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Marital Rape in India: A Comparative and Constitutional Analysis

N. T. PRIYADHARSHINI* AND DR. ASWATHI SUKUMARAN**

ABSTRACT

Marital rape remains a controversial issue in Indian criminal law, where the exception to Section 375 of the Indian Penal Code (now Section 63 of the Bharatiya Nyaya Sanhita) exempts husbands from liability for non-consensual sexual acts with their wives. This study examines the concept, historical evolution, and socio-cultural factors influencing this exception. It evaluates the exception's constitutional validity under Articles 14, 19, and 21 of the Constitution of India, focusing on equality, dignity, and personal liberty. The research also analyses judicial trends through cases such as Independent Thought v. Union of India and RIT Foundation v. Union of India. A comparative study with international legal frameworks highlights the gap in Indian law. The study concludes that the marital rape exception is inconsistent with constitutional principles and recommends legal reform and greater awareness.

Keywords: Marital Rape; Consent; Force; Exceptions; Marriage.

I. INTRODUCTION

Though marriage is considered a relationship based on trust and respect, there can be instances of inequality and absence of consent within it. One example of an instance where consent may be absent even though a woman is married is the case of marital rape. Marital rape violates the principle of consensual sex and can be characterised as rape. According to Section 375 of the Indian Penal Code (now the Bharatiya Nyaya Sanhita), rape is a criminal act, but there exists an exception to this rule under Exception 2, which provides that non-consensual sexual intercourse between a husband and wife is exempt from the offence of rape.

This exemption is founded on archaic conceptions of marriage that assume perpetual consent to sexual activity between a husband and wife. However, consent must be continuous and voluntary, and it therefore cannot be presumed. Several constitutional provisions cast doubt on

* Author is a Student at Vels Institute of Science, Technology & Advanced Studies, Chennai, Tamil Nadu, India.

** Author is a Professor at Vels Institute of Science, Technology & Advanced Studies, Chennai, Tamil Nadu, India.

the validity of this exception, including Articles 14, 19, and 21 of the Constitution of India.¹

II. MARITAL RAPE AND ITS IMPACT IN THE UNITED STATES

The United States is among the world's most economically developed nations. Yet even there, marital rape was historically treated as legally impossible, on the belief that marriage between two parties created an irrevocable consent to sexual intercourse. The treatment of rape in the United States is complex. Historically, a husband could not be charged with raping his wife, because marriage was regarded as an agreement to engage in sexual relations. This position began to change in the 1970s and 1980s, when women's rights groups and lawyers started to question its fairness.

A. Historical Background

The concept of marital immunity emerged from English common law and was received into the law of the United States. More particularly, it derived from the doctrine propounded by Sir Matthew Hale in the seventeenth century. According to this doctrine, a husband could not be charged with or held guilty of having sexual intercourse with his wife, irrespective of her consent. This idea was followed as a matter of practice and was incorporated into the American legal system, subordinating a woman's autonomy over her own body for years.

The courts in the United States viewed marriage as a contractual agreement between two parties in which the wife surrendered her sexual autonomy to the husband for life. Until the twentieth century, for nearly three hundred years, marital rape was not even a concern in American law and was legally treated as impossible in nature. Married women had no criminal protection for the physical trauma they endured. At best, with no other options, married women sought to address the issue by filing for divorce under civil remedies such as cruelty.

B. Abolition of the Marital Rape Exemption

Between 1975 and 1993, the marital rape exemption was abolished slowly and steadily across the country.² During this period, every state in the United States either completely repealed the marital rape exemptions or had them struck down by the courts. Finally, in 1993, all fifty states criminalised marital rape. It is important to note, however, that many states imposed lesser punishments, stricter evidentiary requirements, and shorter reporting periods.

¹ The constitutionality of the marital rape exception has been challenged on the ground that it violates Articles 14, 15, 19, and 21 of the Constitution of India. *See Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

² The movement to abolish the marital rape exemption gained significant momentum in the United States between 1975 and 1993, reflecting a broader recognition of women's rights and bodily autonomy within marriage. *See SUSAN ESTRICH, REAL RAPE* (1987).

