

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Marital Rape: Existing Legal Framework in India - Quest for Recognition and Liability

AKANKSHA BHATT¹ AND KULJIT SINGH²

ABSTRACT

Sexual offences are a worldwide issue that affects the social well-being of not only the victims, but also their families and friends, due to the stigma associated with them and the poor reaction by law enforcement agencies. The purpose of this article is to explain the phenomenon of a husband's sexual offence against his wife, as well as to address prevention and control strategies. This article examines the definitions of rape and marital rape, as well as their legal and societal implications in India. It describes the victims' condition and the difficulties they encounter.

The article inquires about the legislation concerning rape and marital rape, as well as the penalties imposed on the perpetrator. It also discusses the role of the victim's consent in sexual offences and how consent should be assessed in the context of sexual activities. The article claims that marital rape should be criminalized in India's legal system, and that it should be considered the same as rape in terms of punishment. It concludes with some more recommendations in favor of the victims in order to improve their social standing. Also, it examines the major case laws linked to the topic for clarity in the subjects.

Keywords: Consent, Marital Rape, Rape, Sexual Abuse, Sexual Intercourse, Victim, Woman.

I. INTRODUCTION

"I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist."

-Philippa Gregory

The idea of a hallowed and sacrosanct marriage, as depicted in Indian films and television shows, is nothing more than a fantastic imagination that is completely incompatible with women's genuine pain and servitude. Despite the fact that marital rape is one of India's most common and vile forms of masochism, it is nevertheless protected by the veil of marriage.

¹ Author is a student at Law College Dehradun, Uttarakhand University, India.

² Author is an Assistant Professor at Law College Dehradun, Uttarakhand University, India.

In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*³, the Supreme Court of India ruled that "rape is a crime against basic human rights and a breach of the victim's most valued of human rights, namely the Right to Life established under Article 21 of the Indian Constitution." However, the Supreme Court itself negates this point by refusing to recognise marital rape as a crime.

When a woman is raped brutally with a weapon or any other object that produces pain and injury, that injury pales in contrast to the injury caused on her soul and spirit; all of her dreams and thrill to live are extinguished. It appears to last a long time since it stays with her the longest.

It requires a lot of time for her to forgive herself for her role throughout the whole thing, for naively trusting the people around her, but it's sometimes necessary to simply give voice to their tale and what they've been through. And while everyone's experience is unique, the common thread running through these tales and tragedies is that they are all deeply and profoundly affecting, forever altering their lives. Marital rape is a severe problem that affects millions of women. Because it is someone a woman knows, trusts, and loves, marital rape is the worst sort of rape.

Physical contact between the couple with their consent is like a lovely dream full of love, compassion, and caring for one another. Rape or sexual assault is defined as any sexual act performed without the permission of the other party. When a woman is raped, she loses all of her authority, individuality, and sense of entitlement. It all happens in the snap of a finger, and that is the most difficult thing to deal with. Rape victims find it difficult to reintegrate into society. People believe it is something they can simply overcome, yet they are unable to do so. It's awful and disturbing on a soul level right now when I'm writing about it or thinking about it.

II. 'RAPE' – AS A DISTINCT SOCIAL OFFENCE

“Women are fully owned subsidiaries, not self-sufficient individuals. Rape cannot be considered a question of female consent or denial... As a property crime of man against man, rape entered the law through the back door. Of course, women were seen as property.”⁴

Meaning & Definition

The most horrible and inhumane crime is rape. It is the most heinous form of barbarism. Rape

³ AIR 1996 SC 922.

⁴ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Open Road Media, 2013).

comes from the Latin word *rapio*, which means "to seize." It literally translates to "forced enslavement." For a layperson, this horrible crime could be a forced or unwilling sexual assault or carnal abuse. Rape is defined as "the crime of compelling a person to have sexual intercourse with a male without their consent, by threat or use of violence." Rape, according to the Cambridge Dictionary, is when someone uses violence or threatening behaviour to force someone to have sex against their will.⁵

The Hon'ble Supreme Court classified rape as a "deathless humiliation and severe offence against human dignity" in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*.

