

## **Criminalizing Marital Rape in India: A Bright or a Bleak Future?**

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### **Abstract**

Rape in all forms is considered heinous and must be criminalized with the strictest of punishments that exist. However, the entire concept of the criminalization of marital rape seems to be flawed. The debate about the criminalization of marital rape has been an ongoing one for decades together in India. The Indian notion of marital rape needs reforms, as the Indian society, the Legislature, and the Judiciary, seem to overlook the seriousness of rape in a marital relationship. The Indian notion of criminalizing marital rape is yet to move on from the notion that a woman consents to sexual intercourse at all times once she is married. This article seeks to draw a comparison between India's marital rape laws and the rape laws of the United States of America (USA), the United Kingdom (UK), and Germany. The comparison seeks to present the development in the marital rape laws in the three countries mentioned above, and how India still has a long way to go before it can reach that stage of criminalization. The article further seeks to emphasize the constant attempts made by law committees, judges, and even the Indian public to recognize the urgency of criminalizing marital rape and making the legislature realize the same. The future of criminalizing marital rape in India currently seems to be farfetched, considering the traditional notions adopted by the organs of the government. Nevertheless, the reasons why marital rape needs to be considered a serious matter in India, have been enumerated in this article,

along with a few recommendations and suggestions for its effective implementation.

**Keywords:** *Notion, Judiciary, Traditional, Legislature, Comparison.*

### **1. The History of Criminalizing Marital Rape in India**

Marriage as a social institution has evolved since 500 C.E., in India, making it one of the purest and most revered forms of institution. Marriage is constituted by merging multiple elements, of which intimacy and consent play a vital role. The consent given for marriage constitutes the consent for various situations arising in a marital relationship. The consent for intimacy is also one that arises from the overall consent to a marriage. Consent for such intimacy has been generally discussed in Indian statutes like Section 375<sup>1</sup> of the Indian Penal Code (IPC), 1860<sup>2</sup> (presently, the Bharatiya Nyaya Sanhita, 2023), wherein a woman who is subject to sexual intercourse against her will, will constitute an offense of rape. But, concerning marital rape particularly, the Indian laws have remained silent on it. Nevertheless, the concept of marital rape has been sufficiently discussed by the Indian legislature and the judiciary. Multiple judgments of the Supreme Court and various other courts across India have touched upon the question of criminalizing marital rape in India.

The constitutionality of marital rape has been challenged in multiple judgments that have seen a split opinion from the sitting judges. In contrast, marital rape has civil remedies under the Protection of Women from Domestic Violence Act, 2005<sup>3</sup>, under the provision of sexual violence as a part of domestic violence. But the entire debate on the criminalization of marital rape arises from an exception provided by the Indian legislature in the Indian Penal Code under Exception 2 of Section 375<sup>4</sup> that states that sexual intercourse or any sexual act carried out by a man with his own wife will not constitute the offense of rape. This exception has sparked multiple contrasting opinions from high court judges, union ministers, and

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<sup>1</sup> S. 375 of the Indian Penal Code 1860.

<sup>2</sup> Indian Penal Code 1860.

<sup>3</sup> Protection of Women from Domestic Violence Act 2005.

<sup>4</sup> S. 375 (Exception 2) of the Indian Penal Code 1860.

parliamentary standing committees<sup>5</sup>. The judicial opinions put forth are mainly centered around privacy, an integral element of a marital relationship. Such opinions have especially raised concerns about a woman's privacy in a marital relationship, emphasizing such privacy as a pathway for a woman to exercise her rights in a marriage. Further, criminalizing marital rape not just raises questions on the privacy of a woman or the family, but questions the entire social institution of marriage. Marriage has been long seen as an intimate relationship between a husband and a wife, to which the law can exercise its control only to a limited extent. The state can exercise its control in the domestic sphere to prevent incidents of domestic abuse or violence, but Justice Hari Shankar, a permanent sitting judge of the Delhi High Court, takes the opinion that the state does not have the leverage to interfere in the intimacy and privacy of a marital relationship<sup>6</sup>. The critics of criminalizing marital rape have centered their opinions and arguments on the sanctity of marriage and the aspect of privacy in a marital relationship. Criminalizing marital rape might seem a way to further stress the importance of consent in a marriage. However, the state's limits with interfering in the privacy of a marital relationship far outweigh the essence of consent. Further, the state alone cannot be blamed for overlooking the aspect of consent in a marriage. The manner in which societal mindset is shaped plays a crucial role in determining the future of the criminalization of marital rape in India. Indian society still follows the patriarchal notion that a woman automatically consents to sexual intercourse after marriage which undermines her autonomy and consent as a woman. The debate on criminalizing marital rape goes both ways. Despite there being critics who strongly deny such criminalization, there are also a few who show their support.

