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## Critical Analysis of Marital Rape in the Indian Legal Scenario

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*Despite the rising recognition of numerous penal laws in India over the last two to three decades, the concept of marital rape is still considered to be offensive. There is a need for unique legislation in India to address marital rape, which should also be consistent with international conventions on the subject. Women have been granted the right to fight for their rights, yet her husband, whom she married with complete faith, seeks to damage and torment her by having forcible intercourse without her consent, which eventually harms her health and well-being. There is no basis or relevance for the concept of total marital exemption in today's world. This article discusses criminalizing marital rape and how it should be recognized by law. The aim of the article is the distinction between marital rape and rape, and comparative research of two different nations have been conducted. Through this paper, we also get to know about the effect of marital rape on women and how exception 2 of Section 375 violates Article 21 and Article 14 of the constitution.*

**Keywords:** *marital rape, article 14 article 21, section 375, rape, wife, husband, consent.*

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### INTRODUCTION

Matrimony is a holy bond that brings together two people and their families. However, if the marriage is entered into without the consent of the individuals involved, or if the parties involved are dissatisfied with the marriage, it may end in divorce. In India, women were not accorded the same status as males and were considered the property of their fathers before

marriage and the property of their husbands afterward. The father was free to marry his daughter off to whoever he saw fit. To assure offspring and the continuance of the family line, the woman was forced to perform sexually for her husband, with or without her agreement. This led the lady to assume that being sexually available to her husband at all times was a must and a responsibility; she could never refuse her husband's demands. However, these rules were enacted a long time ago, when everything was socially acceptable.

Even after so many years of freedom, our country's women are still not truly free and independent. Despite India having been independent for 70 years, women in the country are still oppressed and lack true freedom and autonomy. Rape is a crime against women that destroys her dignity and self-esteem, and it degrades the woman to the position of a sexual object when it occurs inside the limits of a marital home. Marriage is regarded as a sacred social institution in India. The legal implications of a husband and wife's sexual activity are the most distinct aspects of their marriage. On the other hand, marriage has suddenly become a license to rape. How is it possible for a husband to be granted permission to rape his wife? Rape is rape. How can the institution of marriage be deemed sacred when women suffer physically, mentally, and emotionally while having no recourse? In the current context, it is the most contentious issue in India. To that end, the report investigated the concept of marital rape, current laws in India, court cases, and the necessity for marital rape laws to be reviewed.

## **MARITAL RAPE**

Marital rape, also known as spousal rape, is the act of having sexual relations with a wife without permission. Marital rape is a type of domestic violence and sexual assault. Some women assume that a woman cannot be sexually raped by her intimate husband, which leads to many victims being unaware of their sexual abuse. This is commonly referred to as one of the misconceptions about sexual assault against women. The most important factor is a lack of consent, which does not have to be physical assault.

The distinction between the two types of reluctant sexual behaviors is based on the idea that women might be persuaded to have sex without being physically pushed; for example, it can

happen as a result of verbal or emotional pressure. Some abusers compel sex by threatening to be unfaithful or depriving women of essential resources like money and food. They can also employ other methods of coercion, such as threatening to use physical force. All of these are methods used by abusers to exert control over their victims.

“**Exception 2 to Section 375**<sup>1</sup> protects husbands from prosecution by wives on charges of rape. As per law “Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape. Beyond 15 years of age there is no legal protection accorded to the wife except in cases when she is living separately under a decree of judicial separation or otherwise” i.e. Under Section 376B<sup>2</sup> of the amended IPC, if the husband forcibly has sexual intercourse with her without her consent under any custom or usage, the husband faces imprisonment of either description for a term not less than two years but not more than seven years.”

There is currently no law in India that prohibits marital rape. While the legislature in other nations has either criminalized marital rape or the court has taken an active role in recognizing it as a crime, the Indian judiciary appears to be in conflict with the legislation. The Karnataka High Court, in a single-judge bench led by Justice M Nagaprasanna, recently said “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’s wife’,” The “age-old...regressive” thought that “husbands are the rulers of their wives, their body, mind, and soul should be effaced,” the court said.

## **EFFECTS OF MARITAL RAPE**

Marital rape leaves physical, psychological, and mental health scars on a woman's life that have long-term consequences for her emotional and physical well-being. This section is subdivided into psychological and health difficulties that a woman may suffer during or after being raped.

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

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

**Physical effects** - Marital rape causes injuries to private organs, bruises, torn muscles, lacerations, fatigue, and fractures, among other things. During sexual violence, women who are subjected to physical violence, such as rape, face additional complications such as blackened eyes, broken bones, and wounds inflicted by any type of weapon. Miscarriages, infections, infertility, and the risk of diseases like HIV are all problems that women face as a result of marital rape.

