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## MARITAL RAPE – AN UNDEFINED CRIME IN INDIA

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### ABSTRACT

Both men and women should have equal significance and function in the development and progress of humanity, yet women have always been exposed to a great deal of humiliation by men; rape is an excellent example of atrocities perpetrated against women's dignity. Marital rape is one of the most contentious and divisive problems in India, despite the fact that it is not considered a crime. Since the dawn of time, women have been viewed as objects of pleasure. In recent years, as the public fights for equal rights for men and women, the prevalence of crime against women has risen dramatically. Rape is a crime that causes pain to women all around the world. India focuses on protecting and preventing crimes against women, but it fails to protect a married woman from her rapist, who is often her husband, because there are no legal provisions that recognize marital rape as a crime. The crime of marital rape must be made illegal immediately. India is the world's seventh biggest country, and the rate at which crime rates are rising is worrisome and humiliating for a prosperous, multi-cultural, huge, and secular nation like India.

Marital rape is not only the most pressing issue in the sphere of women's rights at the time, but it also breaches a number of constitutional requirements. In this article, researcher would want to outline the breadth of marital rape in India, as well as the laws that it breaches. An examination of why it hasn't been legalized yet but recently Kerela High Court discover marital rape as a valid grounds for divorce. This article also aims in-depth discussion of many forms of marital rape, as well as a proposal and conclusion.

*Keywords – Marital rape, Non - Criminalized, Laws, Types, Divorce, Crime.*

## INTRODUCTION

The term "marital rape" refers to rape perpetrated by the victim's husband. The definition of rape remains the same when there is no consent, sexual intercourse or sexual penetration occurs.<sup>1</sup> As a result, proving that the act committed is against her will and consent. The burden of proof for lack of consent is frequently placed on the victim. When the victim and the offender are married, this assumption is common. In such cases, the concept of marital rape becomes diametrically opposed. Only fifty-two nations have laws that recognize marital rape as a crime. Marital rape is not an offence by law or culture in many places across the world, including India unless the wife is under fifteen years.<sup>2</sup> Even though nations recognize rape as a crime with consequences, they exclude the victim and perpetrator from the law's applicability if the victim and perpetrator are married. This is sometimes referred to as the 'marital rape exemption clause.' It has been stated that a country's worth may be determined by the status it accords to women. In India, women have never been valued, and their status is still not what it should be. Women have traditionally been regarded inferior to males in India, resulting in the country's development as a society based on male chauvinist ideas.

In India, the concept of marriage as a "sacred" institution is diametrically opposed to women's perceptions of reality. The horrible truth of crimes like marital rape, domestic abuse, and so on is hidden under the iron curtain of marriage. Marital rape is currently not only the main concern in the sphere of women's rights, but also simultaneously breaches numerous articles of the constitution. Whether marital rape should draw penal acts or should be considered simply as a part and piece of marriage as a wider institution is an issue for anyone in the globe. The problem is whether the provisions of the Indian Constitution and the Indian Penal Code clearly guard marital rape, or the stated laws reject the illegality of marital rape.

In the second part of the 20th century the notion of marital rape gave international importance and momentum. International bodies began working on the notion of marital rape, therefore eliminating the dark and covert violence against married women. International pacts and regulations have therefore been established to prove null and void marital rape yet, in certain countries, they remain a part and parcel of the marriage structure. The fact that a husband had

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

<sup>2</sup> Raveena Rao Kallakuru & Pradyumana Soni, Criminalisation of Marital Rape in India : Understanding its Constitutional, Cultural & Legal Impact, 11 NUJS L. Rev.1 (2018) (Sep 7, 2021, 8:40 AM). <http://nujlawreview.org/wp-content/uploads/2018/01/11-%E2%80%931-%E2%80%93Raveena-and-Pradyumna.pdf>.

the right to have sexual intercourse with his Spouse in Ancient India was supported by legal and societal support. In this connection, this is rather a patriarchal claim.<sup>3</sup> But it is impossible to blame the central government alone for such an abominable and gruesome crime against women, considering the very patriarchal and male-dominated establishment of the Indian culture we live in. Society itself empowers its males to perpetrate such atrocities and eventually get away with them. The domestic violence is part of marital rape itself. It is a technique of controlling the thoughts, ideas, body and mind of another person. It encroaches upon the right of a person to privacy and the right to a decent living.

