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Marital Rape: Lonely Battle for Justice

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ABSTRACT

“She was a beautiful daughter

Now a forceful bride

Tomorrow she will be a victim of harmonised crime.”²

India is a country that cherishes its rich culture in all of its dimensions. Marriage is an important component that demonstrates how our civilisation is organised. Marriage is a legal obligation between two opposite genders people that gives them the legal right to engage in sexual activity with each other. When it comes to women, the question is whether the implicit acceptance granted at the time of appealing into that “contractual binding relationship” entails permission for everything that extends till the end of life or has any limits. To address this, the paper looks at how married women are used without their consent. The study also discusses Section 375 of the IPC and its fundamental and constitutional legitimacy. India is one of those countries that constantly amend its laws in order to upgrade the country’s progress. To upgrade, we must inspect what we are doing and what should be done. The author has provided a different examination of the legislation of different countries with our own country. The Law Commission, Health and family survey³ Report and the reasons in favour of Marital Rape reinforce the necessity for something about which we are quiet. Thus, matrimony is a bind between couples in which both have their own space and where love rather than compulsion or forcefulness makes marriage extremely lovely. The main focus of this paper is to examine the social & legal elements of marital rape, as well as to show the current situation of marital rape in India and the rest of the world.

I. INTRODUCTION

Admitting that we are commemorating our 70th year of independence, women in this nation pursue to be marginalised and lack true freedom, autonomy and self-reliance. When forced sexual intercourse occurs within the four walls of a conjugal house for the opposite gender’s joy is called a curse name “marital rape”, and it is a crime against a woman that violates her

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² https://www.yourquote.in/unknown-blogger-flood/quotes/she-beautiful-daughter-now-forceful-bride-tomorrow-she-crime-dzknj?utm_source=whatsappWeb

³ National Family Health Survey, India, NFHS-4 Publications – Reports, available at: <http://rchiips.org/NFHS/NFHS-4Report.shtml>

dignity and self-respect by reducing her to the status of an object used solely for sexual pleasure. Marriage is regarded as a sacred social institution in India. One of the most distinguishing aspects of a husband and wife's relationship is the legal consequence of their sexual activity. On the other hand, marriage has become a license to rape all of a sudden. Marital rape is also known as spousal rape and the act of having sexual relations with their marital partner without her consent. The most crucial aspect is the lack of authorisation, which does not have to be followed by physical violence. How is it acceptable for a husband to rape his wife? Rape is rape, although sexual intercourse between spouses was historically considered as a right thing now commonly classified as rape in many nations throughout the world, and it is denounced by international accords and is increasingly criminalised. How can marriage be considered sacred if women are subjected to physical, mental, and emotional abuse with no recourse?

II. BACKGROUND

In 18th century English law, the woman was regarded to be dependent on her spouse and incapable of living alone. Husband and wife were identified as the same entity, and the wife's rights (including her sexual rights) were absorbed by her husband. The sweeping norms that evolved in 18th-century English law gave rise to Exception 2 of Section 375 of IPC. Before the 18th century, it was treated that the husband was the master of wife and had exclusive access to her body; thus, rapping his wife was unthinkable. Husbands treated women as they were chattel. Women were limited to the home sphere in the 18th-century, and the state guaranteed that they remained reliant on their male counterparts. It's surprising to think that this still holds true in the 21st-century in India when women have become more self-reliant and capable of providing consent. Women are no longer dependent on males. Under the law, they are self-governing people.

III. RAPES & ITS PUNISHMENT

All types of sexual or physical assault, including non-consensual contact with a woman, are included in the definition of rape precise in Section 375 of the Indian Penal Code [IPC]. Although Exception 2 to Section 375⁴ states that sexual intercourse between a married couple above the age of fifteen from Section 375 did not come under the definition of rape and protects such conduct from prosecution. Section 376 of the Indian Penal Code makes rape illegal. A man is accused of rape if he inserts any item or any part of his body into a woman's intimate

⁴ Section 375(Exception) in The Indian Penal Code :(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT

region or manipulates any part of a woman's body under any of the following circumstances:

1. against her will;
2. without her consent;
3. with her permission, while she is inebriated or in a condition of unsound mind or when her consent is acquired by placing her in fear of death or harm;
4. When a woman believes that she is lawfully married to that person, but he is not her husband;
5. When a woman is under the age of 18 or incapable of giving permission or consent.

