

## MARITAL RAPE IN INDIA AND HOW INTERPRETATION OF STATUTES CAN BE APPLIED TO LAWS GOVERNING IT

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### ABSTRACT

This paper seeks to look into the practice of Marital Rape in India, and how it is an exception to Section 375 of the Indian Penal Code, which deals with the crime of rape. Furthermore, this paper seeks to find whether the mischief rule of interpretation can be used by the Court to set a precedent and change the interpretation of Section 375 to include marital rape. It looks into how the mischief rule of interpretation can be used to remedy the archaic nature of Section 375, and how this law goes against certain presumptions to statutory interpretation.

**Keywords: Marital Rape, Marital Laws, Section 375.**

### INTRODUCTION

Marital Rape or Spousal Rape is defined as non-consensual sexual intercourse with one's spouse. Lack of consent is an essential element in marital rape. It is considered to be a form of domestic abuse and sexual abuse. Even though historically, sexual intercourse within marriage was considered to be a right of spouses, it is now widely considered to be wrong and has subsequently been criminalized in most nations. Marital Rape is predominantly faced by women, but there are also cases of men facing marital rape. There are also cases of marital rape occurring in same-sex marriages.

Marital Rape, historically, has always been an exception to any laws against rape. Sir Matthew Hale, in 1600 CE, stated that any sexual intercourse occurring within a marriage is already consensual as in marriage, the wife has already given consent to her husband and that she cannot ever retract it.<sup>1</sup> This law is extremely old and prejudiced and was made at a time when women were treated as a man's property. But this same archaic rule was widely accepted in the world until the 1970s when rape was accepted to be a crime against a woman's liberty and dignity, and rather than against her family's honour. After this change in ideology, many came

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<sup>1</sup>Spousal Rape: The Uncommon Law, American Bar Association Journal-Volume 66, Sep. 1980

to accept that sexual intercourse within marriage was not a right, and the consent of spouses was taken into consideration. This led to a widespread reform regarding marital rape in Europe, and eventually the whole world. Now, there are only thirty-six countries where marital rape is not criminalized.<sup>2</sup>

## MARITAL RAPE IN INDIA

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In India, Marital Rape isn't considered to be a crime, except if the partners are divorced. In the IPC, in section 375, which covers rape, there exists an exception which states that sexual intercourse between a man and his own wife will not be considered rape unless the wife is below 18 years of age. When questioned about the existence of this exception, the Government gave a very out of touch and conservative response, stating that sexual intercourse is a presumption in the contract of marriage and criminalizing marital rape will result in the degradation of family values and traditions.<sup>3</sup>

In India, the article of the Indian Penal Code that covers rape is Article 375, which by itself is an old and archaic law, as it does not consider the possibility of a man being raped by a woman. The exception to this law, i.e. Marital Rape, states that sexual intercourse between a man and his wife is not rape, as long as the wife is above eighteen years of age, and has only been amended to keep the age of the wife in the exception to the age of consent.

Another problem in India is that knowledge about marital rape in India is not widespread. Many women in rural areas do not even know that the abuse suffered by them is wrong and that they can take actions against their abusers. They simply carry on with life without the knowledge that what they suffer through is wrong or immoral. This lack of knowledge is because no government has taken significant steps to educate the country about marital rape. No knowledge of the fact that marital rape can be used to construe cruelty under Section 13 of the Hindu Marriage Act is made easily available to the people of rural India. This needs to change as spreading awareness amongst people would result in them understanding their sufferance and taking steps in order to prevent it from happening again.

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<sup>2</sup> Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016

<sup>3</sup> Why it's Still Legal for Indian Men to Rape Their Wives, The Swaddle, Jan. 20, 2020

## PROBLEMS CAUSED DUE TO MARITAL RAPE

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Marital Rape is often seen in relationships where physical violence and domestic abuse already exists. While rape by a stranger is highly traumatic, it is typically a one-time event after which the victim does not have to keep any contact with their rapist. According to psychologist Dr Marie Hartwell-Walker, Marital Rape adds trauma to an already traumatic relationship. The trauma from rape has severe long-term mental effects regardless of the fact that other abusive or traumatic practices already occur. It is usually not a one-time event and can be repeated or even frequent.<sup>4</sup>