### MEANING OF MARITAL RAPE

Marital rape refers to the sex between a man and a woman who is legally recognized as husband and wife, when the woman doesn't agree. Marriage also provides the husband and the wife the right to complete their wedding properly. Marriage is a solid partnership, when a man and a woman can have children socially, meaning their entitlement to sexual intercourse. Marital rape is also known as spousal rape or prisoner partner rape. The differences between rape and marital rape must be understood first, since both phrases have a different significance and cannot be interchangeably employed. The word rape's dictionary term is the ravishing or breach of a woman. The definition of rape established by FBI is summarized by the words: 'Penetration of the vagina or anus, no matter how minor, in any body part or object, or oral insertion by another person's sex organs, without the victim's permission.'

The definition "rape" under Section 375 of the Indian Penal Code of 1860 indicates that if sex with a woman is against or without her consent, it would become violation. If the woman's agreement is gained by coercion or a serious harm or death arrest, it will also be termed rape.<sup>4</sup> If a guy makes the woman think fraudulently that he is her spouse and has a relationship with her, then this is also rape. If a man has a sexual relationship with a woman who cannot offer permission because of a lack of health, then it will also be a violation. Sex with a girl under the age of eighteen is also known as rape even when the girl agrees. Section 375 of the Indian Penal Code (IPC) provisions on rape reflects very archaic feelings, which are stated as an exception- "Sexual intercourse between a man and his wife is not rape"<sup>5</sup> The rights of the husband over his wife are obviously preferred over the rights of the woman to herself. It can be seen plainly

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<sup>3</sup> Sneha Mohanty, Introduction, Paper on Marital Rape ( Sep 7, 2021, 8:58 AM )  
[https://www.researchgate.net/publication/336170675\\_Paper\\_on\\_Marital\\_Rape](https://www.researchgate.net/publication/336170675_Paper_on_Marital_Rape) .

<sup>4</sup> The Indian Penal Code, 1860, S 375.

<sup>5</sup> The Indian Penal Code, 1860, S 375.

that a woman is not raped by her husband, as long as she is over 15 years old, save for this part. The Indian Penal Code just ignores an atrocity like marital violation by not providing for it. The judge in one of the case remarked "Advocate of the defense properly contended that the notion of marital rape was not recognized by the IPC. If the accused's wife were lawfully married, their sexual intercourse with the would not constitute a violation, although by force or against her desires." <sup>6</sup>

## **TYPES OF MARITAL RAPE**

Legal scholars have recognized the following three types of marital rape as being widely frequent in society :

- **Battering rape:** In battering rapes, women are subjected to physical and sexual abuse in their relationships, which manifests itself in so many ways. Some women are assaulted during the rape, or the rape may occur after a physically violent event in which the husband attempts to make amends by forcing his wife to have sex against her will. The vast majority of victims of marital rape fall under this group.
- **Rape committed solely by force:** Husbands employ just the amount of force necessary to compel their wives in what is known as force-only rape; beating may not be a feature of these marriages. The attacks usually occur after the lady has declined to engage in sexual activity.
- **Sadistic or obsessive rape:** Other women are subjected to what is known as sadistic or obsessive rape, which involves torture and/or bizarre sexual activities and is frequently physically violent.<sup>7</sup>

## **LAWS GUARDING MARITAL RAPE IN INDIA**

### **Article – 21 ( Right to life and live with dignity )**

The Right to Life is a comprehensive right. Every time a human rights violation issue arises,

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<sup>6</sup> Ayush Choudhary, *Marital Rape : A Crime Undefined*, Lawctopus ( Sep 7, 2021,8 : 41AM ) <https://www.lawctopus.com/academike/marital-rape-a-crime-undefined/> .