This is a case of rape. A guy who does not engage in intercourse with his wife who is not under the age of 15 is not regarded to have committed rape, according to the second Exception of section 375 of IPC.

Rape is punishable by a variety of means.

According to Section 376 of the IPC⁵, The rapist should be sentenced to a term of imprisonment of at least seven years but no but not more than his life and a fine. According to the Indian Penal Code, a spouse can be punished for marital rape in the following circumstances:

1. When the spouse is between the ages of 12 & 15, the offence is punished by up to two years in imprisonment or a fine or both.
2. When the wife is under the age of 12, the offence is blameworthy by any type of imprisonment for a time period of not less than 7 years but not more than life, or a term of up to 10 years, plus a fine.
3. The rape of a judicially separated spouse carries a maximum sentence of two years in a detention centre and a fine.
4. Wives beyond the age of 15 are not penalised for rape.

IV. MARITAL RAPE

The act of having sexual or physical relations with one's spouse without their consent is known as marital rape or spousal rape⁶. The absence of assent is the most important factor, and it does not have to be accompanied by physical assault. Spousal rape is a type of domestic violence and sexual or physical assault that occurs while two people of the opposite gender are married. Although sexual intercourse within marriage was once considered a right of spouses in many countries throughout the globe, today it is considered as rape or, in specific marital rape that is

⁵ Section 375 in The Indian Penal Code

⁶ Marital Rape, available at:https://en.wikipedia.org/wiki/Marital_rape

condemned by international agreements and increasingly criminalised. Since the second half of the twentieth century is concerned with physical, sexual and domestic violence inside marriage and the family unit is particularly violence against spouse and have attracted increasing international attention. Even yet, in many states, marital rape is either legal but commonly allowed, or it is prohibited but widely tolerated. Laws are rarely enforced due to a variety of factors ranging from authorities' unwillingness to prosecute the offence to a lack of public understanding that sexual intercourse in marriage without consent is illegal. Albeit, women are not exclusively are more likely to be raped in marriage. Marital rape is a common form of female abuse in violent relationships. It takes place as part of a massive system of state legislatures, cultural practices, and societal concepts that interact to influence each special event and circumstance in different ways.

Traditional conceptions of the wedding are a religious interpretation that beliefs about gender, sexuality and cultural expectations of a wife submissive to her husband and have all been cited for lack of willingness to define and prosecute non-consensual sex between a married couple. In most developed democracies, these views of wedding and sexuality were questioned in the 1960s and 1970s, especially by 2nd wave of feminism, leading to the recognition of a female's right to self-resolution (i.e., control) over all elements of her body and even the abolition of the spousal rape exception or defence.⁷

V. CONSTITUTION OF INDIA

All Indian citizens, regardless of caste, colour, sex, religion, or birth order, are guaranteed certain fundamental rights under part (iii) of the Indian Constitution.

India's rape laws are in breach of Articles 14 and 21 of the Indian Constitution.

Article 14 is being violated.

Article 14 ensures equal protection under the law and equality before the law. In order for Article 14 to apply, the two conditions of intelligible differentia and rational nexus must be satisfied. Infringing on her fundamental right to equality under Article 14, Exception 2 to Section 375 discriminated against married and unmarried women. Married women beyond the age of 15 and married women under the age of 15 are clearly distinguished in the statute. In their personal lives, married women deserve judicial reviews like men and unmarried women. Section 375 of the Indian Penal Code takes away marital women's freedom of choice, effectively depriving them of physical autonomy and personhood. As a result, the

⁷ Britannica, The second wave of feminism, available at: <https://www.britannica.com/topic/feminism/The-second-wave-of-feminism>

categorisation is unneeded, incomprehensible, and in violation of Article 14's mission.

Article 21 is infringed upon.

The safety of life and individual freedoms are guaranteed by Article 21 of the Constitution. Human dignity refers to the right to live with dignity. According to the Supreme Court of India in *Bhodhisathwa Gautam v Subhra Chakraborty*⁸, rape is a violation of basic human rights and a violation of the victim's most prized fundamental right. A married woman has the same right to dignity, privacy, and control over her own body as anyone else. Marriage cannot deprive you of these rights.

Sexual privacy is a right.

In *Justice K.S Puttaswamy v Union of India*⁹, the right to privacy is recognised as a basic right, which includes decisional privacy, which is described as the capacity to make private judgments principally about one's sexual or procreative nature, as well as decisions about intimate connections.

