

NON- CONSENSUAL SEXUAL INTERCOURSE WITHIN MARRIAGE IN INDIA AND THE UNITED STATES: A COMPARATIVE STUDY

Written by *Laxmi Subhash Parihar** & *Dr. Pranay Malviya***

**Visiting Faculty, Dr. Panjabrao Deshmukh College of Law, Amravati., Sant Gadge Baba
Amravati University, Amravati, Maharashtra, India*

*** Professor, Dr. Panjabrao Deshmukh College of Law, Amravati., Sant Gadge Baba
Amravati University, Amravati, Maharashtra, India*

ABSTRACT

The majority of times, non-consensual sexual intercourse within marriage go unreported as sexual assault. i.e., an unintentional rape of the wife by the husband. It is not about marriage, tradition, or culture; rather, it is about the absence of permission and willingness. Non-consensual intercourse does not include sexual encounters; rather, it involves aggression and cruelty toward his wife. Rape should be outlawed and punished whenever, wherever, and with whomever it occurs because it is still rape whether it involves married or unmarried women. More than just a physical connection, marriage signifies the beginning of a new family. It also represents an emotional relationship between the couples. "*Marital rape*" or "*spousal rape*" is defined as "*the forceful and non-consensual sexual intercourse by a husband with his wife.*" It has had extremely negative physical and psychological effects on spouses and is not only about sex but also about sexual assault and cruelty. Comparatively, Non-consensual intercourse is a crime in the US since 1993, but there is no equivalent law in India. As stated in the Manusmriti in the Common Era (200 CE), the notion of Non-consensual intercourse within marriage has been disregarded for years. It became susceptible under Mughal rule, and this horrible crime is still the exception today. While marital Non-consensual intercourse is illegal in many other nations, including Australia, Nepal, and the United States, it is generally accepted that a married couple's desire for sexual activity should be reciprocal. Unlike India, where there is no law. The JS Verma Committee was established, but its suggestions to make Non-consensual

intercourse within marriage a crime in India were disregarded. The bills that were presented to parliament were likewise defeated. The victims of Non-consensual intercourse are not protected by law. The article's goal is to examine the social and legal ramifications of marital rape. Because of the divergent rates of Non-consensual intercourse in the two nations, they are being compared. Non-consensual intercourse has to be made a crime, and India's legislature and courts should pay attention to this matter.

Keywords – Non-Consensual, Intercourse, Marriage, India, United States, Marital Rape.

INTRODUCTION

The majority of times, non-consensual sexual intercourse within marriage go unreported as sexual assault. i.e., an unintentional rape of the wife by the husband. It is not about marriage, tradition, or culture; rather, it is about the absence of permission and willingness. Non-consensual intercourse in marriage does not include sexual encounters; rather, it involves aggression and cruelty toward his wife. Rape should be outlawed and punished whenever, whenever, and with whomever it occurs because it is still rape whether it involves married or unmarried women.

Because we live in a patriarchal culture, the husband dominates the woman. Due to the fact that such family matters are lawful and ungoverned by any laws, they are not addressed and kept private. Statistics show that 36 nations worldwide do not consider Non-consensual intercourse in marriage to be a crime, whereas more than 52 countries have made it a crime. Poland was the first nation to make spouse rape a crime in 1932ⁱ. Many other common law nations, including South Africa, Ireland, Canada, the United States, New Zealand, Israel, and others, have eliminated the protection granted to men for having forcible, non-consensual sex with their wives since the 1980s. In the United States, non-consensual sexual intercourse within marriage are prohibited in each of the country's 50 states, with varying penalties. The victims have both physical and psychological problems, including post-traumatic stress disorder (PTSD), depression, vaginal injuries, and in some cases, suicide. It is a flagrant breach of fundamental rights protected by articles 14ⁱⁱ and 21ⁱⁱⁱ of the constitution as well as a violation of human rights.