**Psychological Effects** - Women who have experienced Marital rape have reported symptoms of despair, PTSD, fear, low self-esteem, rape trauma syndrome, and being sexually unstable, unavailable, or dysfunctional. When a woman marries, she is expected to satisfy her husband's sexual desires. It must have come as a surprise to any girl the first time she encountered this that such a thing could be demanded without her agreement. Any further events may have seemed horrible yet numb to her, but she knows it is pointless to resist or refuse to obey her lover. The woman is concerned that her family's reputation may be harmed. As a result, she feels compelled to preserve her family's name.

### **SECTION 375 OF IPC - RAPE**

Rape is defined as unlawful sexual activity, most commonly involving sexual intercourse, committed against the victim's will through force or the threat of force, or with an individual who is incapable of giving legal consent due to minor status, mental illness, mental deficiency, intoxication, unconsciousness, or deception. Rape is a social stigma that has existed for a long time. She is traumatized as a result of the experience; it is extremely difficult for a woman to recover from this trauma. Rape is a punishable offense in India. Rape is a crime that not only harms someone in the short term but also has the potential to destroy their whole life. When it comes to rape, numerous elements come into play, including the victim-offender connection, alcohol use, and a record. There are also numerous misconceptions concerning rape victims. Rape is a highly sensitive topic for women, both victims, and non-victims.

Section 375<sup>3</sup> of the IPC discusses rape and what activities might subject him to punishment under Section 376<sup>4</sup> of the IPC if committed by a man. Section 375 was in the IPC at the time of its enactment, but its scope was expanded following the Criminal Law Amendment of 2013. Previously, penetration of the penis into a woman's vagina, urethra, anus, or mouth was deemed rape. However, it is now deemed rape whenever a male enters any object or other part of his body into a woman's vagina, urethra, anus, or mouth. A man is considered to commit rape under Section 375 of the IPC, 1860:

*“if he enters his penis or puts, to any extent, any item or a portion of the body, other than the penis, into a woman's intimate part or manipulates any part of a woman's body under any circumstances:*

- 1- *against her will;*
- 2- *without her permission;*
- 3- *with her consent when her permission is acquired by placing her in fear of death or bodily harm, or when her consent is obtained when she is inebriated or in a condition of unsound mind, or*
- 4- *when she believes she is lawfully married to that person but he is not her spouse*
- 5- *When she is under the age of 18 or when is unable to communicate the consent.*

*This is rape. There are two exceptions under this Section; the second exception states that a man who does not engage in intercourse with his wife who is not under the age of 15 years is not said to have committed rape.*

*Section 376 provided for seven years of jail term to life imprisonment to whoever commits the offense of rape.”*

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<sup>3</sup> Indian Penal Code, 1860, s 375

<sup>4</sup> Indian Penal Code, 1860, s 376

## JUDGEMENT

While noting the acts of a husband to constitute rape under Section 375, the Gujarat High Court's Single Judge Bench in *Nimeshbhai Bharatbhai Desai v the State of Gujarat*<sup>5</sup>, stated that lawful marriage between the accused and the first informant saves the situation for the husband. "...the complainant is a legally wedded wife of the accused, the sexual intercourse with her or any sexual acts by accused would not constitute an offense of rape even if it was by force, violence or against her wishes." Though the Court made it clear that if a husband engages in sexual intercourse with his wife after the couple has separated, the act would be a violation of Section 376-B. "*By marriage, a woman gives irrevocable consent for her husband to have sex with her any time he demands it. If the husband lays an assault on her wife, then that would constitute an offense under the IPC. If the very same husband lays an assault and forces his wife to have sexual intercourse, he would be liable for assault but not for an offense of rape only because there is a valid marriage between the two.*"

In a recent *Chhattisgarh High Court decision*, it was decided in 2021 that "sexual intercourse or sexual act by a man with his wife, the wife not being under the age of eighteen years, is not rape."<sup>6</sup>

While shedding light on gender equality in a recent decision delivered on March 23, 2022, the High Court of Karnataka in *Hrishikesh Sahoo v the State of Karnataka*,<sup>7</sup> stated that women and men being equal under the Constitution cannot be made unequal by Exception-2 to Section 375 of the IPC. It is for lawmakers to ponder over the existence of such inequalities in law. For ages man donning the robes of a husband has used the wife as his chattel; [...] his crude behavior notwithstanding his existence because of a woman. A brutal act of sexual assault on the wife, even if committed by the husband, cannot but be classified as rape. Justice Krishna Iyer, In the case of *Rafiq v State of Uttar Pradesh*<sup>8</sup>, said that "A Murderer kills the body but the Rapists kill the soul". Exception-2 to Section 375 of the IPC cannot be used to

