

# An Analysis on the Criminality of Marital Rape in India

by

Neha Susan Thomas

## Introduction

An 18-year-old girl, in an arranged marriage to a man she has met probably once, maximum twice. She dreams of love and care that he had promised in front of others; this shatters the second they enter the bedroom. She is subject to physical, sexual, and verbal abuse. Where she expected affection, she is met with scars, both physical and mental, and where she looked for love, she felt lust and hatred. Speaking to her family is met with responses asking her to adjust to it. The policemen laugh at her when she tries to file a complaint; she becomes the perpetrator when filing for a divorce. *"This is a part of marriage; as a woman, you have to try and adjust,"* these words from friends and family become a daily reminder of the scars that she bears. Every ordeal she goes through is described as a part of normalcy in married life, including a candle being inserted into her vagina! When she decides to approach the Court, the Supreme Court tells her that her problem is a personal claim and not a public one; the law cannot be changed for a single person. This sorry state of affairs is a reality for numerous women in our country, where there isn't legal support for married women whose husbands have raped. Marital Rape is real and is happening around us all.<sup>1</sup>

## Marital Rape

Marital Rape refers to any act of sexual violence that a man inflicts on his spouse without her consent. The act of marital rape is yet recognized as a criminal offense in 36 countries, India being one of them.<sup>2</sup> Though rape is seen as a criminal offense, the fact that marital rape is yet to be criminalized is sad, owing to the increasing number of cases registered under the purview of marital rape. The major question arising in this scenario is that 'Is marital immunity the

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<sup>1</sup> Krina Patel, Gap in Marital Rape law in India: Advocating for Criminalization and Social Change <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2760&context=ilj>; Dailybite, "Night after Night the Torture Grew": "A survivor of Marital Rape speaks up"; (December 5, 2016); <https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html>; Dailybite, "My husband raped me and I was blamed for the divorce" (May 22, 2018); <https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html>

<sup>2</sup> Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.

law?’ The right over a person’s body belongs to them alone. Any violation of this right is a direct infringement of Article 14<sup>3</sup> and Article 21<sup>4</sup> of the Indian Constitution. By not criminalizing marital rape, the law categorizes victims as 2; one group can claim protection under Section 375<sup>5</sup> and Section 376<sup>6</sup> of the Indian Penal Code. The other is left destitute only because they were subject to rape by their husbands. When one can claim justice under Section 376<sup>7</sup> of the Indian Penal Code, the woes of the other are maligned as her husband raped her. Article 21<sup>8</sup> sees it violated as there is a violation of the right to privacy<sup>9</sup> which is brought under the purview of the right to life.<sup>10</sup> A person’s personal space and the right to be left alone is violated. There is an unspoken immunity extended to married men raping their wives.

There are different types of Marital Rape, they are:<sup>11</sup>

- Force only rape: a husband who uses threats and violence only to the degree necessary to coerce sex.
- Battering rape: When violence and rape are combined. Often the rape occurs as a continuation of the physical assault.
- Obsessive rape: The abuser seems obsessed with sex, and the act itself is violent. In these relationships, the abuser may use violence to become aroused.

Marital Rape is often not reported by the victims due to a lack of legislative support for their case. Out of 664 domestic violence cases reported at NGO Sneha’s crisis counselling centre, 159 women reported instances of marital rape. Around 60% of married women report sexual violence; forced sex is the most common form.<sup>12</sup> The National Crimes Report Bureau data<sup>13</sup>

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<sup>3</sup> Constitution of India, 1950, Article 14

<sup>4</sup> Constitution of India, 1950, Article 21

<sup>5</sup> Indian Penal Code, 1856, Section 375

<sup>6</sup> Indian Penal Code, 1856, Section 376

<sup>7</sup> Indian Penal Code, Id

<sup>8</sup> Indian Penal Code, Supra note 5

<sup>9</sup> *K. S. Puttaswamy (Retd.) v Union of India*, 2017 SCC Online 996

<sup>10</sup> Indian Penal Code, Supra note 5

<sup>11</sup> Indiana Coalition Against Sexual Assault; Marital Rape Brochure-RAINN; [https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital\\_Rape.pdf](https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital_Rape.pdf)

