



# THE CRIMINALISATION ABSTINENCE: MARITAL RAPE AND THE INDIAN PENALOGY

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## ABSTRACT

The act of subjecting someone to sexual behaviour without that person's permission is referred to as sexual abuse. It covers a wide range of actions, from caressing to raping. Women make up the bulk of the victims. The act of engaging in sexual activity with an individual without that person's permission is known as rape. Because of the philosophy that supports men's rights to treat their wives however they choose and the wife's need to meet her partner's desires, the idea of marital rape has been disregarded for years. Now, with the evolution of marital ideals, the rise in social consciousness, and the comprehension of the idea of violence against women, it is widely accepted that a couple's desire for sexual relations, even if they are legally wedded, should be reciprocal. If not, it should be regarded as sexual abuse or rather rape. This paper discusses a wide range of defences that are advanced against the criminalization of marital rape.

Key words- rape, marital rape, marriage, section 375 IPC.

## INTRODUCTION

Fundamental to the conversation of rape committed regardless of the solemnization of marriage between the said parties is the idea of assent which is ignored in the previous situation. Marriage is frequently, even in general sets of laws, conceptualized as a stylized agreement that puts resources into the mates and a few rights regarding intercourse and multiplication. The presumption of assent then, at that point, becomes suggested in such serious agreements which thus has a dehumanizing impact keeping the right from getting decision, an essential basic liberty, to the life partner concerned. The express award of principal privileges in the constitution are proof to the way that for authorization, concerned freedoms, paying little mind to how fundamental they may be to human life, should be spread out and certified by regulation. The requirement for legitimate acknowledgment of privileges, consequently, can't be overemphasized, for regulation is the sole gadget of assurance that stands behind a standardized society and rebellion.

It is in this light that summoning the man-centric premise of a few cultural standards becomes vital. The opposition to making this offense a crime might be understood as an anxious effort to uphold the male sexual dominance that is supported by the patriarchal social hierarchy. Statements in favor of coercive sexual contact after getting married as vital for the survival and preservation of the traditional family institution and, consequently, the progeny are made to refute the constitutional or ethical wrongness of marital rape. The possibility of false charges made by couples to stoke personal animosity against their feuding partner seems to be another worry associated with the regulatory effect of outlawing marital rape. Assent or "consent" is a fluid idea and is thusly hard to quantitatively demonstrate or lay out in the court, the limits of assent become considerably more obscured when it gets enveloped under the foundation of marriage.<sup>1</sup>

<sup>1</sup> Marriage and Rape: We Need a Law on Marital Rape but Such Acts Cannot Be Separated from the Structure of the Indian Family, Economic and Political Weekly 48, no. 12 (2013): 7–8.

## FAMILY LAWS IN INDIA AND THE SACRAMENTAL NATURE OF MARRIAGE: A CRIMINALISATION CONTRABAND

Together with its morality, marriage also carries a religious meaning recognized by the nation's many personal laws. Marriage is seen as a sacramental as well as a contractual between two people specifying their mutual responsibilities and duties including both Hindu and Mohammedan personal laws. Marriage as an institution with a spiritual aspect is viewed as outshining its recognition as a legal institution in a number of rulings. The three fundamental aspects of matrimony that make it clear that it is a serious sacrament were emphasized in the case of **B. Sivanandy versus P. Bhagavathy Amma**<sup>2</sup>. They are:

- 1.As it is a perpetual relationship, no court has the authority or legal ability to dissolve marriage for any reason.
- 2.It represents a seemingly everlasting partnership that gives birth to lots of offspring. This trait provided justification for denying widowed the ability to get remarried.
- 3.It's considered a sacred or divine marriage.

In addition, ancient writings may be used to illustrate the characteristics of Hindu marriage. For illustration, per the Shastras, matrimony is a sanctified ceremony in which the father of the bride is obligated to give a daughter to a fitting husband, or "Kanyadan," in order to reap the spiritual rewards of fulfilling this sacred duty. This perspective also features prominently in the Vedas, which recognize marriage as a holy institution required for the control of communal life. Nonetheless, the current legal perspective acknowledges the dual dimension of marriages with a concentration on its contract like features, notably with allusion to these pertinent Acts: The Hindu Widows Remarriage Act, 1856, as well as Hindu Adoption and Maintenance Act, 1956.