A circumstance in which a man imposes himself on a woman is known as rape. In India, rape is all too common. According to the National Crime Records Bureau's (NCRB) annual report for 2019, there were 32033 rape cases reported in India in 2019, averaging 88 cases per day.⁶ 94.2 percent of the rapes (30,165) were committed by attackers who were known to the victim (94.2 percent of cases).⁷

The current factors that constitute rape an offence were not there in ancient times, as rape was viewed through the restricted prism of property. The rape was not regarded a crime against the woman's body, but rather a theft against the male who was her legal guardian.⁸ As a result, a husband cannot rape his wife.⁹

Nonetheless, the definition of rape evolved quickly, and the focus switched from it being a crime against property to a crime of violent confiscation and ravishment of a woman's body, with force being a key component. The element of resistance was incorporated into the idea of the offence of rape with the addition of force, making it an important component of the offence.¹⁰

Typically, a rape victim experiences the following:

- a. Deep depression,
- b. A feeling of impression,

⁵ Cambridge Advanced Learner's Dictionary & Thesaurus (Cambridge University Press), available at: <https://dictionary.cambridge.org/dictionary/english/rape> (Last visited on May 18, 2021).

⁶ Dipu Rai, "No Country for Women: India reported 88 rape cases every day in 2019", *India Today* (September 30, 2020), available at: <https://www.indiatoday.in/diu/story/no-country-for-women-india-reported-88-rape-cases-every-day-in-2019-1727078-2020-09-30> (Last Visited on May 21, 2021).

⁷ "Crime in India Report 2019" (PDF). Ncrb.gov.in, available at: <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf> (Last visited on May 22, 2021).

⁸ Dipa Dube, *Rape Laws in India* 12-13 (LexisNexis Butterworths, India, 2008).

⁹ Jonathan Herring, *Family Law: A Very Short Introduction* 35 (Oxford University Press, 2014).

¹⁰ Nicholas J. Little, "From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law", 58 *Vanderbilt Law Review* 1329 (2005).

- c. Submissiveness, and
- d. Hatred for male gender.

Depression can present itself in a variety of ways, including—

- a. Lack of will to survive.
- b. Suicidal tendencies, and
- c. The fear of conception.

Forced sexual intercourse, sexual assault, and sex between an adult and a minor, whether homosexual (between the same sex) or heterosexual (between the opposite sex), all include the introduction of an erect penis or any other inanimate object into the female vagina. Forced oral sex or other sexual activities may be included in the legal definition of rape.

It leaves a lifelong scar on the victim's body and has a significant psychological impact on her family. As a result, no one would fabricate an incidence of her being raped solely to falsely blame someone.¹¹

III. ROLE OF CONSENT IN SEXUAL OFFENCES

Consent has the potential to offer women more power in sexual relationships. Perhaps this is why so much effort has gone into defining the concept.¹² When it comes to rape, consent that is offered out of fear or dread is not actual consent. Opposition and consent must both be considered. Submission is not consent if a woman resists to the point where further resistance is fruitless or until her resistance is forcibly overcome.¹³

Physical touch, like any other act, necessitates consent. The normative line between criminal rape and non-criminal sex is consent. The essence of the crime of rape is the woman's consent. Sexual consent refers to a person's active agreement to engage in sexual behaviour. The permission is voluntarily provided, devoid of any pressure, compulsion, or manipulation, and without the use of drugs or alcohol. Furthermore, once consent is provided, it can be revoked at any time. As a result, it can be reversed at any time. Giving assent to one item does not imply that the individual will provide approval to everything else.

- In some circumstances, a person is not legally capable of consenting to any sexual activity. This may be the case if the person is unable to give consent because they are a

¹¹ Rajendra Dutta Zarekar v. State of Goa, Appeal (Crl.) 32 of 2007 decided on 4th December, 2007.

¹² Patricia Smith (ed.), *Feminist Jurisprudence* 162 (Oxford University Press, 2003).

¹³ *West's Encyclopedia of American Law* (Edn. 2), available at: <https://legal-dictionary.thefreedictionary.com/consent> (Last visited May 18, 2021).

minor, inebriated, or under the influence of narcotics. Even if consent is given, it is not deemed legal in these situations. As a result, permission can be examined in regard to sexual acts in the following ways:

- *confirmatory or affirmative consent, whether the person gave his or her consent for sexual acts through actions or words;*
- *freely given consent, whether the consent was given freely or was induced by threats, coercion, fraud, or other means;*
- *and capacity to consent, whether the person was capable and had legal authority to give his or her consent.*

Women's consent should never be assumed based on non-consent assumptions such as wearing provocative clothing, smoking, drinking alcohol, or going out alone in the dark.

IV. MARITAL RAPE AND ITS LEGALITY IN INDIA

(A) What is Marital Rape?

