
THE GROWING SIGNIFICANCE OF CRIMINALISING MARITAL RAPE IN INDIA

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Abstract

Despite being known for its diversity and culture, India is unfortunately notorious for grievous crimes as well, like rape. Although India is transitioning into an emerging economy globally, such crimes remain persistent and entrenched within the system, perhaps indicating a notable systemic failure. Marital rape, a heinous offence, ceases to be considered as even a 'crime' within the Indian judicial system. Ironically, the law itself provides legal immunity for perpetrators through Exception 2 of Section 375 of the Indian Penal Code (IPC).² Under this section, sexual intercourse between a husband and wife, where the wife is aged over 15, cannot be deemed as rape. This seems atrocious as not only does the Indian judicial system not provide a solution for marital rape, but they instead offer immunity to the offenders. Henceforth, this article contends that criminalising marital rape may be the ideal response. Additionally, it takes account of the issues and objections underscored by the detractors such as preserving the sanctity of marriage, potential misuse and evidentiary difficulties. Ultimately, the article upholds that the fundamental right to bodily integrity surely cannot be contingent upon marital status.

Keywords: Marital Rape, Criminal Law, Crime, CrPC, IPC, Rape

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² Indian Penal Code, 1860, Section 375, Exception 2

Introduction

Notwithstanding the legislative advancements of India, it remains within the minority of democracies where marital rape fails to be criminalised. The present discourse examines the legislative, social and constitutional implications of the marital rape exemption. The article offers a compelling case for reform, drawing upon Indian Constitutional jurisprudence, comparative law, international human rights obligations and the feminist legal theory. It investigates judicial tendencies, particularly the split landmark result in *RIT Foundation v. Union of India*³ and the progressive rulings in *Justice K.S. Puttaswamy (2017) v. Union of India*⁴ and *Joseph Shine v. Union of India (2018)*⁵ to illustrate the inconsistency in safeguarding women's bodily autonomy. Additionally, it combats the most prevalent justifications against criminalisation including the likelihood of misuse and adverse effects to the institution of marriage, attempting to respond with rational legal reasoning. Henceforth, the article notably contends that penalising marital rape is not simply constitutionally indispensable, but also ethically and socially imperative alongside fulfilling the international commitments.

The use of Legal Jargon

The statutory framework governing the criminalisation of marital rape in India emphasises numerous critical constitutional and legislative principles. Section 375 of the Indian Penal Code describes the crime of rape, while also providing Exception 2, which exempts a husband from prosecution for raping his wife, granting legal protection purely based on marriage.⁶ This immunity is undoubtedly contrary to the essence of Article 14 of the Indian Constitution, which ensures equality before the law⁷, and Article 21, which safeguards the right to life and personal liberty, encompassing bodily autonomy and sexual integrity.⁸ Furthermore, Section 376 of the IPC

³ *RIT Foundation v Union of India* 2022 SCC OnLine Del 1404

⁴ *Justice K.S. Puttaswamy (Retd) v Union of India*, AIR 2018 SC SUPP 1841

⁵ *Joseph Shine v Union of India* AIR 2018 SC 4898

⁶ Indian Penal Code, 1860, Section 375

⁷ Constitution of India, Art. 14

⁸ Constitution of India, Art. 21

specifies the sentence for rape, spanning from seven years to lifetime imprisonment, however its application is severely constrained by the marital exception.⁹

This antiquated exception stands in direct contrast to modern constitutional standards. The Supreme Court, in landmark cases which include **Justice K.S. Puttaswamy v. Union of India**¹⁰ established the right to privacy as an essential and fundamental privilege encompassing bodily integrity and decisional sovereignty. Similarly, in *Joseph Shine v. Union of India*¹¹ (2018), the Court overturned the adultery statute because it viewed women as possessions of their husbands, reaffirming that marriage does not invalidate a woman's agency. This exemplifies the necessity for constitutional reform by abolishing the exception which preserves detrimental orthodox notions.

Case Laws:

Independent Thought v Union of India AIR 2017 SC 4904¹²: This case protected child brides by significantly highlighting that having sexual intercourse with a minor wife (formerly of age 15 but now of age 18) will be deemed rape.

Justice K.S. Puttaswamy (Retd) v Union of India AIR 2018 SC SUPP 1841¹³: Within this case, it was affirmed that bodily autonomy will be considered a component of privacy.

Joseph Shine v Union of India AIR 2018 SC 4898¹⁴: This case rightly decriminalised adultery under Section 497 of the IPC which was discriminatory against women and overlooked their consent entirely, therefore this ruling reinforced agency within marriage.

