

CRIMINALIZATION OF MARITAL RAPE

Written by Sanskriti Kaul

2nd Year BALLB (hons) Student, Jindal Global Law School, Jaipur, India

Rape may be perceived as an offense that only occurs between complete strangers, but, non-consensual intercourse occurs frequently in marriages too. Section 375 of the Indian Penal Code defines rape as "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." But if the women are a victim of rape by her husband or in other terms, is married to the man, there are no laws broken. There is no crime committed by a man who rapes his wife because "marital rape" is not recognised as an offence under the Indian Penal Code. India is amongst the 36 countries where marital rape is not a criminal offence.

The term "marital rape" refers to a sexual act carried out by the husband without the wife's consent. Most of the time, some husbands take advantage of their wives sexually to assert their power and authority. The essential fundamental rights of women in our nation are being violated by this coercive conduct. By raping the wife and endangering her life, the fundamental right to life is violated. When the husband disregards the wife's personal space and disregards her wishes, he is violating her fundamental right to privacy. Finally, when marital rape is not recognised as a form of rape, the "right to equality" is infringed. This issue has reached its pinnacle in India and must be treated as an offence with severe penalties. Therefore, it is crucial that India ban marital rape. Rape is a crime that is defined in Section 375 of the Indian Penal Code. While the exception (2) of section 375 of the Indian Penal Code, 1860 provides that having sex with one's own spouse who is not a minor is not considered rape.ⁱ

In a recent ruling, the Delhi High Court issued a split decision on petitions seeking to criminalize marital rape and transferred the case to the Supreme Court. Although Justice Rajiv Shakhder found that marital rape was unconstitutional, Justice C Hari Shanker affirmed the constitutionality of Sections 376B and 198B. Exception B to Section 375 (Sexual intercourse or sexual activities by a husband with his own wife, wife not being under 15 years of age, is

not rape), according to Justice Shankar, does not violate the Constitution because it is based on discernible difference.ⁱⁱ According to Justice Rajiv Shakti's decision, husbands can be held criminally accountable for sexual contact with their wives without their consent, whereas Justice C Harishankar disagreed. The petitioners argued that the marital rape exception of Section 375 IPC (rape) was unconstitutional since it discriminated against married women who were sexually attacked by their husbands. Sexual intercourse or sexual actions by a man with his wife, if the wife is not a minor, are not rape under the exception provided in Section 375 of the IPC. The petitioners claimed that marital rape was the most common form of sexual abuse against women, while the Delhi government claimed that this act was already classified as a "crime of cruelty" under the Indian Penal Code.ⁱⁱⁱ

Section 198 of the Code of Criminal Procedure says that no offence should be taken under Section 376 of the Indian Penal Code, 1860 if the offence consists of sexual intercourse by a husband with his own wife, the wife being under the age of 15, if more than one year has gone past from the date of the offence. These parts normalize the allegedly 'not' typical marital rape culture, and they should be repealed to end the mainstream marital rape culture. Marriage is regarded a shield and sanctity in the eyes of the law; hence, these regulations do not address marital rape. As a result, India requires specific provisions for victims of marital rape. Later, in 2001, the Forum of Women, Law, and Development (FWLD) petitioned the Supreme Court. The apex court determined that marital sex without the wife's consent is marital rape and is punished under the law.^{iv} As a result, Nepal has proclaimed that marital rape is a crime punished by law. Why couldn't India do the same if these countries can ban it? A woman should always feel safe within the four walls of marriage, and it is past time for the Indian judiciary to act on this matter and safeguard our country's marital rape victims.

Marital rape should be treated in the same way as rape. Because the emotional implications of both offenses are the same, the punishment provisions should be the same. Rape is widely regarded as the most excruciating of all crimes committed against women. What is more unexpected and terrifying for a woman is having her self-esteem smashed by her spouse, who is supposed to love and nurture her. Marriage should not be interpreted as a man's permission to gratify his sexual needs. It has a significant impact on a woman's self-esteem and dignity. Not treating marital rape as a serious offense is equivalent to forcing a rape victim to share a bed with her rapist every night. This is not only a legal issue, but it is also a call to humanity. As disturbing as this may sound, consider how victims of marital rape live with this anguish

on a daily basis. Furthermore, the only reason the spouses must endure silently like this is because the judiciary still does not consider it a rape.

