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# Does Marital Rape Fall under the Rape?

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## ABSTRACT

*Even in the today scenario to find out the answer of this question is really a typical task India is one of 36 countries that still have not criminalized marital rape, unlike the other 150 countries. Approximately 20-30% of married women are raped by their husband. Approx. 1/3rd of women reported having unwanted sex with their partner. Further, women who are victims of spousal sexual abuse often suffer from other types of IPV as well; physical, emotional, and psychological, thus bearing a particularly potent burden of exposure and psychiatric risk.*

## I. INTRODUCTION

Is a man and women losing his or her sexual independence after marriage? The Honorable Justice DY Chandrachud took the initiative to challenge the Right to “NO” (SEX) after marriage. It is commonly believed that one spouse should confirm the legitimacy of another’s sexual relations.

**Meaning:** Rape refers to forcing or manipulating another person into unwanted sexual intercourse.

**Marital Rape:** Rape in a romantic relationship and marriage is considered intimate partner violence. This includes forced sex and sexual assault between spouses.

### Is Marital Rape Legal or Illegal?

Not a criminal offence as it is mentioned under exception i.e., **Exception 2** under **Section 375** of the IPC 1860.

Section 375;- A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following six descriptions: -

1. Against her will.
2. Without her consent.

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<sup>1</sup> Author is a student in India.

3. With her consent, when her consent is obtained by placing him or her in fear of death or injury or when his consent is obtained when she is intoxicated or in poor health or
4. When she believes that she is legally married to that person but is not her husband either
5. When she is under 18 years of age or unable to communicate with her permit.

There are two exceptions under this section;

Exception 1; A medical procedure or intervention shall not constitute rape.

Exception 2: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”<sup>2</sup>

**In October 2017, the Supreme Court of India increased the age to 18 years.**

**Domestic Violence Act, 2005:**

- It hints at marital rape by any form of sexual abuse in a live-in or marriage relationship.
- However, It only provides for civil remedies. There is no way for marital rape victims in India to initiate criminal proceedings against their perpetrator.

## **II. HISTORY**

**Ancient time:** In 1900 BCE in Babylon a man could be sentenced to death, for forcing sex upon someone’s wife or daughter. A rape was not possible within a marriage because man could do whatever he wanted with his property.....(a.k.a his wife)

**In 19<sup>th</sup> & 18<sup>th</sup> century:** With the growth of middle-class mentality and victorim morality.

**Lord Macaulay** in his original draft of criminal law in 1839 as an exception necessary to pretend the ‘conjugal right’ of a husband.

**(A) The Constitution of India regarding marital rape**

Article 14 and Article 21 of the Constitution states that the right to equality and equal protection of every citizen and the right to life and personal liberty shall be guaranteed. Some men think that the person they are marrying is their property, however, a woman is not someone else’s property. because a woman has a much of right to rights as anyone else.

Woman still have to fight for the basic rights they were given years ago when the Constitution of India was drafted. Marital rape is a heinous crime and has been Legalized many lands. It is time for the Indian government to look into this.

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<sup>2</sup> ( Indian penal code 1860 reference book : Ratanlal and Dhirajlal)

### **Against Basic Rights of Women:**

- The exception clause violates the women's fundamental right to equality, freedom of speech and expression, and most of all the right to life and personal liberty.
- It also denies the agency over their own bodies women.

### **III. LEGAL POSITION IN INDIA**

**In 2000 at Law Commission of India:** While considering several proposals to reform India's laws on sexual violence, had rejected any need to remove the marital rape exception, saying, "we are not satisfied that the exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship."

**The Justice Verma Committee:** tasked with proposing amendments to India's law after the horrifying Nirbhaya gangrape and murder, had included the deletion of the marital rape exception as one of its recommendations. However, the amendment was not accepted by a parliamentary panel in 2013.

**In 2015:** When the government was questioned in Parliament about Marital rape, then Minister of State for Home Affairs Haribhai Parthibhai Chaudhary responded: "**Marital rape cannot be applied in the country since marriage was treated as a sacrament or sacred in the Indian society.**"

**In 2017:** The Supreme Court held that the section should read "**the wife not being under eighteen years of age.**" But this judgement was limited to making sure the IPC was in line with the age of consent, which is 18, and hence did not address the larger problem of the marital rape exception for adults.

**In 2021:** Another significant judgement came in the year 2021 when Kerala High Court ruled '**marital rape as a valid ground for divorce.**'

'Treating your female partner's body as something owed to the husband and engaging in sexual acts against her consent or will is nothing more than marital rape,' the court ruled.

