

The Myth of Consent in Marriage

Md. Tauseef Alam¹ and Abhinav Rajawat²

Abstract

India is one of the ten countries in the world that expressly allows marital rape. Around 30% of Indian women aged 18 to 49 have experienced domestic violence. Women in India are 17 times more likely than women elsewhere to endure sexual assault from their husbands. After the brutal gang rape in Delhi in 2012, the notion of marital rape gained traction. Rape in the home might be more painful and cruel than rape on the street. Suffering at the hands of a husband causes the woman to feel betrayed, disillusioned, and alone. Eliminating immunity would not raise the likelihood of divorce; if rape happens, the marriage has already deteriorated. In India, a woman gets raped every 16 minutes and the likelihood of Indian married women suffering from sexual violence is 17 times more. Here we will discuss the background, major challenges, and recent changes in the laws surrounding marital rape around the nation.

¹ 2nd Year, Lloyd Law College, Noida, tauseef.alam2021-26@lloydlawschool.com

² 2nd Year, Lloyd Law College, Noida

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Introduction

The world has defeated millions of challenges that pose a danger to humans but still in the 21st Century, we are struggling to bring a solution to Marital Rape. India is one of the ten countries in the world which expressly allows marital rape of a woman or a girl by her husband. As once F.

H. Batacan said “Her friends used to tell her it wasn't raped if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.” According to the National Family Health Survey, around 30% of Indian women aged 18 to 49 have experienced domestic violence. Women in India are 17 times more likely than women elsewhere to endure sexual assault from their husbands, with 724,115 women responding. After the brutal gang rape in Delhi in 2012, the notion of marital rape gained traction, with the Justice Verma committee suggesting that it be criminalized. After this parliament panel stated that criminalizing marital rape will cause stress in families by destroying marriages and causing complete anarchy. Even while the Protection of Women from Domestic Violence Act of 2005 recognizes marital rape as a kind of domestic violence that can be classified as cruelty and used as a basis for divorce, it is not criminalized.

The poll that wealth and education were also important factors. For example, 7.2% of married women with fewer than five years of education had experienced sexual assault from their partners.

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

However, it was just 2.9 percent among women with 12 or more years of education. In addition, 10.2% of married women in the lowest economic quintile experienced sexual abuse from their spouses, compared to only 3.1 percent among the richest.

Domestic Violence has been recognized as a criminal offense under the Section 498-A of the Indian Penal Code, 1860 since 1983, and further in 2006 the Protection of Women from Domestic Violence Act, 2005 came into effect which provided the definition of domestic violence that includes all forms of physical, emotional, verbal, sexual, and economic violence, and covers both actual acts of such violence and threats of violence. Furthermore, the PWDVA (Protection of Women from Domestic Violence Act) defines marital rape as a type of abuse and harassment in the form of unlawful dowry demands.

“The home is one of the most dangerous places for women, ” said the United Nations while appealing to the countries to end marital rape by closing legal loopholes.

Background

Although rape has been acknowledged as a horrific crime against human dignity and society, and one in which the male is treated like an animal, the Indian Penal Code makes an exemption for it. Rape³ is a crime against humanity, according to the International Court of Justice Rape is a kind of

³ Indian Penal Code 1860, § 375 (India)

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

violence. Rape is a breach of "personal dignity," and "Rape and sexual assault are among the worst forms of victimization because the victim is subjected to both physical and emotional trauma. The marital rape exception was instituted in common law nations since it was deemed "impossible" for a husband to rape his lawfully married wife.

Back early in 1900 BCE in Babylon, a man could be sentenced to death for forcing sex on someone's wife or daughter on the ground of 'vandalizing someone else's property'. Not just in Babylon but in most of the early civilizations rape was defined as a property crime. This concept was not left behind, in the 1700s the rape laws were introduced by the British empire and addressed rape as a crime as it violates the sexual purity of a woman. Rape began to be perceived as a threat to women faced outside the household and yet again believed that their husbands cannot spoil the purity of their wives. With the same view, the Indian Penal Code was drafted in the year 1860 with the exception of section 375 which says sexual intercourse by a man with his wife, is not rape.