The Indian society holds that after marriage, a man can utilize his wife to fulfill all of his sexual wants, with the wife's agreement always implied. The victim's relationship with the rapist shouldn't even be considered, rape cannot be classified based on the relationship between the offender and the victim. The permission of both the husband and wife is an idea that needs to be normalized in today's culture. A guy must recognize that NO MEANS NO, if a woman refuses to engage in a sexual act, he must not view it as a quest to satisfy his pride by pushing her. A husband who rapes his wife should face the same punishment as any other rapist. The fact that they have a marriage certificate does not give him the right to perpetrate such a horrific crime. In such cases, society might play a humanitarian role by assisting such women. Instead, they are too busy offering her bad counsel, advising her not to file a complaint against her husband in order to salvage their marriage.

According to studies, marital rape is more prevalent in rural communities where marriage is seen as a free permission to perpetrate this crime. Rape is one of the most heinous crimes because it endangers a girl's life, and rapists are sentenced to life in prison or death. However, this is not the case in the instance of marital rape. Only by successfully changing the thinking of those who normalize the culture of marital rape can things improve. Articles 21 and 14 of the Indian Constitution state, respectively, the right to equality and the right to life. Marital rape breaches both of these fundamental rights, as well as, to some extent, the right to privacy. In Justice K. S. Puttaswamy vs. Union of India^v, the decision made it abundantly evident that the fundamental right to privacy of every individual is guaranteed by the Indian Constitution, specifically Article 21 and Part III as a whole.^{vi} So, since the right to privacy is a basic right, how can the husband infringe on it?

Even our legislation believes that marriage is of the utmost value and should not be destroyed in some instances. One of the cases is *Harvinder Kaur v Harmender Singh*^{vii}, in which the court discussed the applicability of constitutional rights, particularly Articles 14 and 21, inside a family. It was said that introducing Constitutional legislation into the household is extremely inappropriate. It will be a brutal destroyer of marriage and everything it stands for. Articles 21 and 14 have no place in the privacy of the home or married life. The introduction of chilly principles of Constitutional Law will have an effect on eroding the marriage bond in a sensitive domain that is both intimate and delicate. This case was eventually challenged in another case,

Sareetha v T Venkata Subbaih^{viii}, but the situation was not improved. The Supreme Court later stated in the case of *Saroj Rani v Sudarshan Kumar Chadha*^x that the inclusion of an equality provision within the house will destroy the institution of marriage.^x

The topic of marital rape, or the sexual assault of wives by their husbands, raises a variety of issues for debate. First off, there is no such thing as "marital rape" in law. Since the "crime" of rape is typically and legally defined as forcing sexual intercourse on someone other than the accused's wife, a woman cannot be raped by her husband. Second, calling the forced sexual contact between a husband and wife "marital rape" requires a significant value judgment on the part of the labeller as it effects the inter-family relationships. Finally, do the wives or the husbands find it even objectionable if the husbands force the wives to have sexual encounters, especially if it involves physical violence?

In India, the idea of marital rape has always been complicated, with several laws and rulings being issued but never modified over the centuries. A husband cannot be convicted of rape in the presence of his lawful wife. While many petitions to criminalize marital rape have been filed in Indian courts, the majority have been suppressed or dragged on for years without a significant ruling. A petition brought by a woman at the Supreme Court in 2015 was denied on the grounds that the law would not alter for one lady. In *Arnesh Kumar v. State of Bihar*^{xi}, the court stated that criminalizing marital rape will result in the collapse of social and familial institutions, on top of already discriminatory laws.^{xii}

The Indian judiciary has frequently viewed criminalizing marital rape as a means of undermining the foundation of marriage. The exception to Section 375, however, sometimes conflicts with Section 498A, which deems cruelty to a wife by a husband or a relative of a spouse a punishable offense. Maneka Gandhi, the Union Minister for Women and Child Development, sparked a storm last year when she stated in Parliament that there cannot be a law against marital rape since marriage is a "sacrament." However, in 2013, an amendment was introduced that rendered rape of women between the ages of 12 and 15 punishable under the statute, even though it fails to recognize the enormous harm done to victims above the provided age in marriage.^{xiii}

The question of whether a wife herself views the incident as a "rape" arises because forced sexual relations between a married couple are not legally considered cases of "rape." It is likely that most women who are physically pressured into having sexual intercourse with their

husbands do not accept this to be a case of rape, a violent act, or a deviant act so How can we begin to examine the phenomena of "marital rape" if the victim herself is reluctant to perceive the action as "rape"? It might be useful to briefly examine the reasons why a woman might not consider physically coerced intercourse to be rape in order to respond to the question. Numerous victims of family violence, especially abused children, may not perceive these behaviours as violent or problematic, according to research on marital violence. If their husbands have severely abused them, many of these women will claim that they "ought to be hit," "deserved to be hit," or that "husbands are allowed to hit their wives." It doesn't lessen the fact that women are routinely hurt by their husbands in attempts to stop these behaviors just because they are conditioned to believe that domestic violence is normal and expected and frequently denied basic legal protections.^{xiv}

