

2. An Examination of Marital Rape As a Sacred Violence in India

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Abstract:

Indian legal system controversially uses an exception to exclude marital rape from punishment. The Law Commission's numerous publications, parliamentary discussions, and court rulings all provide numerous explanations for this. The justifications include preserving the institution of marriage's integrity as well as the availability of alternative legal remedies. In this chapter, attempt was made to show how these justifications for not making marital rape a crime is flawed. Furthermore, if a woman is raped by her husband, there are currently no other avenues for her to pursue remedy. It is very vital to make marital rape a crime. In this chapter researcher tries to offer a model by recommending modifications to the criminal code by comparing Criminal Code of Canada as the law of Canada has also changed from non-criminalization of marital rape to its criminalization.

2.1 Introduction:

Marital rape refers to rapes where the victim's husband is the accused or offender, with sexual contact or penetration without consent. Minors are legally incapable of providing consent for such acts, but consent is assumed in some cases. In some countries, such as India, rape inside a marriage is not considered a crime. The "marital rape exception clause" is often used to describe this.

In some countries, there are four primary grounds against criminalizing marital rape, but due to gender equality, the first two arguments are no longer applicable in the current environment. The concept of marital rape cannot be reconciled in these situations.

The first defense of marriage argued that women were submissive to their husbands, meaning they had no rights.¹ This led to the unity's hypothesis, which posited that a woman's identity blended with her husbands upon marriage, making it impossible for a

¹ Rebecca M. Ryan, *The Sex Right: A Legal History of Marital Rape Exemption*, 20 *Law and Social Enquiry*, 944 (1995).

husband to rape her. This contradicted the previous defense, which treated women as property of their husbands.² The unitary hypothesis argued that the law did not provide a distinct personality for a married woman.

These arguments, however, were no longer central to the movement to make marital rape a non-crime after the feminist revolution in 1970s. This occurred as a result of women being acknowledged as equal citizens to males. Rather, the explanations have evolved into more complex hypotheses. One such defence is the "implied consent" doctrine. There is an indisputable presumption of consent when a man and woman enter the institution of marriage. The distinguishing characteristic of marriage, which is viewed as a legal contract, is consent to sexual conduct. The fourth and most recent argument is that the criminal code shouldn't affect a husband and wife's marital interactions. Section 63 of the Bharatiya Nyaya Sanhita (previous "IPC") makes rape a crime. The definition of "rape" is broad and include oral sex as well as other types of sexual penetration. Exception 2 exempts sexual activities or contact between a husband and wife from this section's application. Accordingly, under Indian law, a woman who is raped by her husband has no legal recourse. The BNS's "exception clause" offers no explanation for why a husband and wife's sexual interactions or activities are not considered rape. The text suggests that consent is presumed in cases where the victim and perpetrator are married, but due to its societal respect, it is likely that a court ruling prohibits its use in marital partnerships. Non-consensual sexual interactions between husband and wife living apart, including court separation, are illegal, while marital rape is not.

The 172nd Report of the Law Commission examined the validity of the exemption for marital rape.³ In this case, there were disputes over the legitimacy of the exemption provision itself during the consultation rounds. It was claimed that rape alone shouldn't be exempt from the law's application because other violent crimes committed by a husband against his wife were already illegal. Concerned that making marital rape a crime would result in "excessive interference with the institution of marriage," the Law Commission dismissed this claim. The study delves into the correlation between marital rape and the integrity of the marriage institution.

Justice J.S. Verma (Retd.) committee argued in favor of criminalizing marital rape in 2012, which was different from the earlier talks.⁴ This committee was established in response to the national movement to improve the effectiveness of criminal law in handling cases of horrifying sexual abuse on women. J.S. Verma report made several recommendations, one of which was that marital rape should be made a crime.

The second recommendation states that a marital connection is not a valid defense for the accused, does not influence permission granted, and does not mitigate sentencing. The immunity conferred in situations when the perpetrator is the victim's spouse is based on the

² *Ibid.*

³ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

⁴ As per GOI Notification No. SO (3003), December 12, 2012, this committee was constituted to give out a report in merely thirty days.

outdated notion that women are men's property and give their husbands their irreversible consent to their sexual desires. It claimed that the current idea of equal marriage is incompatible with such an excluding language and that this exemption has been abolished in some countries.

In 2015, a member of parliament proposed a bill that would have criminalized marital rape, which the Ministry of Home Affairs once again opposed. It "was believed that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context," according to the press release. The "societal mind-set to treat marriage as a sacrament" was cited as one of the explanations. Notably, in 2015, a bill was submitted, the Home Minister said during the discussion that followed that the Law Commission was considering this and that a decision would only be made once the report was out. This stance against making marital rape a crime is not limited to the government; the judiciary also shares this viewpoint. Section 63's exception clause has been used by courts to avoid answering questions about a husband's rape or reject petitions to strike it down. Justice Virender Bhat, an Additional Sessions Judge of the Special Fast Track Court, ruled that forced sex in a marriage cannot be considered rape.⁵

There are three primary sorts of arguments against criminalizing marital rape. The first has to do with the goal of protecting marriage as an institution and, thus, abstaining from any interference to preserve its sanctity. The Law Commission and BNS research demonstrate this. Other options for women seeking redress within the family and through the legal system include Protection of Women from Domestic Violence Act, 2005, Section 498A of the Indian Penal Code, and other personal laws pertaining to marriage and divorce. The argument that criminalizing marital rape is unnecessary is weakened by arguing that women already have choices.

