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The Phenomena of Consent and Marital Rape under the Prism of Indian High Courts

SUMANTH KUMAR.T.S¹ AND REENY SINHA²

ABSTRACT

Marriage is sacrosanct in Indian culture, and the wife is expected to entirely submit to her husband. The rest of the world has not heard much of marital rape as a crime, but in the legal space marital rape/spousal rape is not a new term. Is it true that in a marriage between two individuals, permission for sexual encounters is implied? Is it true that a woman's consent fades after she marries? These are issues that emerge in the context of marriage yet are rarely addressed. Concerns about marriage consent and sexual experiences have grown louder in the twenty-first century. Women have the right to privacy and personal liberty, but married life is different. Women were given equal status during the Vedic period but deteriorated and worsened after many invasions and especially during the British invasion in India. India is one of the few countries where marital rape is tolerated. When a woman's right to her own body is abused on a daily basis under the pretext of marriage where does that leave her? Marital rape is a human rights violation against women. The authors examines the assumption of consent in marriage, as well as judicial developments toward criminalization of marital rape. Marital rape is a crime which has been unnoticed for a long time and it needs to be criminalized.

Keywords: Marital rape, privacy, consent, rights, women, patriarchy, marriage

I. INTRODUCTION

Unlike The notion of marital rape is new to the general public, but it is not new to the legal community. The first case and definition of marital rape was provided by **Sir Mathew Hale CJ** in History of the Pleas of the Crown: "*The husband cannot be guilty of a rape committed by*

*himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract*³." This is a restricted interpretation, and this occurred during a time when women were considered property. In subsequent time, **Lord Keith** in **R vs. R**⁴ stated

¹ Author is an LL.M Student at University Law College and Department of Studies in Law, Bengaluru, India.

² Author is an Advocate at High Court of Chhattisgarh, India.

³ 1 Hale, History of the Pleas of the Crown 629 (1778).

⁴ R vs. R [1992] AC 599.

that 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.' The **European Commission of Human Rights** in *C.R. vs. UK* had concluded that "a rapist remains a rapist regardless of his relationship with the victim".⁵ Women have the right to autonomy. It is absolutely up to her whether she gives consent or not. There should be adequate consent in a marriage between two equals, but when it is overruled by coercion or financial circumstances, the sanctuary of women's privacy is demolished. Due to a lack of equal footing and cultural norms, women have been forced to adhere to their husband's preferences. The crime of marital rape is punishable under the law of cruelty, however this is insufficient. Because there is no section against which a police officer may file an F.I.R., the majority of incidents of marital rape go unrecorded. The term "marital rape" is not well understood. Many people are baffled as to how a husband can rape his wife. When the wife refuses to give her consent and the husband compels it against her for sexual act, this is known as marital rape. The authors investigate the assumption of consent in marriage as well as judicial

developments toward criminalization of marital rape.

II. INCIDENTS IN WHICH MARITAL RAPE WAS NOT CONSIDERED AN OFFENSE

The Hon'ble High Court of Karnataka ruled on one of the cases in 2012, "*The husband cannot be made to suffer for no fault of his and be deprived of his natural urge to enjoy sexual happiness if the wife is unwilling to share bed and discharge her duties*"⁶. The Court goes on to say that "*the husband cannot be made to suffer by depriving him of his natural desire to enjoy sexual happiness.*"⁷ This indicates the courts' unwillingness to acknowledging marital rape. The authors would like to stress that the wife's role is not to be accessible for sex; she is not an object; she has a human soul existing in her body, and she has complete autonomy over her body, consent, and autonomy.

In *Dilip Pandey & Ors. vs. State of Chhattisgarh*⁸, the Hon'ble High Court of Chhattisgarh observed that Section 375 of the Indian Penal Code (IPC) Exception II to rule that, "*sexual intercourse or sexual act between a man and his own wife who is not under the age of eighteen is not rape*"⁹. It was also ruled that sexual intercourse or sexual acts performed by a

⁵ Krishnadas Rajagopal, "Courts continue to differ in views on marital rape", (August 14th 2021)<https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece> (last visited March 1st, 2022).

⁶Hetal Vyas, "Denying sex a ground for divorce: Karnataka HC", *The Times of India*, (April 20th, 2012)http://timesofindia.indiatimes.com/articleshow/12739949.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited March 5th, 2022).

