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# **AN EXAMINATION OF THE LAWS RELATED TO MARITAL RAPE IN INDIA**

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## **ABSTRACT**

Most countries consider marital rape to be a crime, but India is one of the 30 or so countries where it is not. The patriarchal discourse in society has given rise to the grounds for "marital immunity" from rape prosecution. According to this, a husband cannot be held liable for a rape committed against his lawful wife because she has given up herself in this manner to her husband through their mutual matrimonial consent and contract, which she cannot revoke.

Section 375 of the Indian Penal Code, also known as the "marital rape exception," exempts forceful sexual intercourse by a man with his own wife from the offence of rape if the wife is over the age of 13<sup>1</sup>. This exception clause violates women's fundamental rights to equality, freedom of expression, and, most importantly, life and personal liberty.

It also denies women agency over their own bodies. This paper seeks to understand the fundamental issues and consequences of having marital rape de-criminalized in India.

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<sup>1</sup> Indian Penal Code, 1860, Section 375, Acts of Parliament, 1860 (India)

## Introduction

The act of sexual intercourse with one's spouse without the partner's consent is known as marital rape or spousal rape. The absence of permission is the most important factor, and it does not have to include physical violence. According to the World Health Organisation, Sexual violence is defined as: "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."<sup>2</sup>

Section 375 of IPC defines rape, "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age."<sup>3</sup> Thus, we can understand that there are two elements that are required to constitute as rape, and that is if the act was done against her will and without consent. Where consent is the most important element to determine the sexual intercourse as rape. The exception to this is when a man has Sexual intercourse with his own wife who is above the age of 18, this is not considered as sexual assault.

## The current status of a married women in India

The National Family Health Survey (NFHS) also showed that sexual violence is most often committed by people with whom women have a close relationship. According to the 2019-21 NFHS survey, 83 percent of ever-married women aged 18-49 who have ever suffered sexual assault blame their present husband and 13% blame a prior husband<sup>4</sup>. National Crime Records Bureau's (NCRB) 'Crime in India' 2019 report, about 70% of women in India are victims of domestic violence<sup>5</sup>.

According to the latest National Family Health Survey conducted by the Indian government, approximately 30% of Indian women aged 18-49 reported having experienced spousal violence. According to a survey of 724,115 women, the average Indian woman is 17 times

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<sup>2</sup> Violence against women, World Health Organization, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (last visited May 22, 2022).

<sup>3</sup> Indian Penal Code, 1860, Section 375, Acts of Parliament, 1860 (India)

<sup>4</sup> National Family Health Survey, <http://rchiips.org/nfhs/> (last visited May 22, 2022).

<sup>5</sup> National Crime Records Bureau, <https://ncrb.gov.in/en> (last visited May 22, 2022).

more likely to face sexual violence from her husband than from anyone else. Based on data from 26 states (data from Tamil Nadu, Arunachal Pradesh, Odisha, and union territories other than Jammu and Kashmir were unavailable on the NFHS-5 portal), nearly 4% of women reported experiencing sexual violence in their marriage "often" or "sometimes."<sup>6</sup>

However, the percentage was significantly higher in Karnataka (9.7%), Bihar (7.1%), West Bengal (6.8%), and Assam (6.1 per cent). In Karnataka, the percentage of women who reported sexual violence in their marriage increased from 6.3 percent to 9.7 percent when compared to NFHS-4 data from 2015-16. In Bihar, however, the percentage dropped from 12.2 percent to 7.1%.<sup>7</sup>

The exception for marital rape is an affront to the constitutional goals of individual autonomy, dignity, and gender equality enshrined in fundamental rights such as Article 21<sup>8</sup> (the right to life) and Article 14 (gender equality) (the right to equality)<sup>9</sup>. The Supreme Court ruled in *Joseph Shine v. Union of India* (2018)<sup>10</sup> that the offense of adultery was unconstitutional because it was based on the principle that a woman is her husband's property after marriage. The marital rape exception reveals a similar patriarchal belief: that when a woman marries, she gives up her right to personal and sexual autonomy, bodily integrity, and human dignity.

A lot of women were and are continually subjected to abuse by their spouse and her close family. There is an issue that is hiding behind the closed doors of a protective institution of marriage. There is a lot that a woman faces, just because there is belief that a married woman is under the ambit of the powers of her husband. This fact allows for much abuse and sexual violence towards women.

