

# Marital rape in India

## Introduction

In India, the definition of marital rape exemplifies what we call "*implied consent*". Marriage between a man and a woman in this context means that both parties have consented to sexual intercourse, and it cannot be otherwise. The term "*rape*" is defined in *Section 375 of the Indian Penal Code, 1860*<sup>1</sup>, and it primarily includes all types of non-consensual sexual intercourse and other non-consensual sexual penetration committed against a woman, with the penalty specified in *Section 376 of the Indian Penal Code, 1860*<sup>2</sup>.

Similarly, *Section 375 of the Indian Penal Code, 1860* makes an unusual exception that marital rape, i.e., non-consensual sexual intercourse between a man and his wife, is not called rape. When a woman is married to the man in question, the law presumes that consent to have sexual intercourse with her husband is implied. This presumption is incompatible with the fundamental canon, which considers consent to be the most critical consideration in determining whether or not rape should be penalized and this is where the controversy about whether or not it is necessary to criminalize marital rape in India begins.

## **Law on Rape**

Even though marital rape is the most common and heinous form of masochism in Indian society, it is concealed behind the iron curtain of marriage.<sup>3</sup> In the last hope for reforming the obsolete approach to marital rape, the Hon'ble Supreme Court of India, stated that the country is not ready to recognize marital rape as a crime. It is clear that legislators hold a different viewpoint, believing that marital rape cannot be used in India due to factors such as "*level of education and illiteracy, poverty, social norms, and religious beliefs.*"

The offence of rape is described in Section 375 of the Indian Penal Code, 1860<sup>4</sup>, as sexual intercourse and other sexual penetration, such as oral sex, committed against a woman against her will, or when she lacks the mental capacity to make an informed decision to engage in a

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<sup>1</sup> The Indian Penal Code, 1860, s.375

<sup>2</sup> The Indian Penal Code, 1860, s.376

<sup>3</sup> Merril D. Smith, *Encyclopedia of Rape*, (Greenwood Publishing Group, 2004).

<sup>4</sup> Supra note 1, s.375

sexual act; that is, when she is intoxicated, a minor, or under threat. The concept of marital rape is exempted from such broad definition of Rape by the way of *Exception 2 of Section 375 of the Indian Penal Code, 1860* where the sexual act in question is between a husband and wife and the wife is not under the age of 15.<sup>5</sup>

After the horrible Delhi Gang Rape case in the year 2012, significant amendments were made in the Indian Penal Code, the Criminal Law Amendment Act of 2013<sup>6</sup> came into force. While the main objective of the 2013 amendment was to increase women's access to the legal system by making much-needed improvements to the definition of rape.<sup>7</sup> Justice Verma Committee also made detailed suggestions on the prevention of marital rape as well as rapes committed through the commission of void marriages.

Despite the amendments in the legislation, legislators and governments have taken no action to address the issue of marital rape.

Although there is domestic violence legislation in India, it is mostly focused on physical abuse rather than sexual abuse. Because of the marital rape exemption under Section 375<sup>8</sup>, women who come forward to report sexual violence perpetrated by their husbands are currently denied State protection. As a result, Indian laws are currently deficient in providing support mechanisms for women to exercise bodily integrity and sexual autonomy, especially when they are married, which is why we must address why it is necessary to criminalize marital rape in India.

### **Valid grounds for the elimination of the marital rape exception and make marital rape criminalized**

While marriage is regarded as a profoundly personal issue between two individuals that the State is reluctant to interrupt because marriage is the bedrock of our society, the reluctance of the State to invade this private space may be detrimental because it contributes to the indoctrination of the

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<sup>5</sup> Prof. S.N Misra, *The Indian Penal Code*, (Central Law Publications, 20th edn. 2017).

<sup>6</sup> <https://thewire.in/gender/rape-law-amendments-2013> (Visited on Mar 06,2021)

<sup>7</sup> Priyanka Rath, *Marital Rape And The Indian Legal Scenario*, Indian Law Journal,1.

<sup>8</sup> Supra Supra note 1, s.375

common assumption that a woman should take on the burden of her family's responsibility.<sup>9</sup> But on the other hand, it is outrageous that India's legal system, which seeks to protect the rights of every person in society, offers no legal recourse to a wife claiming accountability from her husband for abusing her. The wife is left in a difficult situation, unable to seek assistance from either the government or her family. Thus, there is a need for the State must intrude into this private domain because, when the seriousness of the offence is as great as rape, it is also necessary to call into question the sacred institution of marriage. After all, marital affairs can no longer be held sacred when a repugnant crime such as rape is committed.<sup>10</sup>

It is explicit that marital rape infringes the right to live with the dignity of a woman and that the exception to marital rape specified in section 375 of the Indian Penal Code is in violation of Article 21 of the Indian Constitution<sup>11</sup>.