Like Hindu personal regulations, Islam additionally thinks about marriage as the premise of society fundamental for the serene upkeep of its social texture. The word "nikah" has an Arabic origin, whose exacting implication implies the association of the genders. In Islam, marriage all the while capabilities as an agreement whose object is to concede legitimate acknowledgment of sex between the concerned couple and the reproduction of kids. This capability has been expounded in Hedaya through its meaning of marriage, which gives: "Nikah in its crude sense, implies bodily combination. In the language of the regulation, it suggests a specific agreement utilized to legitimize age." The significance connected to the foundation of marriage in Islam can likewise be connected to its restriction of unchastity and illegal relations and hence, marriage exists to legitimize suitable sex as between a legitimately hitched couple by presenting to its the assent and security of society.

The authoritative idea of Muslim marriage has been pushed for in cases like **Abdul Kadir versus Salima & Another**<sup>3</sup>. In any case, a few legal scholars have contended going against the norm by referring to that even Quran doesn't think about marriage as a standard agreement, yet rather acknowledges that there is a strict and social base of the establishment. In **Shoharat Singh versus M.J. Begum**<sup>4</sup>, the Privy Board contended for the meaning of nikah under Muslim Regulation as a strict function. This view was repeated on account of Mt. Anis Begam & Others versus Malik Muhammad Khan<sup>5</sup>, where it was contended that marriage in Islam can't be just viewed as a common agreement.

The marriage relationship has been accorded fundamental significance as the cornerstone of the social systems, as may be seen from the aforementioned conclusions of Hindu as well as Muslim personal family laws. Similar to this, a pair of spouses are regarded like one individual in statute; as a result, their conversations are shielded from liability. So, in practice, the constitutional and societal perception of marriage as a sacred unity renders it difficult to penalize certain elements of exchanges between partners.

### THE EXEMPTION RATIONALE

According to **Section 375 of the Indian Penal Code**, having sex with one's spouse who is beyond the age of fifteen is not considered rape, regardless of whether it is forced, against her choice, or without her permission. Yet, if his wife is under fifteen years of age, he faces legal ramifications for raping her. The goal of this important caveat (to the deferral given to spouses from the crime of rape), in order to preserve the physical safety of married girls who are of a certain age from untimely sexual activity with their male partners often with devastating results

<sup>2</sup> AIR 1962 Mad 400

<sup>3</sup> (1886) ILR 8 All 149

<sup>4</sup> (1915) 17 BOMLR 13

<sup>5</sup> AIR 1933 All 634

for oneself as well as the substantial risk of child mortality looking to follow in its immediate aftermath, it might appear that her assent would indeed be inconsequential in this kind of cases.

Alas, the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 has argued that sexual activity between a gentleman and his spouse (wife), without regard to the biological maturity of the woman, ought not to be deemed as rape. This is contrary to the Law Commission's proposal that this activity be removed from Section 375 of the Code and created into a completely separate offense. Hence, the proposal for a new provision on rape in clause 157 of the Bill has had the language referring to sexual activity between a man and his minor wife omitted by the joint committee.<sup>6</sup>

Clearly the joint committee has not given profound idea to the reasonings fundamental the exclusion given to the spouse from this offense or thought about finally the changing pattern towards cancelation of this exceptional exclusion directly following ladies' freedoms development in the custom-based law nations or the situation in such manner in common law nations and communist nations of the world. This paper is worried about those perspectives.

Prior to thinking about those perspectives, a couple of different places of law in this regard might be noted. Under the law, a spouse can be at fault for abetting the rape of his significant other, no matter what her age, and assuming he were available around then, he would be considered to have committed rape itself despite the reality he is excluded from the actual offense (and endeavour thereof).

Be that as it may, as the law stands, a spouse appreciates insusceptibility from a charge of rape despite the fact that he has effective non-consensual sex with his significant other who has been living separated from him whether by shared understanding or under a pronouncement of judicial separation. In such a case, the marriage in fact stays alive. The Law Commission didn't believe this to be correct. It is thought about that in such conditions performance of sex by a man with his significant other without her consent ought to be culpable as rape. The Joint Committee on the Indian Penal Code Bill, 1972, has seen well the acquaintance of an extra clarification with the proposed new section on rape to consider a lady living independently from her significant other under a pronouncement of judicial separation or by common consent to be a lady other than the man's better half for the reasons for this section. In any case, the joint committee has decreased the quantum of discipline given in such a manner from a limit of seven years of detainment to one of three years as it were. In this regard additionally, the joint committee has seen with favouritism the place of the spouse according to this offense.<sup>7</sup>