Sexual intercourse between married couples without the female partner's consent. When a guy forces or threatens to force sexual contact with his wife without her consent. In most nations, rape is defined as "sexual intercourse by a male with a woman who is not his wife without her consent." This effectively gives the husbands 'permission to rape' their women. India is one of just 35 nations where marital rape is permitted, according to WHO data. And that is unquestionably a bad lift to be on.

Rape, especially marital rape, is an attack on the human spirit as well as the physical body, with severe and long-term consequences for individuals who are victims.

Unwanted and non-consensual sexual contact between a husband and his wife is known as marital rape. It does not just encompass unconsented sexual actions, but also consents gained through force, undue influence, coercion, misrepresentation, or where a person is not in a legal position to give consent. These are the activities that are most usually humiliating, shameful, and humiliating.

Forced sexual intercourse in marriage is generally thought to be less traumatic than rape by a stranger since spouses have been sexually intimate. Stranger rape is extremely traumatizing, yet it is usually a one-time occurrence that is clearly recognized as rape. In the instance of rape by a spouse (a long-term sexual partner), the victim's reactions are influenced by the history of the relationship. Furthermore, spousal rape is likely to occur on a regular basis. As a result, rape is rape regardless of the nature of the relationship between the victim and the perpetrator.

(B) Indian Legal Scenario

In India, marital rape is excluded from the definition of rape on the basis of the express presumption that when a woman enters into a marriage, she relinquishes her right to agree to sexual contact and the husband is granted an unconditional and unqualified right to sexual access to her. Because India does not have a law against marital rape, a woman's husband cannot be tried for rape even if he had sexual intercourse with her without her consent. Excessive and unreasonable demands for sex, as well as unnatural intercourse, have been deemed cruel, and may entitle a woman to a divorce, which is a civil, not a criminal, remedy.¹⁴

The exemption clause in Section 375¹⁵ of the Indian Penal Code, 1860, states that "sexual intercourse by a man with his own wife, the wife not being under the age of 15 years, is not rape." Furthermore, even if the wife is under the age of 15, the severity of the punishment is far less than that of a rape. The punishment for rape is laid forth in Section 376 of the Indian Penal Code, as well as the circumstances in which the spouse might be charged criminally for marital rape. They are as follows:

1. When the wife is between 12 – 15 years of age, offence punishable with imprisonment upto 2 years or fine, or both;¹⁶
2. When the wife is below 12 years of age, offence punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.¹⁷
3. (As amended in 1983) Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine;¹⁸

¹⁴ Dr. Subhash Chandra Singh, "Marital rape: how offensive is it?", *Criminal Law Journal* (July 2019).

¹⁵ Sec. 375 of the Indian Penal Code (45 of 1860) says:—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 six following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

¹⁶ Indian Penal Code (Act 45 of 1860), Sec. 376(1).

¹⁷ *Ibid.*

¹⁸ Indian Penal Code (Act 45 of 1860), Sec. 376A. *Intercourse by a man with his wife during separation.*—

4. Rape of wife of above 15 years in age is not punishable.¹⁹

The Section 376 of the Criminal Code deals with sexual assault in a very limited way. It points out that marital rape is only a felony if the woman is under the age of 12. If she is between the ages of 12 and 15, and the crime is committed, she will still be punished, but the punishment will be less severe. However, once the wife reaches the age of 15, she has no legal protection. She is in excruciating pain and has no way of alleviating it. It is a clear violation of human rights laws, as the victim has no recourse.

According to our country's laws, a married woman is presumed to have given her husband permanent agreement for any sexual favours, and women are often treated as sex slaves by their husbands. India is one of the thirty-six countries that do not recognise marital rape as a crime²⁰, which is one of the main reasons for women's victimisation and abuse. Most victims of marital rape are either unwilling or afraid to speak out against their husbands' sexual aggressiveness and oppression. Depression, post-traumatic stress disorder, gynaecological issues, and gloomy physical health symptoms are common among these victims.

Marital rape is considered a type of violence against women under the Protection for Women from Domestic Violence Act of 2005, which protects women from physical and mental cruelty and abuse in all forms. It allows the wife to petition the court for divorce from her husband on the basis of marital rape.

There is no such thing as spousal/marital rape in India. In India, the right to have a conjugal relationship has been acknowledged. Following the definition of 'implied consent,' a wife is presumed to grant perpetual assent to have sex with her husband after entering into marital relations under current law. As a result, even if a husband engages in sexual activity with his wife without her consent or against her will, it does not constitute rape.