<sup>7</sup> Abhayan, *Types OF Marital Rape* , Legal Service India ( Sep 7, 2021, 6: 3 PM ) <https://www.legalserviceindia.com/legal/article-5571-types-of-marital-rape.html> .

the Right to Life becomes a key player in that scenario. Article 21 protects each and every person the right to a healthy and dignified existence free of interference from the state or any other entity.<sup>8</sup> In one of the landmark case *Chairman, Railway Board & Others v Chandrima Das & Others*<sup>9</sup>, a foreign lady, Smt Hanuffa Khatoon, was raped at the Yatri Nivas by four men from the Railway Department, and then raped again by a member of the Railway Department, where she was gagged and tortured. Hearing her screams, the residents of the leased property rescued her, and the Court awarded her Rs10 lacs in compensation. In this sense, the Supreme Court stated that rape is not just a criminal against the victim, but also a crime against society as a whole. Rape has a negative impact on both society and the victim.

Under the case of *T. Sareetha v. T. Venkata Subbaiah ('Sareetha')*<sup>10</sup>, the Andhra Pradesh High Court was the first to declare the RCR in the Hindu Marriage Act unconstitutional. The Court was told that Section 9 of the Hindu Marriage Act contravened Articles 14, 19, and 21 of the Constitution. This argument was accepted by the Court. The RCR "restitution of conjugal rights" remedy was found to be illegal because it shifted the woman's right to choose whether or not to engage in sexual intercourse to the state. Because it infringes on an individual's personal autonomy, this would be a violation of Article 21 of the Constitution.

The Right to Privacy is a recent judicial development in which the Court recognised that no individual's personal space and privacy should be invaded. The Honorable Supreme Court of India unanimously affirmed the Right to Privacy as an integral and fundamental component of Article 21- Right to Life and Personal Liberty in the case of *Justice K S Puttaswamy (Retd) versus Union of India*.<sup>11</sup> This may also be seen to support marital rape. A woman's right to privacy is protected. No one has the authority to trespass or breach her right to privacy. She also has the right to privacy in her sexual life. No man or woman has the right to intrude the sexual privacy of another man or woman. The same was seen in the landmark case of *Vishaka vs. State of Rajasthan*.<sup>12</sup> It is a personal right of a woman. No one can violate her Article 21 without her permission. The Supreme Court ruled in the case of *State of Maharashtra versus Madhakar Narayan* that a woman's sexual privacy is not available to everybody according to her preferences. It is her personal right and choice, and she should be respected for it.

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

<sup>9</sup> AIR 2000 SC 988.

<sup>10</sup> T. Sareetha v. T. Venkata Subbaiah, 1983 SCC OnLine AP 90 : AIR 1983 AP 356.

<sup>11</sup> AIR 2017 SC 4161.

<sup>12</sup> (1997) 6 SCC 241.

## **The Indian Penal Legislation of 1860**

It is the country's primary criminal code. It is a lengthy piece of legislation with twenty-four chapters and 511 parts. The Indian Penal Code defines offences as well as punishments. It does not, however, issue any processes because the Code of Criminal Procedure governs that area. In this context, the following sections of the IPC, 1860 are relevant:

Section – 319 Hurt is defined as anybody who causes bodily pain, sickness, or disability to another person.

Section - 320 where only some specific types of pain are classified as "grievous".

Section 321- Intentionally inflicting harm "Voluntarily to inflict injury" refers to someone who does anything with the goal of causing harm to someone else, or with the knowledge that he is likely to do harm to someone else, and then does so.

Section 322- Intentionally inflicting great bodily harm If the damage that he wants to inflict or knows he is likely to cause is severe hurt, and if the hurt that he produces is grievous hurt, he is said to have "voluntarily caused grievous hurt."<sup>13</sup>

Section 339 - Wrongful restrain Whoever willingly obstructs another person's ability to move in any direction in which that person has a right to move is said to be unlawfully restraining that person.<sup>14</sup>

Section 349 - Section 349 - A person is said to use force against another if he causes that other's motion, change of motion, or cessation of motion, or if he causes that other's motion, change of motion, or cessation of motion, or if he causes that other's motion, change of motion, or cessation of motion, or if he causes that change of motion, or cessation of motion to any substance that brings that substance into contact with that other's body, or with anything that that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of self-awareness.<sup>15</sup> If the person who produces the motion, change of motion, or cessation of motion does so in one of the three methods indicated below, the motion, change of motion, or cessation of motion is legal.