Apart from this, in marital rape, the victim in many cases has to continue living with their rapist, as it is difficult to get a divorce in many countries and there are social stigmas against divorce. This means that many victims of marital rape, especially in underdeveloped nations, have to continue living with their rapists. This results in even more trauma because the victim has to live in constant fear of the act occurring again. Authors and researchers David Finkelhor and Kersti Yllö commented on this in 1987, saying “When a woman is raped by a stranger, she has to live with a frightening memory. When a woman is raped by her husband, she has to live with her rapist.”<sup>5</sup>

Marital Rape also results in the spread of Sexually Transmitted Diseases and causes unwanted pregnancies. This is a problem because the family might not have enough money to support a child, obviously, the spread of STDs is also a very big problem. In African nations such as Lesotho, the maximum percentage of Sexually Transmitted Diseases are spread through rape and almost half the rapes that occur in Lesotho are by a man against his wife.<sup>6</sup>

## HOW INTERPRETATION OF STATUTES CAN BE APPLIED TO MARITAL RAPE

### MISCHIEF RULE OF INTERPRETATION

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The mischief rule of interpretation has been in use since the sixteenth century. It is usually applied when the court looks into what mischief or problem a certain statute does not cover,

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<sup>4</sup> Marital Rape and Forced Sex, Psych Central, Feb. 1, 2020

<sup>5</sup> License to Rape: Sexual Abuse of Wives, Simon and Schuster Publications, 1987

<sup>6</sup> Marital Rape: History, Research, and Practice, JSTOR, Jul. 3, 2003

that the legislature intended to solve when passing the law. This rule was first established in Heydon's Case, which was decided in 1584.<sup>7</sup> The mischief rule seeks to establish 4 things-

**History of the mischief** - This will help understand how the problem has arisen.

**Analysis of existing laws** - To see whether any existing laws can be used in order to solve the problem.

**Analysis of international laws** - To see whether any international laws exist that can be used to solve the problem.

**Execution of remedy** - To find a remedy to the problem and use this remedy to overcome the problem.

**These 4 parts of the mischief rule can be applied to marital rape in the following ways-**

### 1. History of the Mischief

The Indian Penal Code or IPC was enacted in 1860 by the First Law Commission of India, which was chaired by Lord Thomas Macaulay.<sup>8</sup> Section 375 has existed as a part of the IPC since this time, and the exception of marital rape under section 375 has existed since this time. This exception has been amended various times, but only to change the age in the exception to be in line with the age of consent.<sup>9</sup> This was most recently done in the case of *Independent Thought vs Union of India*.<sup>10</sup>

This exception has been consistently in India's rape laws since it was included by the British in 1860, while Britain itself criminalized marital rape in a judgement in 1992, in which the House of Lords unanimously stated: "Nowadays, it cannot seriously be maintained that by marriage, a wife submits herself irrevocably to sexual intercourse in all circumstances."<sup>11</sup> India

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<sup>7</sup> 76 ER 637

<sup>8</sup> Act No. 45 of 1860

<sup>9</sup> Supreme Court Landmark Judgement- *Independent Thought vs Union of India*, October 11, 2017, Law News Network, Oct. 2017

<sup>10</sup> *Independent Thought vs Union of India* (2017) 10 SCC 800

<sup>11</sup> (1992) 1 AC 599

still continues to have archaic and backward laws regarding marital rape, despite there being petitions by women's rights groups for the criminalization of marital rape since the 1980s.<sup>12</sup>

Marital Rape is a widespread problem in India, especially in rural areas. According to the 2018 National Family Health Survey, more than 80% of women who have faced sexual assault have named their current spouse or partner as their abuser.<sup>13</sup> In a 2010 survey, 20% of Indian men have admitted to forcing their wives or partners to have sexual intercourse with them.<sup>14</sup>

Many Indians are very conservative, especially when it comes to traditions and customs such as marriage. They believe that sexual intercourse is the right of the husband and that consent is already implied with the contract of marriage. Haribhai Chaudary, a minister of state in the Ministry of Home Affairs said that marital rape cannot be made illegal in India because of high illiteracy, poverty, extreme religious beliefs, and the very 'sanctity' of marriage.<sup>15</sup> What can be interpreted from his statement is that because people consider marriage to be a sacred bond, consent in a matrimonial relationship is implied, and one need not seek consent from their spouse before engaging in sexual intercourse with them.