<sup>12</sup> Roli Srivastava, “Marital Rape: the statistics show how real it is”; (September 16, 2016); <https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece>

<sup>13</sup> Rukmani S., *Marital and other rapes grossly under-reported*, The Hindu; <https://www.thehindu.com/news/national/marital-and-other-rapes-grossly-underreported/article6524794.ece>

stated that out of 1,00,00 women around 6590 women report to have been a victim of rape at the hands of their husbands.

### **Fundamental Rights and Marital Rape**

Marital rape is violative of equality as marital rape is not treated as a criminal offense but rather as a civil wrong. Considering marital rape as a civil wrong, creates discrimination in the sense that a person raped by her husband is not liable to receive equal justice as a person who was raped by somebody who is not their husband. Therefore, the principle of marital rape immunity is highly violative of a woman's right to equal treatment before the law. This is unequal treatment of rapes as people are denied the right to justice is based on their marital status and the relationship between the rapist and the victim. Also, rape is considered an offense when committed by a husband when the couple is judicially separated; *"Whoever has sexual intercourse with his wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.."*<sup>14</sup> This creates different categories for the same offense, where married women are placed at the lowest tier and denied access to justice.

Marital Rape is highly violative of the right to dignity<sup>15</sup> enshrined under the right to life<sup>16</sup> which is a fundamental right. The same was reiterated in the case of *The Chairman, Railway Board v. Chandrima Das*<sup>17</sup>, where the Court held that rape is not violation of a mere right, rather the violation of a fundamental right. The Court was talking about the right to dignity<sup>18</sup> that is guaranteed under the Article 21 specifically.

Rape as an offense is violative of the right to bodily dignity, which is encompassed under the right to dignity. The Supreme Court held that *"There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it will amount to a violation of her human right to liberty or dignity guaranteed by the Constitution"*<sup>19</sup> in the landmark judgment of the *Independent Thought v Union of India*<sup>20</sup> case, which

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<sup>14</sup> The Criminal Law (Amendment) Act, 2013 No, 13 of 2013; Section 376 B

<sup>15</sup> *Danial Latifi v Union of India*, (2001) 7 SCC 740

<sup>16</sup> Constitution of India, 1950, Supra note 4

<sup>17</sup> *The Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465

<sup>18</sup> *Danial Latifi*, Supra note 15

<sup>19</sup> *Independent Thought v Union of India*; (2017) 10 SCC 800

<sup>20</sup> *Independent Thought*; Id

challenged the marital rape.<sup>21</sup> The idea of dignity<sup>22</sup> and right to personal liberty<sup>23</sup> is constitutionally guaranteed to all citizens; therefore, subjecting a person to sexual intercourse without their consent is a violation of their fundamental rights.

### Indian Legislations

It is pertinent to analyse the rape laws in India, before looking at marital rape. Rape is considered a criminal offense under Section 375 of the Indian Penal Code, 1856. The Section states also provides for the idea of marital rape immunity under Exception 2<sup>24</sup> which is

*Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

Marital rape is therefore not recognised a crime under the Indian Penal Code. Marriage is by, and large understood as giving partners the right over the partner's legitimate sexuality. Marital rape has been an issue that has existed for a long time in India. The Protection of Women from Domestic Violence Act of 2005 was brought in to ensure safety for married women. This same law, however, refuses to criminalize the concept of marital rape. It states that "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not the rape."<sup>25</sup> The idea of 'forced cohabitation' has been merely reduced to a civil wrong. The criminal aspect of infringing upon a person's privacy is ignored. The concept of "My Body, My Right" is lost in this process.

