

Revisiting the Marital Rape exception: a constitutional and comparative analysis

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Abstract

This short article describes about exception 2 of sec 375 of Indian penal code, 1860 that is marital rape. It is an act where the husband commits sexual intercourse with his own wife against her will and he is not held liable. This provision is considered as a colonial and outdated thought which demands a strong change in our social and legal jurisprudence. The act is committed within those four walls, and the perpetrator is her own husband, yet he is never held liable as it is not a crime. A rape is a rape, and a crime is a crime irrespective of the person committing it. This provision is surrounded by moral ethos and is chained to obsolete thoughts. This article relies on statistics showing the state of married women and relies on secondary sources evaluating the plight of the battered gender. The recent developments surrounding the topic and evidence signifying that Indian courts are no less and they can be the harbinger of a developed society. Where we are marching towards being a superpower and considered as viswa guru we cannot hide from the fact that there are 68 % of women in our country who are being sexually abused in their marriage. They have laws, they have statutes, but they don't have voice because somewhere they feel crippled and helpless. The laws are not strong enough to give them a chance to come out and remove that fake mask from their own perpetrators. Neglecting the cries of such harassed women would not only make them question our holy bible that is the constitution but also can shake their trust, their belief which they have bestowed on those 3 powers that is legislature, executive and judiciary. India being the land of temples and culture where women are worshipped as goddesses, it becomes difficult and cumbersome to decide the fate of such an entity who is regarded as equivalent to God. As the god can do no wrong and his actions can never be questioned, females once entering a holy union are considered to respect that union with utmost faith. My article questions the very fundamentals of this society where one section of society is being ignored where the problems of other section

of the society is being heard, and the basis of the distinction is not gender, race, caste or creed but marital status.

According to Hindu Dharmasastra marriage is a sacrament, a holy union-a permanent and indissoluble union-between a man and a woman for the performance of religious duties. The existence of a woman in a man's life is pivotal and serves an important purpose except the sexual gratification. During the performance of a yagna, it was very important for the wife to be seated with the husband to uphold dharma. However, as the world progressed these ideologies took a backseat and women were considered no less than chattels. This concept developed when some of the renowned Hindu philosophers like Manu propounded that a woman is the caretaker of the household, of her kids and the elderly. She is prohibited from going outside the house. No doubt, in his famous book of Manu smriti he has greatly praised of women in a household along with the concept of mutual fidelity and that a woman brings sparkle in the family. But nowhere she has been given the freedom to make her own boundaries. In fact, there has been certain impositions that her desertion from her husband won't be considered as any freedom to her. She is to be compelled to stay with him. A clear catalogue has been framed for women in which they have been given instructions on how to behave and why not to misbehave.

It is quite normal to think that why all of this is being discussed now, when we are already in the 21st century. However, it is imperative to understand the root of the disease to eradicate it from its inception. A disease as it is contaminating the ethos of our society on which we once used to believe. Marital rape is one of such disease.

Marital rape

Marital rape or spousal rape means indulging in sexual intercourse with one's spouse without the consent. Marital rape is deemed to be a form of domestic violence and sexual abuse. It is not only an attack on the body but the soul too. It is a mockery on the fundamental rights of the married gender where there marital status is proliferating their helplessness.

The origin of the discussion / why this discussion

Exception 2 to sec 375 of Indian penal code states “non-consensual sexual intercourse by a man with his wife, if she is over 15 years, does not amount to rape”. This imputes that non-consensual intercourse by a husband with his wife is outside the ambit of rape.¹

After the Nirbhaya case, the Verma committee report² also suggested to criminalise marital rape but no such suggestions were accepted. (Verma, 2013)

When people began to question the idea behind this exception many theories crept out. First theory which came into light talked about women merely being servants to the husband's sexual needs. Husbands were considered as masters to their wives.³

Second theory was that man and woman in a marriage were considered as one body two souls. Thus, the law never recognised the woman as an independent person.

Third theory which is still in vogue is the implied consent theory. It states that when a woman gets married, she gives her positive consent along with her to the man to satisfy himself as he pleases. It is pointing out to the fact that a married woman's status is not more than a concubine.⁴

Last theory signifies that marriage and its elements are privy to the couple. It's not advisable to interfere in the marital setup where both of them are adults.

Numbers that show the gravity of the crime

A working paper based on a comparison of NFHS and NCRB data indicated that less than 1% of cases of sexual violence by the husband are reported to the police.

A survey carried out in 2010 reported that one in five men reported having ever forced their wives for sex.⁵

In another study carried out in rural Karnataka, 36% of the women agreed to the statement that “a husband might force his wife to have sex even if she refuses”.⁶

¹ Sec 375 of Indian penal code

² Justice Verma committee report (2013) (Verma, 2013)

³ Blackstone, W., 1765–1769. *Commentaries on the Laws of England*. Oxford: Clarendon Press.