### **Implied consent**

Traditionally, the subject is given as a woman's implicit consent to sexual activity with her husband at the time of marriage. The question is what exactly is a wife consenting to in marriage to her husband. Our laws do not define what may constitute consent in marriage, and

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<sup>6</sup> National Family Health Survey, <http://rchiips.org/nfhs/> (last visited May 22, 2022).

<sup>7</sup> National Family Health Survey, <http://rchiips.org/nfhs/> (last visited May 22, 2022).

<sup>8</sup> INDIA CONST. art. 21

<sup>9</sup> INDIA CONST. art. 14

<sup>10</sup> WRIT PETITION (CRIMINAL) NO. 194 OF 2017

thus it is very difficult to navigate through the field of consent in the context of marriage when we assume that there is an implied consent in the constituency of marriage. It is commonly perceived that when a woman says “no”, what she means is “maybe”, she can be assumed to be “playing hard to get”, or even a “yes”. This is a misconstrued conception that is popularly circulated in our society, this coupled with the norm of an implied consent in marriages, leads to marital rape.

Our societies need to understand that marriage is a contract based on faith, love, friendship, trust, compassion, and sharing. This definitely includes sexual intercourse between two spouses. We must acknowledge that sexual intercourse is also a source of joy for both parties involved. Seeing such a marriage contract, in which a woman is said to have implicitly agreed to sexual intercourse, raises the question of how we interpret the exception to section 375<sup>11</sup>.

and wife under the “Doctrine of Coverture<sup>12</sup>.” The marital exception to the IPC’s definition of rape was drafted on the basis of Victorian patriarchal norms that did not recognize men and women as equals, did not allow women who were married to own property, and they had to merge their identity with that of their husband.

### **The Court’s stance**

In the case of *RIT Foundation v. UOI and other connected matters*<sup>13</sup>, popularly known as the Delhi High Court marital rape case. The split judgment of this case has left the country divided. Justice Shakti, who had headed the division bench, was in favor of striking down the exception to marital rape for being “unconstitutional” and noted that it would be “tragic if a married woman’s call for justice is not heard even after 162 years” since when the IPC was enacted. Justice Shankar had opposing views, where he noted that rape law is not “unconstitutional and was based on an intelligible differentia”.

The Chhattisgarh High Court ruled in a criminal case brought by a woman accusing her husband of “unnatural sex” and raping her with objects. The court decreed that “sexual intercourse or any sexual act by a husband with his wife would not constitute rape even if it was by force or against her will.” The court based its decision on the exception set forth in

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<sup>11</sup> Indian Penal Code, 1860, Section 375, Acts of Parliament, 1860 (India)

<sup>12</sup> Coverture, Encyclopædia Britannica, <https://www.britannica.com/topic/coverture> (last visited May 22, 2022).

<sup>13</sup> Citation: 2022 LiveLaw (Del) 433

Section 375 of the Indian Penal Code<sup>14</sup>, which states that any act of sexual intercourse between a man and his wife, provided the wife is not under the age of 18, does not constitute rape, thus ignoring the elements of will, consent, and health of the women. It is only a crime if the wife is under the age of 18.

In a civil case, the Kerala High Court ruled that "a husband's licentious disposition disregarding the autonomy of the wife is a marital rape, albeit such conduct cannot be penalised."<sup>15</sup> However, as espoused in Section 13(1)(ia) of the Hindu Marriage Act, physical and mental cruelty can be a valid ground for divorce. In the obiter dictum of the judgment the court noted that "Autonomy is now considered as a part of privacy and ennobled as a fundamental right. ... In a changed scenario of marriage in the society, shifting from the social philosophy to individual philosophy, we are afraid whether the present divorce law on enumerated grounds would stand to the test of constitutionality."

In a more recent decision, JUSTICE M. Nagaprasanna of the Karnataka High Court issued a significant order upholding a Sessions Court order framing a rape charge against the husband considering that Exception to Section 375 of the IPC exempts the husband from the scope of the rape offence. Justice Nagaprasanna ruled that the husband's exemption from rape cannot be absolute, because no legal exemption is so absolute that it becomes a licence to commit a crime against society<sup>16</sup>.