III. MARITAL RAPE AND ITS IMPACT IN THE UNITED KINGDOM

As in the United States, the doctrine propounded by Sir Matthew Hale was applied and followed in the initial stages, and the legal position rested mainly on this doctrine.³ Hale famously stated that a husband could not be held guilty of having sexual intercourse with his spouse even against her will. This doctrine emphasised a male-centric approach, subsuming the legal identity of the woman under that of her husband (the doctrine of coverture). On this view, sexual consent was presumed to be permanent and unconditional, meaning that the woman was to have no say in the matter. As in the United States, this meant that a husband could not be prosecuted for raping his wife, and a woman had no criminal remedy for non-consensual intercourse within marriage.

A. Legal Evolution

In the early part of the twentieth century, doubt began to arise within the judicial system of the United Kingdom, and the courts began to question the strict application of Sir Matthew Hale's doctrine. The courts drew certain exceptions to the doctrine, namely where the spouses were legally separated, where a restraining order was in force, or where a court had issued a non-cohabitation decree. In these circumstances, the courts recognised that the presumption of the woman's consent could be withdrawn.

B. Dynamic Social Change and Its Influence

Women's empowerment, the women's rights movement, and evolving notions of a woman's autonomy over her body, dignity, and equality paved the way for intense criticism of the practice of marital rape and its exemptions. This shift from the doctrine to recognised exceptions was also influenced by the rising number of domestic violence cases, legal reforms focused on gender justice, and the expanding scope of human rights jurisprudence.

C. Judicial Approach

One of the most significant cases in the history of the United Kingdom relating to marital rape is *R v. R* (1991).⁴ In this case, the husband attempted to have sexual intercourse with his wife without her consent and contended that, under English common law, he could not be held guilty of rape. The House of Lords rejected his contention and held him guilty, ruling that the doctrine propounded by Sir Matthew Hale was outdated and no longer formed part of modern law. This marked a decisive shift in the understanding of marital rape, resting on three key observations: that marriage does not imply irrevocable consent; that a woman has autonomy over her body

³ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1377-1382 (2000).

⁴ *R v. R*, [1992] 1 A.C. 599 (H.L.); see also Hasday, *supra* note 3, at 1434-1439.

irrespective of her marital status; and that the exemptions to marital rape were anachronistic and offensive. This landmark precedent formally abolished the marital rape exemption and recognised marital rape as a criminal offence equivalent to other forms of rape.

D. Statutory Framework

Following the landmark judgment in *R v. R* (1991), the courts in the United Kingdom subsequently affirmed that marriage cannot be a defence to rape and that consent must be present at the time of the act, irrespective of marital status. This judgment and its subsequent affirmation led to the enactment of the Sexual Offences Act 2003, which became the principal legislation governing sexual offences.⁵ The Act defines rape as intentional penetration without consent and applies to every individual irrespective of marital status. It also expanded the concept of consent by emphasising freedom, capacity, and voluntariness. Under this legislation, a husband charged with marital rape is prosecuted in the same manner as any other accused.

E. Current Legal Trend

Currently, the United Kingdom has a fully developed and progressive legal framework that completely criminalises marital rape. It is also addressed within the broader framework of domestic violence and coercive control, which recognises psychological abuse, economic control, and coercive behaviour by the husband. This has enabled the courts to better understand the non-physical forms of compulsion.

IV. MARITAL RAPE AND ITS IMPACT IN SOUTH AFRICA

The South African legal system is mainly based on the inherited Roman-Dutch legal tradition, together with English common law. The historical treatment of marital rape in South Africa therefore followed the marital rape exemptions seen in the United States and the United Kingdom, treating marriage as a contract that removed the autonomy a woman possessed over her body. This perspective was also justified on the grounds of preserving the private sphere of marriage, the fear of misuse and abuse of the law, and patriarchal notions of conjugal rights.