**In 2022:** - The Delhi High Court on May 2022, saw a split decision on the constitutionality of the marital rape exception. Justice Rajiv Shakdher held that Exception 2 to Section 375 is "violative of Articles 14,15 ,21 of the Constitution and hence must be struck down."

**September 30 2022:**\_"Sexual assault by a man on his wife can take the form of rape."

### **IV. JUDICIAL ROLE IN THE MARITAL RAPE**

Legislature have been claiming that marital rape is now under the IPC which means that a

married woman in the event of rape without consent can apply Section 498A of the IPC Cruelty or an act of domestic violence but not Section 375, but the judiciary took a different decision. Here is the some of latest events:

**RIT Foundation v. The OI and other related issues (2022)**<sup>3</sup> had challenged the legal validity of the ‘protection of marital rape’ provided under the exception of section 2 of section 375 of the IPC. The case was dominated by important issues related to consent, the level as state control over women’s sexual autonomy, and the redress of historical discrimination in law.

1. The Court here basically looked at how the dignity of married and unmarried women could be divided and affirmed that regardless of marital status, every woman has the right to say ‘no’ to an unacceptable sexual act.
2. The reason and emphasis are that relationships cannot be placed in a different place as a woman remains a woman or married or unmarried.
3. The court held that ‘because she is married so that she can apply other civil and criminal laws and not under section 375 of the IPC if she is a victim of forced sexual intercourse by her husband, it is wrong.
4. Bench of Judge Rajiv Shakhder and C. Hari Shanker said the non-prosecution of husbands under section 375 IPC had a created a firewall and the courts should consider whether the firewall violates Article 14 & 21 of the Constitution.

- **Delhi High Court:**

1. The Delhi High Court has been hearing arguments in the case since 2015.
2. In January 2022, two judges of the Delhi High Court started to hear petitions filed by individuals and civil society organizations challenging the exemptions.
3. By May 2022, they had arrived at a controversial split verdict. One judge was in favour of criminalizing marital rape as it violated a woman right to consent, while other was against it, saying marriage “necessarily” implied consent.
4. The matter was pushed to the Supreme Court.

- **Supreme Court:**

In September 2022, a Supreme Court ruling on women’s right to safe abortions regardless of the **Medical Termination of Pregnancy Act**, the definition of the rape should also the include marital rape.

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<sup>3</sup> Rit Foundation vs The Union Of India on 14 January, 2022 (indiankanoon.org)

- **Parliament Role:**

Upon being questioned in a Parliament session in 2015, the idea of criminalizing marital rape was dismissed with the view that “marital rape cannot be applied in the country since marriage was treated as a sacrament or sacred in the Indian society.”

- **Government Stand:**

1. The Central Government initially defended by the rape exception and later changed its stand and told the court that it was reviewing the law, and that “wider deliberation are required on the issue.”
2. The Delhi Government argued in favour of retaining the marital rape exception.
3. The Government’s arguments spanned from protecting men from possible misuse of the law by wives, to protecting the institution of marriage.

## V. EFFECTS

1. Fake cases Increases
2. How a man will prove his innocent?: - **As** there can be no eye witness is possible in that case, and also no other type of witness.so how a man will prove guilty himself? If marital rape law will come woman can also misuse it. we already see woman using dower as weapon to punish husband family. Besides that, we need to educate people first. With education and awareness people will get to know laws and soon people develop.
3. **Some of the reasons for low rates of prosecution in the cases of marital rape in India include:**
  - a. Low reporting of crimes due to **societal conditioning and low legal awareness.**
  - b. Inaccurate method of collection of **National Crime Records Bureau (NCRB)** data.
  - c. **Out of court settlements** due to lengthy process of justice/ lack of admissible proof.

## VI. MEASURES

1. Make it gender neutral.
2. Make provisions to stop its misuse.

3. Strict punishment for filing false cases.
4. Burden on the proof should be on the accuser.
5. Follow Article 14 religiously.

## **VII. CONCLUSION**

It has been concluded that Indian laws have failed to provide proper protection to woman as earlier as the woman are still treated as the property of husband and he has all the rights to exploit her and no remedies have been provided. Alongwith case a written by a human right activist (Deepika Narayan) a total of 111,549 cases were registered under 498A by 2020. of these, 5,520 were dismissed by the police as false case and 16151 in total were dismissed by the police on the ground that it was lie or a fact or a law where many husbands commit suicide after being charged. Non criminalization of marital rape is the major concern in the legal system. In order to protect the woman, the Judiciary should take initiatives to safeguard them. Hence this section has very narrow view in dealing with sexual assault and as such till now there is no legal provision where protects the married women.

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