The third section discusses Indian cultural values and the need to prevent criminalization of marital rape. The text asserts that rape violates women's fundamental rights and necessitates the State's intervention in the private sphere of a marriage, even if it occurs. Indian Constitution's Articles 14 and 21 require the State to declare cruelty in a marriage illegal if mistreated, otherwise, women have no recourse. Therefore, it is crucial for the State to periodically encroach on the private sphere.

2.2 Court's view on Marital Rape:

Over the past few decades, Indian law's definition of marriage has undergone significant change. The dynamics of the marriage have changed due to the codification of marriage regulations. Traditional perspective on female's roles in marriage was to see them as the husband's property from the beginning. If not property, it was to maintain gender roles by considering the wife as inferior to the husband. The codification of marriage has not altered the status of either husband or wife, as both are constitutionally entitled to gender equality. The Supreme Court has recognized third gender alongwith man and woman, and has argued that marital rape should be illegal, as it goes beyond implied consent in marriage. All

⁵ Apoorva Mandhani, Marital Sex Even if Forcible is Not Rape; Delhi Court, Livelaw (Delhi) May 14, 2014

women, whether married or unmarried, must have legal security to preserve their physical autonomy. Anuja Kapur filed a Public Interest Litigation (PIL) in *Anuja Kapur vs. Union of India Through Secretary*, 2019, requesting the Indian government to pass legislation and rules concerning marital rape. However, the Supreme Court denied the petition, stating that the legislative branch should be responsible for enacting legislation, not the courts.

The Indian Supreme Court has ruled that having sex without permission is equivalent to sexual and physical abuse, and sexual violence is an unlawful interference with a female's right to privacy and sanctity. The court compared the freedom to choose sexual activity options with the right to physical integrity, personal liberty, and dignity, as outlined in Article 21 of the Indian Constitution. In *Justice K.S. Puttaswamy (Retd.) vs. Union of India*, the court affirmed the fundamental right to privacy as a fundamental right of all citizens under Article 21. The court ruled that "decisive privacy" encompasses making intimate decisions about one's sexual or reproducing nature and intimate relations. This decision does not discriminate against the rights of married and unmarried women, and Article 21 grants women the right to refrain from sexual conduct.

2.3 United Nations Report on Domestic Violence:

The UN has called on countries to close legal gaps and end marital rape, stating that the home is one of the most dangerous places for women. A study found that only four out of ten countries denounce domestic abuse. Twelve nations allow perpetrators to evade punishment by getting married to their victims. The UN Women's annual "Progress of the World's Women report" leader stated that family laws have been the steadiest to progress in eliminating oppression against females.

Given the startlingly high likelihood of sexual partner violence, a woman's house is actually among the riskiest places for her to live. According to the data, family killed nearly 60% of the women who died in intentional homicide in 2017. The survey also revealed that nearly one in five females between the ages of 15 and 49 worldwide has been subjected to physical or sexual abuse by current partner or partner in the past year, describing violence against women as "genuine and universal."⁶

2.4 Changed Paradigm of Marital Rape in Canada:

From 1892 to 1983, men in Canada were exempt from criminal sanctions for raping their wives due to British colonial rules and practices. However, these defences are now considered false, as they are based on false beliefs about women and their assailants. The notion of implied consent suggests that when women married, they forfeited their ability to object to unwelcome sexual encounters with their husbands.⁷ Sir Matthew Hale argues that

⁶ Girls & Women, Ellen Wulforst, Thomson Reuters Foundation, Global Citizen, June 26, 2019

⁷ M Hale, *The History of the Pleas of the Crown*, vol I (1763), 629. See also C Boyle, 'Married Women: Beyond the Pale of the Law of Rape' (1981) 1 *Windsor Yearbook of Access to Justice* 192, 195-6; C Backhouse & L Schoenroth, 'A Comparative Survey of Canadian and American Rape Law' (1983) 6 *Canadian-US Law Journal* 48.

a wife's consent and contract have allowed her to rape her husband, and therefore, the husband cannot be accused of raping his lawful wife alone.⁸ William Blackstone's concept of coverture suggests that a woman becomes a part of her husband's identity post-marriage, preventing marital rape, and that wives are considered property, allowing them to rape them without consequences.¹⁰ The main arguments against rape in marriage include protecting husbands from the stigma, proving lack of consent in ongoing relationships, claiming marital rape is less serious than outside of marriage, and women lying about rape for advantage in divorce, matrimonial property, or child custody proceedings. Religious organizations also maintain that husbands cannot rape their wives. These arguments are applicable in the Indian context and are relevant to the ongoing debate on rape in marriage.

