

On the exception to marital rape

What is the legal provision under challenge? What rights does it infringe upon and what are the contentions advanced by stakeholders? What is the 'doctrine of coverture' in English common law? What was the split verdict issued by the Delhi High Court in 2022 on the issue?



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- A pivotal question before the top court is whether striking down the MRE would result in the creation of a new offence, as it would allow for the prosecution of husbands who engage in non-consensual sex with their wives.

The story so far:

A three-judge Bench headed by Chief Justice of India (CJI) D.Y. Chandrachud has begun hearing a batch of petitions challenging the constitutional validity of Exception 2 to Section 375 of the Indian Penal Code, 1860 (IPC). The challenge also extends, by implication, to Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023, which supersedes the former provision. These provisions grant legal immunity to Indian husbands by stipulating that “sexual intercourse or acts by a man with his wife, provided she is not under 18 years of age, do not constitute rape”.

What do statistics say?

While data on marital rape remains limited due to stigma and legal barriers, available statistics are deeply concerning. Data from the National Family Health Survey-5, conducted between 2019 and 2021, indicates that nearly one-third of married women (18-49 years) in India have experienced physical or sexual violence at the hands of their husbands. Additionally, global statistics reveal that approximately three-quarters of all sexual assaults transpire within intimate settings, often perpetrated by someone familiar to the survivor.

What is the genesis of the exception?

The MRE is a colonial relic, originating from the “doctrine of coverture” in English common law, which severely curtailed a married woman’s legal autonomy. As elucidated by the Supreme Court in *Joseph Shine versus Union of India* in 2018, this doctrine assumed that the husband and wife became a single entity after marriage, that is, “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband”.

One of the earliest instances of codification of the MRE can be traced back to British jurist Matthew Hale, who wrote in a 1736 treatise that “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 has given up herself in this kind unto her husband, which she cannot retract." Hale's reasoning proved hugely influential and was subsequently adopted by several British colonies. However, in 1991, England outlawed the MRE in the landmark case of *R versus R* underscoring that the common law doctrine no longer represented the true position of a wife in present-day society.

What are challenges before the SC?

Section 375 of the IPC delineates seven conditions under which sexual intercourse is deemed rape, such as when it occurs without the woman's consent, or when consent is obtained through coercion. Those convicted are punished with a prison term of at least 10 years, which can be extended to a life sentence, along with a possible fine. However, the provision stipulates two "exceptions". The first exception pertains to medical procedures. As per the second exception, "sexual intercourse or sexual acts by a man with his own wife" do not constitute rape if the wife is over 18 years of age.

While the law initially granted immunity to husbands if their wives were under 15 years old, the Supreme Court revised this age limit to 18 years in *Independent Thought versus Union of India* (2017). The MRE, therefore, creates a legal fiction whereby, even if all the elements constituting the offence of rape are met, a conviction cannot take place if the parties are married and the wife is over 18 years of age. However, a married woman can seek recourse to other criminal law provisions such as Section 85 of the BNS which criminalises subjecting a woman to "cruelty". Civil remedies can also be availed under laws such as the Protection of Women from Domestic Violence Act (2005) but they are limited to "protection orders, judicial separation and monetary compensation". The petitioners have argued that the exception is unconstitutional since it violates a host of fundamental rights. Foremost among them is Article 14 which guarantees the equal protection of laws to all persons. The MRE creates two distinct classes of victims of non-consensual sex by denying married women the protection of laws that are extended to unmarried women. This, according to the petitioners, also offends the principle of "substantive equality" by failing to address systemic barriers to ensure that all women regardless of their marital status receive equal protection against sexual violence. By specifically disadvantaging married women, the MRE violates their right to non-discrimination under Article 15(1).

Another important facet is the purported violation of the right to privacy and bodily integrity under Article 21. The Supreme Court's ruling in *K.S. Puttaswamy versus Union of India* (2017) not only clarified that privacy was a fundamental right, it also affirmed the concept of decisional autonomy — the right of each individual to determine how and for what purposes their body may be used. As noted by constitutional law expert Gautam Bhatia the true brilliance of *Puttaswamy* lies in clearly establishing that the right to privacy is not merely anchored in physical spaces and institutions (such as marriage), but is fundamentally tied to individual self-determination. The right is, therefore, inseparable from the ability to make choices regarding the most integral aspects of one's body and life. In *Joseph Shine*, the top court built on this jurisprudence by observing that "familial structures cannot be

regarded as private spaces where constitutional rights are violated” and that doing so is “to obstruct the unfolding vision of the Constitution.”