In the case of *Bodhisattwa Gautam v. SubhraChakraborty*<sup>12</sup>, the Supreme Court ruled that rape is a violation of the victim's right to life, which is guaranteed under Article 21 of the Constitution. In some cases, however, the judiciary contradicts this rule by refusing to recognize marital rape explicitly. Former Chief Justice of India Dipak Misra stated to the *Deccan Herald* that making marital rape an offence in India will “create absolute anarchy in families,” and that “our country is sustaining itself because of the family platform which upholds family values.”<sup>13</sup>

The *Chairman, Railway Board v. Chandrima Das*<sup>14</sup> is a landmark case in which the Hon'ble Court held that rape is more than just a violation of a person's ordinary rights but it is also a

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<sup>9</sup> David Finkelhor, Kersti Yllo, Simon et.al., *License To Rape: Sexual Abuse Of Wives*, (1987).

<sup>10</sup> *Marital Rape- Myth, Reality And Need For Criminalization*, Saurabh Mishra, Sarvesh Singh, available at <http://www.ebc-india.com/lawyer/articles/645.htm>, last visited on March 06, 2021.

<sup>11</sup> *Supra* note 10, s.21

violation of fundamental rights. Rape is an offence not only against a woman but also against society as a whole.

Keeping in view the above judgments , it is pertinent to note that where there is no consent involved, including marital rape, the crime is equally heinous and will be in violation to Article 21 of the Constitution of India

Further, Article 14 of the Indian Constitution<sup>15</sup> ensures that the State shall not deny any person equality before the law or equal protection of the law within the territory of India by protecting a person from State discrimination, but it is noteworthy that exception 2 under Section 375 of the Indian Penal Code discriminates against a woman when it comes to protection from rape because there is no rational classification that is been put forward before the Supreme court of India.

The Indian law prohibits a girl under the age of 18 from marrying; however it permits non-consensual sexual intercourse with a wife who is 15 years old or above. The Indian Penal Code considers that rape is the case if the woman is under 15 years of age and not the man's wife, even if she consents, but if she is a woman, not under 15 years of age and does not consent, it is not rape.<sup>16</sup> Another loophole is that non-consensual intercourse with a wife between the ages of 12 and 15 is considered rape. However, the penalty is either a fine or a maximum sentence of two years in jail, or both, which is far less than the penalty for rape outside of marriage.

However, what the law makers have failed to realize is that marital rape rips of the sanctity of marriage and leads to a breach of trust, including overlooking the fundamental principles of women's bodily integrity. The rationale behind not including marital rape as an exception is ignorant towards the systemic disparities that exist in today's society',further inculcating the acceptance of sexual violence toward women as normal. It is an irony in itself that while cruelty is accepted as a reason for divorce, sexual torture or marital rape inside the marriage are not.

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<sup>15</sup> Constitution of India, art. 14

<sup>16</sup> [http://www.hiddenhurt.co.uk/marital\\_rape.html](http://www.hiddenhurt.co.uk/marital_rape.html) (Visited on Mar 07, 2021)

In a recent petition filed by Mr. Vinay Pratap Singh the issue of marital rape was again brought up before the Supreme Court of India. Wherein the Apex Court questioned whether or not sexual intercourse between a man and his wife constitutes as rape. The court while hearing the case of a man accused of rape by a woman with whom he had been in a live-in relationship for more than two years. After he married another woman, she lodged a rape complaint.

A bench headed by Chief Justice of India A. Bobde asked, *“If a couple is living together as man and wife, the husband may be a brutal man, but can you call the act of sexual intercourse between a lawfully wedded man and wife as rape?”*

The woman also said that the accused had *“brutally abused”* her. *“Then you file a case for assault and marital cruelty. Why file a rape case?”* Chief Justice of India asked. For the next eight weeks, the man will be protected from prosecution by the judge. Thus, still the judiciary fails to entertain such serious matter and have not specified what actually constitutes marital rape.

## **Conclusion**

Legislators here seem to foresee the concept that getting a divorce from a sexually abusive man is a more secure choice than penalizing him. The gender sensitivity of marital violence is ignored and this stance fails to consider the fact that rape within marriage implies a patriarchal assertion of male authority.

It is therefore high time that marital rape is recognized by Parliament as an offence under the Indian Penal Code, the penalty of which should be the same as that prescribed for rape committed in a non-marital institution. The fact that the parties are married should not make the punishment lighter, since the seriousness of the offence is extremely significant; otherwise, it would be similar to the principle that if a woman consents to be married, she also consents to be abused by her husband.