V. NEED FOR CRIMINALIZATION

The burning question now is how India's legal system can allow for an 18-year-old legal age of consent for marriage while only protecting individuals under the age of 15 who are sexually assaulted in their marital relationships. Why is it that a husband who frequently rapes his own wife and makes her life a living hell receives no punishment?

Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

¹⁹ Indian Penal Code (45 of 1860), Exception to Sec. 375.

²⁰ India Today Web Desk, "Marital Rape In India: 36 Countries Where Marital Rape Is Not A Crime", *India Today* (March 12, 2016), available at: <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12> (Last visited on May 21, 2021).

The Hon'ble court decided in *Francis Muin v. Union of Delhi*²¹, illustrating the concept of right to life, held that the right to live with human dignity is a key part of the right to life that respects a person's freedom. In the case of *The Chairman, Railway Board v. Chandrima Das*²², the Hon'ble Supreme Court stated that rape is not only a criminal offence under Indian law, but also a crime against society. As a result, the exemption in Section 375 of the Indian Penal Code exempting marital rape from punishment is a violation of a spouse's right to live with dignity and should be declared unconstitutional because it allows a husband to engage in forcible sexual intercourse without wife's consent.

Following international outrage over the Nirbhaya²³ gang-rape case on December 16, 2012, the JS Verma Committee²⁴ was formed, which proposed that marital rape be criminalised by removing the exception for marital rape under section 375, thus protecting spouses from domestic violence and sexual abuse. However, this suggestion was turned down.

It's unfortunate to note that, despite the fact that India has a plethora of laws protecting women from violence and cruelty, including inside their homes, the most heinous crime of marital rape has yet to be recognized as a crime, which is, of course, the need of the hour. Rape is a crime in our country, but not marital rape. However, rape is rape, whether it is perpetrated by a stranger or her own spouse. Furthermore, because they are financially dependent on their husbands and are unable to return to her parents owing to the stigma attached, the wife may find it much more difficult to flee such harsh conditions at home.

As a result, the most critical step in saving the victims is for the legal system to regard marital rape as a crime as well. India wants a significant shift in the way laws are implemented. Furthermore, women must step out and confront for themselves, breaking free from the strict societal limitations. It is past time for women to stand up for themselves by refusing to be indefensible and fighting back.

As a result, the most crucial step towards rescuing the victims is for the court system to recognise marital rape as a crime as well. India need a significant shift in how laws are implemented. Women must also come out and confront for themselves, breaking free from traditional limitations. It is past time for women to stand up for themselves and fight back against the unjustifiable.

²¹ AIR [1981] SC 802.

²² Civil Appeal No. 639, of 2000 (Arising out of SLP(C) No. 16439 of 1998).

²³ *State v. Ram Singh & Another*, SC No. 114/2013.

²⁴ Government of India, *Justice Verma Committee Report* (2013), available at: <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary> (Last visited on May 23, 2021).

VI. CONCLUSION & SUGGESTIONS

Rape, including marital cases, is on the rise, and law enforcement authorities are to blame to a large measure because they are careless and lenient with perpetrators. Rape will not decrease unless the existing law not only makes rape a death penalty in theory but also in practise. The cases of marital rape would not be dropped unless stringent punitive legislation and measures are adopted. Even the laws will not suffice. It is past time for the victim to be treated with respect, and the rapist to be severely punished, even if the rapist is her husband!

The article concludes with the following suggestions for the social well-being of the victims and their families:

- The general attitude of society must be transformed in favour of women's dignity, which would need widespread female literacy and economic betterment for the impoverished masses.
- Marital rape must be treated as a crime by the justice system, and stringent punitive regulations and measures must be adopted against sexual offences committed within marriage.
- Authorities must eliminate Section 375 (Exception 2) of the IPC to bring marital rape under the purview of rape laws.
- Along with criminal justice functionaries, Non-government organisations, social workers, media people, political leaders, and ordinary men must work together to create an environment in which sexual offences within marriages do not proliferate.
- The victim should not be ignored, but the rapist should be severely punished, even if the rapist is her husband.
- Women should be in control of the unit dealing only with violence against women in police stations. They should be well-trained in offering victims counselling and in instilling comfort and confidence in them.
- The women in charge of the cell dealing solely with violence against women should be placed in control of the police stations. They should be well-versed in bringing comfort and confidence to victims through counselling.
- Individuals, women's groups and cells, and victim's family members can assist the raped woman in overcoming her pain and humiliation while also pursuing criminal charges against the rapist.

Ultimately, strong commitment and involvement of governments and civil society, as well as a coordinated response of individuals, will result in the criminalization of this heinous practice, ensuring the country's successful future.