The bill to make Non-consensual intercourse a crime was proposed in Parliament but was rejected. Some lawmakers believe that marriage is a sacrosanct institution, and that interfering with it will cause marriages to fail and damage the institution as a whole. Without accepting the fact that most marriages in India survive because women suffer abuse in silence and make personal sacrifices, they said that India should be proud of its low divorce rates. In India, where culture values tradition above modernity and the family is the basic unit of social organization. After becoming married, do women lose the ability to refuse something?

UNDERSTANDING THE NON-CONSENSUAL SEXUAL INTERCOURSE CONCEPT

Crimes against women can take many different forms, including domestic violence, rape, sexual abuse, eve-teasing, acid attacks, etc. Rape remains a threat to the lives of women in society and is seen as one of the most susceptible forms of violence against women globally. Rape is not only a problem that affects specific women; it is a problem that affects everyone in society. It is not just a social problem; it is also a political one that blatantly demonstrates the power disparity between the sexes.

The legal definition is restricted to forcible and non-consensual vaginal penetrations, which is typical of many nations' legal systems. Many nations' laws prevent husbands from being held accountable for raping their wives since, in their eyes, wives gave their implicit agreement when they were married. In India, section 375 provides an exemption for marital rape.

Exception for Marital Rape: Section 375 of the IPC lists two situations which is not regarded as rape for purposes of the law^{iv}.

THE CONCEPT OF CONSENT IN MARITAL RELATIONSHIPS

Respect for women as individuals and as partners is the guiding concept behind consent in marriage. It entails having the choice to accept or reject a sexual interaction. In the 1600s, Mathew Hale, the Chief Justice of England, relied on the principle of implied consent. Under

this theory, the wife has given her consent by getting married, and that consent is regarded as having been given at the time of marriage and is irrevocable consent to lifelong sexual activity.

In the case of *State v. Smith*, the New Jersey Supreme Court overturned this implied consent theory, writing that "this implied consent rationale, aside from being offensive to our valued ideals of personal liberty, is not sound where the marriage itself is not irrevocable." If a wife has the legal right to leave her husband and ultimately end the marital "contract," may she not also renounce one of the "terms" of that contract, namely consent to sexual relations? In the same way that a husband has no right to imprison his wife because of the vows she has made to him, he also has no right to compel his wife into having sex against her will. His recourse, if her refusals constitute a "breach" of the marriage "contract," is in matrimonial court, not through violent or coercive self-help. The idea of implied consent has been deemed irrational by courts in the US and the UK because a wife who says the marital vows cannot consent to being violated by her husband or to being subjected to violence against her will.

The sacramental character of marriage as a lifetime tie removes and ignores the idea of consent in India since it is a "Patriarchal" or male "dominated" society and follows the principle of implied consent. A woman is seen as a husband's property.

MARRIAGE DOES NOT GIVE A MAN THE RIGHT TO RAPE HIS OWN WIFE

The right to rape is authorized by an immediate marriage. As was already indicated, society often operates on the erroneous presumption that marriage is a permit for rape and that when a woman joins the matrimonial bond, she knowingly consents to being sexually assaulted for the rest of her life. In India, non-consensual sex is seen as consented and non-consensual sex during marriage is not recognized. Laws and procedures must recognize that rape happens whether it takes place in the bedroom or a public area, regardless of who committed it or where. Whether she is married or not, the consent is crucial since non-consensual sex constitutes rape. Married women don't have any rights in India, and her permission isn't taken into account, which is against her human rights. Because a connection between a man and woman does not constitute

permission to commit rape, we need distinct laws to criminalize Non-consensual intercourse and safeguard the rights of married women.

MARITAL NON-CONSENSUAL INTERCOURSE CONCEPT IN THE UNITED STATES

Rape has long been considered any non-consensual sexual contact between people who are not partners. But up until 1975, every state had a "marital exemption" that gave a husband complete legal immunity for raping his wife. By 1993, every state and the District of Columbia had approved laws prohibiting marital rape, primarily in reaction to the campaign for women's rights and equality.