It doesn't follow from the exception of the spouse from the offense of rape that the law views the wife as a thing made over to be the outright property of her significant other, or as an individual external the security of the criminal law. The husband has not unquestionably the option to partake in the individual of his better half regardless of the subject of wellbeing to her, concerning occurrence, assuming that the conditions be to such an extent that it is sure passing to her, or that it is presumably hazardous to her life. The husband may by his effective demonstration of intercourse, bring himself under any of different arrangements of the criminal law, contingent on the singular conditions of the case, or at least, having respect to the state of being of the wife, and to the goal, the information, the level of thoughtlessness or carelessness with which he is displayed to have followed up on the event being referred to.

**"A man is a man; an act is an act; rape is a rape, whether it was performed by a man the 'husband' on the woman the 'wife',"** the Karnataka High Court remarked in its ruling that an offender should stand prosecution irrespective of the immunity afforded by the penal law. In May of last year, a Division Bench of the Delhi High Court gave a divided ruling in a different case addressing the same problem. Judge Rajiv Shakhder, the two-judge Bench's leader, deemed the exemption to Section 375 of the Indian Penal Code to be unlawful (IPC). The request to make marital rape a crime was denied by Justice C. Hari Shankar, an associate judge on the High Court Bench, who claimed that any alteration would be unconstitutional

The plea to render marital rape a crime was denied by Justice C. Hari Shankar, an associate judge on the High Court Bench. He claimed that any change to the law should be made by the legislature because the situation required taking into account a variety of factors, including social, cultural, and legal ones. Mr. Mehta questioned Chief Justice Chandrachud on whether the high court should hold off until the three-judge bench of the Delhi High Court rendered its decision. Nevertheless, the Chief Justice of India stated that the Supreme Court will

<sup>6</sup> M.V. Sankaran, (1978), The Marital Status Exemption In Rape, Journal of the Indian Law Institute, 594–606

<sup>7</sup> Chapman, Jean, Violence against Women in Democratic India: Let's Talk Misogyny, Social Scientist 42, no. 9/10 (2014): 49–61.

accept the petitions because it already possessed the benefit of the firmly formed opinions of two judges. In its 2013 report, the Justice J.S. Verma Committee recommended that the provision for marital rape be repealed.

The Karnataka government has cited the 2013 report of the Justice J.S. Verma Committee, which had recommended the abolition of the exemption for marital rape and advised that the law must say explicitly that "marital or other relationship between the perpetrator and victim is not a valid defence against the crimes of rape or sexual violation." The petitioners claimed that the Exemption compromised women's bodily safety, freedom, and integrity and undermined their permission to have sex. One of the petitioners was activist Ruth Manorama.

Similar to India, the United States did not start to classify marital rape as a crime until the 1970s. Before this, legal definitions of rape frequently exclusively focused on the use of physical force and failed to acknowledge that someone may be persuaded into sex through psychological as well as emotional duress. There haven't been many attempts at legislation or legal action to make marital rape illegal in India. Notwithstanding recent events such as the high-profile case of Jyoti Singh, who was savagely gang-raped and killed in Delhi in 2012, the nation has seen a rise in awareness of gender-based violence. Although progress has been sluggish and unequal, over time, cultural perceptions about marital rape have changed. Many traditional countries still consider marital infidelity to be a husband's prerogative, and wives who reject their husband's advances may face shame or worse. Nonetheless, there is a rising understanding of the suffering that marital rape causes as well as the fact that it is against women's human rights. The historical background of marital rape reveals the longstanding social and legal acceptability of gender-based violence in marriage as well as the sluggish steps taken to acknowledge and address this problem. Notwithstanding recent substantial legislative and cultural changes, much more needs to be done to guarantee that women's right to bodily autonomy is upheld.

