



Marital Rape: *Consent and Society*

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ABSTRACT

The current research paper focuses on the question of marital rape and its impact on the Indian society as an attempt to understand the sociological, psychological, economic and legal reasons behind the non-criminalisation of marital rape. The paper aims to evaluate the possibility of a policy criminalising marital rape in the country, with an acknowledgement and technical understanding of the problems of enacting such a policy. The cultural and social background of marital rape in India, along with the relationship between marriage and sex have to be understood to truly grasp the gravity of marital rape and its psychological impact on women. The paper also attempts to collate various sources that contribute to the understanding of a woman and her bodily rights in order to furnish a more holistic view of marital rape, which draws from several disciplines.

INTRODUCTION

***Yatra Naryastu Pujyante Ramante Tatra Devta, Yatraitaastu
Na Pujyante Savaastatrafalaah Kriyaah***

“Where Women are honoured, divinity blossoms there, and wherever women are dishonoured, all action no matter how noble it may be, remains unfruitful.”

- Manusmriti chapter 3, Mantra 56

India is a thriving democracy speeding to catch up to the pace of the 21st century, with technological advancements occurring in every sector. These technological advancements do not occur in a vacuum, but in a complex social environment which is dynamic and resistant to change at the same time. While India is proving its mettle in terms of economic advancement, there is a need for the country to introspect and consider its own social and cultural values, which cannot be frozen in time, no matter the alleged sanctity of tradition. In this whirlwind of change, a construct that often emerges is that of marital rape, i.e., the act of a spouse forcing their partner to have sex with them without their consent. While this concept emerged in Russia in 1922 (Patel, 2022), it has taken some time for India to catch up to its Western counterparts.

A policy for marital rape is deemed necessary by some, and problematic by some others. While its opponents often call for freedom from intrusive Western ideologies, supporters often ask whether the right to a person’s body can be given to another through marriage, no matter how sacrosanct and unbreakable it may seem. The question is, whether India as a developing country is ready to accept that a person’s bodily integrity is theirs, and only theirs at all times.

The current paper will be dealing with heterosexual marriages in a Hindu patriarchal context. Marital rape can exist in homosexual couples or among non-Hindu religious and regional couples as well. However, they will be considered beyond the scope of this paper.

- ***Research Question***

1. What is the Indian understanding of rape and marital rape?
2. Why is India hesitant to implement a marital rape policy?
3. Is it possible to implement a policy criminalising marital rape in India?
4. What are the problems associated with a law against marital rape in India?

- ***Aims and Objectives***

1. To evaluate the cultural and social background of marital rape in India.
2. To understand the relationship between sex and marriage in India.
3. To understand the underlying Psychosocial constructs that prevent the enactment of such a policy.
4. To understand the problems associated with criminalising marital rape.

- ***Methodology***

The current paper will be a review paper which aims to consolidate the existing body of literature surrounding marital rape and policy and legislation regarding the same, with an attempt to understand the ramifications of such a policy in the Indian cultural context while reviewing the success or failure of such acts in other South Asian nations. The paper will be qualitative in nature.

MARITAL RAPE: DEFINITION AND HISTORY

Marital rape is defined as an act of sexual intercourse with one's spouse without their consent (Patel, 2022). The act does not mandate physical violence and men can be subjected to it too.

Historically, the concept of sexual violence did not exist since sexual intercourse was considered the spouse's right. The movement to criminalise marital rape emerged with the feminist movement in the 19th century although it gained momentum later as till the 20th century, under American and English law, a woman's legal rights were subsumed by those of her husband (Patel, 2022). The movement gained traction in later decades and culminated in the Soviet Union being the first nation to criminalise it in 1922, followed by many other Western nations.

Over years of advocacy and the construction of new legislation, marital rape has been concretely defined in terms of the types of marital rape (Sharma, 2023):

1. **Sexual coercion by non-physical means:** This form of marital rape involves non-physical tactics like verbal pressure and social coercion in which the wife is reminded of her duties as a wife in order to get into sexual contact with her (Barkan, 2011).
2. **Battering Rape:** Women experience both physical and sexual violence in which they may be physically assaulted during or after the forced sexual intercourse (McMahon, 2009).
3. **Force-only Rape:** The husband uses as much force as is necessary to enter into sexual intercourse with the reluctant wife.
4. **Obsessive Rape:** Obsessive rape is a kind of sadistic rape which involves torture and/or perverse sexual acts against the wife which are often accompanied by physical violence (Wallace, 2016).