It is also believed that the husband's immunity for marital rape is based on the assumption that a woman while marrying gives her forever consent to the husband for sexual intercourse. Her husband has the right to sexual intercourse with her, whether she is willing or not, and the woman is under obligation to surrender her will and desire.

In *Sakshi V Union of India*⁴, the Supreme Court of India asked the Law Commission of India to

⁴ *Sakshi V Union of India*, (1999) 6 SCC 591

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

investigate the viability of amending different parts of the Indian Penal Code in connection to "sexual abuse," as proposed by Sakshi in their Petition. The report of the Law Commission of India recounts the request by representatives of Sakshi to suggest the elimination of the exemption to marital rape in accordance with the directives. However, they were not satisfied with the advice since removing it may result in undue interference with the marital connection.

The 'Report of Committee on Amendment to Criminal Law,' led by Justice J.S. Verma (Rtd), had also taken note of the subject of marital rape and suggested that the exemption for marital rape under Section 375 of the IPC be eliminated. It went on to say that the perpetrator's or victim's marital or other connection is not a sufficient defense against rape or sexual violation, nor should it be a valid reason for reducing the crime's punishment. Responding to which the standing committee of the parliament said that criminalizing marital rape will put families under stress further they were of the view that this will create absolute anarchy in families.

Theory of Implied Consent

Sir Matthew Hale is credited with developing the common law doctrine of a marital exemption for rape. He said, "but 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 up herself in this kind unto her husband, which she cannot retract." It is often presumed that when a man and a woman get married it becomes an obligation for the wife to provide for the sexual needs of the husband

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

whenever he requires, the will and the consent of the wife are presumed to be implied.

In the year the validity of Hale's theory was called into doubt by the matter of *R. v. Clarence*⁵. Despite the judges' obiter remarks, four of the six justices expressed reservations about Hale's theory. It was observed that the theory Hale's doesn't hold strong in every case and further it was held marital rape could be possible in some cases if the wife refuses intercourse and the husband uses violence to force the sexual act upon her.

Hence, the marital rape exception was founded on Hale's implied consent thesis. This hypothesis was based on how marriage united the husband and wife's identities into one—the husband. As a result, rape was impossible since a spouse could not rape himself. Furthermore, a woman was considered property or chattel by society. As a result, forced sexual intercourse was simply a spouse making good use of his resources.

Is Marital Rape a violation of Fundamental Rights?

Indian Constitution's Article 38 and the preamble envisage social justice as the arch to ensure life is meaningful and livable with human dignity and social justice, equality, and cornerstones of social democracy. This concept of "social justice" which the constitution of India engrafted, consist of diverse principle essential for the orderly growth and development of the personality of every citizen

⁵ *R. v. Clarence*, 22 Q.B.D. 23 (1888)

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

which also includes vulnerable sections of the society. The apex held in the matter of Rubinder Singh vs Union of India⁶ rule of law required that no person shall be subjected to uncivilized harsh or discriminatory treatment even if the object is securing and safeguarding the paramount exigencies of law also, the equal law should be applied equally to all in the same situation and there should be no discrimination between one person and another⁷. The Honorable Supreme Court in the landmark case of *Puttaswamy vs. UOI*⁸ held that sexual privacy is a fundamental right of all citizens and forced sexual act would be a clear violation of this right.

