead a dignified married life and concludes by emphasizing the protection of women's bodily autonomy, dignity, and equality.

KEYWORDS

Marital rape, Bodily integrity, Constitutional morality, Unconsented sexual intercourse, Gender equality, Non-criminalisation.

INTRODUCTION

Marriage is the union of two people who are declared to be one. Every religion has the concept of marriage involving rituals and ceremonies. For some it's a sacrament whereas to some it's a contract.² Thus, marriage is a means for accepting each other's life. In India, due to the dominance of patriarchy in society, it's assumed that husbands have pure privilege upon their

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² Abdul Kadir v. Salima, (1886) ILR 8 All 149.

wives in all aspects whether its financially, physically , emotionally, etc. So, the husband assumes that he has bodily autonomy over his wife. With time, when women raised up their voice against discrimination and the patriarchal system, the issue of marital rape arose. Since 1860s, marital rape has been debated and various scholars and researchers put out their thoughts on the subject. Then, marital rape became a news headline and questioned in the parliament and before courts because it came to be known that “India is one of the 36 countries”³ who haven’t criminalised marital rape yet.

Now, what is marital rape? It can be defined as a forceful or an unconsented intercourse between husband and wife is nothing but a marital rape.⁴ Consent is the key factor as in course of rape. Sexual intercourse is a marital obligation⁵ but a forceful intimation is nothing but an offense. In Indian marriages, it is like a passport that gives autonomy to the husband over his wife.

Within the definition of Rape under section 375 of the Indian Penal Code (IPC) which is now Section 63 of Bharatiya Nyaya Sanhita (BNS), there lies a statement termed as marital rape as an exception 2 (intercourse within marital ties isn’t a rape irrespective of consent). The only change made under this provision was increment of age of victim from 15 years to 18 years. In 2023, when the older laws were repealed by the newer ones, various changes were made in the BNS but the question of marital rape as a crime is still left ignored. BNS is considered the “modernized” version of IPC, and yet marital rape was only the exception but not the offense. The society believes that there is nothing wrong in such unconsented intercourse as it forms a part of a marriage, but what about women rights? Her dignity? Her equality? Her freedom? The question is still unanswerable and there seems no ray of hope as of now.

EVOLUTION OF MARITAL RAPE

The modern concept of marital rape immunity is commonly traced back to Lord Hale’s contractual theory. Sir Mathew Hale’s seventeenth-century formulation says that a husband could not be guilty of raping his lawful wife. This proposition later influenced the development of the marital rape exception in common law jurisdictions.⁶

³ Sarthak Makkar, Marital Rape: A Non-criminalized Crime in India, HARV. HUM. RTS. J. (Jan. 1, 2019), <https://journals.law.harvard.edu/hrj/2019/01/marital-rape-a-non-criminalized-crime-in-india/>.

⁴ L. Bidwell & P. White, The Family Context of Marital Rape, 1 J. FAM. VIOLENCE 277, 287 (1986).

⁵ Ted Bauer, The Obligation of Sex in a Marriage, Medium (May 27, 2024), <https://tedbauer.medium.com/the-obligation-of-sex-in-a-marriage-762f01eb5514>.

⁶ Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1376 (2000).

A. “Harvinder Kaur vs. Harmander Singh 1983”⁷

The case filed to seek order for restitution of conjugal rights. But on appeal wife argued against this order as it infringes her right to privacy. The Delhi High court held that it does not violate any fundamental right and has nothing to do with the privacy and the order for restitution doesn't force to meet sexual relations but instead encourages to preserve marriage.⁸

B. “Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty”⁹

Accused allegedly rape with victim under a false marriage. Under this case, the court held that rape is an offense and do affects women rights to lead a dignified life.

C. “Nirbhaya rape case”¹⁰

The 2012 Delhi gang rape case prompted significant reforms in India's criminal law relating to sexual offences. With this, stringent provisions were enforced against rape accused as the Criminal Law (Amendment) Act, 2013¹¹ was introduced following the recommendations of the Justice Verma Committee¹². Justice Verma Committee also recommended bringing marital rape under ambit of rape by the removal of exception under Section 375 IPC, but the legislature rejected their plea.