The much-debated immunity accorded by virtue of the second exception to Section 375 is undeniably one of the most challenging aspects of the law that although criticized, still remains tough to obstruct or strike off from the Indian Penal Code. The exception also has its roots in archaic ideas about the role of the woman and the intent behind the rape statute. The woman was originally viewed as her husband's commodity or possession. To protect the "male pleasure of being in sole ownership of a sexual item," rape legislation was created. Therefore, chastity and marital fidelity were prized ideals that were hoped to be guarded against the frequently unprompted, unexpected, and extremely brutal assault that, in turn, was called forward by the retribution. The victim of rape always suffered reputational harm. That ruined the possibility of a bride-to-be who is single. But, in a typical married partnership when the partners have had intimate relationships, forced sexual activity without consent.<sup>8</sup>

Traditional notions of the role of the woman were comparable to the common law principle of the cohesion of two people as one in a marriage, which holds that after being wedded, a woman's legal identity merges with that of her husband. Theoretically, a wife cannot be raped by a husband since he's one with his spouse and therefore, he cannot be considered by implication of this legal fiction to rape his own self. These legal fabrications that render marriage as an instrument that renders the synthesis of two souls into one, that viewed a woman as the husband's property or his significant other have largely been abandoned in today's legal systems. These days, a lot of people see marriage as a union in which the husband and wife have equal rights. The goal of rape law might now be understood as one of protecting a woman's personal safety and freedom of choice rather than safeguarding men's interests in a lady's integrity. Thus, the spouse was excluded from conviction or even considered by the law as a rapist.

Furthermore, another complication is because of issues with procuring evidence of rape in marriage. The exclusion in rape statute has been defended on the grounds that it is challenging to prove that a rape occurred between a married couples and that the woman may make a complaint against the man. Although it's correct that the existence of marriage creates an implication of permission, this is insufficient to stop a woman from filing a rape complaint against her husband if she so chooses. The statute doesn't quite preclude a woman from accusing a male of raping her even while she is sexually intimate with him, even in cases where consent may be assumed in that situation due to prior intimate intercourse.<sup>9</sup>

Additionally, the reasoning that a conniving wife might file a false complaint or use the threat of prosecution to pressure her husband into agreeing to an amicable property settlement during a divorce is unpersuasive because it is inconsistent with the actuality that she might still file a grievance against him for offenses other than rape.

<sup>8</sup> Bhat, Meghna, and Sarah E. Ullman, Examining Marital Violence in India: Review and Recommendations for Future Research and Practice, *Trauma, Violence & Abuse* 15, no. 1 (2014): 57–74.

<sup>9</sup> G. Gangoli, Controlling women's sexuality: Rape law in India, In G. Gangoli & N. Westmarland (Eds.), *International approaches to rape* (1st ed., pp. 101–120). Bristol University Press.

But keep in mind that if a wife finds it difficult to substantiate a rape claim against her husband, then giving up the exemption would most likely not be a powerful instrument in the hands of a spiteful wife.

Another argument in support of the exception is that convictions for marital rape would thwart reunion and encourage marriage strife, contrary to the law's goal. This explanation is also incompatible with the husband's denial of impunity for further crimes he could conduct related to this one. It also assumes that there is marital peace, which is untrue because the husband isn't going to be favoured for such a claim until the pair are divorced or there has been marital strife for a long time. Lastly, it is claimed that the wife is adequately protected by assault and battery (criminal force) legislation. This argument makes the exemption's legality an assumption while the correct inquiry is, "Why to allow it at all?" This exception is without a doubt out of date. "The interests that are infringed are unaffected by the fact that rape takes place in a married setting. Also, it shouldn't compromise the defence." Consequently, it is imperative to repeal this exception in light of both growing and changing within marriage and the risks associated with coercive sexual activity without the wife's permission.

## CONCLUSION

While it has been a problem since the beginning of time, marital rape has mostly been ignored in support of domestic violence. With the advancement of civilization, it became obvious. Following the experience, sufferers of marital sexual abuse exhibit physiological and psychological issues. Analgesic and genital injuries, vaginal infections, cuts and bruises, infections of the urinary tract, and pelvic discomfort are a few of these issues. Some of the psychiatric problems include headaches, enduring anxieties, sadness, and post-traumatic stress. All through the past century, there has been ongoing research on the topic of law. This topic became one of the most pressing issues of the day because of the importance of privacy, the dearth of complaints, and the unresolved legal issues. In certain countries, marital rape is still disregarded or seen as normal, which may deter victims from coming forward with their stories. Women make up the bulk of the victims. Due to their embarrassment or fear of their wives and friends, victims typically choose not to disclose the occurrence. In hopes of preventing these incidents, sufferers' knowledge needs to be increased so that they understand that they are innocent and that marital sexual abuse is illegal. In order to set a precedent, it is crucial to protect the innocent and punish the offenders.