All US states now recognize domestic rape as a crime, and many of them prosecute the offender in the same way they would if the victim had been a married woman. The laws regarding rape between spouses still varied slightly in at least two states, namely South Carolina and Virginia. In South Carolina, marital violence (rape) cases cannot be prosecuted unless the offending spouse's actions were reported to the police within 30 days of the incident. (See S.C. Code 16-3-615.). In some instances of marital rape, Virginia allows for marital or individual counseling in place of legal action.

In America, there are several types of marital rape:

Sexual Pressure That Isn't Physical-

It describes societal or normative compulsion and interpersonal coercion as the two fundamental categories of non-physical sexual coercion used by those who commit marital rape. Social pressure brings up the notion of "wifely duty."

When a husband uses his riches or influence in the marriage to coerce his wife into meeting his sexual expectations, this is known as interpersonal coercion.

Threatened or forced rape, such as beating rape, force-only rape, and obsessional rape, is the other violent variety.

INDIA'S MARITAL RAPE'S HISTORICAL BACKGROUND

India is a patriarchal nation where men predominate. Males do better in the home and even in work. Implied consent is taken into account in India during the marriage process based on the mutual marital contract. The Manusmriti scriptures, written in ancient Sanskrit, which excluded the permission of women, are where we may find the exemption for marital rape. "The license to have sex" is the marital arrangement. There was no concept of consent, and Non-consensual intercourse was seen to be lawful. It was also noted that a woman is not being regarded ideal if she denies having sex with her husband. During the Mughal Empire, women's status in society was similarly precarious. Women were given to the winner as a "sex slave" kind of thing. They brazenly sold their own wives for money and a kingdom. Even now, particularly in marriage matters, the patriarchal mindset and sense of privacy persist. Today's situation has not changed. The assumption of consent is made when a husband and wife cohabit. Legislative bodies and law commissions so gave consideration to the issue, and the 42nd Law Commission Report supports the idea of spousal but limits it to judicial separation. Due to implicit permission for sexual activity and the fact that a husband cannot be punished for raping his own wife, the grounds of Non-consensual intercourse were rejected. They declined to charge the husband with raping the woman.

JUDICIAL DECISION AND NON-CONSENSUAL MARITAL INTERCOURSE LEGAL ACTION

Non-consensual intercourse is not even considered a crime in India, since there is no legislation against it. The current legal guidelines are as follows:

Exception 2 of the Indian Penal Code, 1860 states that "sexual intercourse/sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." Exception 2 of the IPC, 1860 is found in Section 375 of the IPC. It is an exemption clause that limits married women's rights.

Domestic Violence Act of 2005: The Domestic Violence Act of 2005 addresses sexual assault on a more general level. Domestic abuse, battering, family violence, and violence between a couple who may be legally married are other names for domestic violence. It may be observed in both men and women, and it involves many forms of violence such as physical, sexual,

emotional, and economic violence that may be a result of societal injustice. In the event of a marital rape, only sexual violence—not rape—will be taken into consideration, and the husband will be able to commit a second marital rape. Because the Domestic Violence Act only covers domestic violence, the crime of Non-consensual intercourse will not be recognized under it, which is why we need two legislation.

Report of the Justice Verma Committee:^v The Justice Verma Committee was established to make recommendations for changes to the Criminal Code that will expedite the legal process for those accused of sexual assault against women and increase their penalty. On January 23, 2013, the Committee submitted its report. It was established in order to amend the rape laws and foster deterrence. The 2015 Criminal Law Amendment Act was largely a result of the recommendations made by the JS Verma Committee. It was said in its recommendation that the nature of rape cannot vary with a person's relationship status and that the perspective on marriage remains the same. For purposes of comparison, only countries like the United States, Canada, Australia, South Africa, etc. authorized the criminalization of non-consensual sexual intercourse within marriage. The definition of consent was discussed, and it was said that it cannot be inferred from a person's relationship status. Regarding Non-consensual intercourse as a less serious offense and the need for a minimal punishment, punishment and penalty were also discussed. One of the significant achievements in the area where sexual interactions were differentiated from sexual activity and sexual violence was these guidelines in the context of Non-consensual intercourse in a more complex and appropriate manner. The report does not yet include this severe kind of sexual abuse against a wife.