The UN Population Fund (2008) states that more than two-thirds of

married women in India, aged 15-49 have been beaten, raped, or forced to provide sex (Jejeebhoy et al. 2010). Article 2 of the Declaration of the Elimination of Violence against Women (2013) includes marital rape explicitly in the definition of violence against women. However, India still grapples with the criminalisation of marital rape.

To understand the concept of marital rape, its impact on the victims and its ramifications in the society, it is important to understand the existing social structures around the same.

THE CURRENT INDIAN LAW REGARDING MARITAL RAPE

Section 375 of the Indian Penal Code of 1860 states that sexual acts by a man against a woman against her free will constitute rape. However, under Exception 2 of this law, if a man has forced sexual intercourse with his wife who is above 18 years of age, then it cannot be considered rape. If the adult wife is officially or unofficially separated from the husband, then the rape punishment is of 2-7 years in prison (Patel, 2022).

Victims of marital rape often have to take protection under the ***Protection of Women from Domestic Violence Act 2005 (PWDVA) or Section 498-A of the IPC (“Perverse sexual conduct by the husband”)***. Under the PWDVA, if a married woman is subjected to a “sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman” by her husband, then she can request financial compensation from her spouse, including allowances and child custody. However, the act is not considered a crime but only a misdemeanour and is very narrow in terms of the nature of abuse it punishes (Patel, 2022).

UNDERSTANDING THE INDIAN PATRIARCHAL SOCIETY

- *Situating Women in the Indian Historical Context*

The major debate around the concept of marital rape is often based on external factors - the situation in which the alleged rape occurred, the husband as the perpetrator, and the difficulty in proving the absence of consent. While all these arguments make sound cases both for and against the construct of marital rape, they make fundamentally flawed arguments as they forget the main piece in the puzzle - the woman who experienced the alleged rape. To truly understand marital rape, it is vital to understand the entity against which the act is committed. In the complex Indian society gyrating constantly on a continuum of tradition and modernity, a woman has been defined in many ways.

The origins of Indian civilisation record a matriarchal society where men and women were considered equals (Patil 2021). Women were placed at the forefront of martial arts, Ayurveda and statistical philosophy with a system of self-determination. As advances were made in agricultural technology and the role of males in childbirth became evident, the ideas of a female mahatma were replaced by patriarchy (Ahire, 2011).

With the beginning of the *Rig Vedic period*, women enjoyed high status and were still given the opportunity to attain high intellectual and spiritual standards (Rana, 2017). However, with the arrival of the Aryans between 3000 and 2500 BC, patriarchal culture formed the basis of the Vedic period where women were confined to the four walls of the home for housework. In the Post Vedic period, from 1500 BC to 500 AD, when the great Indian epics, Ramayana and Mahabharata were written, women's status further declined as the level of female education dropped and unequal laws were introduced through the Manusmriti (Patil, 2021).

In the **Medieval period**, from 1200 to 1818 AD, the caste system was solidified, which placed women below men of even the lowest castes. Their chastity was associated with religion and family honour and the practice of sati and female infanticide became common.

The Ancient Indian society thus gave very conflicting views of women where they were either placed in a noble place in religion or declared as perpetual minors who had to lead their entire lives under the guardianship of a man (Majumdar, 2004). A woman was considered to be less than fully human, an object to be preserved by her male guardians (Sourav, 2019). Panini referred to a woman as a maiden, a wife, a mother and so on, detailing her position in the household (Agarwala, 1953). Since they were weak, they needed protection: “a wife, a son, a slave, these three are declared to have no property”, as stated in the Manusmriti (Buhler, 2004).

Before India gained independence, women still suffered under **British rule** although some changes began happening, as Indian social reformer Raja Ram Mohan Roy enacted the Prohibition of Sati Act in 1829. Mahatma Jyotiba Phule also recognised that the reason for the backwardness of Indians was the confinement of women, which led to the starting of the first school for girls in 1848 (Patil, 2021).