The Honorable Apex Court in its judgment of *State of Maharashtra v. Madhukar Narayan*⁹ held that Every woman has the right to her sexual privacy, and it is not permissible for anyone to breach her privacy at any time. The Supreme Court has determined that a right to privacy is inherent in the scope of Article 21. The Constitution guarantees the right to remain unbothered and unaffected when sitting. Any form of intensive sex is harmful to the right to protection and sexual security. It is argued that teaching marital exclusion to rape undermines a married woman's right to protection by forcing her into a sexual connection she does not desire. The honorable court in the matter of *State of Karnataka vs Krishnappa*¹⁰, held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. All these judgments

⁶ Rubinder Singh vs Union of India, AIR 1983 S.C 65

⁷ State of West Bengal vs Anwar Ali Sarkar, AIR 1952 S.C 75

⁸ Puttaswamy vs. UOI, (2017) 10 SCC 1

⁹ State of Maharashtra v. Madhukar Narayan, AIR 1991 SC 207

¹⁰ *State of Karnataka vs Krishnappa*, (2000) 4 SCC 75

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

make no distinction between the rights of married women and unmarried women and there is no contrary judgment establishing that marital relationship abridges the individual right to privacy.

Section 375 of the Indian Penal Code, 1860 excludes rape which is committed by a husband against his wife in a marriage. Marriage is regarded as a holy institution that serves as the foundation of our society. It is seen as profoundly personal, and the government is wary of intruding into this delicate territory. This is to protect people's privacy, and the government's intervention in this realm would jeopardize that privacy. As a result, the state does not force any two people to marry or divorce. However, the government's unwillingness to intrude on this private zone, even in limited circumstances, might be troublesome.

In the case of *Rubinder Singh vs Union of India*¹¹ court held that the rule of law required that no person shall be subjected to uncivilized harsh or discriminatory treatment even if the object is securing and safeguarding the paramount exigencies of law also, the equal law should be applied equally to all in the same situation and there should be no discrimination between one person and another¹². Section 375 protects the right of every unmarried woman to say no to sexual intercourse with her partner but after entering marriage this remedy takes away from the married women right to give consent for sexual intercourse with her husband.

¹¹ Rubinder Singh Vs Union of India, AIR 1983 SC 65

¹² State of West Bengal vs Anwar Ali Sarkar, AIR 1952 SC 75

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Chief Justice Gita Mittal observed that “Marriage does not mean that the woman is all time ready, willing and consenting the man will have to prove that she was a consenting party”. Exception 2 of Section 375 discriminates against the marital status of the woman which violates the fundamental right of equality¹³ that guarantees the constitution of this nation.

Several PIL was filed before the honorable courts of India to criminalize marital rape but no order ruled in favor of those PIL¹⁴. Some are of the view that marriage is a sacred sacrament and consent in these cases is implied.

A Violation of Article 14

Article 14 of the Indian Constitution guarantees the fundamental right of equality before the law and equal protection of the laws within the territory of India. However, criminal law discriminate against and excludes the violation of liberty to bodily integrity of women, who are the victims of marital rape.

In the case of *In Valsamma Paul v. Cochin University*¹⁵, it was held that: Human rights are derived from the dignity and worth inherent in the human person. Democracy, development, and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights of women, including girl children, are, therefore, inalienable, integral, and an

¹³ Indian Constitution Art. 14

¹⁴ Janata Dal vs. H.S. Chaudhary (AIR 1993 SC 892)

¹⁵ Valsamma Paul v. Cochin University, AIR 1996 SC 101

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

indivisible part of universal human rights.

All the above cases do not discriminate between the rights of a married woman and an unmarried woman. The archaic law of exception 2 of section 375 of IPC has been provided. immunity against rape in a marital relationship and therefore destroys the right and dignity of a woman as an individual human being.

In the case of *Motor General Traders v. State of Andhra Pradesh*¹⁶ Supreme court state test of permissible classification two conditions must be fulfilled for violation of article 14:

(a) First that the classification must be founded on an intelligible differentia that distinguishes persons or things that are grouped from others left out of the group

(b) Second that differentia must have a rational relation to the object sought to be achieved by the statute in question. If we apply this principle to our case, married women here are regarded as different groups from the rest of women to avail equal protection of the law, secondly, this differentia has a very valid ground because this MRE violates the fundamental rights of women in marriage by treating them differently from the rest. There is no basis for treating married and unmarried women differently with respect to rape. The requirements for Article 14 as laid down in present law require not just a nexus between the purpose to be achieved and the law, but also that the law is not arbitrary.