⁷ *Ibid.*

⁸ Dilip Pandey & Ors. vs. State of Chhattisgarh CR.R. No. 177 of 2021.

⁹ Nupur Thapliyal, "Sexual Intercourse Or Any Sexual Act By Husband With Legally Wedded Wife Not Rape Even If It Was By Force Or Against Her Wish: Chhattisgarh HC", <https://www.livelaw.in/news-updates/marital-rape-sexual-intercourse-sexual-act-husband-wife-not-rape-force-against-her-wish-chhattisgarh-hc-180283> (Feb 2nd, 2022, 10:30am).

husband forcibly or without her consent are not constituted rape. And dismissed the accusations brought against him under section 375, but did not dismiss the charges brought against him by the trial court for his unnatural offences under section 377¹⁰ and cruelty to his wife under sections 498-A¹¹ and 34 of the IPC¹². The court did not recognize marital rape in this case, but it did acknowledge the husband's sexual perversity in engaging in sex acts without his wife's consent in an unnatural manner. There was no conjugal compassion on the part of the husband, who instead took sadistic pleasure in his wife's anguish and misery.

Another P.I.L was dismissed by the Hon'ble High Court of Delhi, which attempted to establish procedures for reporting marital rape in the F.I.R so that it may be used as a basis for divorce. The legislation, not the judiciary, is to blame, according to the court.¹³

Despite the fact that the husband had forced his wife to participate in forceful intercourse, which resulted in her waist and lower body becoming paralyzed, the Hon'ble High Court of Mumbai granted bail to the husband in *Sushant Jyotivardhan Jadhav & others vs. The State of Maharashtra*¹⁴. The Hon'ble Court went on to conclude that the husband had committed no wrongdoing or acted in an improper manner.

¹⁰ The Indian Penal Code, 1860, § 377, NO. 45, Acts of Parliament, 1860.

¹¹ The Indian Penal Code, 1860, § 498A, NO. 45, Acts of Parliament, 1860.

¹² The Indian Penal Code, 1860, § 34, NO. 45, Acts of Parliament, 1860.

¹³ Delhi HC dismisses plea to make marital rape a ground for divorce, *The Indian Express*, (July 9th, 2019)<https://indianexpress.com/article/cities/delhi/de>

Sexual intercourse between a man and his own wife, if the wife is not under the age of fifteen (currently the age restriction is 18 years), is not rape, according to section 375 exemption 2 of the Indian Penal Code, 1860¹⁵. A large group of women are being robbed of their autonomy and right to consent as a result of this one exemption. Women who are married and over the age of 18 have no right to privacy or control over their bodies because of this one exemption.

We can see a theme where courts have failed to acknowledge and register incidences of marital rape time and time again. The courts have failed to set rules and guidelines, instead transferring this responsibility to the legislature. In our country, there is a sector of the community that does not report a crime that harms the victim's body, mind, or spirit.

III. INDIA'S CULTURAL SHIFT TOWARDS CRIMINALISING MARITAL RAPE

The concept of marital rape has undergone a profound transformation. The notion of marital rape is becoming more well-known, and the authors' present evidence of the evolving concept of marital rape in India, as well as the country's progress toward outlawing marital rape.

The first major alteration was the Justice Verma Committee's suggestion in the year 2013. The

[lhi-hc-dismisses-plea-to-make-marital-rape-a-ground-for-divorce-5822261/](https://www.bhaskar.com/article/lhi-hc-dismisses-plea-to-make-marital-rape-a-ground-for-divorce-5822261/)(last visited April 1st, 2022, 08:30am).

¹⁴ Sushant Jyotivardhan Jadhav & others vs. The State of Maharashtra Anticipatory Bail Application No. 1075 of 2021 (CNR NO. MHCC02-006686-2021).