It was after independence that women realised their own self-esteem and slowly got the resources they needed to advocate for themselves. It is in this period where we still stand, 77 years after independence, where a woman is still limited to what society makes of her. This is in strong contrast to the idea of a woman at the beginning of civilisation.

Women are portrayed as mothers, protectors, cherishers, motivating primal forces and in many versions as a wife - chaste, suffering or charmer (Patel, 2022). The figure of the Indian woman is in terms of her husband's wife. And thus her value is judged in terms of whether or not her marriage survives. The latter is a dreadful fate.

- ***Women: At the brink of freedom and self-sacrifice***

Women's lives have always been considered private but have been shaped by powerful, social ideologies that give women a limited repertoire of behaviours from which they can choose (West and Zimmerman 1987). Marriage is one such behaviour, where women play out their roles and conform to all kinds of restrictions, like asking permission from family elders before stepping out of the home to go to health centres, friends' homes or the local bazaar (Desai & Andrist, 2010). Indian social anthropologist M. A. Srinivas first identified the role of women as custodians of family status and caste purity (Srinivas, 1977). Thus, women are projected as decorous, pious and modest and the honour of a family and a caste. Popular literature, films, and social science literature all emphasise a fear of women's sexuality, particularly among upper-class and upper-caste families, and suggest that even the possibility that the bride may not be a virgin reduces her desirability to her prospective parents-in-law (Desai & Andrist, 2010). Even platonic friendships with the opposite sex can be detrimental to her reputation (Caldwell et al. 1998).

- ***Marriage As The License to Have Sex***

Marriage in the Indian context can be defined in a variety of ways. It is termed as a ***sacred union based on trust and love*** (Raina & Kumar, 2022). It is also considered as a means for spiritual growth (Jain, 2019). Sociologically, marriage is defined as an institutional arrangement between two persons consenting to live together under the requisite legal provisions as spouses — typically (but not only) between women and men (Bose, 2022). Thus, it is a social fact which makes the union legalised and visible which has been used to police women's sexuality and to control their agency in marriages.

A marriage can also be defined as a ***stable relationship*** in which a man and a woman are socially permitted to live together without losing their status in the community (Jain, 2019) which showcases one of the reasons why Indian society and particularly men may be so reluctant

to legalise marital rape. The patriarchal institutions of the state, the society and the family often use marriage as a tool to reinforce their dominance and the relations of the state with its population - one of control and service, are mimicked in the family structure where the man controls the subservient wife. Thus, a ***marriage can be seen as an elaborate private drama*** which mimics societal processes with fixed roles for both the parties involved. It is this traditional 'social role' of women that marital rape shatters when it is brought to the fore. Further, social anthropologists and historians have stated that marriages evolved to their present stage from a promiscuous relationship between male and female, which also explains the need for control by the man over the woman (Patel, 2022). Women are expected to submit to this form of control, in the form of sexual demands, with no importance being given to their consent (Sharma, 2023).

In order to reinforce the value of marriage, it is seen as an ordinance by God with many religions giving several teachings regarding marriage (Patel, 2022). Marital relationship is considered to be sacrosanct (Nambi, 2005) where the husband is considered to be an incarnation of God (Jiloha, 2013).

The responsibility of building a successful and faithful marriage has historically rested upon the woman and on committing to the marriage with a standardised gender script which involves the woman's sanctity (Bose, 2022). Traditional Indian women who are obedient and subservient are considered to be the ideal wives as they uphold the moral stature of marriage in Indian society.

Complicit within these ***ideas of sanctity, chastity and obedience*** is an implicit idea that wives must fulfil their husband's sexual desires, whenever necessary. Sex is treated as obligatory in the marriage (Carstairs, 1983). This idea runs deep in our society as noticed by the social response to the attempts of criminalising marital rape. In early

2022, during the court proceedings relating to marital rape, many Indian men promised to go on a strike against marriage if it was criminalised. Over 66,800 tweets on social media made this commitment (The Print, 2022). Over years of socialisation, these men have been made to believe that marital rape is nothing but an expression of the traditional perceptions of sex roles (DeGue & DiLillo, 2005).

This idea is not only witnessed in the general position but in positions of power as well when politician **KR Ramesh Kumar** addressed a political assembly “*When rape is inevitable, lie down and enjoy*” (The Wire, 2022).