The Supreme Court of India ruled in **Independent Thought v. Union of India** that although Non-consensual intercourse against a child is an offense punishable by law, it is still not a crime in India when it occurs between adult married couples. *It was decided that a wife might start legal action against her husband for having unnatural sex under Section 377, but only for sodomy, buggery, and bestiality.* The husbands may stop engaging in these behaviors if they receive both recognition and discipline.

State v. Vikash (2014): Although the topic of Non-consensual intercourse was thoroughly explored, the court eventually decided that *498-A is a sufficient reason to address all related difficulties, and that it is not the right moment to criminalize Non-consensual intercourse in*

India. It is not necessary to enact additional legislation or distinct laws, nor should the exemption provision be removed.

Amendment Bill 2015 and Criminal Law Amendment Bill 2014: The bills were presented in both houses, but they were rejected on a number of occasions for irrational reasons. As a result, they were only presented and not passed into law by Parliament. It was argued that Indian society does not need laws against Non-consensual intercourse and that such laws should not be passed to protect the sanctity of marriage.

MARITAL RAPE'S LEGAL HISTORY IN THE UNITED STATES

Feminists pushed for improvements to the legal system during the Women's Movement of the 1970s. In this way, Laura X was a particularly significant female figure. She participated as an advisor in the 1978 John Rideout case, which was the first time in American history that a man was tried for raping his then-wife. Laura X was successful in organizing a campaign that resulted in the criminalization of Non-consensual intercourse in California the following year, notwithstanding the Rideout case's failure to succeed in making the practice unlawful in Oregon (X, 1999). On December 2, 1979, the *Commonwealth v. James K. Chretien* case led to the country's first conviction for marital rape.

Many states made distinctions between three types of victims throughout the 1990s:

- Sexual offenses legislation provided unequal protection for single women.
- Married people who were in aberrant marriages, such as those where a divorce petition had been filed, were subjected to severe forms of abuse and were punished.
- When married people cohabitated, many state regulations were initially quite restricted and crime rates were lower.

In 2003, 24 states—including the District of Columbia—abolished marital immunity for sexual offenses, but 26 states still uphold it in some capacity.

Similar laws existed in **Tennessee** until 2005, when they were abolished, and **South Carolina's** requirement that husband violence be of a higher degree. According to the law, if a husband has injured his wife seriously physically while they are cohabitating, he may be charged with

raping her. Finally, the legislation was overturned in 2005, allowing for the treatment of Non-consensual intercourse to be the same as other types of rape.

Until July 2019, sexual assault cases involving cohabiting spouses or unmarried partners in **Minnesota** could only be prosecuted if there was force or danger related to "voluntary relationships." Unless they were separated, some sexual offenses do not apply to couples. In 2019, the exception that applied when the victim was mentally unstable, insane, or physically helpless was eliminated. Currently, Non-consensual intercourse is a serious crime in the United States, and each state has its own laws and processes. According to the poll, an intimate partner sexually assaults or physically harms 1.5 million women every year. The legal status of Non-consensual intercourse in the United States has changed significantly over the past three decades, starting from the time when it was permitted in all 50 states. Efforts were made to recognize Non-consensual intercourse as a crime, and on July 5, 1993, all states passed laws making Non-consensual intercourse a crime. Non-consensual intercourse was classified as non-Non-consensual intercourse in just 17 states. Less harsh penalties were in place in other states. Even while state laws on Non-consensual intercourse have evolved significantly, it's still crucial to keep in mind that each state has its own definitions, penalties, and procedures. In the last thirty years, there have been significant legal improvements in the US relative to other countries.