A. Early Reforms

By the end of the twentieth century, various feminist movements began to work against the practice of marital rape, challenging the system of exemptions. In 1989, these movements led to the implementation of limited reforms treating marital rape as a physical assault rather than

⁵ Sexual Offences Act 2003, c. 42 (U.K.).

as rape. Although the reform criminalised the conduct, it reflected a reluctance to fully criminalise the concept owing to social concerns such as rising divorce rates.⁶

B. Criminalisation

The South African legal system witnessed a major turning point in the legal treatment of marital rape. In 1993, the State enacted the Prevention of Family Violence Act, 1993, which clearly criminalised marital rape, expressly stating that a husband could be charged with and convicted of raping his wife.⁷ This legislation abolished the marital rape exemption and marked South Africa as one of the early jurisdictions to criminalise the practice. It also aligned with the country's transition to a constitutional democracy after 1994, emphasising dignity, equality, and bodily integrity.

C. Current Legal Framework

In the modern legal system, the law governing rape is the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which defines rape as any act of sexual penetration without consent.⁸ This is a broader law than its predecessor because it is gender-neutral and relationship-neutral. The key implication of this enactment is that there is no exception for marriage: marital rape must be treated the same as any other rape, irrespective of gender, marital status, or relationship. The concept of consent in South Africa requires that consent be voluntary, expressly informed, and ongoing; that it may be withdrawn at any time; and that marriage does not imply permanent consent.

D. Role of the Judiciary

The judiciary contributed to abolishing the practice of marital rape in the State. Its role is evident in *S v. Ncanywa*, a significant case dealing with marital rape.⁹ There, the husband was charged with raping his wife; during the trial, the State applied the English common law, the wife alleged non-consensual intercourse, and the defence relied on the marital relationship between the parties. The court expressed judicial hesitation in convicting for rape but acknowledged the changing legal landscape and stressed the importance of legislation on the issue. This precedent served as a transitional case questioning the immunity attached to marital rape.

⁶ Feminist movements in the latter half of the twentieth century played a crucial role in challenging the legal fiction that marriage implied permanent consent to sexual intercourse and in advocating recognition of marital rape as a criminal offence. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 376-385 (1975).

⁷ Prevention of Family Violence Act 133 of 1993, § 5 (S. Afr.).

⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.).

⁹ *S v. Ncanywa*, 1993 (1) SACR 297 (CK).

In *S v. Mvumvu*, the judiciary treated marital rape as a criminal act.¹⁰ The accused was charged with raping his wife within a customary marriage and contended that the customary marriage implied consent. The court rejected this contention and convicted him, holding that sexual intercourse in the absence of consent constitutes rape and that no exception, such as implied consent or customary practice, can justify it.

V. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A. CEDAW

CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, was adopted by the United Nations in 1979 and is often described as the international bill of rights for women.¹¹ General Recommendations Nos. 19 and 35 of the CEDAW Committee address gender-based violence as a form of discrimination and expressly state that marital rape forms part of violence against women. They make clear that the merely private nature of marriage is not sufficient to justify State inaction. The position taken in General Recommendation No. 19 was reaffirmed in General Recommendation No. 35, which reiterates that the State must criminalise all forms of gender-based violence against women, including marital rape, irrespective of its nature or seriousness.

B. ICCPR

The ICCPR, the International Covenant on Civil and Political Rights, was adopted by the United Nations in 1966 to protect fundamental civil and political rights.¹² Its key provisions include Article 6 (the right to life); Article 7 (freedom from torture and cruel, inhuman, or degrading treatment); Article 17 (the right to privacy and bodily integrity);¹³ and Article 26 (equality before the law). The Human Rights Committee, which monitors the implementation of the ICCPR, has interpreted these provisions to include protection against sexual violence within marriage. In particular, the Committee has recognised that rape, in all its forms, violates Article 7, and that any sexual act within marriage without consent amounts to torture or to cruel, inhuman, and degrading treatment. It has also affirmed that the State is under a duty to criminalise such acts in order to prevent their commission.

¹⁰ *S v. Mvumvu*, 2005 (1) SACR 54 (SCA). The judgment reflects the constitutional values embodied in the Constitution of the Republic of South Africa, 1996, particularly the rights to equality, dignity, and freedom from violence.