D. “RIT Foundation vs Union of India, (petition filed in 2015, judgement delivered in 2022)”¹³

The foundation filed a PIL in Delhi high court for criminalising marital rape in Section 375 IPC as it infringes Articles 14,15, 21 of the Indian Constitution. The judgement passed by the 2-judge bench was contrary. Justice Rajiv Shakti held in favour of PIL whereas Justice C. Hari Shankar gave his verdict against the PIL. As the verdict was split, no final conclusion was met and the matter proceeded further to the Supreme Court for consideration.

E. “Independent Thought vs Union of India 2017”¹⁴

⁷ Harvinder Kaur v. Harmander Singh Choudhry, AIR 1984 Del 66.

⁸ Harvinder Kaur v. Harmander Singh Choudhry (AIR 1984 Del 66), Pahuja Law Academy, <https://www.pahujalawacademy.com/harvinder-kaur-v-harmander-singh-choudhry-air-1984-del-66> (last visited June 17, 2026).

⁹Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, (1996) 1 SCC 490 (India).

¹⁰ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.

¹¹ Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

¹² JUSTICE J.S. VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013).

¹³RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404 (India).

¹⁴ Independent Thought v. Union of India, (2017) 10 SCC 800.

Under this case Supreme court held marital rape as unconstitutional if the victim age is under 18 years, even under a valid marriage.¹⁵ This was the first case where Supreme court declared marital rape as a crime though under limitations.

F. “Nimeshbhai Bharatbhai Desai vs State of Gujarat”¹⁶

The Gujarat High court stipulated their thoughts against the exception of marital rape. Justice Pardiwala in his judgement stated that non-criminalisation of the marital rape is draining the confidence and trust of the women to marry. He used marital rape concept as a “disgraceful offense” as it’s against the ethics of constitution and is abuse of the statute. Thus, the court can’t criminalise on its own as it’s a statutory exception, showing tension between constitutional ethics and statutory interpretation.

G. “X vs X”¹⁷

The Kerala high court held out marital rape as a divorce ground as it constitutes to cruelty physical or mental.

Thus, with all these judgements it’s crystal clear that marital rape is not seen with broader perspective. In 2016, the then minister for Women and Child Development, Maneka Gandhi, mentioned that because of illiteracy and poverty in India the marital rape concept could not be applied even if it’s applicable worldwide.¹⁸

CONSTITUTIONAL PRINCIPLES

A. Article 14¹⁹

This article embodies principle of right to equality. With the lens of marital rape, there lies inequality amongst the married and the unmarried women. This classification creates distinction and infringes principle of reasonable classification. A woman remains a woman, irrespective of change in her marital statutes.

¹⁵ Daisy Jain, Independent Thought v. Union of India (2017) 10 SCC 800, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-6315-independent-thought-vs-union-of-india-2017-10-scc-800.html> (last visited June 17, 2026).

¹⁶ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC OnLine Guj 1386.

¹⁷ X v. X, Mat. Appeal No. 151 of 2015, decided on 30-07-2021.

¹⁸ PTI, Marital Rape Concept Cannot Be Applied in Indian Context: Maneka Gandhi, INDIAN EXPRESS (Mar. 3, 2016), <https://indianexpress.com/article/business/budget/amarital-rape-concept-maneka-gandhi-indian-context/>.

¹⁹ INDIA CONST. art. 14.

B. Article 15²⁰

This article embodies prohibition of discrimination. With the lens of marital rape, females are facing discrimination on basis of gender as they are kept under the male dominance.

C. Article 21²¹

This article embodies right to life and liberty. Every individual has the right to live a dignified life. After the case of “*K.S Puttaswamy v. Union of India*”²², right to privacy was added under the ambit of the Article 21.²³ Bodily autonomy is also under the umbrella of privacy and all women have right to make their own personal choices.

COMPARATIVE ANALYSIS

If we compare the status of marital rape criminalisation, various nations given below has already declared marital rape as an offense.