This, however, does not mean the entirety of India has such backward and conservative views with regards to marital rape. There have been many protests and petitions to have the marital rape exception redacted but to no avail. During a ruling in the Gujarat High Court, Justice J.B. Pardiwala said, on hearing a case about a man sexually assaulting and raping his wife, expressed his dismay about the backward laws that did not treat marital rape as rape. He advocated the criminalization of marital rape and said that making non-consensual sexual intercourse illegal was the first step in making society understand that inhuman treatment of females will not be tolerated. He also said marital rape should not be treated as a spouse's privilege, but as a violent act that should be illegal.<sup>16</sup>

This was also seen in the case of RIT Foundation vs Union of India, an ongoing case in the Delhi High Court. In this case, the RIT Foundation and the All India Democratic Women's Association challenged the constitutionality of Section 375 on the grounds that it failed to adequately protect married women from being sexually assaulted by their partners. The two-

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<sup>12</sup> Men can still rape their wives in India after new Government bill, Daily Telegraph, Mar. 2013

<sup>13</sup> Marital Rape: Survey takes lid off sexual violence by husbands, Live Mint, Jan 15, 2018

<sup>14</sup> International Men and Gender Equality Survey, International Centre for Research on Women, 2010

<sup>15</sup> Marriage Sacred in India, So Marital Rape Does Not Apply: Government, Press Trust of India, Aug. 30, 2015

<sup>16</sup> Gujarat High Court Underlines Need to Make Marital Rape Criminal Offence, Indian Express, Apr. 3, 2018



judge bench comprised of then -acting Chief Justice Gita Mittal and Justice C. Hari Shankar held that in a relationship like marriage, both men and women have a right to say 'no' to physical relations, further stressing that being married does not mean the wife is always ready for sex. Expanding the scope of rape to non-consensual sex within marriage, the bench further deemed it unnecessary to look for physical injuries and force when a victim accuses their spouse of rape.<sup>17</sup>

## ANALYSIS OF EXISTING LAWS

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Section 375 of the Indian Penal Code covers the crime of rape. This section consists of an exception, which exempts married men from being prosecuted under this section for the act of raping their wife, as long as the wife is above eighteen years of age. This exception has received a few amendments in the past, but the purview of these amendments was to keep the age of wives that are mentioned in the exception to be in line with the age of consent in the nation. None of these amendments has dealt with the overturning of this exception.

This however does not mean that marital rape has no legal consequences in India. Under matrimonial law, forced sexual intercourse can be treated as cruelty, which is a ground for separation or divorce.<sup>18</sup> But this is not enough, as in such cases, the rapist does not get the same punishment as someone who has committed the crime of rape, which carries a sentence of seven years extendable to ten years of imprisonment. In comparison, a husband who rapes his wife does not face any punishment under Section 376. Furthermore, if a husband who lives separately from his wife rapes her, he faces a punishment of two years of imprisonment, extendable to seven years

This is in violation of Article 14 of the Constitution. Article 14 of the Indian Constitution ensures that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."<sup>19</sup> Yet, Section 375 discriminates against women who have been raped by their own husband. According to the Supreme Court, in the judgements of *Budhan Choudhary vs State of Bihar*,<sup>20</sup> and *State of West Bengal vs Anwar Ali*

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<sup>17</sup> Marital Rape Case: Marriage Does Not Mean All-Time Consent for Sexual Relations- Delhi HC, Bar and Bench, Jul. 2018

<sup>18</sup> Section 13, Hindu Marriage Act, 1955

<sup>19</sup> Article 14, Constitution of India, 1950

<sup>20</sup> *Budhan Choudhary vs State of Bihar* AIR 1955 SC 191

Sarkar,<sup>21</sup> clarified that any classifications under Article 14 are subject to a test of reasonableness, in which the classification has to have a reasonable nexus to the objective that the act seeks to achieve.

