

## **Behind the Closed Doors: The Crime of Marital Rape**

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### **Abstract:**

*They say women are equal in society, but even after 76 years of India's independence, the old notions of male supremacy, men being the head of the family and women being subservient to men, prevails. This is perhaps one of the major reasons for men committing crime on women.*

*Amongst the category of crimes, Rape is one of the most heinous crimes committed on women as it not only affects her physically but leaves a scar to her soul. The Indian Penal Code, 1860 defines rape in section 375 and section 376 makes it punishable with imprisonment upto life. The problematic area which the researcher will be examining is exception (2) to section 375. The exception does not bring within its ambit the sexual acts committed by husband on his wife, thereby excluding rape happening in marriage and not recognising it as an offence. The Indian Penal Code does not recognise the requirement of 'consent' for wife and believes that wife upon marrying loses her right to say yes or no to sexual acts. In the present paper, the researcher would examine the prevailing criminal statutes of the country and suggest changes required in Indian Penal Code, 1860, Indian Evidence Act, 1872 and Code of Criminal Procedure, 1973, now repealed with Bharatiya Nyay Sanhita, 2023, Bharatiya Sakshya Adhiniyam, 2023 and Nagarik Suraksha Sanhita, 2023 respectively. In the process, the researcher will make use of doctrinal method.*

**Keywords:** Consent of Wife, Marital Rape, Offence, Sexual Intercourse By Husband.

### **Introduction**

The Constitution of India is the law of the land, also recognised as grundnorm from which all other laws get their backing. It grants equal rights and freedoms to all the citizens and persons, be it a man or woman, without making any distinction on the basis of gender. The Constitution came into force in 1950; India got independence from British rule in 1947; and since then about 75 years have lapsed; unfortunately, the mindset of the people, especially the male community, has not changed. Even today, the old notions of male supremacy, men being the head of the family, women being subservient to men, etc. still prevails. The woman is considered on a lower edge when it comes to comparison with the male counterpart. This might sound absurd to few, but this is the reality, to begin with.

One of such crimes committed by men on women in furtherance of their ideology and belief is rape. 'Rape' is in the category of 'most heinous crimes' committed on women. The offence of rape offends the bodily integrity and autonomy of women. Section 375 of the Indian Penal Code, 1860 mentions the crime of rape and punishment for the same is provided in section 376. One troubling area that researcher would be examining is Exception (2) to Section 375 which stipulates that 'Sexual intercourse or sexual acts by a husband with his wife, the wife not being under fifteen years of age, is not rape.' The effect which the exception creates is that the act when committed by a man on any woman, in normal circumstances, would be a crime, but, if

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committed by a man, in the capacity of a husband, with a woman, being his wife, is not a criminal act of rape.

Indian law does not recognise marital rape because it believes that the wife on marrying loses her right to 'consent' to sexual advances by husband. What in normal circumstances would have been an offence, is not, because it is done by privileged class - husband, as they have "*licence to rape*" their wives. Indians consider marriage to be a 'sacred institution', therefore, the offence of marital rape has no place either in the society or law. It is considered too abhorrent a concept to talk about, let alone be in the statute book.

## **Historical Development of Concept of No Marital Rape**

For the first time, the law that codified and put into words what would constitute rape was the Indian Penal Code a British Colonial legislation, framed in 1860. The concept of 'No Marital Rape' was borrowed from the theory developed by Sir Matthew Hale, C.J., in England in 17th century who stated that "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract."<sup>3</sup> At that time when the concept was developed, women used to work as slaves of their husband's, their only job was to carry out household chores and please their husbands. Women had no right to her bodily integrity, consent, autonomy and willingness. The theory went to the extent of taking away the individual personality of the wife by saying that after marriage the wife is subsumed into her husband, and the logic that defend the husbands flowed from the fact that how can a person (the husband) be guilty for raping himself.

Initially, the crime of rape was limited to certain acts and with the passage of time, the ambit of the crime has been broadened to include so many acts. However, one exception that has always remained intact to the offence of rape is 'Marital Rape Exception'. The exception stipulated in the 1860 Act that sexual acts or intercourse by a husband on his wife would not amount to rape. Initially there was no minimum age limit mentioned in the Act and leeway was given to every husband, no matter the age of the wife, to have intercourse at his will and that would not make him a rapist under the law of the land. This law for the first time granted immunity to the husbands and gave them a protective shield by legalising a criminal act. Subsequently, an amendment was brought in the Indian Penal Code in the year 1891 vide Age of Consent Act, 1891, which increased the consenting age for girl child for both married and unmarried and for the first time, the exception to Section 375 mentioned that sexual acts or intercourse by the husband on the wife would make him guilty, if the age of the wife is below 12 years. Thereafter, with an amendment in 1925, the age of exception was increased to 13 years from 12 years.