What are the judicial precedents?

In March 2022, the Karnataka High Court in *Hrishikesh Sahoo versus State of Karnataka and Others* ruled that a married man can be prosecuted for raping his wife. Relying on a 2013 report authored by the Justice J.S. Verma Committee, which recommended the abolition of the MRE, Justice M. Nagaprasanna reasoned that no legal exception can be so absolute as to licence crimes against society. However, instead of striking it down, he made the exemption inapplicable in cases involving the commission of heinous sexual offences by husbands against their wives.

The case stemmed from a 2017 complaint by a woman against her husband, Hrishikesh Sahoo, accusing him of committing multiple sexual offences. He was also charged with sexual assault under the Protection of Children from Sexual Offences Act, 2012 (POCSO) for abusing their daughter. An appeal was subsequently filed challenging the High Court’s decision resulting in an interim stay being imposed by a Bench headed by former CJI N.V. Ramanna. In an affidavit filed before the top court, the Karnataka government, however, endorsed the High Court’s ruling.

In May 2022, the Delhi High Court rendered a split verdict on this issue. Justice Rajiv Shakdher deemed the MRE unconstitutional, asserting that it violates a woman’s bodily autonomy and expression. He characterised the exception as “steeped in patriarchy and misogyny,” adding that “the classification, in my opinion, is unreasonable and manifestly arbitrary as it implies that forced sex outside marriage constitutes ‘real rape,’ whereas the same act within marriage does not.” Conversely, Justice C. Hari Shankar opined that within marriage, sexual relations are a “legitimate expectation” making the MRE legal. “Introducing, into the marital relationship, the possibility of the husband being regarded as the wife’s rapist, if he has, on one or more occasions, sex with her without her consent would, in my view, be completely antithetical to the very institution of marriage, as understood in this country, both in fact and in law”, he reasoned.

Following this split verdict, the petitioners moved the Supreme Court, which clubbed together all petitions related to the MRE in January last year. While an authoritative pronouncement is awaited, the top court in 2022 recognised for the first time that “sexual assault by a man against his wife can constitute rape” in a separate case concerning an unmarried woman’s right to seek medical termination of pregnancy. A Bench led by Chief Justice Chandrachud underscored, “We would be remiss in not recognising that intimate partner violence is a reality and can take the form of rape. The misconception that strangers are exclusively or almost exclusively responsible for sex and gender-based violence is a deeply regrettable one”.

What has the Centre stated?

The Union government’s latest Supreme Court affidavit is the first time that it has on record opposed the striking down of the MRE. During the proceedings before the

Delhi High Court, the government had said that the “issue needs wider consultations” and that a review of existing criminal laws was pending at that time. Drawing from Justice Shankar’s opinion, the Centre has argued that marriage creates “a continuing expectation of reasonable sexual access” which is absent in the case of a stranger or of another intimate relationship. While acknowledging that a man has no fundamental right to violate his wife’s consent, it has contended that classifying such acts as “rape” is “excessively harsh” and “disproportionate”. It has also apprised the court that criminalising marital rape would affect the sanctity of the institution of marriage and potentially result in false allegations of marital rape.

Would a ‘new’ offence be created?

A pivotal question before the top court is whether striking down the MRE would result in the creation of a new offence, as it would allow for the prosecution of husbands who engage in non-consensual sex with their wives. Justice Shankar, in his opinion, responded in the affirmative and cautioned that there is an “absolute proscription” against this since such an authority rests exclusively with the legislature. However, senior advocate Rebecca John argued before the Delhi High Court that deeming the exception unconstitutional would not create any new offence, as the offence already exists— rather, it would simply revoke the legal immunity presently enjoyed by a specific class of individuals. In *Independent Thought*, while raising the age for the application of the MRE from 15 to 18 years, the top court noted that “by partly striking down Section 375 IPC, no new offence is being created”.