⁴ Hale, M., 1736. *Historia Placitorum Coronae: The History of the Pleas of the Crown*. London.

Deosthali, S., Rege, S., and Arora, A., 2022. *Women's experiences of marital rape and sexual violence within marriage in India: Evidence from service records* **Sexual and Reproductive Health Matters**, 30(1).

⁶ Jejeebhoy, S.J. and Santhya, K.G., 2002. *Sexual relations and decision-making within marriage in rural India*. Population Council Working Paper.

A mixed-method study in Chennai found that about 31% of women reported sexual violence by husbands.⁷

A large-scale survey on married men in four districts of Uttar Pradesh found that about 32% of husbands in their lifetime had forced their wives to have sexual intercourse.⁸

More recently, the National Family Health Survey (2019–2020) showed that 29% of ever-married women had experienced some form of physical or sexual violence from their husbands.⁹

The table below shows different forms of sexual violence reported by women. Sixty-eight per cent of the women reported “forced sex,” referring to forced penile penetration and 8% of women reported that they had experienced “forced anal or oral penetration”. These forced sexual acts would be recognized as “rape” under Section 375 only if exception 2 to the law were not to exclude marital rape.

Forms of Sexual Violence Experienced by Married Women (N = 828)

Forms of Violence	Number of Women (N=828)	Percentage (%)
Forced sexual intercourse	565	68%
Withholding sexual pleasure	260	29%
Not allowing women to use contraceptives	79	10%
Forcing her to have children	119	14%
Forcing wife to perform sexual acts against her will (e.g., oral sex)	64	8%

⁷ Evidence from a mixed-method study conducted in Chennai indicates that nearly one-third of married women reported experiencing sexual violence within marriage (Deosthali et al., 2022).

⁸ Koenig, M.A., Stephenson, R., Ahmed, S., Jejeebhoy, S.J. and Campbell, J.C., 2006. Individual and contextual determinants of domestic violence in North India. *American Journal of Public Health*, 96(1), pp.132–138.

⁹ (2019-20, p. 7)

Sexual advances from mother 30
family members

4%

Source: Deosthali et al. (2022)

A tussle between fundamental rights and private sphere

There is no iota of doubt that judiciary and legislation is avoiding the issue by excusing themselves with those theories as mentioned above but along with that some interesting creation has been evolved that heralds the institution of marriage, so sacred that to maintain its purity women fundamental rights should be sacrificed.

Private sphere denotes a situation where it is quite difficult to penetrate into the privacy of the situation as it is very sensitive and can be catastrophic to that ultimate goal which our legislature or the judiciary intends to preserve. They have sidelined the case of marital rape citing the penetration of judiciary into that very private sphere which is direct attack on the root of the marriage. Frances Olsen in the 'Feminist Critique' ¹⁰ argues that the notion of certain private spaces creates an area wherein those who are harmed do not have recourse under law, and as a consequence, no legal action can be taken against those who harm. While in many cases like the restitution of conjugal rights, sec 498-A cruelty or the question as to consensual sex between two consenting adults states as well as the judiciary has cared to intrude into the private sphere. this very well signifies that this problem can also be heard and deliberated reaching to its final conclusion.

The term marital privacy came into the picture when the issue related to the constitutional validity of restitution of conjugal rights came before the court through various case laws like T Saritha Venkata Subbaiah vs state of Tamil Nadu¹¹ or Harmandar Kaur vs Harminder Singh.¹² Where the former case held that sec 9 of Hindu marriage act, 1955 is unconstitutional as it forced a woman to return back to a broken and torturous marriage and most importantly stating an important fact that women too may experience forced sex within a marriage and by compelling her to return we are only encouraging the idea that women doesn't

¹⁰ Olsen, F., 1983. *The myth of state intervention in the family*. *University of Michigan Journal of Law Reform*, 18(4), pp.835–864.

¹¹ T. Saritha v. T. Venkata Subbaiah, AIR 1983 AP 356.

¹² Harmander Kaur v. Harmander Singh, AIR 1985 P&H 83.

hold any sexual autonomy and at the same time violating art 14 of constitution of India that vouches for right to equality in every aspect. While this could have been a significant breakthrough, but this case failed to create any fire. In the latter case, the term marital privacy was entwined with the private sphere holding the provision as constitutional as it doesn't compel parties to live together for establishing sexual relationship only but for re-establishing the conjugal ties, forgetting the fact that in a marriage sexual activities, is a normal consequence which can be felt forced in a lachrymose marriage.