¹⁵ The Indian Penal Code, 1860, § 375 exception 2, NO. 45, Acts of Parliament, 1860.

committee came up with a number of conclusions about the crime of rape. The committee further observed that the idea of rape within marriage and outside marriage is separated in the IPC. This committee acknowledged marital rape and recommended that the exception be repealed.¹⁶

The committee's suggestion was not fully embraced, although it was adopted in partially. We can observe that these two provisions were introduced to the Criminal Law (Amendment) Act of 2013, i.e., Section 376 B of the Indian Penal Code¹⁷ and Section 198 B of CrPC¹⁸. When we inspect these two sections extensively, we can see that certain sections prohibit marital rape, but not entirely. If a husband has sexual relations with his wife without her agreement while they are living apart, whether under a decree of separation or otherwise, he will be sentenced to a minimum of two years and a maximum of seven years in prison and fined under section 376 B of the Indian Penal Code. Furthermore, pursuant to section 198 B of the CrPC, cognizance can be granted only if the prima facie satisfaction is met and the complaint is filed by the wife herself. When read together, this demonstrates the legislature's intention to safeguard women who are separated from their husbands. However, there is no mention of making marital rape a criminal offence for married women over the age of 18.

Independent Thought vs. Union of India and Anr¹⁹ was one of the most important instances, in which independent thought challenged the legitimacy of Exception 2 of Section 375 of the Indian Penal Code, 1860. The Hon'ble Supreme Court ruled that rape is defined as sexual intercourse or sexual act with a wife under the age of eighteen. It makes no difference whether the wife, who is between the ages of 15 and 18, has given consent or not; it is still rape. Based on constitutionally recognized human rights laws, the country's highest court delivered a judgment in this case, stating that every girl child has a right to bodily integrity, self-worth, dignity, and freedom of choice and sexual orientation. The Supreme Court did not go into detail on marital rape because it was not part of the PIL, and it therefore avoided further discussion.

In the case of **Nimeshbhai Bharatbhai Desai vs. State of Gujarat**²⁰, the woman filed a complaint against her husband for marital rape and unnatural activities. The Hon'ble High Court of Gujarat ruled that a husband cannot damage his wife's dignity by having sexual relations with her or performing sexual actions without her consent. The Hon'ble High Court also stated that the time has come for the legislature to act on the subject of marital rape. Because there is currently no law prohibiting marital rape, the wife can file a complaint under section 377 of the Indian Penal

¹⁶ Justice Verma Committee Report Summary, <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary> (last visited February 27th, 2022).

¹⁷ The Indian Penal Code, 1860, § 376B, NO. 45, Acts of Parliament, 1860.

¹⁸ The Code of Criminal Procedure, 1973, § 198-B, NO.2, Acts of Parliament, 1974.

¹⁹ Independent Thought vs. Union of India and Anr [2017] 10 SCC 800.

²⁰ Nimeshbhai Bharatbhai Desai vs. State of Gujarat 2018 SCC Online Guj 732.

Code, 1860, for any unnatural offence or unnatural sexual conduct.

In *XXX vs. XXX*²¹, one of the most recent instances that made news and altered the tide toward criminalizing marital rape, the Hon'ble High Court of Kerala expressed, "*The case in hand depicts a story of the struggle of a woman within the clutches of law to give primacy of choice "not to suffer" in the bondage of legal tie. An insatiable urge for wealth and sex of a husband had driven a woman to distress. In desperation for obtaining a divorce, she has forsaken and abandoned all her monetary claims. Her cry for divorce has been prolonged in the temple of justice for more than a decade (12 years). She still awaits a final bell to answer her prayers and cry*²²." Even though she was sick, pregnant, and during the day when her husband's mother died, the wife was forced to have sexual intercourse in front of her daughter, as well as all kinds of perverse sex. The Hon'ble High Court of Kerala held that the woman is not a chattel of the husband and that marital rape could be a reason for divorce.

The Hon'ble High Court of Punjab and Haryana held in *Suchita Srivastava & Ors. Vs. Chandigarh Administration*²³ that the fetus of a mentally handicapped woman should be aborted, but the court did not take the women's consent, hence the case was appealed to the Hon'ble Supreme Court. The Supreme Court of India maintained women's reproductive rights, stating that Article 21 of the Indian Constitution protects

them. They can choose to reproduce or not reproduce. The Court also stated that women's right to privacy, dignity, and bodily integrity must be protected. Finally, the court stated that women's reproductive choices should be unrestricted, and that they should also have the **right to refuse participation in sexual activity**.