The case facts are completely relevant. The wife had filed a complaint alleging that she had become a sex slave to her husband from the day they married, and that he had compelled and forced her to have unnatural oral and anal sex by imitating pornographic films. He was also accused of sexually harassing their daughter, according to her. This complaint was converted into a First Information Report for offences under Sections 506 (criminal intimidation)<sup>17</sup>, 498A (husband or relative of husband subjecting a woman to cruelty)<sup>18</sup>, 323 (punishment for voluntarily causing hurt), and 377 (unnatural offences)<sup>19</sup> of the IPC, as well as Section 10

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<sup>14</sup> Indian Penal Code, 1860, Section 375, Acts of Parliament, 1860 (India)

<sup>15</sup> XXX vs XXX in Mat. Appeal No. 179 of 2015

<sup>16</sup> WRIT PETITION No.48367 OF 2018 (GM-RES)

<sup>17</sup> Indian Penal Code, 1860, Section 506, Acts of Parliament, 1860 (India)

<sup>18</sup> Indian Penal Code, 1860, Section 498A, Acts of Parliament, 1860 (India)

<sup>19</sup> Indian Penal Code, 1860, Section 377, Acts of Parliament, 1860 (India)

(punishment for aggravated sexual assault) of the Protection of Children from Sexual Offenses Act<sup>20</sup>.

The court charged the accused husband with violating Section 376<sup>21</sup> of the Penal Code, as well as other offenses. Section 498A<sup>22</sup>, for cruelty by a husband against his wife, was one of the sections under which the complaint was filed. Surely, a woman who accuses her husband of cruelty must be deemed to have withdrawn her deemed consent. The court pronounced in their judgment that

“The submission of the learned senior counsel that the husband is protected by the institution of marriage for any of his acts being performed, as is performed by a common man, again sans countenance, for the reason that institution of marriage does not confer, cannot confer and in my considered view, should not be construed to confer, any special male privilege or a license for unleashing of a brutal beast. If it is punishable to a man, it should be punishable to a man albeit, the man being a husband”<sup>23</sup>. The law declared here must therefore mean that a wife does not give “implied consent” to brutal sex by the husband.

In the *Suchita Srivastava v. Chandigarh Administration*<sup>24</sup>, the Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.

In *Justice K.S. Puttuswamy (Retd.) v. Union of India*<sup>25</sup>, the Supreme Court recognized the right to privacy as a fundamental right of all citizens. The right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.

In all these judgements the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution. Therefore, forced sexual cohabitation is a violation of the fundamental right under article 21.

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<sup>20</sup> Protection of Children from Sexual Offenses Act, 2012, Section 10, Acts of Parliament, 2012 (India)

<sup>21</sup> Indian Penal Code, 1860, Section 376, Acts of Parliament, 1860 (India)

<sup>22</sup> Indian Penal Code, 1860, Section 498A, Acts of Parliament, 1860 (India)

<sup>23</sup> WRIT PETITION No.48367 OF 2018 (GM-RES)

<sup>24</sup> (2009) 9 SCC 1

<sup>25</sup> (2017) 10 SCC 1

## Way Forward

Violence against women is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life." The UN Committee on the Elimination of Discrimination Against Women (CEDAW)<sup>26</sup> recommended to the Indian government in 2013 that marital rape be criminalised. The same was recommended by the JS Verma committee, which was formed in the aftermath of nationwide protests over the December 16, 2012 gang rape case<sup>27</sup>.

Women will be safer from abusive spouses, will be able to receive the help they need to recover from marital rape, and will be able to save themselves from domestic violence and sexual abuse if this law is repealed. Husbands and wives now have separate and independent legal identities under Indian law, and much modern jurisprudence is explicitly concerned with the protection of women. As a result, it is past time for the legislature to address this legal flaw and bring marital rape within the purview of rape laws by repealing Section 375 (Exception 2) of the IPC.

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<sup>26</sup> Committee on the Elimination of Discrimination Against Women, OHCHR (2022), <https://www.ohchr.org/en/treaty-bodies/cedaw> (last visited May 22, 2022).

<sup>27</sup> Mukesh and Anr. Vs NCT Delhi (Nirbhaya Case)(2017) 6 SCC 1

<sup>28</sup> Indian Penal Code, 1860, Section 375, Acts of Parliament, 1860 (India)