It is in light of such instances that the author of this paper wishes to explore the potential of a marital rape law to uproot the deeply rooted socio-cultural practices which perpetuate exploitation and injustice, including enduring abuse within marital relations (Kadyan & Unnithan, 2023).

ARGUMENTS IN FAVOUR OF CRIMINALISING MARITAL RAPE

- ***The Faux Private Sphere***

The consideration of ***marriage as a sacred institution*** which forms the bedrock of Indian society has led to hesitancy by the State in intervening in matters relating to the family. The judiciary has sometimes created a notion of a fictional private sphere, refusing to enforce fundamental rights within it. Marital rape is in direct violation of the fundamental right of women under **Articles 14 and 21** of the Constitution of India (Kallakuru & Soni, 2018). Thus, feminist theory has deconstructed the traditional division between public and private spaces in law, arguing that the law should not be limited to regulating only public affairs. Instead, it should also address private matters,

challenging the notion that the private sphere is immune to legal scrutiny (Thornton, 1991). The State has intervened in many private spaces by abolishing untouchability and banning practices like sati and child marriage. Overall, there's a recognition that the separation between public and private spheres is not absolute.

The creation of this false public sphere is deeply rooted in the history of the laws that India has inherited from the British. *The Restitution of Conjugal Rights clause* in the IPC, as given in the Hindu Marriage Act 1956 states that the court can pass an order compelling a married couple to live together if they do not have a “reasonable excuse” to live separately. This law has historically worked to the disadvantage of women and forces them to resume sexual relations with their husbands (Kallakuru & Soni, 2018).

The legality of this act was challenged by the Andhra Pradesh High Court in the *T. Sareetha v. T. Venkata Subbaiah* court case since it recognised that this provision shifted the right of choice to indulge in sexual intercourse from the woman to the state. The Court emphasised the bodily autonomy of women by stating that “no positive act of sex can be forced upon the unwilling persons because nothing can conceivably be more degrading to human dignity and monstrous to the human spirit than to subject a person by the long arm of the law to a positive sex Act” (Kallakuru & Soni, 2018).

Thus the argument of a “private sphere” severely falls short as the state has criminalised adultery and often polices sexual activities between consenting adults (Harvard Law Review, 1956).

- ***Culture and the Constitution***

Culture plays a huge role in shaping the laws that are formed and followed by the people of a country. In the South Asian context, several reports shed light on the unique understanding of marital rape by men and women. A *report by the Population Council* stated that women in several South Asian countries are afraid to resist sexual

advances by their husbands due to the chance of beatings (Patel, 2022). Further, it was found that men and women both believe that a husband is entitled to sex anytime he demands it, according to the report.

Law and culture have a symbiotic relationship where each shapes the other (Kallakuru & Soni, 2018). Thus, while the law is bound to be formed based on cultural foundations, it can also lead to a change in these foundations when they begin to crack. While public morality tends to shape constitutional morality, this derivation cannot be considered to be invariable. The cultural acceptance of a crime does not invalidate the necessity of punishing that crime (Kallakuru & Soni, 2018). This argument was used to bring laws against the practice of dowry. The Constitution cannot uphold rape culture in marriage, even if society chooses to turn a blind eye to the individual. Similarly, even if sexual relationships are culturally expected in marriages, marriages cannot be constitutionally equated to the right to sex (Kallakuru & Soni, 2018). Consent is a choice and can be given or withdrawn, at any point, regardless of whether a woman is married or not. While there are many generalisations made in Indian society about women appreciating constrained sex and that their “no” means a “yes”, the Constitution of India cannot turn a blind eye to crime, just because its violence is confined to the four walls of a home. Since the home mimics the social relations of the State, this kind of violence should be considered to be violence against the State.

- ***The Psychological Impact of Marital Rape***

A survey carried out in 2010 reported that ***one in five men in India reported having forced their wives for sex*** (Basu & Koolwal, 2005). Women experience post-traumatic stress disorder (PTSD), depression, higher levels of anger, fear, and guilt, and begin to hate their bodies, therefore causing their self-esteem to drop. It has also been found that women who suffer marital rape go through more severe psychological consequences and for a longer period of time than those who were raped by a stranger (Victorio, 2023).