Many wives believe that they are liable for the instances of non-consensual sex. This type of victim blaming is frequent in rape cases where the victim is believed to have provoked the attack by acting provocatively and just being "in the wrong place at the wrong time." In cases of marital rape and domestic abuse, victims who have experienced deviance in the family often blame themselves for their husband's actions to lessen the stigma associated with the deviance. Last but not least, just like in instances of domestic abuse, women who are coerced into having sex with their spouses feel ashamed to bring up the issue.

Several discussions about the connection between sex and violence were evoked during interviews Richard J. Gelles conducted with 80 family members for his journal paper "Power, Sex, and Violence: The Case of Marital Rape" Many wives said that their husbands had physically abused them because they were jealous about a possible act of infidelity. Additionally, husbands said that their spouses had struck them due to rumors of extramarital affairs. Although the interview questions did not expressly address the issue of marital rape, a review of the interview transcriptions revealed that 4 women spoke about sex-related violence that might be interpreted as incidents of marital rape or attempted marital rape. In the conversations with the four women, the most common theme was that they felt pressured or bullied into having sex with their spouses and that the husbands humiliated the wives for lacking in affection.^{xv}

According to the analysis of marital rape, the connection between sex and violence in family violence or marital rape may be because both sex and violence are tools that husbands can use to dominate and frighten their wives without worrying about outside interference. Forced

sexual contact and marital violence are two illegal strategies that bands can use to maintain dominance in their families because women cannot legally accuse their husbands of rape and because cases of marital violence rarely end with a husband being successfully prosecuted. The law's nature, which forbids women from accusing their husbands of marital rape or seeking legal action against them, is the final subject worth thinking about. If marital rape exists and is a problem, it is logical to ask if the law should be changed to give victims of marital rape legal channels for restitution. There are two issues that arise if we claim that the laws should be altered. First, if all wives had the right to sue their husbands for coercing them into having sex, the judiciary may become overrun with cases involving disputes within families. The vast number of cases that it could have to handle would likely be too much for the already overworked criminal justice system to handle. Any legal change on the topic of marital rape would also need to be accompanied by social, behavioural, and moral changes that show society takes the problem of marital rape seriously, refrains from labeling victimized wives as masochists or actually enjoying the rape, and communicates a willingness to get involved in family matters and offer real protection for victims of marital rape.^{xvi}

In a recent judgment by a Bench led by Justice D.Y. Chandrachud held that “When a woman's husband engages in non-consensual sexual activity with her, she may become pregnant. We would be negligent if we failed to acknowledge that rape is a form of intimate partner violence that occurs in real life. It is profoundly distressing that there is the misunderstanding that sex- and gender-based violence is always, or mostly always, the result of strangers. Numerous women have experienced sexual and gender-based violence [in all its manifestations] in the framework of the family for a very long time.” The court observed that marital assault was simply one act among many that qualified as violence in the context of the family. "It's not impossible for married women to get pregnant after their husbands 'raped' them. Marriage does not change the characteristics of sexual violence or the parameters of consent. The institution of marriage has no bearing on the determination of whether a woman has given consent to sexual contact, according to Justice Chandrachud.^{xvii}

The courts in India interpret the obscure or non-existent statutes that are in place to prevent marital rape. Section 375 of the Indian Penal Code states, "A man's sexual intercourse with his wife, his wife who is no less than 15 years old, are not rape" (IPC). According to article 376 of the CPI, the rapist should be punished with jail or imprisonment for a period that may extend to life imprisonment or up to 10 years, in addition to the fine, unless the raped woman is the

husband and is not less than 12 years old. Since the punishment is less severe, marital rape is only taken into consideration if the victim is under the age of 15. The spouse has no legal protection after the age of 15, which is against international human rights standards. Only minors under the age of 15 are shielded from sexual assault by a comparable statute that increases the legal age of consent for getting married to 18. According to the Indian Penal Code, the offense is punishable by up to two years in prison, a fine, or both if the wife is between the ages of 12 and 15; if the woman is less than 12, the offense is punishable by up to ten years in prison and fines.^{xviii}