## **2. Attempts Made to Criminalize Marital Rape in India**

In the year 2012, Justice J.S. Verma, a former retired judge of the Supreme Court, constituted the Verma Committee under his guidance, which advocated the criminalization of marital rape, and subsequently submitted its report in 2013. The committee reasoned that the age-old

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<sup>5</sup> Uma, S. (2023) Why the marital rape exemption in criminal law must go, *The Wire: The Wire News India*, Latest News, News from India, Politics, External Affairs, Science, Economics, Gender and Culture. Available at: <https://m.thewire.in/article/rights/why-the-marital-rape-exemption-in-criminal-law-must-go/> amp (Accessed: 23 July 2024).

<sup>6</sup> *Ibid.*

notion of a woman implicitly and automatically consenting to the sexual needs of her husband in a marriage cannot be a ground that the legislature and the judiciary can take for not regarding marital rape as a form of rape<sup>7</sup>. The committee opined that the exception clause be repealed and the aspect of consent cannot be blatantly overlooked just because the man and woman share a marital relationship. Despite the recommendations of the Verma Committee, the Criminal Law (Amendment) Bill, 2012, introduced by the Parliamentary Standing Committee, did not seem to include any provision that criminalized marital rape. They reasoned that this would undermine the sanctity of marriage and essentially put the entire family under a reasonable amount of stress<sup>8</sup>.

Unlike medieval times where the wife was seen as the property or chattel of the husband, who could use her as a sexual object and force her consent whenever he wished to, the opinions of legal jurists' stem from the modern era that have evolved from the traditional notion of viewing a wife as the property of her husband. The concept of marital rape has emerged to protect the integrity of a woman in a marriage rather than shelter the interests of the man through his wife. The modern-day assumption opined by legal jurists is that in a marital relationship, consent should go both ways and the husband must essentially not get immunity under Indian criminal law for forcibly obtaining consent from his wife. The consent that the wife gives during a marriage is one that shows her consent to intercourse, but not for each sexual intercourse, and the husband must ensure that his wife consents willingly to every sexual intercourse. Nevertheless, such attempts remain attempts due to the age-old notion followed by the Indian legal system that assumes when a woman gets married, she consents to overall sexual intercourse with her husband, which includes implied consent for every intercourse irrespective of whether the consent is obtained willingly or unwillingly.

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<sup>7</sup> Sabhapandit, S. (2023) Criminalising marital rape in India, The India Forum. Available at: <https://www.theindiaforum.in/law/criminalising-marital-rape-india> (Accessed: 23 July 2024).

<sup>8</sup> Uma, S. (2023b) Women's rights in the balance as India weighs criminalizing marital rape, - The Diplomat. Available at: <https://thediplomat.com/2023/11/womens-rights-in-the-balance-as-india-weighs-criminalizingmarital-rape/> (Accessed: 23 July 2024).

### 3. Position of Marital Rape Laws in Countries Around the World

To draw a comparison between marital rape laws in India and countries around the world, this research article analyses the position of three countries namely, The United States of America, The United Kingdom, and Germany. Each country has had a different history that has led it to its present position in its marital rape laws, and such history has been majorly shaped by the opinion of its population.

#### 3.1 *The United States of America (USA)*

The USA has a split statutory system wherein each of its states has either criminalized or decriminalized marital rape in its own statutory language. Of the 50 states, 27 states have not criminalized marital rape, providing immunity to the husband. From these 27 states, 9 states have provided in their statutes certain exemptions that can call for a marital rape charge<sup>9</sup>. These states have not decriminalized marital rape in its entirety but have provided certain provisions that open the possibility of a charge of marital rape to be imposed on the husband in a few exceptional situations. Nevertheless, the USA has also witnessed developments and progress in this regard that mainly give up the exception to marital rape, recognizing the undue advantage it can hold as a defense.

The legislature in the USA has taken into consideration multiple judicial opinions that have resulted in amendments to rape laws in a few states. The amendments were done in the states of Hawaii, South Dakota, and Delaware. The three states have amended their rape laws to broaden their outlook on the importance of consent to sexual intercourse, and have viewed the victim as a female rather than a wife. Additionally, Delaware and Hawaii have classified marital rape into two degrees; The first considers consent given in previous sexual instances, and the second overlooks the marital relationship between the man and the woman and punishes nevertheless, only considering the forced consent obtained from the wife. The only aspect in which the two states differ is in the punishment awarded. Few other states like Oregon, New Jersey, and Nebraska have also made efforts to punish marital rape by including separate statutory provisions for the same. The marital rape law that the New Jersey

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<sup>9</sup> Sankaran, M.V. (1978) 'The Marital Status Exemption in Rape', *Journal of the Indian Law Institute*, 20(4), p.594 & p. 598, <http://www.jstor.org/stable/43950556> .

legislature has created has an extremely broad ambit, wherein either of the spouses can be charged with marital rape<sup>10</sup>.