Beyond psychological impact, there are **severe health consequences** of marital rape as it has been associated with stillbirths, pelvic inflammatory diseases (PIDs) and attempted suicides by women (Dube, 2001). Further, the risk of sexually transmitted diseases also increases as men who commit marital rape are more likely to engage in sex outside of the marital relationships (Desai & Dubey, 2009; Desai & Johnson, 2005; Dube, 1996).

ARGUMENTS AGAINST CRIMINALISING MARITAL RAPE

- ***Breakdown of the Institution of Marriage***

A common argument used to argue against the criminalisation of marital rape is that it will lead to the breakdown of the institution of marriage and by extension, the breakdown of the society since family unity would become increasingly scattered and impact the reproductive rates of the country. The protection of the institution of marriage by not criminalising marital rape for the 'good' of the larger society and its stability (Sharma, 2023) is a paradoxical argument. This argument assumes that there is no harm being done to society even when marital rape occurs even as psychological, sociological and historical research evidence statistically proves otherwise. The harm done to a woman in a marriage cannot be weighed against the assumed harm suffered by society due to the breakdown of a marriage.

- ***Misuse by Women***

This reason stems from the difficulty of trying to establish **whether consent was involved or not**. There is an inherent fallacy in this argument as the difficulty of establishing a crime is not reason enough to not acknowledge that the crime has happened (Sharma, 2023). Further, in cases of marital assault, there may be a history of sexual abuse or physical violence, which may be indicated by forensic evidence if the woman has previously reported any form of abuse or has mentioned such incidents.

The other reason is a more direct argument that **women will use the policy to undermine their spouses and blackmail them**. However, inadequate resources, restricted access to the legal system, and overwhelming stigma all present hurdles for women seeking justice under these laws. Moreover, given the societal shame surrounding rape cases, it is unlikely that a woman would willingly choose to endure this ordeal (Sharma, 2023).

- **Problems with Criminalising Marital Rape**

In 2016, the then **Union Minister for Women and Child Development Maneka Gandhi** said in Parliament there cannot be a law against marital rape because marriage is a “sacrament” and that even if there was, it would make no difference because “no one would complain” (Patel, 2022). Since it has already been established that marriage is a sacrament because it is deemed to be so socially and culturally, the first part of the objection cannot be deemed justifiable. The latter part of the argument which states that women would not complain can be debated, although non-reporting of a crime does not mean that it is not a crime. Rather, if a crime is not reported by victims, it is a sad commentary on the state of affairs in the country.

Another major factor contributing to the non-reporting of this crime is the **economic dependence of women on men**. The World Bank Reports (2005) noted a decline in the female labour force in India which points to the economic disparity between the two genders that leads to women’s dependence on men to control their mobility, freedom and reproductive rights (Klasen & Pieters, 2015). This form of dependence forces women to stay in abusive marriages. With a state that does not even recognise this abuse, reporting to the police is futile. The absence of a physical injury, the normalisation of husbands forcing themselves on their wives, the perceptions about the assumed differences in the sexual desire of men and women or of non-consensual sex being inevitable in marriage and the socio-cultural norms and legal statutes that condone such violence are the reasons behind underreporting or

marital rape, not its rarity. Marital rape might even be a daily phenomenon for hundreds and thousands of women but only a few ever have the resources to seek formal support for marital sexual violence (Patel, 2022). Even then, they must utilise other legal recourses, because marital rape, according to the Constitution of India, is not rape.

CONCLUSION

The paper brings together a holistic understanding of the Indian cultural context and the specificities of marital rape embedded within it. In this myriad of roles and behaviours, perhaps the most essential piece of the puzzle is missed, where the woman is seen simply as another human being. When social and cultural constructions harm a human being, then they are changed for the greater good. The consideration of women as less than human was characteristic of Indian society dating back thousands of years ago, which has been changed but needs more concrete action, with legal backing and support for the same. The paper contributes to the diverse literature on the subject, bringing together various disciplines and their individual and interdependent impact on women and by extension, the society. The legal aspects of marital rape can be further evaluated through the draft models created by research scholars for the same.

Whether India as a developing nation of the 21st century, aiming to achieve world prominence wishes to continue on notions that devalue women and maintain a system of violence, is a question to be answered. The question that has been answered, is whether marital rape is a social, cultural and legal offence against the individual.



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