

# A Comprehensive Legal Analysis of Marital Rape in India

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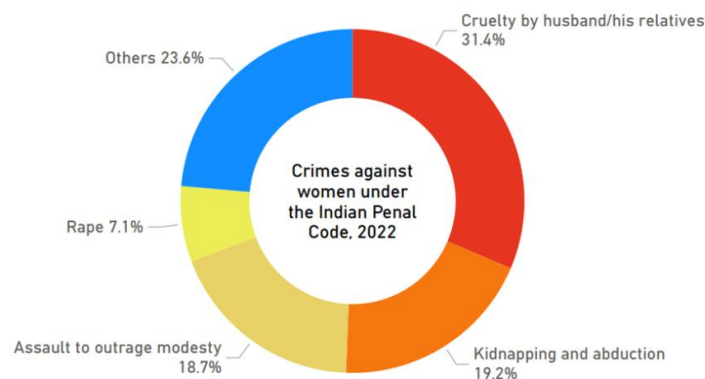
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**Abstract:** *The world, since the advent of mankind, has been run predominantly according to patriarchal setups barring a few notable exceptions. Indian society is a prime example, wherein, the biggest form of patriarchy has been witnessed in the institution of marriage, conferring the husband with an unequivocal right to his wife's body and demand for sexual intercourse whenever it pleases him. This paper significantly focuses on the violation of the fundamental rights of women guaranteed by the Constitution of India and the status of marital rape in India and different countries of the world. The woman has and still continues to be victimized by man and society. The patriarchal power structures have deemed marriage to be a license to legal unwilling sex. There is a total negation of the self worth of a woman. This paper talks about criminalizing the marital rape and it should be recognized by law that, whatever form the rape may be analysed. Any forceful sex without the spouse consent will amount to Rape. This paper also discusses about the identification of marital rape as different from Rape and a comparative study of laws is also presented.*

**Keywords:** patriarchal, marital rape, intercourse, laws, women's right

## I. INTRODUCTION

Rape is a situation where a "Man" commits an offence against a Woman and such offence involves a sexual violation. The offence Rape involves using of force against the woman and having sexual intercourse. Such an act is a clear violation of the individual autonomy and privacy of the woman. Under Indian Constitution it is, therefore, a clear violation of Article 21 which is one of the most cherished Fundamental Right under Indian Constitution. Rape is described as one of the most heinous crimes around the whole world as it involves not only violation rather also the violation of Woman's dignity and sanctity. It is considered as scar on human race as such a violation against Woman is surely a stigma upon the human race.



**Fig. 1 Crimes against women under IPC**

As in figure 1 above various types of crimes against women covered under IPC are shown. Of the crimes against women approximately 31.4% the family members specifically husband and his relatives are held accountable. The majority of crimes against women were categorized as cruelty by husband or relatives, making up 31.4% of cases.

Kidnapping and abduction of women constituted 19.2%, assault with intent to outrage modesty accounted for 18.7%, and rape was reported in 7.1% of cases.

Similarly, “Marital Rape” is a condition where a Husband uses force against the will of his Wife in order to have sexual intercourse. This situation also implies violation of individual autonomy of the Wife but still in many countries marital rape has not been made punishable. The reason behind such leniency is the marriage in many societies has been considered as the pious institution and it is believed that if such an act is been made punishable then the sanctity of institution of marriage itself will be in danger. In countries like India, where the whole society tends towards protection of such an institution and always prefers to avoid breakdown of marriage it is very much likely that situations like marital rape could not be accepted as offence, so easily. In countries, where there is a diversified culture prevailing all along the country it is found to be impracticable to make situation of “Marital Rape” to be an offence. And if it is done then the institution of marriage would be at risk of breaking down. Also there is a theory of “implied consent” prevailing which provides that there is a implied consent to have sexual intercourse with each other among husband and wife. But the issue lies with use of “force” and “against the will of wife”, these two elements could not be justified and so the legality of such an act would always be questioned.

Any violation of women’s sexual sanctity & dignity<sup>1</sup> is manifestly found to be against equity, justice and good conscience. It was held in K.S. Puttaswamy(retd.) vs. Union of India that right to privacy lies at the core of Article 21 and it is related to individual autonomy of every person and individual autonomy includes individuals dignity and sanctity. So in cases where there is a violation of sexual sanctity and individual autonomy there is a clear breach of Article 21 of the Indian Constitution.