¹⁶ *Motor General Traders v. State of Andhra Pradesh*, 1984 AIR 121

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Violation of Article 19(1)(a)

Article 19(1)(a) protects the expression of sexual desire as a form of self-expression. This must inevitably involve the unrestricted setting of the circumstances in which such desire may be expressed. It offers everyone the option of refusing sexual relations as well as initiating them. The ability to choose when to reject and when not to refuse is fundamental to the concept of freedom of speech. This perspective is expressed in a number of Supreme Court rulings. However, dignity is included not just in Article 21, but also in the equality provision in Article 14 and the liberty clause in Article 19.

The expression of one's sexual desire is part of self-expression protected under Article 19(1)(a). CJI in *Navtej Singh Johar v. Union of India*¹⁷ held that "Article 19(1)(a) which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means."

It is the fundamental right of married women also to express their will and consent for sexual intercourse. Here expression is not only merely restricted to freedom of expression but also includes the expression of sexual desire whether she wants to involve in sexual intercourse. The Gujarat High

¹⁷ Navtej Singh Johar Vs Union of India, (2018) 1 SCC 791

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Court in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹⁸, notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same.

As well stated in the ruling of *State of Karnataka vs Krsishnappa*¹⁹ that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. In conclusion marital rape violates a married woman's right to self-expression which is guaranteed under Article 19(1)(a) of the Indian Constitution.

Violation of Article 21

The Preamble of the Constitution of India speaks about the dignity of the individual which is also a facet of Article 21 of the constitution. The apex held in the case of *The Chairman, Railway Board v. Chandrima Das*²⁰, was held that rape is a crime against the basic postulates of human rights and is an unlawful intrusion onto the right to privacy and sanctity of a female as guaranteed under Article 21. As the Supreme Court while interpreting Article 21 in its landmark judgment of *Maneka Gandhi vs Union of India*²¹ held that the right to live is not merely confined to physical existence, but it includes within its pace the right to live with human dignity.

¹⁸ Nimeshbhai Bharatbhai Desai Vs State of Gujarat, 2017 SCC OnLine Guj 1386

¹⁹ State of Karnataka vs Krishnappa, (2000) 4 SCC 75

²⁰ Railway Board v. Chandrima Das, (2000) 2 SCC 465

²¹ Maneka Gandhi v. Union of India, (1978) 1 SCC 248

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Furthermore, the Hon'ble court has also made sexual privacy a fundamental right of all citizens in its landmark Judgement of *K.S. Puttaswamy vs Union of India*²² and also held that forced sexual act would be a clear violation of this right and its judgment of *The State of Maharashtra vs Madhukar Narayan*²³ held that right to bodily integrity was initially recognized in the context of privacy, wherein it was observed that no one has any right to violate the person of anyone else.

The right to dignity has been recognized to be an essential part of the right to life and accrues to inside all persons on account of being humans, it covers “personal autonomy” and “self-determination”²⁴.

In the case of *Suchita Srivastava v. Chandigarh Administration*, where it was held that the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity, and bodily integrity and includes the right to abstain from procreating.

The right of a woman to protect her bodily integrity as providing a fundamental right under Article 21 is eliminated because of the exception provided under section 375 of IPC because her husband effectively has total authority over her body and can subject her to sexual intercourse without her consent or willingness because such conduct would not be rape. Surprisingly, while her husband can rape her, he cannot molest her because he would be prosecuted under the Indian Penal Code if

²² .KS. Puttaswamy v. Union of India, 2015 SCC OnLine SC 1640

²³ Maharashtra vs Madhukar Narayan, AIR 1991 SC 207

²⁴ National legal service authority vs Union of India, (2014) 5 SCC 438

he did. This particular provision also violates women's fundamental rights.