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; see CEDAW Committee, General Recommendation No. 19 (1992) and No. 35 (2017).

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹³ Article 17 protects individuals against arbitrary or unlawful interference with privacy, family, and personal autonomy.

Furthermore, in General Comment No. 28, the Committee stressed the importance of gender equality within marriage. It observed that legal doctrines such as implied consent and exemptions for marital rape run directly counter to the core objectives of the Covenant, and that it is the duty of the State to ensure protection for all women against every form of sexual violence.

VI. STATUTORY FRAMEWORK IN INDIA

In India, marital rape is not addressed explicitly but is subsumed within the broad definition of rape under Section 63 of the Bharatiya Nyaya Sanhita, 2023 (formerly Section 375 of the Indian Penal Code, 1860). Although the law has been updated by the legislature, the marital rape exemption is retained in the new criminal law as well.

A. Section 63 of the Bharatiya Nyaya Sanhita, 2023

Section 63 of the Bharatiya Nyaya Sanhita, 2023 defines rape as an act in which sexual intercourse is committed forcibly and without consent.¹⁴ Although the act of marital rape satisfies the conditions for the offence, it is still treated as an exemption under the provision. The exemption provides that sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, does not amount to rape. In effect, the protection of the rape provision extends only to a wife below the age of eighteen; an adult wife has no remedy for non-consensual intercourse within marriage. This means that the doctrine of implied consent propounded by Sir Matthew Hale in the seventeenth century is still followed in India in 2023.

B. Section 67 of the Bharatiya Nyaya Sanhita, 2023

This provision deals with sexual intercourse by a husband during separation.¹⁵ It criminalises sexual intercourse only where the spouses are living separately, and only where they are in judicial separation as ordered by a court. This implies that the woman's consent is taken into account only when the marriage is disrupted, which in turn implies that non-consensual sexual intercourse within an ongoing marriage is yet to be criminalised.

C. Other Relevant Laws

Although various statutes, such as the Protection of Women from Domestic Violence Act, 2005 and the Dowry Prohibition Act, 1961, were enacted to protect women from domestic violence,

¹⁴ The Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2, No. 45, Acts of Parliament, 2023 (India) (formerly the Indian Penal Code, 1860, § 375, Exception 2).

¹⁵ The Bharatiya Nyaya Sanhita, 2023, § 67, No. 45, Acts of Parliament, 2023 (India).

sexual abuse, and dowry torture, non-consensual sexual intercourse by the husband, that is, marital rape, is still not criminalised, even though forced sex may be treated as cruelty.¹⁶

VII. CHALLENGES IN ENFORCEMENT

In a country such as India, where customary practices prevail in many regions, marriage is often viewed as a sacramental institution that implies presumed consent established under English common law. This conception of marriage as a sacramental and private institution makes it difficult for people to recognise forced or non-consensual sex within a marriage as rape. Furthermore, the government and the authorities fear the misuse of any such law, given concerns about false allegations between spouses driven by economic motives. Policymakers fear that criminalising marital rape may lead to false or exaggerated complaints by wives and that it could be used as a tool in matrimonial disputes.

Another key concern is the protection of the institution of marriage. There is a rising apprehension in India that criminalising marital rape may destabilise marriages or lead to divorce and increased litigation. The criminalisation of marital rape is thus hindered by a mix of deep-rooted social norms, policy reluctance, and fear of the abuse of the law.

VIII. CONCLUSION

In conclusion, this comparative analysis of the marital rape laws of the United States, the United Kingdom, and South Africa demonstrates a clear global shift towards recognising marital rape as a serious offence.¹⁷ By contrast, India continues to retain the exception available for marital rape, failing to take into account the consent of the adult woman. Enforcement challenges further complicate the issue, including societal stigma, underreporting, evidentiary barriers, a lack of statutory support, and the fear of misuse that overshadows the genuine concern underlying this practice. While international practice offers persuasive guidance, domestic law continues to fail to address the issue.

¹⁶ The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); the Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961 (India).

¹⁷ *People v. Liberta*, 64 N.Y.2d 152 (1984) (holding that the marital rape exemption violated equal protection guarantees).