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<sup>13</sup> The Indian Penal Code, 1860, S 322.

<sup>14</sup> The Indian Penal Code, 1860, S 339.

<sup>15</sup> The Indian Penal Code, 1860, S 349.

Section 351- An assault is defined as any gesture or preparation made with the intent or knowledge that such gesture or preparation would lead any person present to suspect that the person making the gesture or preparation is going to use unlawful force against that person.<sup>16</sup>

Section 375 - A man is considered to commit "rape" if he has sexual intercourse with a woman in any of this five scenarios listed below.<sup>17</sup>

First, She had to do something she didn't want to do at first.

Second, without her permission.

Thirdly, with her consent, when she has given her consent by placing her or anybody she cares about in danger of death or harm.

Fourth, with her consent, if the man is aware that he is not her husband and she is providing her consent because she believes he is another man to whom she is or believes she is lawfully married.

Fifth, with her consent, if she is unable to appreciate the nature and implications of that t because of unsoundness of mind or drunkenness, or the administration by him personally or through another of any stupefying or unwholesome substance, at the time of giving such consent.

Section 498 - The notion that 498A has been used to harass males has also reached the Supreme Court. The Court has issued orders in case of *Rajesh Sharma v. State of U.P*<sup>18</sup> to prohibit the abuse of 498A. This language from the Supreme Court reflects the attitude that pervades the State's different institutions and will make the prosecution of cases of marital rape much more difficult. The maximum penalty under Section 498A is merely three years in prison, with or without a fine. Rape carries a potential sentence of life in prison.<sup>19</sup> This significant disparity in punishment demonstrates that the idea of cruelty is incapable of dealing with a case of marital rape in any way.

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<sup>16</sup> The Indian Penal Code, 1860, S 351.

<sup>17</sup> The Indian Penal Code, 1860, S 375.

<sup>18</sup> *Rajesh Sharma v. State of Uttar Pradesh*, 2017 SCC OnLine SC 821.

<sup>19</sup> The Indian Penal Code , 1860, S 498 A.

## NON – CRIMINALISATION OF MARITAL RAPE

The Verma Committee, a three-member group formed to tighten India's sexual-assault legislation in the aftermath of a violent gang rape in 2012, recommended criminalizing marital rape as well. Marital rape should be declared a crime, according to the Justice Verma committee, which is a fundamental demand of women's rights advocates.<sup>20</sup> The IPC, according to the committee, should distinguish between rape within and outside marriage. Sexual intercourse without permission is illegal under the IPC. However, there is an exemption to the crime of rape in the case of unconsented sexual contact between a husband and his wife. The Committee suggested that the marital rape exemption be removed. Poverty, religious beliefs, social conventions, and the attitude of Indian culture, among other things, are said to be the causes of marital rape in India, according to the government. According to recent legislative talks, India's Bharatiya Janata Party-led administration, led by Prime Minister Narendra Modi, appears to be unwilling to implement any measures pertaining to punishments or penalties for marital rape.

The Indian Penal Code, Section 375, defines rape as a criminal crime and includes this asterisked exemption. If a man has sexual intercourse with a woman against or without her permission, or if she is a minor, he has committed rape. (The legal age of valid consent in India is 18.) Exception 2 to Section 375, on the other hand, exempts unwanted sexual intercourse with a wife above the age of fifteen from this definition of rape, making it legal for men to rape their wives beyond the age of fifteen. The Supreme Court of India expressly said in *Independent Thought v. Union of India*<sup>21</sup> that marriage is personal, and that nothing short of the Indian State criminalizing marriage itself may destroy it. If divorce and judicial separation haven't destroyed the institution of marriage, it's unlikely that criminalizing marital rape would. Surprisingly, the Gujarat High Court recently decided that marital rape is what has harmed the institution of marriage since it is a non-consensual conduct that undermines trust and confidence inside a marriage. So be it if criminalizing the rape of two-thirds of married Indian women destabilizes the institution of marriage and family. The union government stated in an application to the Delhi High Court that a legislation criminalizing marital rape might become a "easy instrument to harass the spouse," according to the document.