In *Independent Thought v. Union of India* held that the execution carved out in the Indian Penal Code creates an unnecessary and artificial distinction between married women and unmarried women and has no rational nexus with any unclear objection sought to be achieved. The artificial distinction is arbitrary and discriminatory and is not in the best interest of the women.

Dignity, Integrity, choice, and privacy are the strongest pillars of human life which are enshrined in the Indian Constitution²⁵. Hence, the establishment of a forceful sexual relationship even when there is no will of the wife puts the fundamental right which is guaranteed to everyone into a question mark. Rightly specifically noted by Justice Chandrachud in the matter of *Joseph Shine vs Union of India*²⁶ that 'Control over women's sexuality is the key patriarchal assumption that underlies family and marriage.'

The International Take on Marital Rape

In 1932, Poland became the first country to make marital rape a criminal offense. In 1976, Australia became the first common law country to implement legislation and criminalize marital rape, thanks to the impact of the second wave of feminism.

²⁵ Indian Constitution, Art. 21

²⁶ *Joseph Shine vs Union of India*, 2018 SCC OnLine SC 1676

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

The exception of Section 375 of the IPC is still in conflict with the International Human Rights instrument and the treaties to which India is a signatory. Common law countries like England criminalized marital rape in the year 1991 and New Zealand in the year 1985.

The introductory paragraph of the United Nations- Convention on the elimination of all forms of Discrimination against women reads, “Nothing that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and the equal rights of men and women, Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex, Noting that the States Parties to the International Covenants on Human Rights must ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights”. The committee of the UN on Elimination of Discrimination Against Women suggested in India in the year 2013 that the nation should end marital impunity. The explicit exception which makes rape permissible on one’s wife violates the motive of the UN Convention on Elimination of Discrimination Against Women as: -

1. It discriminates against the equal rights of men and women.
2. Violates that all human beings are born free and equal in dignity and right.
3. Violates that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind.

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

4. And violates that the state parties to the International Covenants on Human Rights must ensure equal rights for men and women to enjoy all economic, social, cultural, civil, and political rights.

Marital rape is punishable for up to 50 years in Guatemala, the Philippines, Serbia, and Grenada. Marital rape carries a life sentence for the perpetrator, particularly if the victim is murdered in Liechtenstein, Mongolia, or Rwanda. In Mozambique, Ecuador, Luxembourg, New Zealand, Greece, Argentina, and Monaco, rape against a spouse is punished by up to 30 years in jail.

Marital rape is a blatant human rights violation. Countries all across the globe have recognized this kind of violence and have taken appropriate measures to criminalize it. India should pursue the path that leads to the country's advancement and should put an end to all the discrimination across the great nation.

Challenges Ahead

The people who are against criminalizing marital rape believe that before giving it an incriminating nature, it is necessary to clarify what constitutes marital rape and what would constitute marital non-rape. It's just a simple sense; if a woman is given broad authority to choose which sexual encounters are rape and which are consensual, what about the spouse's conjugal rights? Is it possible that it will become a weapon for harassing husbands, and it will disrupt the marriage institution? Before taking any steps to criminalize Marital Rape, there are a few basic questions that must be addressed and

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

answered.

Do researchers also believe that if marital rape is criminalized, is Indian society ready to acclimatize to this change? As per the records of 2016, the population of India is 132.2cr. This huge population leads to many problems and the most important among those being poverty and illiteracy. These social dilemmas are crucial in determining whether or not marital rape should be criminalized. People must comprehend how the legal system works and be sufficiently educated to do so. People who have not been exposed to education will have no concept of what constitutes Marital Rape and may easily fall into a trap that arises from vengeance. These two issues should be considered before criminalizing marital rape in the future.