VI. JUDICIAL STAND AND PIL TO CRIMINALISE MARITAL RAPE

***Nimeshbhai Bharatbhai Desai v. the State of Gujarat*,¹⁰**

Under section 376 of the Indian Penal Code, the Court reviewed whether a husband is forcing his wife to indulge in oral sex comprised rape. Marital rape has not yet been criminalised in our country, according to the court, because the legislature is afraid that it may weaken the institution of marriage. An untrustworthy wife may use false and frivolous charges against her husband as a deadly tool or weapon to punish him. The criminal court system, on the other hand, has safeguards in place to detect and investigate fabricated or fraudulent marital claims, and anyone who makes false and malicious accusations could face legal consequences. Marital rape cannot be overlooked as a result of this fear. Indian laws guarantee women the right to life and liberty, but not to their bodies. A husband's assault on his wife is a crime under the IPC, but if the same husband forces his wife to have sexual intercourse with him, then he would be guilty of assault but not of rape.

The court identified three types of marital rape that are common in today's society:

- **Battling rape:** This is a sort of marital rape in which women are subjected to physical and sexual abuse in a variety of ways. The woman may be pummeling during the

⁸ 1996 AIR 922, 1996 SCC (1) 490, JT 1995 (9) 505, 1995 SCALE (7)228

⁹ 2017 10 S.C.C. 1.

¹⁰ 2018 SCC OnLine Guj 732

sexual barbarity, or the rape may occur after a physically violent event in which the husband attempts to make amends and forces his wife to have sex against her will. In the vast majority of incidents, the victims fell into this category.

- **Force-only rape:** Husbands use only as much force as is necessary to pressurise their wives in this sort of marital rape. Battling may not be a characteristic in such instances, but women who refuse sexual intercourse are more likely to be assaulted.
- **Obsessive rape:** Assaults, including brutal torture and/or bizarre sexual practises, are more typically ferocious in nature in obsessive rape. Another word for this type of rape is sadistic rape.

Independent Thought vs Union of India¹¹

The court had to assess if sexual intercourse between a man and his wife, a girl aged 15 to 18, constituted rape.

Despite the fact that Section 375 of the Indian Penal Code, 1860 (the IPC) takes a pessimistic view of the case, the court decided that sexual or physical intercourse with a female under the age of 18 constituted rape, irrespective of whether or not she is engaged. The artificial distinction is against the spirit of the Constitution's Article 15(3) and Article 21. As the first step in this direction, the Prohibition of Child Marriage Act (PCMA) was approved in 2006, but no later amendments to Section 375 of the Indian Penal Code (IPC) to legalise marital rape of a female child were made. If a wedded girl between the ages of 15 and 18 is sexually assaulted or raped by her partner then she may be accused with "aggravated penetrative sexual assault" under the Protection of Children from Sexual Offences (POCSO) Act of 2012, but not with rape under the IPC because such an assault is not recognised as rape under the IPC. For the following reasons, the court directed that Exception 2 to Section 375 IPC, insofar as it applies to a female child under the age of 18, be struck down for the following reasons:

1. It is capricious, tyrannical, and not just reasonable or equitable. It breaches Articles 14, 15, and 21 of the Indian Constitution and infringes the rights of female children;
2. It is biased and violates Article 14 of the Indian Constitution;
3. It violates the conditions of the POCSO Act.

The centre stated in a new affidavit filed on January 20, 2022, that counselling on this "contentious issue" is currently in progress, especially in light of the 2013 Justice JS Verma committee report and the 2017 Supreme Court ruling that the "marriage exemption" does not

¹¹ (2017) 10 SCC 800

apply because the wife is under the age of 18. A panel of Justices Rajiv Shakti and C Harishankar is now hearing the case. The petitioner NGOs, and the Men's Welfare Trust, a pro-petition "men's rights" group, have filed their arguments. The Delhi government has also maintained that a woman who has been sexually abused by her husband has a number of alternative legal options and that altering the IPC section is superfluous. For the time being, the union has asked the Court to provide it more time to present its case, arguing that it is "engaged in a comprehensive exercise" of holding discussions on criminal code modifications and that the Court should allow it time to conclude the consultations.

The court said in **Queen Empress V Haree Mythee**¹² that the law of rape does not apply to married women after the age of 15 and that even if the lady is past the age of 15, the husband has no right to disregard her bodily safety.