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<sup>20</sup> JUSTICE J.S. VERMA COMMITTEE, *Report of Committee on Amendments to Criminal Law* ( January 23, 2013 ).

<sup>21</sup> *Independent Thought v. Union of India*, AIR 2017 SC 4904.



The doctrine of coverture, which refers to the non-criminalized nature of marital rape, dates back to the British era. The idea of integrating a woman's identity with that of her husband was heavily inspired by and stemmed from the practice of marital rape.<sup>22</sup>

## MARITAL RAPE & DIVORCE

General assumption is that if marital rape is not a crime in India, it cannot be used as a basis for divorce. However, marital rape may and should be recognized as a kind of cruelty against the wife, which can be used as a legal ground for divorce under section 13 (2) of the Hindu Marriage Act, 1955.<sup>23</sup> In India, being married is reportedly seen as an implicit agreement to engage in sexual intercourse, even if it is done forcefully, therefore women should be able to file for divorce on the basis of marital rape. Women will continue to be subjected to such atrocities until the Hindu Marriage Act includes this as a basis for divorce, and until the court system makes the required adjustments, women will continue to be exposed to such atrocities.

The recent ruling of the Chhattisgarh High Court, which has been widely criticized, should come as no surprise. After all, when the renowned Chhattisgarh High Court judge NK Chandravanshi exonerated a man accused of raping his wife by ruling that sexual intercourse between a man and his wife is not rape — even if it is forced or against her will — he was only citing from the law of the country. Surprisingly, Indian High Courts have frequently disagreed on the legitimacy and meaning of marital rape. The Kerala High Court has held that, despite the fact that marital rape is not a criminal offence, it may nevertheless be used as a basis for divorce as a kind of cruelty. "Marital rape happens when a husband uses his wife's body as though it belongs to him and conducts a sexual act without her will," according to the Kerala High Court. Bodily integrity is included in the right to respect for one's physical and mental integrity, and any disrespect or violation of bodily integrity is a breach of one's autonomy."<sup>24</sup>

## SUGGESTION & CONCLUSION

India is far from being able to take a move towards a law unique to MARITAL RAPE, taking into account other nations' laws. The provisions of the IPC and the Indian Constitution can be

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<sup>22</sup> Marital Rape in India, drishti, ( Sep 8, 2021, 4 :5 PM ) <https://www.drishtiiias.com/daily-updates/daily-news-editorials/marital-rape-in-india> .

<sup>23</sup> Ayush Choudhary, *Supra* note 6.

<sup>24</sup> Preeti Choudhary, Marital Rape : Marriage can't mean irrevocable implied consent, INDIA TODAY ( Sep 8 , 2021, 9 : 5 PM ) <https://www.indiatoday.in/opinion-columns/story/marital-rape-marriage-cannot-mean-irrevocable-implied-consent-1846631-2021-08-29> .

invoked as a defense until the new legislation comes into being. In times of change, however, every rule has to adapt, since new things are discovered every day, while the human intellect continues to evolve. Therefore, the present provisions can be used until a new legislation is in effect. A new legislation for marital rape can be implemented after a scrutiny study, or parts of the IPC can be added. Marital rape tarnishes the concept of marriage because it is a woman's own husband who pushes her into sexual encounters, whom she trusts and believes would protect her. This is more traumatic than being raped by a complete stranger. Various jurisdictions across the world have either criminalized or are in the process of criminalizing marital rape, shattering the constraints of traditionalism. In the current situation, marital rape can only be regarded as rape that is legally allowed, obviating the need for the woman's permission. It is past time for India's legal system to pass legislation criminalizing marital rape in order to protect women's dignity.