Also, it is observed by the Hon'ble Supreme Court in *Dastane v Dastane*²⁷ that sex plays an important role in martial life, and it cannot be separate from other factors which lead to matrimony a sense of fulfillment sex is a binding force to keep two spouses together and the denial thereof by one spouse to the other would affect mental health amounting to mental cruelty.

In the case of *Shakuntala Kumar vs Om Prakash Ghai*²⁸, it was observed that a normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage if this is not possible due to ill health on the part of one of the spouses it may or may not amount to cruelty

²⁷ Dastane vs Dastane, AIR 1975 SC 1534

²⁸ Shakuntala Kumar vs Om Prakash Ghai, AIR 1983 Delhi 53

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

depending on the circumstances of the case but willful denial of sexual relationship by a spouse when the other spouse is anxious for it would amount to mental cruelty especially when the parties are young and newly married.

Therefore, it is believed that a wife denying consent for sex to her husband is not fulfilling her matrimonial obligation and it amounts to cruelty to her husband. When both spouses are in good bodily and mental health, continuous rejection or inability to perform sexual acts would be considered harsh. Marriage without vigorous sexual activity is anathema. Denial of sexual activity in marriage has a very negative impact on a marriage. There is nothing that can satisfy a wife's or husband's mind and body, leading to deprivation and dissatisfaction. To compel a husband into such behavior is more destructive to a marriage than disappointment in sexual intercourse. A sexless life that irreversibly harms one's physical and mental health is nothing but cruelty.

Another important major challenge in criminalizing marital rape is that the sexual intercourse between husband and wife takes place within the four walls of the house where the sole testimony of the wife has to be relied upon to convict the accused husbands under the charge of marital rape. This unchecked reliance on the wife's testimony can become a tool of abuse against the husband henceforth exception 2 to sec 375 provides for a vigilant provision in this regard. One is entitled to have and preserve one reputation and one has a right to protect it. The reputation of a person is his valuable asset and is a facet of his right under Article 21 of the Constitution. However, the wife is the victim of sexual violence in a matrimonial relationship various legal remedy has already been

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

provided under various law and statutes to adequately redress the grievance of the wife so victimized.

Lack of Evidence Which Proof of Marital Rape - If the wife is legally allowed to bring in an action of rape against her husband there are chances for the effort of the wife to go in vain as proving the marital rape cases would come with the same burden as that of non-marital rape cases. On the face of it, the evidence so the procedure will lack credibility and authenticity as what happens within the four walls of the house cannot be substantiated with full proof.

It was observed by Delhi HC that the right to sexual intercourse is a part of the conjugal right and it is not judicially enforceable which means the consent to intercourse is applied it was held that the court has neither the means nor the capacity to enforce its decree the Delhi High Court in the matter of *Rita Nijhawan vs Balakishan Nijhawan*²⁹ on 21 February 1973 held that marriage bed and the husband may not by default face penal consequences if he indulges in the sexual intercourse with wife.

²⁹ Rita Nijhawan vs Balakishan Nijhawan, AIR 1973 DEL 200

Recent Developments and Changes in the Ideology of Criminalizing Marital Rape

In the most recent case on criminalizing marital rape in Delhi High Court, even though the court delivered a split verdict, but it is intervention sways public opinion in favour of repealing the law's marital rape exemption. The opinion of Justice Shakti Dharam Advani advances the discussion on the topic and sets the basis for a bigger constitutional intervention before the Supreme Court.

On May 10, 2022, the Hon'ble Supreme Court refused to stay the Karnataka High Court's order that placed a man on trial for the first time for marital rape. The Supreme Court's refusal to suspend the ruling signals that the apex court is willing to conduct a thorough investigation into the colonial-era legislation.