Because it destroys a woman's love and trust, making her feel uncomfortable and terrified, marital rape is irrational. The tactics used and the laws safeguarding the rights of victims of marital rape are undesirable and insufficient. These "rules" are predicated on the notion that consent to sexual conduct is a prerequisite for marriage. But is it accurate to say that giving agreement to sexual activity also means giving consent to sexual violence? The brutality makes the woman feel intimidated and vulnerable, so she consents to sex. This is distinct from indicating your assent to sexual conduct. The contrast between consent and non-assent is crucial in criminal law. Marital rape has already been condemned in over 100 nations, but India remains one of the 36 countries where it is still not criminalized.^{xix} Even though several legislative changes have been made in criminal law to safeguard women, the non-criminalization of marital rape in India continues to damage women's dignity and human rights.

ENDNOTES

ⁱ *Criminalization of Marital Rape in India*, <https://www.legalserviceindia.com/legal/article-2872-criminalization-of-marital-rape-in-india.html>.

ⁱⁱ Delhi High Court delivers split verdict on criminalising marital rape, issue to be taken up by a larger bench, Firstpost (May 11, 2022), <https://www.firstpost.com/india/delhi-high-court-delivers-split-verdict-on-criminalising-marital-rape-issue-to-be-taken-up-by-a-larger-bench-10660891.html>.

ⁱⁱⁱ Live Law, Breaking: Delhi High Court Passes Split Verdict On Criminalizing Marital Rape, Justice Rajiv Shakhder Holds Exception 2 Of Section 375 IPC Unconstitutional, (May 11, 2022), <https://www.livelaw.in/top-stories/delhi-high-court-passes-split-verdict-on-criminalizing-marital-rapejustice-rajiv-shakhder-holds-exception-2-of-section-375ipc-unconstitutional-198832>.

^{iv} *Criminalization of Marital Rape in India*, <https://www.legalserviceindia.com/legal/article-2872-criminalization-of-marital-rape-in-india.html>.

^v *Justice K. S. Puttaswamy vs. Union of India Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1*

^{vi} *Criminalisation Of Marital Rape: How India Perceives 'Sex In Marriage'*, (May 11, 2022), <https://www.outlookindia.com/national/criminalisation-of-marital-rape-how-india-perceives-sex-in-marriage--news-196162>.

^{vii} *Harvinder Kaur v Harmender Singh AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187*

^{viii} *T. Sareetha v. T.Venkata Subbaih AIR 1983 AP 356*

^{ix} *Saroj Rani v. Sudershan Kumar AIR 1984 SC 1562*

^x *Criminalization of Marital Rape in India*, <https://www.legalserviceindia.com/legal/article-2872-criminalization-of-marital-rape-in-india.html>.

^{xi} *Arnesh Kumar v. State of Bihar and Anr.(2014)8 SCC 273*

^{xii} *Criminalisation Of Marital Rape: How India Perceives 'Sex In Marriage'*, (May 11, 2022), <https://www.outlookindia.com/national/criminalisation-of-marital-rape-how-india-perceives-sex-in-marriage--news-196162>.

^{xiii} *Criminalisation Of Marital Rape: How India Perceives 'Sex In Marriage'*, (May 11, 2022), <https://www.outlookindia.com/national/criminalisation-of-marital-rape-how-india-perceives-sex-in-marriage--news-196162>.

^{xiv} *Criminalisation of the Marital Rape in India- iPleaders*, (June 10, 2019), <https://blog.iplayers.in/marital-rape-criminalised-india/>.

^{xv} Gelles, Richard J. "Power, Sex, and Violence: The Case of Marital Rape." *The Family Coordinator*, vol. 26, no. 4, 1977, pp. 339–47. JSTOR, <https://doi.org/10.2307/581754>. Accessed 1 Nov. 2022.

^{xvi} Gelles, Richard J. "Power, Sex, and Violence: The Case of Marital Rape." *The Family Coordinator*, vol. 26, no. 4, 1977, pp. 339–47. JSTOR, <https://doi.org/10.2307/581754>. Accessed 1 Nov. 2022.

^{xvii} *Landmark Judgement By SC Over Marital Rape; Permits Any Women To End Pregnancies | English News*, TimesNow (Sept. 29, 2022), <https://www.timesnownews.com/videos/mirror-now/society/landmark-judgement-by-sc-over-marital-rape-permits-any-women-to-end-pregnancies-english-news-video-94530321>.

^{xviii} *Supra note 12*

^{xix} *Marital Rape in India*, (Oct. 31, 2022), <https://www.drishtiiias.com/daily-updates/daily-news-editorials/marital-rape-in-india>.