### 3.2 *The United Kingdom (UK)*

The UK has also seen multiple discussions and developments in marital rape laws, though contrasting in nature. The provision for rape defined under the Sexual Offences Act, 2003<sup>11</sup>, runs on similar lines to the provision in the Indian Penal Code, 1860, wherein a man is penalized for rape against a woman, except if it is his own lawful wife. The Sexual Offences Act, 1956 does not provide a provision for marital rape, but it has been stated that any harm inflicted by the husband on his wife would attract certain penalties, but not the penalty of rape. The husband can be punished for sexually assaulting her but not for raping her<sup>12</sup>, as the laws of the UK stem from the common law notion that a woman impliedly consents to sexual intercourse at all times in a marriage.

There have been multiple judicial decisions and opinions put forth by the justices of the UK in this regard. In the case of *R v. Clarke*<sup>13</sup>, the justices opined that the exemption of marital rape would not apply to the husband in cases where the husband and wife have been living separately, and there includes a non-molestation clause that provides for the revocation of the implied consent by the wife. The same factual matrix was present in the case of *R v. Miller*<sup>14</sup>, in which the justices took a different notion and stated that even if the husband and wife were living apart, it does not amount to revocation of the implied consent provided by the wife, unless if there exists a non-molestation clause specifically. The justices, in this case, stated that the immunity from the rape exception clause would still apply to the husband regardless of whether the husband and the wife have been living together or separately, and if there does not exist a non-molestation clause, providing immunity to the wife from the exception clause. Though marital rape is considered an offense in the UK, it is only through court decisions and

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<sup>10</sup> *Ibid.*

<sup>11</sup> Sexual Offences Act 2003.

<sup>12</sup> *Supra* n.9.

<sup>13</sup> *R v. Clarke* [1949], 2 All ER 448.

<sup>14</sup> *R v. Miller* [1954], 2 All ER 529.

an official provision is yet to be made under the Sexual Offences Act, 2003, criminalizing marital rape and contrary to the marriage exceptions stated in the Act.

### *3.3 Germany*

The position in Germany runs on parallel lines to the USA. Until 1997, Germany had criminalized all forms of rape except marital rape. But in 1997, due to constant protests and requests by women's rights feminists and public opinion, marital rape was criminalized in Germany under Section 177<sup>15</sup> of the German Criminal Code, 1871<sup>16</sup>, wherein the exception to marital rape was removed, and a "no means no" law was passed, categorizing the offense as rape, irrespective of the marital status. However, there was an additional condition attached to prosecuting the perpetrator; the rape victim had to resist the perpetrator or fight to protect herself. But, in 2016, a majority of the House also removed this condition, and it was only required for the perpetrator to have defied the mere will of the victim.

The marital rape laws have only developed from then, ensuring that consent is compulsorily obtained. Germany's criminal laws have ensured that the perpetrator does not escape punishment and Section 177 of the German Criminal Code awards punishment that ranges from a period of imprisonment from 6 months to 10 years, depending on how heinous the rape committed is.

## **4. The Future of Marital Rape Laws in India**

The current position of India with respect to marital rape laws in India seems slightly unsatisfactory if compared with the USA and Germany. Both countries have evolved from their age-old notion of viewing the aspect of consent to be impliedly given at all times in a marriage, and have respectively specified statutory provisions that criminalize marital rape. This development to criminalize marital rape still has a long way to go in India. Multiple debates and discussions have touched upon this issue, but the end result remains one.

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<sup>15</sup> S. 177 of German Criminal Code 1871.

<sup>16</sup> German Criminal Code 1871.

Numerous instances in recent times also are an indicator of how the Indian legislature and judiciary still follow the age-old notion of implied consent to reason why marital rape cannot be considered an offense. Current judicial cases have also brought up the topic of marital rape but the court's reasoning was nevertheless in favour of the exception. A recent judgment passed was in the case of *Manish Sahu v. State of Madhya Pradesh*<sup>16</sup> in the Madhya Pradesh High Court, wherein a single-judge bench led by Justice G.S. Ahluwalia quashed an F.I.R filed by a wife against her husband under Section 377 stating unnatural sexual intercourse and threats of divorce. Justice G.S. Ahluwalia stated that unnatural sex or even sexual intercourse for that matter between a married couple could not be considered marital rape, since its legality comes into question. Marital rape is not yet considered an offense under Indian laws, and an F.I.R. filed in respect to that cannot be considered and is subsequently quashed. In this case, the husband was rewarded with acquittal, receiving immunity from exception clause 2 of Section 375 of the IPC. Similarly, in the case of *Umang Singhar v. State of Madhya Pradesh*<sup>18</sup>, the Jabalpur Bench had the same reasoning as in the above case *Manish Sahu v. State of Madhya Pradesh*<sup>17</sup>. It quashed an F.I.R. accusing MLA Umang Singhar of marital rape under Section 377 of the IPC. The Court further opined that marital rape is not a crime in India and according to the IPC, the perpetrator can only be convicted for marital rape if the victim is below the age of 15, classifying her as a minor.