From the above facts it may be concluded that cases of marital rape would certainly include the case of violation of Article 21. With the perusal of facts and circumstances prevailing in the society, it is very much evident<sup>2</sup> that there is clearly conflict between Constitutional morality and social morality. On one side there is violation of individual autonomy affecting the way of life of a woman and on the other side society needs to protect the institution of marriage so that situation of vagrancy and destitution does not arises.

As per S.375 IPC, a man is said to commit rape of a woman when he has sexual intercourse with her against her will, without consent, when she has a fear of death, getting hurt, she believes that with her consent when the man knows<sup>3</sup> that he is not her husband, and her consent is given as she believes that he is another man to whom she is or believes to be law- fully married to, she is intoxicated or is of unsound mind, is under the age of 16 with or without consent.

As per S.376 IPC, any person accused of committing rape is punished with imprisonment of not less than 7 years, that may extend<sup>7</sup> to life or for a term stretching upto 10 years and shall also be liable to fine unless the victim is his own wife, and is not under 15 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

But, the biggest drawback of these sections is its exception that sexual intercourse with wife by her husband, where wife is not under age of 15 is not considered as rape.

Rape of wife during judicial separation was criminalized as per amendment of IPC. By not criminalizing marital rape, law is providing a security blanket over men. Due to this, men tend objectify women and consider them as their property. Many women due to family pressure, social strain, and fear of getting kicked out of home or becoming financially unstable, do not report this offence and also due to the fact there is not a properly established law to punish the prosecutrix.<sup>5</sup> Marital rape is considered as a form of domestic violence as per Protection of Women form Domestic Violence Act, 2005.

The patriarchal society governing Indian communities has regarded women as properties of men. This framework of ideology has conditioned our legislators<sup>6</sup> to overrule the abuse of marital rape by protecting men giving the reason of the marriage right and that females are merely a tool for their better half’s sexual gratification without their consent.

1. Vaishali Bansal & Soumali Roy, All you need to know about marital rape, Blog. ipleader, 19. May.22, 9:45 pm,
2. Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches,39 Vanderbilt law Review481(2021),
3. Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, 39 VanderbiltLawReview481(2021),pg.483

### **Health consequences of sexual violence in marriage**

There is strong evidence in the literature to indicate that marital rape leads to severe physical, sexual, reproductive, and psychological health consequences. As women are abused multiple times by a person they trusted, the consequences of marital rape on women's health are grave.

Health consequences include an increased risk of getting sexually transmitted or reproductive tract infections (STIs/RTIs) and HIV/AIDS due to forced sex and the wife's inability to negotiate the use of condoms by her husband. It is evident from the literature that men who inflict violence on their spouses are more likely to engage in sex outside marital relationships, have sexually transmitted infections, and thus pose an increased risk for their spouses through sexual coercion. Further, sexual violence has also been found to be associated with stillbirths, pelvic inflammatory diseases (PIDs), poor access of women to prenatal care, and attempted suicides by women.

“Women aren't safe, before or after marriage.

Marriage is sometimes a license or a legal way to rape.”

“‘I do', doesn't mean ‘I will’ everytime he'd ask for it.”

Women facing domestic violence were found to be 2.59 times more likely to experience perinatal and neonatal mortality in a study conducted in North India among 2199 pregnant women.<sup>Citation8</sup> A study by Johri et al. recommended that reproductive health services must include screening for spousal violence as they found an association between miscarriage and violence faced by women from an intimate partner.

### **Legal Position In India**

It's 2025 and India remains one of 36 countries where it is not a crime for a man to rape a woman “as long as they are married.” Despite the revolutionary legal reforms undertaken over the last century and half which have led to several rights being granted to women and wives specifically, the law and the lawmakers have surprisingly remained silent over the issue of overturning the marital rape exemption for husbands.

As per the Constitution of India, every law that is passed in the country has to be in conformation with the principles and ideas enshrined in the Constitution of India. Any law that fails to meet this standard is considered ultra vires and is liable to be struck down by the Courts and declared unconstitutional. When we look towards the constitution of India, we find Article 14 that provides equality before law for women or we can say that all are equal before law. Article 15(1) mandates the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

But regarding marital rape women in India are not being treated equal. Equal treatment of law is not being provided to the victims of marital rape. Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape.

Article 21 of the Constitution of India provides right to live with dignity. But marital rape clearly breaches the right of a married woman to live with dignity. Or in other words we can say that section 375 of IPC violates Article 21 of the constitution regarding marital rape.

### **Key Legal Issues**

The marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time. The right to live with human dignity is one of the most inherent qualities of the right to life that recognizes the autonomy of an individual. The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape.