RIT Foundation v Union of India (2022) SCC OnLine Del 1404¹⁵: In this landmark judgment, the judges “delivered a split verdict” [9] on the issue of marital rape. Justice Rajiv Shakdher argued

⁹ Shrishti Sharma, Challenging the Legality of Marital Rape in India: An International Human Rights Approach, Jindal Forum for International and Economic Laws (Sept. 24, 2024)

¹⁰ Justice K.S. Puttaswamy v Union of India

¹¹ Joseph Shine v Union of India

¹² Independent Thought v Union of India AIR 2017 SC 4904

¹³ Justice K.S. Puttaswamy (Retd) v Union of India AIR 2018 SC SUPP 1841

¹⁴ Joseph Shine v Union of India AIR 2018 SC 4898

¹⁵ RIT Foundation v Union of India (2022) SCC OnLine Del 1404

the exemption to be unconstitutional and breaching Articles 14, 15 and 21 of the Indian Constitution, albeit Justice Hari Shankar defended it, advocating that the matter falls within the remit of the legislature to decide.¹⁶

Marital Rape: A Legal Vacuum

Within Section 375 of the IPC, rape is constituted as non-consensual sexual intercourse where either consent is not obtained or acquired forcefully. Similarly, the International Criminal Court (ICC) defines rape as forceful invasion of the body of an individual, rendering the victim incapable of granting genuine consent¹⁷. However, the marital rape exception provided by the Indian law is indeed contentious and anomalous. The issue arises by the mere fact that consent is the cornerstone of criminal law which nevertheless is undermined here by the law itself. The Supreme Court of India increased the age of consent from 15 to 18 for a husband to legally have sexual intercourse with his wife without it being considered spousal rape in the **Independent Thought v. Union of India**.¹⁸ However, the blanket immunity provided to husbands remains implying that a husband encounter repercussions for raping a woman but absurdly not for sexually assaulting his wife. Thus, this leads to a legal dichotomy where the aforesaid act of rape is paradoxically legitimate within a marriage yet criminal outside of a marriage. Such conduct is not only ethically wrong but also contradicts Articles 14 (equality before the law) and 21 (right to life and personal liberty) of the Indian Constitution, as well as evolving conceptions of consent within Indian law.

Arguably, while the worldwide momentum around women's sexual rights and autonomy continually gain traction, the Indian legislature continues to sustain conservative and patriarchal notions where marriage signifies irrevocable sexual consent. This is extremely problematic. Therefore, the marital rape exception is a grave concern that undermines bodily autonomy of women while perpetuating gender-based violence obscured by the sanctity of marriage.

Domestic v. International Legislation

¹⁶ Prashant Jha, [Marital Rape] Delhi High Court judges differ on constitutionality but agree that Supreme Court should settle the issue, Bar & Bench (May 2022)

¹⁷ International Criminal Court, Elements of Crime (Issued in 2013)

¹⁸ Independent Thought v Union of India AIR 2017 SC 4904

Evidently, there is consequential disparity between the Indian domestic legislation and standards and expectations of International Human Rights Law and treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979¹⁹ and the International Covenant on Civil and Political Rights (ICCPR) 1966.²⁰ Given that India ratified and became a signatory to both CEDAW and ICCPR, it is obligated to fulfil the treaty obligations under international law under Article 51(c) of the Indian Constitution.²¹ Nevertheless India violates Article 6 of the ICCPR and Article 1 of CEDAW by preserving Exception 2 to Section 375 of the IPC.

Over 100 countries have criminalised marital rape and rendered it illegal, whereas India persists to be one of the 36 countries that refuse to identify this grievous offence.²² Subsequently, India may be depicted as a regressive minority, contravening its democratic and liberal identity. Moreover, India ought to recognise its obligations towards international treaties like CEDAW which mandates eradicating all forms of discrimination against women and declarations like the Universal Declaration of Human Rights which warrants dignity and equality.

Paradoxically, the same legal structure that condemns a man for raping a stranger fails to identify the misconduct when perpetrated by a husband, relying on the defective premise of irrevocable marital consent and undermining the wife's agency. This polarity is apparent, particularly when viewed through the progressive prism of privacy, dignity and consent proposed by **Puttaswamy** and **Joseph Shine**. Crucially, scholars have suggested that the marital rape exclusion reveals an enduring societal formation of the female body in India. As Shubhrangana Pundir observes, “*a woman is primarily seen as a tool for her spouse's sexual satisfaction and then to reproduce*”,²³ resulting in a chronic dismissal of sexual agency and autonomy. The socialisation process frequently causes women to internalise silence and obedience to authority, fostering the belief that

¹⁹ Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979)

²⁰ International Covenant on Civil and Political Rights (Dec. 16, 1966)

²¹ Shrishti Sharma, Challenging the Legality of Marital Rape in India: An International Human Rights Approach, Jindal Forum for International and Economic Laws (Sept. 24, 2024).