Through the statutory elimination of common law immunity in South Australia in 1976, Australia was first country to punish marital rape.⁹ Although some jurisdictions still grant limited immunity for specific types of sexual offenses, all states in the US eliminated the entire exemption by 1993 after New York successfully challenged the immunity under the Constitution in 1984, prompting legislation reform in other states.¹⁰ Feminist organizations and activists spearheaded sexual violence reform initiatives in Canada during the 1970s and 1980s. Studies demonstrating police "suspicion and hostility" against victims of rape and "relatively light sentences" for rape served as a catalyst for women's mobilization.¹¹ Women are advocating for safeguards against questioning about their sexual history and reputation, stronger response to sexual assault, and repealing laws requiring evidence and recent complaints in sexual crime trials. They also aim to eliminate marital rape immunity, which the National Association of Women and the Law considers a serious deficiency in the current offense of rape.¹²

Women argued that "the subordination of women as wives to their husbands' sexual demands [was] a perpetuation of sex-role dependency relationships" in the specific context of marital rape.¹³ At the same time, it was asserted that the idea that women are "sexually passive" and men are "sexually aggressive" stems from stereotypes that are harmful to both sexes. The repeal of marital rape immunity and the implementation of gender-neutral sexual

⁸ Boyle, 'Married Women', above n 49, 202; Backhouse and Schoenroth, 'A Comparative Survey' above n 49, 48; S McIntyre, 'Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law' (2000) 20(3) Canadian Woman Studies 72, 73; E Sheehy, 'Legal Responses to Violence against Women' (1999) 19(1) Canadian Woman Studies 62.

⁹ Naffine & Neoh, *ibid*, 40; W Larcombe & M Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 Sydney Law Review 785

¹⁰ Ryan, 'The Sex Right', above n 46, 988-990; Sack, 'From the Right of Chastisement', above n 49, 50-51, discussing *People v Liberta*, 474 NE 2d 567 (NY 1984). See also JF Decker & PG Baroni, "'No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law' (2012) 101 Journal of Criminal Law & Criminology 1081, 1155-1166

¹¹ Snider, 'The Dangers of Abolishing Rape', above n 52, 340.

¹² National Association of Women and the Law, *A New Image for Sexual Offences in the Criminal Code: A Brief in Response to Bill C-53* (Ottawa, NAWL, 1981) 9.

¹³ J McFadyen, 'Inter-Spousal Rape: The Need for Law Reform' in JM Eckelaar and S Katz (eds), *Family Violence: An International and Interdisciplinary Study* (Toronto, Butterworths, 1978), 194.

assault legislation prioritized the severity of the assault over its sexual content.¹⁴ The sexual assault changes proposed through Bill C-127 ultimately approved were not universally embraced by feminists. The complainants argued that the Bill failed to adequately address the burden of demonstrating lack of consent, which came into effect on January 1, 1983. In his comments regarding the "inequity of the present law" and the "unfair burden on female victims of sexual assault," Canadian Justice Minister and Prime Minister Jean Chretien dismissed claims that removing marital rape immunity would threaten marriage.¹⁵ Bill C-127 introduces a new, gender-neutral set of sexual assault felonies to replace rape and indecent assault charges in the Criminal Code.¹⁶ The Criminal Code was amended to prohibit sexual assaults in marriage, regardless of living together, as per Bill C-127, *ibid*, s 246.8 (now s 278 of the Criminal Code, 1985).

2.5 Conclusion:

The Canadian ban on marital rape demonstrates the influence of feminists on governments to combat sexual violence. To remove marital immunity, it is crucial to remove it with legal clarity, similar to the Canadian statute that allows spouses to face sexual assault charges. Marital rape, also known as spousal rape, should be prohibited as husbands have no right to coerce or intimidate their wives into engaging in sexual activities. Married women should not be treated differently than single women, and their marital status should not determine whether rape has occurred. Marital rape prevents women from leading healthy, caring lives and gives husbands the freedom to act authoritarily. Legislators should remove this provision from legislation, as it is the state's responsibility to protect all citizens from such behavior. New laws should be designed and executed efficiently, considering women's fundamental rights and their right to be recognized as an autonomous legal body, regardless of their marital status.

¹⁴ DC Cashman, 'Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan' (2000) 9 *Dalhousie Journal of Legal Studies* 120, 128-129. The Law Reform Commission of Canada also supported this approach in its Report on Sexual Offences (Ottawa, Minister of Supply and Services, 1978) 14-15.

¹⁵ L Cohen and C Backhouse, 'Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments' (1980) 2(4) *Canadian Woman Studies* 99, 101-103.

¹⁶ Bill C-127, SC 1980-81-82-83, c 125 enacted ss 246.1, 246.2 and 246.3 of the Criminal Code (now ss 271, 272 and 273 of the Criminal Code, RSC 1985, c C-46).