RIT FOUNDATION AND ORS VS THE UNION OF INDIA: a cliffhanger or a new start

The case ¹³ mentioned above gave a new direction and at least discussed about the emerging issue. It didn't put it under the rug and tried to find a sense in order to solve it. Mainly there were two issues; first was, accountability. Marital rape exists but it happens between two individuals within the four walls of their home. No eyewitness, no suspect. It would be difficult to pin a single individual for those allegations. Second, was the idea of breaking a home. It has been the duty of the court since ages that utmost care would be taken to protect a marital life. Whether be it restitution of conjugal rights or the irretrievable breakdown of marriage, the court has never taken a harder route. Many relevant discussions were done pertaining to art 14 of constitution of India, 1950 or sec 375/sec 376B of Indian penal code, 1960. The petitioners were very concerned that if at all this exception 2 to sec 375 would be criminalised it would create a new offence and also along with that this practice would be infructuous because already domestic violence act, and sec 498A of Indian penal code, 1860 is dealing it, where a harassed woman can file a case under that section.

Criminalisation of marital rape in different countries

United Kingdom

It is an interesting fact to know that Indian penal code has been drafted by the rulers of this country, but the irony lies that in the case of R vs R in 1991¹⁴ the act itself was criminalised. It

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

¹⁴ R v R, [1991] UKHL 12; [1992] 1 AC 599.

means United Kingdom criminalised the act of raping your own wife. The drafter's country recognises and accepts it as a crime but in India it is still decriminalised.

Canada

Marital rape is explicitly criminalised under Art 271 and Art 278 of the criminal code.¹⁵ Also, article 273.2 (a) describes the instances where the accused can ascertain the presence of consent. Formally, in 1983 marital rape was criminalised.

France

It was well settled in this country that marital rape is an offence but it was reiterated again in *HW vs France* by the ECHR¹⁶ that a woman cannot be held liable for her divorce just because she refused to have sexual relations with her husband. This case law supported the court of cassation who had already given its proof that it is admitting that marital rape is a crime.

United states

Marital rape is illegal in all 50 U.S states since 1993. The number itself shows that how serious the country is towards safety and security of women.¹⁷ (Anderson, 2016)

These are only few amongst the 100 countries where marital rape is considered as no less than rape. The issues are the same as of India, but they have accepted the fact that marital rape is indeed a crime, and they are prosecuting people under it. To tackle the false cases, they have created a hefty charge in case someone files a false complaint against the husband. The process of prosecution is the same that is proving it beyond a reasonable doubt.

How marital rape is proved ?

Circumstantial evidence

- Statement by the victim
- History of domestic violence
- Medical reports
- Statements by the neighbours

¹⁵ Criminal Code, R.S.C. 1985, c. C-46 (Canada)

¹⁶ *H.W. v. France*, Application No. 13805/21, European Court of Human Rights, 2025.

¹⁷ Anderson, M.J., 2016. Marital rape laws globally: Rationales and snapshots around the world. In: Yllö, K. and Torres, M.G. (eds.) *Marital Rape: Consent, Marriage, and Social Change in Global Context*. Oxford: Oxford University Press.

- If after the act, the victim sends a message to her friend about the unfateful incident then also it can be used as a prove.
- Messages to the husband refusing or showing disagreement to the act

Conclusion

The judiciary in the case shifted the issue to the legislature. As per the separation of power concept, it was a correct thing to do as they didn't want to transgress into the jurisdiction of the legislature. What I believe is that when our Indian penal code was drafted it was done by an Englishman who was surrounded by a different state of mind. The idea of coverture and women to be treated as a chattel were the creatures of their own kingdom and I believe Lord Stephen was no different. Many believe that those laws were colonial in nature and many of those were repealed in the BNS, so, why not this exception. Also, the issues like it would be difficult to prove the act or the fact that it might be misused serves no purpose. India is a welfare state and where the statistics mentioned above shows how many women are still suffering and the most frightening fact is that they must live with her own rapist. Isn't it more saddening. There exist many laws in India where proving the accountability becomes difficult. For example, sec 498A of Indian penal code, many cases came under this section where wives used to file false complaints and police used to pick up husbands or the in laws without any excuse. The supreme court in *Digambar vs state of Maharashtra, 2024* or in the case of *Yashodeep bisanrao Vadode vs state of Maharashtra, 2024* has held the fact that husband or in laws are getting harassed and

a legal terrorism is being done because there is no accountability and the ropes of justice are in the hands of wives. So, if the plight of one gender is being addressed here so why not the plight of another gender is being heard under sec 375 exception 2 of Indian penal code. Art 14 of the constitution of India, 1950 is not being violated? what about natural justice? what about those 68% women? can we do nothing to ease out their pain? Are they meant to suffer just because they are married? those men who rape their own wives, why they are not equated to a stranger and given the same stringent punishment, just because they are married.