Marital rape was criminalised in 1993 in the United States, in 1983 in Canada, in the 1990s in Australia, in 1993 in South Africa (court didn't consider any exception for rape), in 2002 in Nepal, and in 1997 in Germany. The House of Lords's decision in *R v. R* was also a landmark decision as they held that there was no implied consent to sexual intercourse in the context of marriage. The common thread among these jurisdictions is that they all acknowledge that bodily autonomy and consent is essential, and that marriage should not be conceded as a justification for non-consensual sexual relations.

Therefore, these nations believes that bodily autonomy should be protected and anything without consent is itself coercive. International human rights also claims that marital offense is against women rights and blurring the concept of gender equality.

Nations like Bangladesh, Pakistan, Saudi Arabia, UAE, Bahrain, Oman etc, still haven't declared marital rape as a crime. These nations believes that it would be misused and rate of broken marriages will be increased. It would be complex to proof the lack of consent.

²⁰ INDIA CONST. art. 15.

²¹ INDIA CONST. art. 21.

²² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

²³ Fundamental Right to Privacy, SUPREME COURT OBSERVER (July 16, 2025), <https://www.scobserver.in/cases/puttaswamy-v-union-of-india-fundamental-right-to-privacy-case-background/> (last visited June 17, 2026).

HEALTH IMPACT

According to various health reports it is examined that marital rape affects health of a women. It includes mental pressure to survive that causes depression, abusive behaviour by husband and family gives mental trauma.²⁴ Various sexually transmitted diseases, vaginal bleedings, pelvic pain, UTI, etc also come under the negative health effects of marital rape.²⁵ Due to anxiety and distress sometimes women suffer conceiving problems or miscarriages.²⁶

According to the report of “National Family Health Report”²⁷ of 2016 approx. 80% women between 15-49 years of age are victims of sexual assault. About 3% women were treated with misbehaviour and were assaulted for refusing to perform sexual intercourse.

Therefore, it's clear that since ages women are the silent sufferers, who are compromising, adjusting in name of respect, society. The legislature has to come up on the stage to make a balance between statues and constitutional ethics.

CONCLUSION AND THE WAY FORWARD

In India, the issue lies in the traditional norms. It's a bitter pill to swallow that with time traditional norms should be compromised so that the human rights cannot be sacrificed. Marriage is a sacred bond between two individuals but if we dive deeply, marriage is nothing but a means to treat women as a chattel or husband's property. He has full autonomy to break, build, misuse, harm etc over it. This isn't fair. Marital rape is a rape in its own. A husband cannot be defended upon a statutory exception. It is a betrayal to women, her beliefs, her trust, and her rights. The women who are forcefully brought under physical relation with her husband never take the plunge to speak out loud as society will be questioning and blaming her. That's where gender stereotypes stem out.

It's a true saying that actions speak louder than words because debates are going on from long period of time, but no action has been taken. Every year cases of marital rape are increasing and the question still lies before the courts that for how long will women be the sufferers and

²⁴ Nandini Agarwal, Salma M. Abdalla & Gregory H. Cohen, Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review, 2 PLOS GLOB. PUB. HEALTH e0000601 (2022).

²⁵ Jacquelyn C. Campbell & Peggy Alford, The Dark Consequences of Marital Rape, 89 AM. J. NURSING 946, 948 (1989).

²⁶ Jacquelyn C. Campbell, Health Consequences of Intimate Partner Violence, 359 LANCET 1331, 1331–36 (2002).

²⁷ Bhagyashikha Saptarshi, Marital Rape and Law, Manupatra Articles (Apr. 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

constitutional morality will be ignored. Hence, it is high time that marital rape should be criminalised with active legislation and enforcement in the criminal framework, especially by removing the exception provided under Section 63 of the BNS. Institutionalising consent as a key component of the offence alongside good law and procedural safeguards to simplify the determination of evidence, and to eliminate procedural confusion, is essential to ensure a full legal and social reform.

Moreover, because of the intimate character of these conflicts it is advisable to have compulsory counselling as a first step to identify the facts of the case, and create comprehensive public awareness programs to inform the victims and potential offenders about the legal repercussions. Lastly, if strong punishments are called upon, they will help strengthen the fundamental trust that underpins the marital ties. These systemic changes when taken together will break the gender stereotype and will act as a decisive step towards the protection of human rights.