<sup>5</sup> *Nimeshbhai Bharatbhai Desai v the State of Gujarat* (2018) Criminal Misc. Application No. 26957/2017

<sup>6</sup> *Dilip Pandey v the State of Chhattisgarh* (2021) Criminal R. No. 177/2021

<sup>7</sup> *Hrishikesh Sahoo v the State of Karnataka* (2018) Writ Petition No. 48367/2018

<sup>8</sup> *Rafiq v State of Uttar Pradesh* (1981), AIR 559

make women and men unequal under the Constitution. It is up to legislators to consider the existence of such inequalities in the law. For ages, a man in a husband's robes has used his wife as a chattel; [...] his crude behavior notwithstanding his existence because of a woman.

## **VIOLATION OF ARTICLE 21 IN THE CONSTITUTION OF INDIA**

According to the Supreme Court's creative interpretation, the rights inherent in Article 21<sup>9</sup> include, among other things, the rights to health, privacy, dignity, safe living circumstances, and a safe environment. In *State of Karnataka v Krishnappa*<sup>10</sup>, the Supreme Court found that sexual violence is an unlawful infringement of a woman's right to privacy and sanctity, as well as dehumanizing conduct. Furthermore, the court said in the same decision that any non-consensual sexual intercourse constitutes both bodily and sexual assault. In the same decision, it was determined that non-consensual sexual intercourse constitutes bodily and sexual violence.

In the case of *Suchita Srivastava v Chandigarh Administration*<sup>11</sup>, the Supreme Court connected the freedom to choose a sexual activity with the rights to personal liberty, privacy, dignity, and physical integrity guaranteed by Article 21 of the Constitution. In *Justice K.S. Puttuswamy (Retd.) v Union of India*<sup>12</sup>, the Supreme Court recognized the right to privacy as a basic right of all people. The above-mentioned court ruling does not discriminate between married and unmarried women. As a result, it is generally applicable, and a woman's rights under article 21 do not end when she marries. The right to privacy includes "decisional privacy indicated by the freedom to make personal decisions principally involving one's sexual or procreative nature and decisions about intimate interactions." In all of these rulings, the Supreme Court has recognized the right of all women, regardless of marital status, to refrain from sexual activity as a fundamental right guaranteed by Article 21 of the Constitution. As a result, forced sexual cohabitation is a breach of the basic right guaranteed by Article 21.

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<sup>9</sup> Constitution of India, 1950, art. 21

<sup>10</sup> *State of Karnataka v Krishnappa* (1993) ILR 1994 KAR 89

<sup>11</sup> *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1

<sup>12</sup> *Justice K.S. Puttuswamy (Retd.) v Union of India* (2018) Writ Petition No. 429/2012

## VIOLATIVE OF ARTICLE 14

Violative of Article 14<sup>13</sup>: The Exception characterizes women into two groups depending on their marital status and prohibits males from committing crimes against their spouses. As a result of the Exception, married women might be harmed purely because of their marital status, whereas unmarried women are protected from the same offenses.

### *Arguments for marital rape*

Not criminalizing marital rape runs counter to India's other laws. In India, it is a felony to offend a woman's modesty or to do any conduct against her will or permission. Similarly, marital rape is something that occurs without her consent but is not a crime. Violates Article 14's right to equality and equal protection under the law, as well as Article 21's right to life and personal liberty. Society operates on the mistaken premise that if a woman is married, she is sexually bound to her partner at all times. Medically, when a wife has no desire for sexual intercourse but goes through the process, it harms both her physical and emotional health, breaching her fundamental right to live a healthier life. There are only countable incidents of marital rape that are reported since it is not recognized as a crime; only when it is recognized as a crime will we be able to determine its precise prevalence of it.

## CONCLUSION

Husbands and wives now have separate and independent legal identities under Indian law, and much current jurisprudence is particularly focused on women's protection. As a result, it is past time for the government to acknowledge this legal weakness and repeal Section 375 (Exception 2) of the IPC, putting marital rape inside the purview of rape laws. 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. Marital rape is considerably more terrible for a woman in this situation since she has to live with her abuser every day. Victims of rape are victims of violence, and the fact that the offender and the victim are married adds to the severity of the situation. The charge of rape cannot be dismissed and classified as forcible rape

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<sup>13</sup> Constitution of India, 1950, art. 14

resulting in domestic violence just because the accused is a husband and the victim is a wife. Individual autonomy is one of Article 21's most important prerogatives.

*“Whether a marriage or non-marital, rape is rape, and the victim is always a woman.”*