

Contemporary Legal Prospects Relating to Criminalization of Marital Rape in India with Special Reference to Protecting Women's Dignity

Rajeev Kumar Singh¹, Shriya Mishra²

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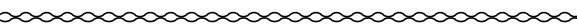
Abstract

Marriage between two people allows them to legally engage in sexual activity. Marriage is the term used to define a sacramental or contractual relationship. Marriage, as mentioned in the definition, legalizes sexual intercourse, implying that any sexual act conducted during the marriage is not prohibited. This equips individuals with the motive to commit marital rape. Marital rape is when a married couple engages in sexual activity without the consent of the wife. This shows how the husband uses the marriage as a permission to sexually torture bride, and then considers it as his right.

Indian marriages are considered as the sacred union of two people. It is assumed that after a marriage is solemnized, there is an implied permission to have sexual relations between them. This concept of marriage has been used to hide the harsh reality, such as domestic abuse, marital rape, cruelty, and other gruesome and horrible crimes committed against women. There are laws in place to protect women in the country from barbarous crimes like rape, but rape that occurs within marriage has never been protected. The principle of equality is enshrined in our Preamble, but societal pressure on women has shown to be greater than on males.

This article focuses on the need of criminalization of marital rape in India whereas the effects and suggestions regarding marital rape. To protect women, the judiciary must take steps to safeguard them. Married women should be treated with respect and not be subjected to sexual abuse or violence. But the truth is that married women does not have legal protection against marital rape.

Keywords: Honourable; Rape; Marriage; IPC; Right.



Author Affiliation: ¹Assistant Professor, Department of Law, ²Student of LLM, Amity Law School Lucknow, Amity University, Lucknow 226028, Uttar Pradesh, India.

Corresponding Author: Rajeev Kumar Singh, Assistant Professor, Department of Law, Amity Law School Lucknow, Amity University, Lucknow 226028, Uttar Pradesh, India.

Email: singh.rajeev264@gmail.com

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INTRODUCTION

Even as India marks 75 years of independence, women in the country continue to face oppression and lack true independence. Rape in and of itself is a crime against women, a violation of their dignity and self-respect, and when it takes place inside the boundaries of a married house,



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it decreases the dignity of the woman and farms her image as a sexual object. In India, marriage is a respected social institution. The regulations placed on a husband and wife's sexual interaction are one of their relationship's primary features. But nowadays, getting married is a licence to rape. How is it possible to allow a husband to rape his wife? A rape is a rape. How can the institution of marriage be called a sacred one if women suffer physically, mentally and emotionally without any remedy against it?

A man and woman enter into a legally recognised contract known as marriage. It is acceptable for husbands and wives to engage in sexual activity. The sole cause of marital rape is because of the husband's greater control over the wife. Marital rape can be described as any unwelcome sexual contact or penetration that is achieved through force, the threat of force, or when the wife is unable to consent, though the legal definition differs. Given the presumption of marital permission to cohabit, the husband cannot be charged with raping his wife. Even the cases of marital rape are increasing still marital rape is not considered as an offence in any statute in India.

The act of a husband engaging in sexual activity with a wife without her consent is known as marital rape, and it can be committed under the coercion, threat, or torture of bodily or mental harm. As was mentioned above, marriage is a sacred union of two souls in which the implied permission to legally consummate their union is seen as a requirement of this ritual. However, nothing enables the husband to compel his wife into having sex against her will. In India, the mutual matrimonial ceremony is viewed as a licence to engage in sexual activity. And so, this heinous and horrible act is not criminalized in India. But what must be understood is that the right to sexual intercourse must be consensual and must not be an obligation. The status of marital rape in India is *de facto* and not *de jure*.¹ It is important to look at the difference between Rape and Marital Rape in order to get a clear picture of marital rape.

"The word rape is derived from the Latin term RAPIO means 'to seize'. Rape is defined as a forcible seizure. It refers to the ravishment of a woman against her will, without her consent, or with her consent obtained through force, terror, or fraud, or the carnal knowledge of a woman obtained through force against her will."²

Section 375³ of IPC states that man is considered to commit "rape" if he has or tries sexual intercourse or oral sex under the seven circumstances.

In addition to clearly defining these seven situations as rape, Section 375⁴ also states that a woman's lack of bodily resistance to such a horrifying act will not be regarded as her consent to that sexual activity. The only restriction against the horrible crime of marital rape in India is found in Exception 2⁵ of Section 375 of the Indian Penal Code, which treats forced sexual violence in a marriage as a crime only when the wife is under the age of 15. *In the case of Independent Thought v. Union of India*,⁶ the judiciary raised this age from 15 to 18 years. But the wife, who is older than 18, has received no protection. As a result, India's legislation and judiciary insulate and normalise domestic sexual abuse while not considering marital rape to be a crime for wives older than 18 years.