In **Emperor V Shahu Mehrab**¹³, the husband was found guilty of causing the death of his child-wife by engaging in hasty or negligent sexual intercourse with her under Section 304A of the Indian Penal Code

In **Madhukar Narayan Mardikar v state of Maharashtra**¹⁴, the Supreme Court discusses the right to privacy over one's body. The right of a prostitute to refuse sexual intercourse has been established. It's depressing to read that all stranger rapes are now outlawed and that all females, with the Exception of husbands, have been granted the right to privacy over their bodies.

The offence under Section 376A IPC will not be attracted because the wife is not living separately from her husband under a decree of separation, even if the woman is subjected to sexual intercourse by her husband against her will or without her consent, according to the High Court in **Sree Kumar v Pearly Karun**¹⁵.

The assumption that rape inside a marriage is impossible or that a woman's rape stigma may be rescued by marrying the rapist appears to have been totally abandoned to the convenience of the judiciary.

PIL to make marital rape a crime

Some argue that Exception 2 of Section 375 is arbitrary and unjust because Marital Rape is no less of a crime than murder, culpable homicide, or rape per se, and that this encourages

¹² (1891) ILR 18 Cal 49

¹³ (1911) ILR 38 Cal 96

¹⁴ AIR 1991 SC 207, 1991 (61) FLR 688, JT 1990 (4) SC 169, (1991) ILLJ 269 SC, 1990 (2) SCALE 849, (1991) 1 SCC 57, 1991 (1) UJ 109 SC

¹⁵ 1999 (2) ALT Cri 77, II (1999) DMC 174

inequality between married and unmarried women, leading to petitions to the Delhi High Court. The All India Democratic Women's Association, the RIT foundations, the Forum to Engage Men, and others were among the petitioners.

The petitioners argued that the Exception was unconstitutional.

Men's Welfare Trust, on the other hand, argued that the issue had affected a large number of men who had been wrongly accused of rape and domestic violence by women who had filed false rape and domestic violence cases. The plea also cited National Crime Record Bureau (NCRB) figures, stating that 62,000 married men commit suicide each year, more than double the number of women, with marital issues being the leading cause.¹⁶

The PIL requested a clear framework for the registration of cases of marital rape within specified standards and legislation so that the authorities' accountability, obligation, and culpability could be shown.

The HC, on the other hand, rejected the petition, saying that this legislature doesn't have court jurisdiction. The government's and the judiciary's responses to marital rape are terrible because they illustrate the patriarchal character of Indian culture.

Marital rapes outside India and their laws

Since 1979, various nations have made marital rape illegal, either by including a clause in the penal code, abolishing the Exception, or enacting legislation to protect married women. Countries such as Brazil, Austria, Belgium, Finland, Canada, the Dominican Republic, Ireland, and Israel have all taken active roles in the past, either by amending the penal code or decriminalising it before or after the 1980s.

- In Austria, where marital rape was made illegal in 1979, the maximum penalty is 15 years in jail.
- In 1994, Finland criminalised and outlawed sentences of up to four years; however, the term is more severe if the violence is directed at a married woman.
- Jordan: a husband who commits marital rape on his wife is sentenced to at least ten years in jail.
- Ireland: The Exception for marital rape was abolished from Irish penal law.
- Germany: the Exception was repealed by an amendment in 1947.
- In 1997, the Dominican Republic made spousal rape illegal.

¹⁶ Deeptiman Tiwary, *Married men twice as likely to commit suicide than married women: Report*, available at: <https://timesofindia.indiatimes.com/india/married-men-twice-as-likely-to-commit-suicide-than-married-women-report/articleshow/48220552.cms>

- In the United States, marital rape is now illegal.
- Israel: In 1980, the Israeli Supreme Court ruled that marital rape was illegal. It was deemed a criminal offence, punishable by up to 16 or 20 years in prison.

India: Although it does not consider marital rape to be a crime, it does have an exemption in the Indian Penal Code (IPC) under Section 375, which states that a man who has intercourse with his wife above the age of 15 years is not deemed raped by her husband. Intercourse with a separated wife, on the other hand, is deemed rape and is punishable by up to seven years in jail under different legislation.

Facts and statistics (international & Indian scenario)

International¹⁷: Marital rape is illegal in eighteen US states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia. *R v R*, a case from the United Kingdom, revolutionised the law by determining that a man may rape his wife under UK law. Even inside a marriage, the courts held that any non-consensual sexual or physical conduct constitutes rape.