The IPC has been recently replaced with a new criminal code, the Bharatiya Nyaya Sanhita (BNS), 2023, that has replaced and amended a few provisions from the former IPC. However, the exception to criminalizing marital rape still stays the same. Under the new BNS 2023, marital rape<sup>18</sup> has escaped from the status of an offense under Exception Clause 2 under Section 63. This exception prevents the prosecution of the husband for the forceful consenting of his wife to sexual intercourse. This exception clause was recently challenged before the Supreme Court of India, before the Hon'ble Chief Justice, D.Y. Chandrachud. The petition is

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<sup>16</sup> *Manish Sahu v. State of Madhya Pradesh* [2024] SCC OnLine MP 2603. <sup>18</sup> *Umang Singhar v. State of Madhya Pradesh* [2023], 251 AIC 457

<sup>17</sup> *Supra* n.17.

<sup>18</sup> SC seeks centre's stand on plea against marital rape exception in New Criminal Law (17 May 2024) The Economic Times. Available at: <https://economictimes.indiatimes.com/news/india/sc-seeks-centres-stand-on-plea-against-marital-rape-exception-in-new-criminal-law/articleshow/110216068.cms> (Accessed: 23 July 2024).



brought by the All India Democratic Women's Association (AIDWA). It is said to be heard by the Chief Justice and other judges of the Supreme Court in July 2024.

While the decision of the Supreme Court is surely awaited, the Indian legislature could have and still can plausibly take into consideration the urgency and necessity of criminalizing marital rape. One of the suggestions on how this could be executed is for the Indian legislature to take instances from the above-listed countries, especially the UK and Germany. Both countries have had similar histories as that of India when it comes to marital rape. The criminalization of marital rape in both countries is a result of multiple and consistent efforts put in by the general public that eventually was recognized by the government. Small and third-world countries like Ghana, Nepal, Chile, Cuba, and many more, have considered marital rape a serious offense and have gone up to the extent of awarding life imprisonment for the offense of marital rape. India can look up to the laws and punishments adopted by such countries. It can start by providing mediocre punishments while gradually increasing the punishment depending on how heinous the rape committed is. Apart from taking ideas from countries worldwide, the Indian legislature can take cognizance of instances from its own country. The extent of discussion on criminalizing marital rape in India on multiple occasions shows the seriousness with which it is looked at. An instance mentioned above in the article is the proposal put forth by the Verma Committee in the year 2012 that advocated for the criminalization of marital rape citing the modern era and the non-practicality of the age-old reasoning of implied consent. Further, in the controversial judgment of *Hrishikesh Sahoo v. State of Karnataka*<sup>19</sup>, the Karnataka High Court under the guidance of a single-judge bench headed by Justice Nagaprasanna, upheld the charge of rape against the husband under Section 375<sup>20</sup> of the IPC. Justice Nagaprasanna opined that Exception 2<sup>21</sup> under the section as mentioned above is violative of Article 14<sup>22</sup> of the Indian Constitution<sup>25</sup>. He further stated that rape committed against a woman irrespective of whether the woman is the wife of the perpetrator, is a heinous offense and the age-old notion of a husband having control over his

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<sup>19</sup> *Hrishikesh Sahoo v. State of Karnataka* [2022], 2 KCCR 145.

<sup>20</sup> *Supra* n.1.

<sup>21</sup> *Supra* n.4.

<sup>22</sup> Article 14 of The Constitution of India 1950. <sup>25</sup> The Constitution of India 1950.

wife's body cannot be termed a valid reason any longer and must be amended. The court only convicted the husband on the grounds of rape, and not marital rape or the exception.

Despite such developments occurring in the legal sphere, the Indian legislature and judiciary have time and again refused to criminalize marital rape, still fixated on the traditional approach. The future of criminalization of marital rape in India looks bleak, as of now, considering the various attempts made towards its criminalization, but rendering each attempt a failure due to the constant denial and the age-old approach adopted by the Indian legislature and judiciary. Marital rape can only be criminalized if the general public of India consistently keeps urging the government and raising awareness on how heinous it is and can further get. The Indian legislature can gradually, through amendments, add a clause under Section 63 of the BNS, 2023, thereby criminalizing marital rape officially. The concept of marital rape still needs further discussion and debates for it to be recognized as an offense truly and till then, its criminalization seems to be far-fetched.