

# CONSTITUTIONALITY OF THE EXCLUSIONARY CLAUSE OF MARITAL RAPE IN INDIA

*BY*

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## ABSTRACT

*The United Nations Convention on the Elimination of all Forms of Discrimination against Women, of which India is a signatory, proposes in its resolution that “marital rape” should be criminalised and that this sort of discrimination is an apparent infringement of the law of equality and human dignity. Unfortunately, India is still one of the countries wherein consent is irrevocable within the bounds of marriage. The arguments opposed to criminalising marital rape are varied but limited in nature. Simply put, they are devoid of the pillars of constitutionality that happen to be the building block of every law framed in India. Furthermore, the Preamble, which is a basic structure of the Indian constitution, solemnly resolves to secure to all citizens — justice, liberty of thought and expression, and equality of status; in real life, however, India is way behind in executing it. This article emphasizes the unconstitutionality of the Marital rape exclusion clause under the Indian Penal Code and its violative nature towards an individual’s fundamental rights guaranteed under Article 14 and Article 21 of the Indian Constitution specifically.*

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## INTRODUCTION

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In 2000, the 172<sup>nd</sup> Law Commission Report, in the consultation rounds, argued the validity of the exception clause under Section 375 of the Indian Penal Code that deals with ‘Rape’. However, the Law Commission rejected the same — concerned about safeguarding the institution of marriage. Thereafter, the Verma committee headed by Justice (Retd) J. S. Verma, in its 2013 report, noted that “the exemption for marital rape stems from a long-outdated notion of marriage which regarded wives as no more than the property of their husbands.”<sup>1</sup> All this and more have called into question an uncertainty of vital importance in recent years pertaining to the protection of women from sexual offenses within the establishment of marriage.

Countries around the world have framed laws with respect to the issue in question; some have no distinction between rape and “marital rape” like the UK, while others are vaguer in terms of legislation and don’t categorize it explicitly. On the other hand, there is still a prevalence of specific exclusion of rape when occurring between parties that possess a matrimonial bond. In fact, as per UN Women<sup>2</sup>, by 2018, 12 out of 185 countries retained clauses in their legislations exempting rapists from prosecution when they are married to, or subsequently, marry the victim<sup>3</sup>. The issue, albeit, remains universal — the United Nations has stated that only 4 in 10 countries criminalize marital rape<sup>4</sup>.

Needless to say, the statistics are a disappointment worldwide but taking India into consideration, which is one of the only 36 countries in the world that hasn’t criminalized marital rape yet, leaving numerous women helpless within the bounds of their violent marriages<sup>5</sup>, rapid amelioration seems unpromising. It is pertinent to question the course of action in such a scenario. Impervious and ill-informed to the plight of women, luminaries in prominent fields & legislative bodies are resistant to the idea of proscribing marital rape with reasons ranging from ‘protecting the sanctity of marriage’ to already existing alternative remedies under civil

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<sup>1</sup> Government of India, Report: *Committee on Amendments to Criminal Law* (Ministry of Home Affairs, 2013), [https://adrindia.org/sites/default/files/Justice\\_Verma\\_Amendmenttocriminallaw\\_Jan2013.pdf](https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf).

<sup>2</sup> Disha Shetty, *Marital Rape: A Conversation India Refuses To Have*, ARTICLE 14 (29 Oct., 2020), <https://www.article-14.com/post/marital-rape-a-conversation-india-refuses-to-have>.

<sup>3</sup> Shetty, *supra* note 2.

<sup>4</sup> Shetty, *supra* note 2.

<sup>5</sup> *Marital rape in India: 36 countries where marital rape is not a crime*, INDIA TODAY (March 12, 2016, 4:06 PM), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

laws. In 2018, a *Bill*<sup>6</sup> introduced in the Lok Sabha was left unsupported and subsequently lapsed, which among other things, sought to criminalize marital rape, turning women's sexual independence post-marriage into more of a question. Consequently, in a situation wherein an individual's safety, freedom, and equality are at stake, it wouldn't be inaccurate to state that constitutionality has been impaired.