Exempting husbands under Section 375 is an unreasonable classification since the consequences of rape for a woman are the same whether she is married or not. Being forced into having sexual intercourse is extremely traumatic, be it by your husband or by someone else. In fact, according to research by RAINN (Rape, Abuse, and Incest National Network), marital rape can be more physically and mentally damaging than rape by a stranger.<sup>22</sup> Moreover, in many cases, marital rape exists as a part of an already abusive relationship, and trauma from marital rape only adds to the trauma that already exists in the relationship. Marital rape is also a frequent act, and when repeated, only adds to the trauma.<sup>23</sup>

This exception can also be seen as a violation of Article 21 of the Constitution, which states the following: “No person shall be denied of his life and personal liberty except according to the procedure established by law.”<sup>24</sup> In the case of *State of Karnataka vs Krishnappa*,<sup>25</sup> the Supreme Court held the following: “Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion into the right of privacy and sanctity of a female.” In the case of *Suchita Srivastava vs Chandigarh Administration*,<sup>26</sup> the Court held that the right to make choices related to sexual activity was included under the ambit of Article 21. Recently, in the case of *Justice K.S Puttuswamy vs Union of India*,<sup>27</sup> the Court declared that decisional privacy also includes the ability to make intimate decisions related to procreation and sexual activity. This ability to make decisions also includes the decision of abstinence from such activity.

Another problem with marital rape only being included under cruelty as a ground for divorce is the stigma against divorce in India. Marital rape is a big problem in all of India but is especially prevalent in rural areas. 36% of women in rural areas face spousal rape, in

<sup>21</sup> *State of West Bengal vs Anwar Ali Sarkar* AIR 1952 SC 75

<sup>22</sup> *Intimate Partner Sexual Violence*, Rainn.org, 2013

<sup>23</sup> *Marital Rape, Hidden Hurt*, Jun. 2007

<sup>24</sup> Article 21, Constitution of India, 1950

<sup>25</sup> *State of Karnataka vs Krishnappa* (2000) 4 SCC 75

<sup>26</sup> *Suchita Srivastava vs Chandigarh Administration* (2008) 14 SCR 989

<sup>27</sup> *K.S Puttuswamy vs Union of India* AIR 2017 SC 4161

comparison to 28% of women in urban areas.<sup>28</sup> There is a considerable stigma around divorce in India, with the second-most populous nation in the world having the lowest divorce rate of all countries, only 1% in the year 2017, compared to 44% globally.<sup>29</sup> This stigma is only amplified in rural India. Having the only solution to the problem of marital rape be divorce results in a majority of victims stay in abusive relationships.

## ANALYSIS OF INTERNATIONAL LAW

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Marital Rape is a criminal offence in all European nations, South American nations, Oceanic nations, and all North American nations except Haiti. It is predominantly still legal in Africa and Asia. This criminalization started in the early 1960s. Second Wave Feminists worked systematically to have the marital rape exception overturned. This was a result of the reclassification of sexual crimes from being “crimes against morality, family values, honour, and chastity and good customs” to being “crimes against liberty, self-determination and physical integrity.”<sup>30</sup>

In December 1993, the United Nations High Commissioner for Human Rights published the “Declaration on the Elimination of Violence against Women”. This document established that marital rape was a violation of human rights. This resulted in a widespread criminalization of marital rape in many nations. However, many underdeveloped and developing nations do not consider it a criminal offence or have very ambiguous laws regarding it.<sup>31</sup>

In April 2015, the Ministry of External Affairs and the Ministry of Women and Child Development brought to attention that the United Nations Commission for Elimination of Discrimination against Women has recommended to India, among other things, to criminalize marital rape. The Law Commission of India, while making its 172<sup>nd</sup> Report on Review of Rape Laws, did not recommend the criminalization of marital rape, resulting in there being no proposal to repeal the exception.<sup>32</sup>

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<sup>28</sup> National Health and Family Survey 4

<sup>29</sup> Happily Divorced: Indian Women Are Breaking the Stigma Around Divorce Like Never Before, Jan 2017

<sup>30</sup> Worldwide Trends in the Criminal Regulation of Sex, From 1945 to 2005, American Sociological Review, Jan. 2010