IMPORTANCE OF CRIMINALIZING MARITAL RAPE

In India, additional laws are required to make Non-consensual intercourse a crime. A separate legislation will ruin India's culture since we believe in keeping families together, according to several debates in parliament that took place after the measure was submitted but never passed. Sati Pratha and Child Marriage were formerly a part of Indian custom and culture, but they were outlawed since they were such horrific crimes. Similar to how non-consensual sexual intercourse within marriage are unrecognized crimes that have an impact on married women's psychology and health, regulations are required to defend their rights.

CONCLUSION

The article compares the prevalence of marital rape in India and the US. Because the prevalence of Non-consensual intercourse differs significantly between these two nations, the author has compared them. There is no law against Non-consensual intercourse in India, where it is common practice. While in the USA, Non-consensual intercourse has been a crime since 1993. Feminist organizations in the US spearheaded the battle against marital rape. On December 2, 1979, the Commonwealth v. James K. Chretien case led to the country's first conviction for marital rape. The definitions, sentences, and procedures of the law vary between the 50 states, but rapes of unmarried and married people are now regarded equally. In India, however, despite the bill's introduction by the parliament, it was never passed. To defend the sanctity of marriage, the members said that such legislation should not be approved, and several times measures were rejected for irrational reasons. The only chance is the judiciary because the administration does not back it. The JS Verma Committee suggested in their report that Non-consensual intercourse be made a crime, however that recommendation has not yet been implemented. Non-consensual intercourse is not made a crime in the name of upholding tradition and culture. Sati Pratha and child marriage were practices that were outlawed under the guise of tradition. Marriage-related rape should also be made a crime since human rights and consent are more essential than tradition and culture, respectively. In the sake of custom and culture, husbands exploit and mistreat their women. 98% of respondents to the author's study said that Non-consensual intercourse is a crime in India, yet there is no law in place. The purpose of the study was to gauge public sentiment toward the topic, and it is evident that most respondents support making Non-consensual intercourse a crime.

Because there are no laws against marital rape, Indian culture and the government need to grasp that it is the worst type of rape. In India, it is the wife's responsibility to cause herself agony for the husband's amusement. The worst effects include women experiencing physical trauma, including vaginal injuries and health problems. miscarriages, STDs, HIV etc. Women have had knife wounds, shattered bones, and swellings as a result of domestic abuse. There are also psychological repercussions, such as shock, intense dread, sadness, and the suicide of some women. Women continue to suffer due to societal pressure and to maintain the stability of the family even after learning about these repercussions, but what about her life? Was she meant to give her life? Such questions never cease, and the suffering of marital abuse victims is

beyond comprehension. In the same manner that we campaigned against domestic violence, rape, and acid assaults, we must continue to fight against the crime of marital rape.

Violence, not sex, is the focus of "marital rape," which again has nothing to do with marriage or consent. Rape is rape, and it ought to be treated as such, no matter where or when it happens.^{vi}

ENDNOTES

ⁱ The Indian Express (September 7, 2019). <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403>

ⁱⁱ (It differentiates rape of married and unmarried women).

ⁱⁱⁱ Article 21 includes right to live with human dignity, right to health and right to sexual privacy.

^{iv} 1. Exception provides that a medical procedure or intervention will not come under this section.

2. Exception states that, "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. This exception has become a wrangling issue as it provides that a husband will not be held liable for raping his lawfully wedded wife. After 2013, by criminal law amendment, age under this exception was increased from fifteen to eighteen.

^v Justice Verma Committee Report, 2013 available at www.manupatra.com.

^{vi} Shashi Tharoor, The Citizen about the private member's bill 'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018' introduced in the parliament. <https://www.thecitizen.in/index.php/en/NewsDetail/index/7/15986/Non-consensual-intercourse-Is-Not-About-Marriage-But-About-Lack-Of-Consent-Shashi-Tharoor>.