Marriage does not mean that a woman is always consenting for physical relations with her husband;<sup>26</sup> the Delhi High Court observed and also held that physical force is not necessary for constituting the offense of rape. A bench of Acting Chief Justice Gita Mittal and C Hari Shankar said that in a relationship like marriage, both man and woman have a right to say 'no' to physical relations in a petition filed by NGO RIT Foundation and the All-India Democratic Women's Association in connection to the constitutionality of Exception 2 of Section 375 of

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<sup>21</sup> Indian Penal Code, 1860, Section 375; Exception 2

<sup>22</sup> Constitution of India, Supra note 4

<sup>23</sup> Constitution of India, Supra note 4

<sup>24</sup> Universal Criminal Manual containing Code of criminal procedure, 1973, Indian penal code (45 of 1860) Indian Evidence Act, 1872 as amended, 547-548, Universal Law Publishing Co. Pvt. Ltd, New Delhi

<sup>25</sup> The Protection of Women from Domestic Violence Act of 2005

<sup>26</sup> The Hindustan Times, "Marriage doesn't mean wife is always ready for sex: Delhi HC on Marital Rape"; (July 17,2018); <https://www.hindustantimes.com/india-news/marriage-doesn-t-mean-wife-always-ready-for-sex-delhi-hc-on-marital-rape/story-1bQh4TUumz8rdym2KUKcVO.html>

IPC.<sup>27</sup> Section 375 of IPC 1860 criminalizes marital rape only if the woman is below the age of 15. <sup>28</sup>Marital Rape as a concept, therefore, is totally absent in the criminal legislation of the country. It is clear that the legal framework of the country sees women to have surrendered the right to consent to sexual relations at the time of marriage. The husband is thus given unconditional, unqualified right of sexual access, i.e., license to sex.

### Verma Committee Report

The Justice Verma Committee Report, released in the aftermath of the infamous Nirbhaya rape case<sup>29</sup> has also called for the removal of the marital rape exemption that has been bestowed upon the citizens. The Committee constituted by Justice J.S. Verma, former Chief Justice of the Supreme Court, Justice Leila Seth, former judge of the High Court and Gopal Subramaniam, former Solicitor General of India submitted a report to the Hon'ble Supreme Court suggesting reforms for criminal law system. One of the points highlighted was the issue of marital rape. The Commission was of the opinion of criminalising marital rape and quoted:<sup>30</sup>

- i. *The exception for marital rape be removed.*
- ii. *The law ought to specify that:*
  - a. *A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;*
  - b. *The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;*
  - c. *The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape*

The Report also highlighted the case of *C.R. v UK*<sup>31</sup>, in which the European Commission of Human Rights held that the nature of relationship between the rapist and victim should not be considered a parameter for judging the crime. The heinousness of the crime marital rape was

<sup>27</sup> "Marriage doesn't mean wife is always ready for sex: Delhi HC on Marital Rape"; Id

<sup>28</sup> Indian Penal Code, 1860; Supra note 21

<sup>29</sup> *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1

<sup>30</sup> Report of the Committee on Amendments of Criminal Law, 2013, New Delhi: PRS Legislative Research; 2013. para 79, page number 118

<sup>31</sup> *C.R. v UK*, Publ. ECHR, Ser.A, No. 335-C (20 June 1995)

understood and analysed by drawing on various international legislations and judgements by the committee while drawing the conclusion.