- Fourteen per cent of married women claim to have been raped by their boyfriend. Their estimate is likely to be lower than the true rate of marital rape. (Russell)
- Only rape and sexual assault were reported as the only forms of abuse in the marriage by 23% of reporting women. (Russell)
- The marital rapist, like other rapists, is not a ‘crazed sex maniac.’
- Marital rape is not necessarily a part of abused women’s condition. He is typically a guy who sees sex as a solution to all marital difficulties, as well as a source of reinforcement for a male identity. However, at least half of all abused women had been raped in their marriage. (Russell)
- Adult female survivors of marital rape are more likely to have been sexually assaulted as children than male survivors. Frieze and Russell are just a few of the names that come to mind.
- According to a nationwide survey, a spouse or ex-husband was involved in 10% of all sexual assault instances reported by women. (Rape in America, 1992, National Victim Centre)

Indian

¹⁷ Indiana coalition against sexual assault, Marital Rape, available at: https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital_Rape.pdf

“Physically pushed her to engage in sexual activity with him, even though she did not want to.”¹⁸

This is a type of marital violence for which the Indian government keeps track of statistics. According to the most recent National Health and Family Survey (NFHS-4) for 2015-16, 5.4 per cent of women had been victims of marital rape. However, while there are statistics on marital rape in India, the crime of marital rape “does not exist.” According to the poll, “the most prevalent kind of sexual violence described by women was their spouse using physical force to have sexual intercourse when they did not want to.” Before reality, the existence of marital rape is being debated in the Delhi High Court, which is hearing petitions calling for its criminalisation. The Women and Child Development Ministry, speaking on behalf of the Union government, said the crime and the concept of it “cannot be adequately applied in the Indian context.” Despite this, 5.4 per cent of married Indian women report they have been raped in their marriage. In the 12 months leading up to this study, 4.4 per cent of them said they had been the victim of marital rape. In 2005-6, NFHS-3 had a value of 9.5 per cent. These figures are far from realistic, not just because of underreporting but also because they do not capture the full scope of marital rape. These ladies are likely to have been raped in their marriages several times. This is due to the fact that these crimes take place in close quarters and with the same individual. The data also includes entries for “forced her to do any sexual actions that she did not want to” and “forced her to perform any sexual acts that she did not want to using threats or in any other way.” Overall, 2.5 per cent and 3.6 per cent of married Indian women said yes to both of these questions. That brings the number of married women who have been subjected to what would be called rape or sexual assault if the attacker had not been their spouse to 11.5 per cent.

VII. SUGGESTIONS

In India, marital rape is not entirely criminalised. It is unquestionably a significant kind of violence against women that requires the attention of the authorities. Women who have been raped by their spouses are more likely to be subjected to numerous attacks and to experience long-term physical and mental issues. If, on the other hand, the government or a court makes marital rape a crime, it will serve as a pretext for a husband to file a false case in order to obtain a large settlement against divorce. It will be extremely difficult to demonstrate that the claim against the husband is false. If marital rape is made a crime in India, it will create a huge

¹⁸ Anoo Bhuyan, *Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims*, available at: <https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims>

loophole in the system, giving women a huge advantage in this situation. I completely agree that marital rape is more painful for a woman since she has to live with it with her assailant every day. However, we must also keep the reverse case in mind. The judicial system should be unbiased, clean, and open. As far as we can tell, over 80% of domestic violence, dowry, and domestic harassment cases are false¹⁹. The main objective of these cases is to obtain the greatest divorce settlement possible.

VIII. CONCLUSION

The subject of marital rape is neither new nor foreign to the citizens of this country. For as long as the institution of marriage has existed, rapes in marriage have been chronicled in culture. However, it has not been acknowledged, and if it has been acknowledged, it has been rejected by the people. Not only the perpetrators but also the victims remained mute on the topic. But, through time, we've gotten to the point where we can claim that we're aware of it and that we've enacted legislation to handle it. Though the existing regulations aren't ideal, they will be in the future, with the best interests of both parties in mind. But there is one thing we must all understand: the law does not always come to our rescue; in order to eradicate a social issue like marital rape, people's beliefs must develop. Women should have enough authority to speak out against injustice, but not so much that they become tyrants who break the law. All of this can only be done via societal revolution, and only then will this problem be solved.

¹⁹ *Around 80% of cases turn out to be false*, The Hindu, available at: <https://www.thehindu.com/news/cities/Delhi/around-80-of-the-cases-we-get-turn-out-to-be-false/article6266926.ece>