The Karnataka High Court Ruling – The Karnataka high court was hearing an appeal by a husband against a sessions court's decision to frame rape charges under section 376 of the Indian penal code, which punishes rape. The man was charged with sections 377 [unnatural offences], 506 [criminal intimidation], 498A [domestic cruelty], and 323 [assault] of the IPC, as well as section 10 of the POCSO Act, 2012 for an alleged sexual offence. The man wanted to have the accusations dismissed, particularly the rape allegations, because section 375 specifically exempts marital rape. However, Justice M Nagaprasanna's single-judge bench refused to overturn the sessions court's decision.

While the high court did not expressly knock down the marital rape exception, it did allow a married

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

man to be tried for rape accusations brought against him by his wife. After the trial court found the offence under section 376 [punishment for rape], the spouse went to court.

The Delhi High Court Ruling³⁰ – A group of petitions challenging the constitutional validity of the exemption for marital rape in the Indian Penal Code was heard by a division bench consisting of Justice Rajiv Shakti and Justice C. Hari Shankar. The provision in the legislation that shields the man from being punished under section 376 of the IPC when he has non-consensual sexual contact with his wife was repealed by Justice Rajiv Shakti in his ruling. He claims that the distinction in question is rooted in sexism and misogyny and that it is arbitrary and nonsensical to classify forced sex that occurs outside of marriage as rape while it occurs within marriage as something else entirely. The major observations made by Justice Shakti were –

The major observations made by Justice Shakti were –

- (i) The Marital Rape Exception (MRE), which grants an offender immunity based on his connection with the victim, fails the nexus test. In other words, it grants immunity for actions that, if committed outside of marriage, would be regarded as rape under the principal requirement [i.e., Section 375].
- (ii) Claiming that the law offers further remedies for a woman who has been violated by her husband by experiencing the most terrible type of sexual assault is not an adequate response (i.e., rape). The state's

³⁰ RIT Foundation Vs Union of India, Writ Petition (C) NO. 284/2015

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

desire to uphold marriage while it is a dictatorship is invalid.

(iii) *Violative Of Article 14* – The Justice noted that MRE "violates the equality clause contained in Article 14 of the Constitution in every respect," as he put it. In addition to providing that no one would be denied equality before the law, Article 14 of the constitution also ensures that everyone living on Indian territory will have equal protection under the law. MRE effectively denies the equal protection of the laws to nearly half of the population in a single blow. The distinction between married and single women in the context of MRE (and what has been observed above) is unquestionably arbitrary.

(iv) *Violative of Article 21* – The MRE violates Article 21 of the Constitution since rape is an offence that can happen to anybody and causes the same harm regardless of who commits the crime. "The fact that the rapist is the victim's spouse does not lessen how harmful, demeaning, or dehumanising the act of sexual assault is. Regardless of the offender, forced sex devastates the victim's physical, psychological, and emotional health. Despite the fact that the rapist and victim may be married, rape is an offence that must be condemned in the greatest terms by society."

(v) *Violative of Articles 15 And 19(1)(a)* – In addition, the judge cited Articles 15 and 19(1)(a) of the constitution, claiming that the MRE's ongoing inclusion in the act violates the former by subjecting women to discrimination based on their marital status. Their sexual agency in terms of coitus and their freedom to procreate or refrain from procreation is therefore compromised and rendered null and void. Justice Shakhder asserts that women's capacity to bargain with

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

contraceptives, defend themselves against sexually transmitted diseases, and look for a haven away from their abusers has been completely gone. He further asserted that the MRE breaches Article 19(1)(a) of the Constitution by denying married women who are citizens of this nation the right to free speech. The protection of the liberty of speech extends to a woman's assertion of her sexual autonomy and agency.