²² Bhagyashikha Saptarshi, Marital Rape and Law, Manupatra (Apr. 9, 2024).

²³ Shubhrangana Pundir, Sexual Autonomy of Married Women in India: Contemporary Constitutional Challenges, 6(5) International Journal of Law Management and Humanities 2177 (2023)

consent is inferred by marriage, thus being redundant. This substantially hinders their propensity to assert control over their own bodies, particularly in the intimate setting of their own homes.

Rebuttals

Critics of criminalising marital rape frequently mention three major concerns: abuse of the law, collateral harm to the institution of marriage, and evidentiary obstacles. These arguments, however, do not hold up under empirical and legal inspection.

Concerns involving misuse extend beyond the marital rape legislation. Every law, whether it deals with dowry, domestic violence or theft, has the potential to be abused. This cannot be a legitimate reason to defy legal protection. The remedy is to establish procedural safeguards, rigorous evidence standards, and judicial discretion over denying justice to true survivors.

Another viewpoint contends that criminalising marital rape undermines the sacredness of marriage. Contrarily, a marriage that does not honour both parties' consent and dignity cannot be considered sacrosanct. The legal acknowledgement of consent in marriage only strengthens the ideals of mutual respect and equality, the very foundations of a strong marital partnership.

Finally, anticipations regarding the difficulty of proving marital rape are common to all sexual assault cases, regardless of the parties' relationship. The fact that an offence is difficult to prove cannot justify its legal exclusion. The judicial system may effectively tackle these issues if the judiciary, police and medical experts are properly sensitised and survivor-centric processes are implemented.

Legislative Reform

India shall unequivocally prohibit marital rape through a statutory alteration to the IPC that eliminates Exception 2 to Section 375. This reform should be facilitated by explicit procedural protections that prevent abuse while prioritising the survivor's voice. Sensitisation of judges, police and medical experts to sexual abuse within marriage is additionally necessary to enable fair implementation.

Furthermore, extensive sex education and public awareness efforts must be implemented to change cultural views towards consent and destroy established patriarchal practices. Survivors of marital rape, who are frequently economically and socially dependent, require accessible legal aid and shelter mechanisms to securely depart abusive situations. Additionally, any reform must be intersectional, acknowledging that the implications of marital rape are exacerbated by caste, class, religion and disability. Postcolonial feminists, including Chandra Talpade Mohanty, contend that legislative reform must take into account women's lived experiences across social strata.²⁴

Conclusion

Subsequently marital rape undermines a woman's fundamental right to bodily autonomy and dignity. Its decriminalisation in Indian legislation mirrors a patriarchal tradition that diminishes women to sexual objects amid marriages. This is irreconcilable with the Constitution's egalitarian goal and the emerging law on consent and dignity.

The expanding public discourse, court deliberations and international requirements all accentuate the vitality of legislative reform. Criminalising marital rape does not mean criminalising marriage; rather, it involves recognising women as whole legal individuals who deserve equal protection, rights and respect irrespective of marriage. India must address this ethical and constitutional necessity by unambiguously stating that marriage cannot act as a shield against the offence of rape.

²⁴ Chandra Mohanty, *Under Western Eyes*, Feminist Review 61 (1988)

FAQs

Q1: Why hasn't India penalised marital rape still?

A: Given the social conservatism, the fear of false accusations and concerns about marriage integrity, it is an intricate issue. However, legal and constitutional principles necessitate review.

Q2: Is there a statute protecting women from spousal rape?

A: The Protection of Women from Domestic Violence Act of 2005 allows civil remedies, however rape within marriage is not a crime unless the woman is under the age of 18.

Q3: What would happen if marital rape were criminalised?

A. Women will have a legal remedy. The measure will bring India in line with international human rights norms while also protecting its constitutional rights.

Q4: Can these cases be proven in court?

A: Yes, albeit tricky. Justice can be achieved with competent judicial training, forensic evidence and survivor-centric procedures.

Q5: Has an Indian court found the marital rape exception unconstitutional?

A: Not yet conclusive. The Delhi High Court issued a split decision in 2022, and the case is currently pending at the Supreme Court.