In the aforementioned ruling, the Supreme Court said unequivocally that women have the right to privacy, dignity, and physical integrity, as well as reproductive options and the right to renounce sexual engagement. In India, where married women are expected to produce children as soon as they marry, the authors are concerned for married women. During this stage, many women are forced to engage in sexual activity in order to bear children. Unfortunately, most women are forced to endure many pregnancies if they do not have a male child. Persuasion to have children infringes on Article 21. Women are subjected to unwanted sexual conduct without their consent. This is in violation of the law established in the case of *Suchita Srivastava & Ors. vs. Chandigarh Administration*. Marital rape, in turn, violates a woman's right to privacy and her ability to decline sexual contact. As a result, we can quickly see the link between marital rape and the violation of her reproductive rights. This is why the authors support for the criminalization of marital rape.

The introduction of a private bill by Shashi Tharoor to make marital rape a crime was another crucial acknowledgement for marital

²¹ *XXX vs. XXX* Mat. Appel no. 151 of 2015[decided on 30-07-2021].

²² *Ibid*.

²³ *Suchita Srivastava & Ors. Vs. Chandigarh Administration* (2009) 9 SCC 1.

rape. The bill, titled the "**Women's Sexual, Reproductive, and Menstrual Rights Bill 2018**," aims to remove Section 375 of the Indian Penal Code's Exception 2. The primary purpose of the bill is to criminalize marital rape.²⁴

The offence of marital rape is so terrible and aggravating that Section 498 A²⁵ of the Indian Penal Code, 1860, can only be used as an addition to it, not as a substitute. Amicus Curiae Rebecca John To Hon'ble High Court of Delhi, the judgement in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*²⁶, delivered by a single judge bench of the Gujarat High Court, stated that the total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanised treatment of women will not be tolerated and that marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized.²⁷

In one of the latest developments, the Hon'ble High Court of Karnataka in the case of *Hrishikesh Sahoo vs. State Of Karnataka*²⁸, observed that no exemption can be absolute. Also observed, "*The exemption of the husband on committal of such assault/rape, in the peculiar facts and circumstances of this case, cannot be absolute, as no exemption in law can be so*

absolute that it becomes a license for commission of crime against society"²⁹. In the immediate case the husband was sexually assaulting the wife for many years brutally and also kept her as a sex slave. The court did not drop the charges of rape which was charged under section 376 of the IPC, against the husband. A single judge bench of Justice M Nagaprasanna said, "*The Constitution, a fountainhead of all statutes depicts equality. The Code practices discrimination. Under the Code every other man indulging in offences against woman is punished for those offences. But, when it comes to Section 375 of IPC the exception springs. In my considered view, the expression is not progressive but regressive, wherein a woman is treated as a subordinate to the husband, which concept abhors equality.*"³⁰

IV. COMPLICATED PHENOMENA OF CONSENT

"Consent", the word itself is tricky and difficult to define. But under the Indian Penal Code, 1860 the word 'consent' is defined under explanation 2 of section 375, "*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*".³¹ When it

²⁴ Shashi Tharoor Introduces Bill To Make Marital Rape A Crime, <https://www.livelaw.in/news-updates/shashi-tharoors-bill-seeks-to-make-marital-rape-a-crime-141823>(last visited on April 1st, 2022).

²⁵ The Indian Penal Code, 1860, § 498A, NO. 45, Acts of Parliament, 1860.

²⁶ *Nimeshbhai Bharatbhai Desai v. State of Gujarat* 2018 SCC Online Guj 732.

²⁷ Nupur Thapliyal, "Section 498A IPC Not A Remedy Against Marital Rape: Amicus Curiae Rebecca John To Delhi High Court" <https://www.livelaw.in/top-stories/section-498a-not-a-remedy-against-marital-rape-amicus-curiae->

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²⁸ *Hrishikesh Sahoo vs. State Of Karnataka* 2022 LiveLaw (Kar) 89.

²⁹ Mustafa Plumber, "Marital Rape Exception Regressive, Violates Article 14; Husband Not Ruler Of Wife's Body & Mind : Karnataka High Court" <https://www.livelaw.in/top-stories/marital-rape-exception-regressive-violates-article-14-husband-not-ruler-of-wifes-body-mind-karnataka-high-court-194834>, (last visited on April 1st, 2022).

³⁰ *Supra*.

³¹ The Indian Penal Code, 1860, § 375 Explanation 2,

comes to consent of a wife it is not established yet.