### **Judicial Pronouncements**

#### ***Independent Thought v. Union of India*<sup>32</sup>**

A division bench of the Supreme Court of India consisting of Justice Madan B Lokur and Justice Deepak Gupta delivered a landmark judgment in 2017 with regard to marital rape exemption. The case was filed by a child rights organization called Independent Thought with regard to Exception 2, also known as marital rape exemption of Section 375 of the Indian Penal Code. The judgment was in favour of the argument of the petitioner that the exception to Section 375 of marital rape cases would only cover cases where the woman was 18 years or older. The case was a major step in criminalizing sexual intercourse with a wife below 18, but the problem still remains untackled as the Court did not comment on the issue of marital rape if the girl is above 18.<sup>33</sup> The main takeaway from the judgment was the idea that non-consensual sexual intercourse is rape in instances of child marriages. Non-consensual sex or marital rape in case of child marriages, i.e., when the bride is between the ages of 15 and 18, was violative of fundamental rights and human rights. The legislation regarding child marriage in the country is very vague in nature. This needs to be taken into cognizance, and necessary action must be taken for the same. Tradition or customary practices are not a justification for rape. "Rape is rape, and consent is consent."<sup>34</sup>

#### **Kerala High Court Judgement**

The Kerala High Court recently delivered a judgement on marital rape that was lauded by all. The judgement given by Hon'ble Justices A. Muhamed Mustaque and Dr Kauser Edappagath declared marital rape to be grounds of divorce as it amounted to cruelty. Cruelty is a pre-established ground of divorce under Section 13 of the Hindu Marriage Act and Section 27 of the Special Marriage Act. The Court highlighted the importance of physical and mental integrity as well as any disrespect or violation of bodily integrity is a violation of individual

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<sup>32</sup> *Independent Thought*; Supra note 16

<sup>33</sup> Akanksha Yadav, SC Case Analysis on Marital Rape: *Independent Thought v. Union of India* and Another By Akanksha Yadav; (August 12, 2018); <https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/>

<sup>34</sup> Sahil Azam; "Refusal to recognise Marital Rape implies we value institution of marriage over lives of women"; Youth ki Awaaz; (October 8, 2019); <https://www.youthkiawaaz.com/2019/10/rape-inside-bedroom-india-is-still-in-denial/>

autonomy.<sup>35</sup> The judgement was seen as a huge wave of changing judicial trends in the matter of marital rape, but the question still remains is it enough? The case that the Kerala High Court dealt with was civil in nature and its recognition is indeed a monumental step, but the fact that women don't have a haven for reporting their woes is still the truth of today's society.

## Conclusion

The current legislations are not very favourable in terms of marital rape in India. The current legal framework doesn't recognize the concept of consent extending to legal relationships such as marriage. There is an imminent necessity to criminalize marital rape in India, keeping in view the increasing number of offenses committed. Though marriage is seen as a contract and offenses of this regard generally falls within the purview of a civil wrong, since marital rape constitutes the offenses of assault verbal, physical, mental and sexual, and battery, and there is also an infringement of the right to privacy<sup>36</sup>, the offense should be declared as a criminal in nature. It is noteworthy that not recognizing marital rape as a crime violates the fundamental rights under Article 14<sup>37</sup> and Article 21<sup>38</sup>, which enshrines the protection of life and personal liberty.

Marital rape is a sad reality to around 60% of the married women in the country.<sup>39</sup> The bodily integrity of women who are coerced or forced to have sexual intercourse with their husbands is also compromised. Marriage is not a license to sex, and a married woman does not lose her right to her body. By not criminalizing marital rape, the right to bodily autonomy of women is overlooked and compromised. It is to be remembered that India derives the majority of its legislative basis from British rule. The Indian Penal Code by itself was drafted by the British. Holding on to this law when the very country that drafted it has progressed is a redundant idea.

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<sup>35</sup> Shaju Philip, *Marital rape a good ground to claim divorce, says Kerala HC*, THE INDIAN EXPRESS, (August 7 2021), <https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/>

<sup>36</sup> *K.S Puttaswamy (Retd.)*, *Supra* note 9

<sup>37</sup> Constitution of India, 1950, *Supra* note 3

<sup>38</sup> Constitution of India, 1950, *Supra* note 4

<sup>39</sup> Roli Srivastava; "Marital Rape: the statistics show how real it is" (September 16,2016); <https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece>



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