## INFRINGEMENT OF FUNDAMENTAL RIGHTS

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In many jurisdictions across the world, even when countries recognize rape as a crime and prescribe penalties for the same, they exempt the application of that law when a marital relationship exists between victim and perpetrator. This is often called the 'marital rape exception clause'<sup>7</sup>, and the justifications for the same mostly stem from the age-old belief of a wife being "chattel" and subservient to her husband by nature. The Indian Penal Code (hereinafter, "IPC") was enacted in the 1860s, a time that exemplified the aforesaid belief. Although a significant amount of time has passed between now and then, Section 375 Exception 2 remains unchanged. It's contended that making marital rape a crime would lead to difficulty in actual convictions and further prove to be a thorn in 'the sacrament of marriage.' However, a marriage cannot be sacrosanct where the woman's bodily autonomy and choice stand immaterial. Moreover, a crime being difficult to prove isn't a justifiable argument. Thus, none of the arguments against criminalization hold any legal or cogent standing whatsoever. On the other hand, the rationale seeking criminalization defines the clear unconstitutionality of the exception clause since it goes against the fundamental rights of concerned women.

Article 14 and Article 21 are two of the most important fundamental rights guaranteed to a citizen in India, but even so, the explicit exclusion of marital rape from Indian Law poses a violation of the said fundamental rights in the case of adult married women who are a victim of rape at the hands of their husbands.

Exception 2 to Section 375 of the IPC provides a marital rape exclusionary clause if the wife is of 15 years of age or above. However, for Section 375, the age of consent to intercourse has been amended and raised from 15 to 18 by the Criminal Law Amendment Act, 2013. This not

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<sup>6</sup> The Women's Sexual, Reproductive and Menstrual Rights Bill, No. 255 of 2018, <http://164.100.47.4/billtexts/lbills/lbills/asintroduced/2271as.pdf>.

<sup>7</sup> Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact*, 11 NUJS L. REV. 121, 122 (2018).

only creates a difference between married and unmarried minors without reasonable cause but also results in an anomaly, wherein forced sex by a husband seems to be permitted when perpetrated against a [minor] wife, who is 15-18 years of age. However, the Apex Court in 2017 removed this irregularity in the case of Independent Thought v. Union of India,<sup>8</sup> a landmark judgment in which the said exception clause was partly struck down. Furthermore, it was held that “differential treatment to the girl on the basis of marriage was wholly unconstitutional...marriage did not serve as reasonable classification”. This proves to be a basis for establishing that there exists no pre-supposition of consent to sexual activities in a marriage and to not criminalize marital rape simply to protect the institution of marriage when there is a constitutional right at stake and when other forms of violence have been criminalized, would be arbitrary<sup>9</sup>. This conclusion lays the groundwork for the violation of Article 14.

## **I. ARTICLE 14**

Article 14 ensures ‘Right to Equality’<sup>10</sup>, requires a nexus between the purpose to be achieved and the law, and the law to not be arbitrary<sup>11</sup>. Furthermore, under Article 14, to satisfy the test of reasonable classification that determines if a distinction is desirable or not — (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question<sup>12</sup>.

As per Exception 2, the two classes of women created are based on marital status. Thus, married women are victimized while unmarried women are protected from the same acts while providing no ‘intelligible differentia’ for this distinction since marriage doesn’t grant irrevocable consent. Even considering marriage a contract doesn’t certify the aforesaid because consent to sexual intercourse at all points in the marriage cannot hold good in view of general rules to contract law since a contract which is ambiguous, contrary to public policy, and is uncertain is not a valid contract<sup>13</sup>. Moreover, the classification needs to possess “a rational nexus to the objective that the act seeks to achieve”<sup>14</sup> — which is absent in the exception clause since exempting husbands from punishment merely for being the spouse is completely

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<sup>8</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

<sup>9</sup> *Shetty, supra note 2*.

<sup>10</sup> INDIA CONST. art. 14. “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>11</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 (India).

<sup>12</sup> *Ashutosh Gupta v. State of Rajasthan*, AIR 2002 SC 1533 (India).

<sup>13</sup> The Indian Contract Act, No. 9 of 1872, § 23 and 29.

<sup>14</sup> *Budhan v. State of Bihar*, AIR (1955) SC 191 (India); *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

contradictory to that objective of the law considering the fact that one in every three women have experienced intimate partner violence<sup>15</sup>. For the aforementioned reasons, this clause doesn't satisfy the test of reasonableness and thus violates Article 14 of the Indian Constitution.