Section 375⁷ of the Indian Penal Code defines rape and considers it as an offence. While the exception (2)⁸ of section 375 of the Indian Penal Code, 1860 provides that having sex with one's own spouse who is not a minor is not considered rape.

Section 198 (6)⁹ of the Code of Criminal Procedure states that, A man engaging in sexual activity with his own wife who is under the age of fifteen is not considered to have committed an offence under section 376¹⁰ of the Indian Penal Code, 1860, if more than a year has passed since the offence was committed.

The important point is to regard any offence as rape as the word consent. So, how can any sexual act committed by the husband after marriage and without the agreement of the wife be exempt from the definition of rape under Indian law? This question remains unaddressed.

JUDICIAL DECISION ON MARITAL RAPE IN INDIA

A marital rape is an intercourse between a man and his wife achieved through coercion, threat of physical violence, or mental agony in which the woman is unable to provide her own consent. Her own husband's reversionary behaviour against his wife was considered physical and sexual abuse.

Even our legal system recognises that marriage is extremely valuable and should not be destroyed in certain circumstances.

One of the cases is *Harvinder Kaur v/s Harmender Singh*¹¹, in which the court discussed the applicability of constitutional rights, including Articles 14¹² and 21¹³, inside a family. It has been

stated that imposing Constitutional legislation into the home is highly inappropriate. It's the equivalent of putting a bull in a China shop. It will annihilate marriage and everything it stands for. Articles 21¹⁴ and 14¹⁵ have no place in the home or in married life. The adoption of cold concepts of Constitutional Law will have an effect on dissolving the marriage bond in a sensitive, private, and delicate realm.

This case was later challenged in another case of *Sareetha v/s T Venkata Subbaih*,¹⁶ failing to improve the situation. The Apex Court then later commented upon the same matter in the case of *Saroj Rani v/s Sudarshan Kumar Chadha*¹⁷, by saying that the introduction of equality clause within home will destroy the institution of marriage.

Recently, In the case of *Independent Thought vs. Union of India and Anr.*¹⁸, the Supreme Court concluded that Exception 2 of Section 375¹⁹ IPC should be repealed as it is related to a girl child under the 18 years of age. *Such as:*

- It violates Article 14²⁰, 15²¹ and 21²² of the Constitution of India.
- It is conflicting with the provisions of POCSO, which must prevail as it a special law for the protection of girl child.

Therefore, Exception 2 of section 375²³ IPC states, "Sexual intercourse or sexual acts by a male with his own wife, the wife not being 18 years, is not rape."

The issue is that it has been believed that a marriage relationship is fundamentally important. Marriage necessitates joint efforts rather than one sided respect. Being raped by your spouse is the worst situation imaginable.

JUDGEMENT OF DELHI HIGH COURT

*Case name: RIT Foundation v. Union of India*²⁴

1. In a divided verdict, the Delhi High Court found that the marital rape provision was "unconstitutional" and should be removed.
2. The Court observed that it would be "tragic" if "a married woman's call for justice is not heard even after 162 years" since the foundation of the IPC.

UNDER SUB-JUDICE

The applications to criminalise marital rape have been approved by the Supreme Court, and the

hearings will begin on March 14, 2023.

Previously, the Karnataka High Court declared that if a husband engages in forcible intercourse with his wife, he may be charged with rape under the IPC. The Karnataka government agreed with the High Court's decision in a subsequent affidavit presented to the Supreme Court. The second exception to Section 375²⁵ of the IPC declares that sexual contact between a man and his own wife who is not under the age of 18 without her consent is not rape and decriminalises marital rape.

"A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'," the Karnataka HC had observed in its decision, saying an accused should trial regardless of the immunity in the penal code.²⁶

In a different case involving the same issue, a Division Bench of the Delhi High Court had issued a split decision in May 22. The exception two to Section 375²⁷ of the Indian Penal Code (IPC) was declared unconstitutional by Justice Rajiv Shakhder, who presided over the two judge Bench.

Justice C. Hari Shankar, an associate judge on the High Court Bench, denied the request to make marital rape a crime, stating that any changes to the law should be made by the legislature because the matter required taking a number of factors into account, including social, cultural, and legal ones.

The case is currently before the Hon'ble Supreme Court of India in Sub-Judice.

SUGGESTIONS AND RECOMMENDATIONS

I suggest the following measures that can be taken to prevent the sexual violent act against the women:

1. *Eliminate the Marital Rape Exception:* First and foremost step should be that the marital rape exception under Indian Penal Code must be removed completely. Also, the Code must define marital rape as a crime and prohibit using the marriage as a defence in rape.
2. *Develop Effective Police Practices:* The state must also strengthen police practises. Police brutality acts as a barrier to stop women from reporting abuse in the very first place. Also, police officers' discretion permits them to refuse to file the complaint, which forms another barrier for women. The state must create Standard Procedures cases of violence against girls and women.