<sup>31</sup> RESOLUTIONS, UN General Assembly 48<sup>th</sup> Session

<sup>32</sup> Home Ministry Refuses to Consider Marital Rape as Criminal, Economic Times, Apr. 29, 2015



## EXECUTION OF THE REMEDY

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The problem of marital rape can be solved by overturning the exception to Section 375. This can either be done by the legislature through an amendment or by the Court through a judgement. The Supreme Court has previously overturned archaic or outdated sections of the IPC, when, on the 27<sup>th</sup> of September, 2018, a five-judge bench of the Supreme Court ruled to scrap Section 497 of the IPC, which dealt with adultery as a crime.<sup>33</sup>

The Court has also changed the interpretation of certain outdated sections through their judgements and brought the IPC more in line with a more modern outlook. This was done by the Court in the case of Navtej Singh Johar vs Union of India,<sup>34</sup> in which the Court declared certain parts of Section 377 of the IPC, which dealt with consensual sexual intercourse between adults, unconstitutional, while other portions of Section 377 regarding sexual intercourse with minors, bestiality, and non-consensual sexual activity, remained in force. This judgement, in essence, decriminalized homosexuality in India.

Seeing that the Court has done this in the past, it can take up one of many petitions against marital rape, and overturn the exception made available in this archaic law since the 1860s. The Court has, in the past, taken decisions for changing sections of the IPC that are now outdated and not consistent with modern views of morality. The problem of marital rape is severe, and allowing it to be punishable only as cruelty is not morally correct. The traumatic consequences of marital rape on its victims is not less than that of rape by anyone else, there should not be a difference in punishment for such actions.

## CRITICAL ANALYSIS

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One of the problems with the criminalization of marital rape is the difficulty in proving it. Due to the nature of marriage, any cases involving this subject usually involve the word of the husband against the word of the wife, which becomes difficult to establish in a court. Another problem is that the criminalization of marital rape is open to misuse. Such misuse is harmful not only to husbands who can be wrongfully accused of this, but it also harms other women who suffer because of marital rape, as people hold less faith in their cases.

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<sup>33</sup> Adultery No Longer a Crime in India, BBC News, Sep.27, 2018

<sup>34</sup> Navtej Singh Johar vs Union of India WP (Cr.I.) No. 76 of 2016

## AUTHOR'S OPINION

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The author is of the opinion that marital rape should be criminalized in India. Marriage does not amount to consent and sexual intercourse with one's spouse without their consent should be considered rape. The author thinks the punishment for marital rape is not enough as it is nowhere near as severe as that for rape. The punishment of marital rape is that it can be counted as matrimonial fault and cruelty which can be used as grounds for separation or divorce. But this is not enough and even granting divorce or separation are up to the discretion of the ruling judge.

This seems severely inadequate as the punishment for rape is seven years of imprisonment, extendable to ten, and in severe cases, life imprisonment or death. Moreover, marital rape causes more mental and emotional damage than that caused by rape, and yet the punishment in India for marital rape is much less than that for rape. It is my opinion that this is a gross violation of spousal and human rights, and that, like many developed and developing countries, the punishment of marital rape should be the same as that for rape. I recognize the problems that can arise due to the criminalization of marital rape. But such problems are unavoidable as many laws can be misused, and it is up to the judiciary to prevent this. Just because some wives might misuse the criminalization of marital rape does not mean that all wives should suffer because of it.

Finally, awareness about marital rape should be spread, especially in rural India, where marital rape is common practice. Women should be made aware that they have the right to file for divorce if their husband forcefully tries to have intercourse with them. They should know that what is happening with them is wrong and that it is not necessary for them to engage in sexual intercourse at their husband's discretion. People should be made aware that their consent is the most important factor in sexual intercourse.

## CONCLUSION

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This paper discusses the concept of marital rape and its prevalence in India. The paper then discusses the problems that arise due to marital rape. It then talks about how the mischief rule of interpretation can be used to overturn the exception to Section 375. The paper first looks into the history of marital rape in India. Then it explores the statutes that govern the problem

of marital rape. Then it looks at certain contemporary international laws and statutes governing the same problem, and then includes a possible remedy for the problem in view of the previous analyses. The paper then discusses the flaws that might exist in such a remedy. Finally, it discusses the views of the author.