The issue of consent does not arise because sexual intercourse with a husband between the ages of 15 and 18 is considered rape³². In similar way section 376-B³³, if a husband pushes his wife into sexual intercourse without her consent during their separation, the code provides for a minimum of two years of imprisonment and a maximum of seven years imprisonment, as well as a fine. So, if a woman is separated from her husband and is compelled to engage in sexual activity without her consent by her spouse, she has a remedy, as does any woman under the age of 18 who is married. *State of Maharashtra vs. Madhukar Narayan Mardikar*,³⁴ the court determined that a woman's sexual history or virtues are irrelevant; she has the right to privacy, which no one can violate; she has the right to self-defense, and she has equal legal rights. However, it is disheartening to see that married women in this country do not have access to any form of redress. Coming back to ground realities, cases like *Nimeshbhai Bharatbhai Desai vs. State Of Gujarat*³⁵ and *XXX vs. XXX*³⁶, We can see how women have been harmed by forced sexual practices, and even when the wife says no, she is taken for granted, and they are forced to bear their husbands' perversity and so many unnatural sexual behaviors. When the legislature turned a

blind eye to such a heinous act, the courts have rushed to the rescue of married women.

The challenge is how to demonstrate consent when it appears that consent is assumed as soon as the marriage is consummated. It's like getting a needle out of a haystack. Due to the lack of establishment of consent and understanding of its meaning, the concept of permission becomes fictitious in reality. Before the act occurs, both the husband and the wife should have given their approval. It is critical to build a culture of conjugal compassion. The goal is to have conjugal kindness with each other; family is a safe place to bond and foster kindness and freedom; everything begins in the home, and such compassion between husband and wife is essential to keep the family sanctuary intact.

V. CONCLUSION

There is no treatment for marital rape, which is an illness characterized by patriarchal rules. Only the physicians of society, notably the judiciary and the legislature, are capable of alleviating this pain. Unless they come up with interpretations and remove the exemption of marital rape in s.375 clause 2, there is no other remedy that can help heal scars that are buried in the victim's spirit. It's a horrible and inescapable circumstance. We cannot remain silent in the face of such terrible crime. At a time when many women are sharing their harrowing experiences, both physically and mentally, going through it

NO. 45, Acts of Parliament, 1860.

³² Independent Thought vs. Union of India and Anr. [2017] 10 SCC 800.

³³ The Indian Penal Code, 1860, § 376B, NO. 45, Acts of Parliament, 1860.

³⁴ State of Maharashtra vs. Madhukar Narayan

Mardikar (1991) 1 SCC 57).

³⁵ Nimeshbhai Bharatbhai Desai vs. State Of Gujarat 2018 SCC Online Guj 732

³⁶ XXX vs. XXX Mat. Appel no. 151 of 2015[decided on 30-07-2021]

right now, the legislature should realize the country's need and include the suggestions of the Justice Verma Committee. Their fundamental rights, as established by the Indian Constitution's Articles 14 and 15 and 21, are being violated. We must raise awareness about what constitutes coercive sexual intercourse and the importance of consent as a culture. Such a crime can be abolished from its source if such an idea is promoted in schools, homes, and other institutions. Everyone will benefit from a basic understanding of what constitutes consent and what does not. To comprehend the concept of consent, we don't need a degree; anyone can be taught the meaning of consent, and this education can take place through commercials, schools, and within the family circle. It is of utmost importance that the children are brought up with a good upbringing. The right morals and values should be imbibed to the children. Boys and girls must be taught to respect each other as well as themselves. In order to build a great nation, a family must recognize fundamental concepts.

Another reason for growing awareness of such a difficult societal issue, according to the authors, is that the victim, who is the wife, can build faith in the system and subsequently file a FIR in such circumstances. Only when women realize that there is a way out of their pain will they have the resolve to fight back against the injustices that have been perpetrated against them. When there are an excessive number of cases involving marital rape, courts must interpret for the public's benefit, which is an important part of the judicial process.

When we talk about society, we have to consider about the police, who need to be aware of the sensitivity of such a crime and how they might help the victim. Women cops must stand up and provide confidence to victims of marital rape because it is difficult for the victim to tell such a dreadful and torturous event.

The two important components of conjugal kindness and consent must be added. To ensure that these two crucial elements are gender-neutral phrases. Because of the rise in incidents of marital rape, it appears to be one-sided at the moment, but it can also be the other way around. These two components must be made aware to the Indian society through the media in order to enhance family well-being.

The Indian judiciary has a long history of supporting human rights, and making marital rape a crime appears to be a reality that will be achieved shortly.

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