However, Justice C. Hari Shankar ruled in favour of the exception for marital rape, stating that exception II in IPC section 375, which defines rape, does not violate Articles 14 and 21 of the Constitution, which safeguards the right to life and liberty as well as equal protection under the law. The main points Justice Shankar raised were:

(i) The carrying of a genuine expectation of sex with the relationship as one of its inescapable occurrences distinguishes the wife and husband relationship from all other woman and man interactions. Whether the petitioners choose to admit it or not, sex between a wife and husband is sacrosanct," the judge ruled.

(ii) Exception II is if it is "very in the public interest." He claimed that a husband having sex with a reluctant wife could not be "equivalent to a stranger ravishing." there is an "intelligible difference" between sexual actions performed within the boundaries of marriage and sexual acts performed between strangers.

(iii) The distinction is premised on the fact that IA has a reasonable connection to the goal pursued

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

by the challenged exemption, which is both legitimate and laudatory, and does not jeopardize any fundamental rights guaranteed in Part III of the constitution.

(iv) *Not Violative of Article 14* – As Justice Shankar pointed out, arbitrariness as an abstract concept cannot be used to declare a legislative provision illegal or in violation of Article 14 of the Constitution. It's important to remember that Article 14 is about the fundamental right to equality. He stated that if a provision is found to be arbitrary and thus violates Article 14, the arbitrariness must be in relation to the manner in which it creates a distinction between persons or things who appear to be similarly situated otherwise.

Conclusion

Radhamonee could hardly have predicted the public outrage that her 11-year-old daughter's lifeless body would cause when she discovered it in a pool of blood. Hari Mohan Maity, her kid, was married to Phulmonee, a 29-year-old man who had forced intercourse with her, resulting in vaginal rupture and bleeding, which finally led to her death. 1 The colonial court sentenced Maity to death for grievous bodily harm, but the episode generated a debate regarding the age of consent to sexual acts inside marriage, which was eventually raised from 10 to 12 years. Maity, on the other hand, evaded punishment for the rape and murder of his child-bride since the modification was prospective in nature³¹.

³¹ *Queens Empress v Huree Mohan Mythee*, [1891] XVIII ILR (Cal) 49

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Rape in the home might be more painful and cruel than rape on the street. Suffering at the hands of a husband, who is supposed to be a source of trust and care, causes the woman to feel betrayed, disillusioned, and alone. The justifications for the spouse exception are unpersuasive. Eliminating immunity would not raise the likelihood of divorce; if rape happens, the marriage has already deteriorated. The review of marital rape laws and the numerous critiques of each type of legislation leads to one conclusion: marital rape exemptions must be abolished, and marital rape must be criminalized in all nations and states.

Regardless of the perpetrator's identity or the age of the victim, the fact that she had to undergo forced sexual intercourse against her will does not change. A woman who is raped by a stranger carries horrific memories of the horrific incident but a woman who's raped by her own husband lives and must sleep with her rapist. In a country where a woman gets raped every 16 minutes and the likelihood of Indian married women suffering from sexual violence is 17 times more, the need for an active interest in the legislation on marital rape is pertinent. Even in the recent past, the Justice Verma Committee and the 42nd Law Commission report have urged the criminalization of marital rape. But the only relief yet available to a victim of marital rape is the civil remedies laid out under the Domestic Violence Act of 2005. It is high time when Indian women and their rights are not ignored, especially when the judiciary has sworn to protect the fundamental rights of every individual.

It would be delusional to think that only changing the legal system would be enough to bring about

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

social transformations that would remove historical biases and pave the way for gender equality. The efficacy of the law will remain dubious until attitudinal changes follow legislative adjustment, as recognized by the Verma Committee. However, gradual social improvement is not an option when it comes to obvious violations of the most fundamental human ideals. While an organic social transition toward a more compassionate and equal society would be ideal, the lives and freedoms of half of the people cannot be left to chance in the meanwhile.

She does not give up her human right to exclusive autonomy over her own body when she marries, hence she is entirely within her rights to grant or deny marital coitus at any moment. In India, a horrible crime called marital rape has completely shattered faith and confidence in the institution of marriage.