## II. ARTICLE 21

Article 21 provides the right to life and personal liberty<sup>16</sup>. This provision extends far beyond the limited literal interpretation; it also entails bodily autonomy and freedom from unwanted sexual invasion, among other things like rights to health, privacy, dignity, safe living conditions, and a safe environment<sup>17</sup>. Courts have held vis-à-vis Article 21 that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female...and non-consensual sexual intercourse amounts to physical and sexual violence.”<sup>18</sup>

In fact, in the landmark privacy judgment of Justice K.S. Puttuswamy (Retd.) v. Union of India,<sup>19</sup> wherein ‘privacy’ was recognized as a fundamental right it was observed by the court that “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 is a part of Right to Privacy” and would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual” — this holds true for marital rape as well.

Thus, the courts have not distinguished between the rights of married women and unmarried women, and there is no contrary ruling stating that an individual’s right to privacy is lost by the marital association since the right to abstain from sexual intercourse is a right of its own<sup>20</sup>. Therefore, irrespective of marital status, a woman can deny sexual activity and ignorance of the same would ultimately violate her fundamental right to a healthy and dignified life, personal liberty, and equality.

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<sup>15</sup> World Health Organisation, *COVID-19 and violence against women - What the health sector/system can do*, (26 Mar., 2020), <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-VAW-full-text.pdf?ua=1>.

<sup>16</sup> INDIA CONST. art. 21. “No person shall be denied of his life and personal liberty except according to the procedure established by law.”

<sup>17</sup> Sarthak Makkar, *Marital Rape: A Non-Criminalized crime in India*, HARVARD HUMAN RIGHTS JOURNAL (1 Jan., 2019, 11:30 PM), [https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#\\_ftn13](https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#_ftn13).

<sup>18</sup> *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

<sup>19</sup> *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

<sup>20</sup> *Govind v. State of M.P.*, AIR (1975) SC 1378 (India); *Kharak Singh v. State of U.P.*, (1963) AIR SC 1295 (India).

## CONCLUSION

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According to data from the National Family and Health Survey (NFHS) 2015-16, “Roughly one in every three (31.1%) Indian women between the age of 15-49 who has ever been married said they had experienced violence from their spouse”<sup>21</sup>. Despite this, brutal crimes are going unpunished. For instance, a court in Maharashtra gave anticipatory bail to a man while concluding that forcible sex with his wife was not an *illegal* thing though she said it left her paralyzed<sup>22</sup>. As per Chhattisgarh High Court, “Sexual activity with wife does not amount to rape, even if it’s by force.”<sup>23</sup>

A relevant question arising in this context is — does merely marrying a person override the need or importance of consent as a whole? If the answer is affirmative, it signifies marriage as a means to attain irrevocable & implied mutual consent for sexual intercourse with very little bodily autonomy, which by no means fits into the narrative of ‘marriage is a sacrament.’

There is still a ray of hope. In Nimeshbhai Bharatbhai Desai v. State of Gujarat<sup>24</sup>, the Gujarat High Court condemned marital rape. The court termed it a “disgraceful offense that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice and lives in abject fear for their lives due to such non-criminalization.” Marital rape and its exclusion from Indian statutes are unconstitutional by nature of Articles 14 and 21 of the Constitution. Thus, India still has a long way to go in terms of the legal framework since its necessary to establish that the rights of women to live their life peacefully and with dignity, among other things is vastly more important than the sexual gratification of their legal partners or preserving the institution of marriage.

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<sup>21</sup> Government of India, *National Family Health Survey* (Ministry of Health and Family Welfare, 2015-16), <http://rchiips.org/nfhs/pdf/NFHS4/India.pdf>.

<sup>22</sup> Murali Krishnan, *Marital rape is still not a crime in some parts of India*, RFI (27 Sept., 2021, 10:07 AM), <https://www.rfi.fr/en/international/20210927-wk-marital-rape-is-still-not-a-crime-in-india>.

<sup>23</sup> PTI, *The Print* (26 Aug., 2021, 8: 30 PM), <https://theprint.in/judiciary/sexual-activity-with-wife-does-not-amount-to-rape-even-if-by-force-chhattisgarh-hc/722822/>.

<sup>24</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732 (India).