3. **Remedy Hostile Judicial Practices:** The judiciary's act in past cases of marital violence where they didn't consider the seriousness of marital rape, must also be addressed. Courts must be given guidelines for situations of marital sexual violence.
4. **Establish Crisis Centres:** The State should establish crisis centres where female victims of violence and rape can get shelter, medical and psychological help, legal assistance, and other needed services.
5. **Combat Damaging Stereotypes:** Women rarely complain about the circumstances of being raped by their husbands in the marriage due to the stigma which gets attached to the rape victims in India and that the women failed to make her marriage work. Along with educating girls on their rights, it is imperative to involve and educate men and boys in the effort to combat marital rape as well as the overarching goal of attaining gender equality in India.
6. Gender neutral laws should be framed and any discrimination should be discarded.
7. If any women do not physically resist to such gruesome act, it should not be interpreted as her consent to that sexual activity and should not be used as a defence to the charge.
8. The laws regarding Marital Rape have been crystal clearly explained.
9. General awareness of such an offence is a must among the citizens.
10. **Consent is must:** In every case, freely expressed consent is required. Rather than waiting for a "no," ensure that everyone involved is saying "yes." Adopt a positive attitude toward consent and talk about it.
11. Talk about the roots of the existence of the rape
12. **Have zero tolerance:** In the places where you live, work, and play, establish zero tolerance policies for sexual harassment and assault.
13. **Educate the next generation:** Let your children be aware about the fact that they can express anything within the family. Affirm their choices and teach the importance of consent at a young age.
14. Just the fact that the parties are married need not lessen the offence of the person.
15. The offence of Marital Rape should be considered as a valid ground for divorce under all personal laws. Demand for divorce may be an option for the wife, but if the wife does not

want to resort to divorce and wants to continue with the marriage then the marriage should be allowed to continue.

16. The matrimony laws should be amended if needed.

CONCLUSION

"Marital rape tends to violate a right to privacy and right to live with dignity of a woman."

It is a terrible act of violence on a lady. The crime of "rape" shouldn't be differentiated for married and unmarried women by the community or the nation. A married woman being raped is just as horrible and awful as an unmarried woman being raped. In India, women's human rights have already undergone a great deal of development, yet the legislature still doesn't understand the gravity of this barbarous act. The traditional culture is a fundamental factor in why marital rape is not criminalised in India. Even after witnessing countless instances of marital rape and the way that people use marriage as a justification for rape, it is still seen by society as a husband's right over his wife. Additionally, the judiciary stays out of it since it's thought that by making this sexual assault illegal, the sacred institution of marriage will suffer. The essential rights of a citizen, including the right to marriage and the right to a life of dignity, are guaranteed by the Constitution; nevertheless, if the crime of marital rape is not criminalized, the woman loses this fundamental right. Denial of justice and defence against such crimes is thus a complete abuse of the legal system. Because of this, criminalising marital rape is urgently needed in order to improve the situation of women in India.

*Independent Thought vs. Union of India and Anr.*²⁸, shows the active role played by Indian judiciary in shaping the laws of the country and making it flexible with the time. However, the case can only be seen as a first step in a much larger issue that needs immediate legal and cultural attention. The case clearly acknowledges that it will not address the greater problem of marital rape, despite the fact that it promotes the equality of women in marriage relationships. This approach keeps things as they are, leaving the problem of adult women being raped in marriage unresolved. However, there is one bright spot in an otherwise gloomy picture: the Supreme Court's opinions in this case will be highly convincing in other contexts. Today, husbands and wives are treated as different legal persons under Indian law.

It is high time for the legislature to recognise this legal flaw and eliminate Section 375 (Exception 2) of the IPC²⁹, bringing marital rape under the jurisdiction of rape legislation.

In a nation like India, where there is a complex and unique system of personal and religious laws that may conflict with the new statutory criminal law revisions, changing the law of sexual crimes is a difficult and delicate procedure. However, there must be significant adjustments made to the law governing sexual offenses, including the eradication of discrimination and gender neutrality. Marital rape must be made a crime right away by amending the Indian Penal Code. However, it is insufficient to merely label a behaviour as criminal. To raise awareness within the judiciary and law enforcement, more work needs to be done.

It has been determined that Indian laws have not adequately protected women. Even now, women are still viewed as the husbands' property, who are free to take advantage of them. Despite the fact that a wife's violent and non-consensual act of intercourse may qualify her to pursue a criminal assault prosecution, the concept of guilt for marital rape is not included in our penal laws. Articles 14³⁰ and 21³¹ of the Indian Constitution appear to have been violated in this situation. The judiciary must take action to safeguard women in order to protect them. Married women should be respected and protected from violence and sexual abuse. However, the reality is that married women are not legally protected from marital rape.

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4. *Id.* at 3
5. Indian Penal Code, 1860, Section 375, Exception 2, No. 45, Acts of Parliament, 1860 (India): "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."
6. (2017) 10 SCC 800.
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12. Indian Const. art. 14: "Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."
13. Indian Const. art. 21: "Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."
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