5. *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence.*

6. *United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women.*

7. *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence.*

1. Consent: The issue of consent is central to marital rape cases<sup>8</sup>. Courts must determine whether the spouse consented to the sexual activity.
2. Coercion: Marital rape cases often involve coercion, which can take many forms, including physical, emotional, or economic coercion.
3. Power dynamics: The power imbalance within a marriage can make it difficult for a spouse to refuse sexual activity or report non-consensual sex.
4. Evidence: Marital rape cases can be challenging to prosecute due to the lack of physical evidence and the often-private nature of the crime.

The Indian Penal Code ('IPC') in Section 375 criminalises the offence of rape. It is an expansive definition that includes both sexual intercourse and other sexual penetration such as oral sex within the definition of 'rape'<sup>viii</sup>. However, in Exception 2, it excludes<sup>9</sup> the application of this section on sexual intercourse or sexual acts between a husband and wife. Thus, a wife under Indian law does not have recourse under criminal law if a husband rapes her.

The wording of S.375 of the IPC on account of the Criminal Law (Amendment) Act, 2013 are: "375. A man is said to commit "rape" if he- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent.

The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation, as per Section 376A. Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. This section indicates that in S.375 of the IPC consent is presumed, which is not so here since the husband and wife are not living together. Living together raises a presumption that the wife has consented to sexual intercourse by the husband.

**Prominent cases of marital rape in India** are few and far between, given the lack of explicit legislation criminalizing the act. However, here are some notable cases that have contributed to the ongoing debate:

*Sakshi vs. Union of India (2004)*: In this case, an NGO filed a public interest petition seeking judicial directions to interpret the term 'sexual intercourse' liberally and include all types of penetrative sexual assault within the definition of rape. Although the Supreme Court refused to entertain the petition, it issued directions to make trial procedures more victim-friendly.<sup>1</sup>

8. *Vaishali Bansal & Soumali Roy, All you need to know about marital rape, Blog. ipleader, 19. May.22, 9:45 pm.*

9. *Justice K.S Puttaswamy (2017) 10 SCC 1 50 Marital rape and violation of constitutional provision, supra note.*

10. *Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.*

Independent Thought vs. Union of India (2017): This case involved an NGO challenging Exception 2 to Section 375 of the IPC, which exempted husbands from being prosecuted for raping their wives aged between 15 and 18. The Supreme Court struck down this exception, making sexual intercourse by a husband without the consent of his wife (who is under 18) a crime.

Delhi High Court Split Verdict (2022): In response to petitions urging the court to strike down Exception 2 to Section 375, the Delhi High Court delivered a split verdict. While the judges differed in their interpretation of the exception clause, the case highlighted the ongoing debate around criminalizing marital rape in India.

These cases demonstrate the gradual shift in India's judicial approach to addressing marital rape, despite the absence of explicit legislation.

### **Lacunae In Indian Law**

- A husband can't be punished for raping his wife because consent to matrimony presupposes consent to sexual intercourse.
- The exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. It's submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution.
- Domestic Violence Act, 2005 also kept marital rape out of its purview. It disregards sexual abuse only if it threatens life or is capable of causing grievous hurt; it has nothing to do with the freedom or want of a woman.

Provisions of divorce under Hindu marriage Act, 1955 includes rape as one of the grounds available to women for claiming divorce from husbands, but only when the husband, on some other woman and not on his wife, committed such rape. • Marital rape no doubt clearly violates the right to live with dignity of a woman and to that effect, the Exception 2 to Section 375 is also a violation of Article 21 of the Indian Constitution.

### **Suggestion**

1. Marital rape should be criminalised in India also and Exception 2 of section 375 of Indian Penal Code be remove.
2. Marital rape should be considered as crime with differentiating married and unmarried women.
3. Indian Penal Code should be amended.
4. While deciding the case of marital rape there should be at least one women judge in the penal while deciding the case.
5. The offence of marital rape should be considered as a valid ground for divorce under all personal laws.

## **II. CONCLUSION**

Marital rape is a serious human rights violation that affects millions of people worldwide. While the legal framework surrounding marital rape varies across jurisdictions, it is essential to recognize the importance of consent, coercion, and power dynamics in these cases. International human rights law provides a framework for protecting spouses from non-consensual sexual activity, and countries must work to strengthen their laws and enforcement mechanisms to prevent and prosecute marital rape. Therefore, researcher would like to submit that marital rape should be criminalised and Exception 2 of section 375 should be removed.

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