With the coming of Child Marriage Restraint Act in 1929, (a law which aimed at controlling the child marriages prevailing in India) the minimum age for marriage was fixed at 14 years under the Act; however, exception (2) to section 375 of the Indian Penal Code, 1860 remained static mentioning the age of wife to be less than 13 years for making the husband guilty of rape. The situation prevailed till the year 1940, where an amendment was brought in the Indian Penal Code, 1860 increasing the age of exemption of husband from rape if the wife is 15 years or above under exception (2) to Section 375 of Indian Penal Code, 1860. Later on in 1978, an amendment was brought to the Child Marriage Restraint Act, where the minimum age of marriage increased to 18 years; unfortunately, the Indian Penal Code retained the age of 15 years in exception (2),

<sup>3</sup> S. Mishra, Marital Rape – Myth, Reality and Need for Criminalization, E. B. C. India (2003), <https://www.ebc-india.com/lawyer/articles/645.htm#Ref16>.

meaning thereby a husband can only be punished if he commits sexual intercourse on a wife who is under fifteen years, though the minimum age to marry was increased to 18 years. This was an indirect way of granting protection to the act of child marriages.

The law as it stands today is that the minimum age to marry for a girl is 18 years and 21 years for a boy. Till 2024, the Indian Penal Code which was the law as existing until repealed by the Bharatiya Nyay Sanhita, 2023 retained in exception (2) to section 375 that husbands would not be guilty of sexual intercourse when committed on his wife who is not less than 15 years, meaning thereby the law recognised and gave validity to child marriages till 2024. With the Bharatiya Nyay Sanhita in July 2024, the age of wife mentioned in exception (2) to section 375 of the Indian Penal Code was increased to 18 years to be in pari materia with the age of marriage.

After this theory today, centuries have passed and developments have taken place in the positive direction. Today, women are recognised to have bodily integrity, a say in marriage, not subsumed into their husband's identity after marriage, etc. However, the position of women in India with regards to the exception of marital rape in section 375 of the Indian Penal Code, 1860 has not changed and they are still at the same footing as they were in 1860.

In all, India took 75 years after independence and 165 years after the date of the commencement of Indian Penal Code, 1860, to increase the age of consent of women from 10 years to 18 years. But even today the notion that husbands cannot be guilty of marital rape because marriage gives the husband the right to have sex and that criminalising marital rape would result into sacredness of marriage being destroyed, remains in the statute book and in the minds of the people, holding them back from taking down the exception (2) to section 375 of the Indian Penal Code from the statutory law.

## **Marital Rape violates Article 14 and 21 of the Constitutional right guaranteed to married women**

Constitution of India is pivotal document of the land that confers rights and duties on the citizens of the country. If the Constitution has not made any distinction between a married women and unmarried women, and it gives equal rights to women, be it of any age, caste, creed, marital status etc., how and why the criminal statute of the country has adopted the orthodoxal laws of the colonial era, and still carrying the burden of it, by denying the married women the right which she is entitled.

### *Marital Rape violates Article 14*

Article 14 of the Constitution talks about the right to equality. However, this right is not absolute and in certain circumstances different provisions or arrangements can be made for a set of people, if it is based on (1) intelligible differentia and (2) has an object to achieve. What the exception (2) to Article 375 of Indian Penal Code does is that, it creates two different categories of women, married and unmarried. An act of sexual intercourse when undertaken by a man on a woman, when the latter not being the wife of the former, is a crime and punishable severely; whereas if the same act is committed on the wife by her husband, the latter is exempted under exception (2) to section 375 under the garb of marital status and privacy of marriage. No justiciable reason has been given by the legislature for creating difference between married and unmarried women and making an act a crime for one category of women, whereas, denying the protection of the law to other category. The distinction is based on no intelligible differentia having any object to be achieved and being arbitrary and unjustifiable, shall be struck down as unconstitutional. Further, the impact in the form of trauma and mental agony that the crime

causes is same and equal to the married or unmarried women. A woman does not give an irrevocable consent once she enters into marriage, neither does she lose her individuality. Therefore, the exemption carved out in the nature of protection accorded to married men, is violative of Article 14 to the Constitution, as it fails to provide the married women, equal and similar protection as available to unmarried women. The classification has no reasonable rationale on which different treatment is justified.

This position has been clarified and upheld by the Supreme Court in various landmark judgements starting from *State of West Bengal v. Anwar Ali Sarkar*, (1952) 1 SCC 1, E.P. *Royappa v. State of T.N.*, (5 Judges) (1974) 4 SCC 3, *Shayara Bano v. Union of India*, (5 Judges) (2017) 9 SCC 1 and so on. It has been clarified that for Article 14, merely making different provisions would not suffice, unless it is shown that there is some rationale behind it and aims for a constitutional object to be achieved.

### *Marital Rape violates Article 21*

The most valued right embedded in the Constitution is Article 21 that talks about the right to life. It stipulates that a person is a master of his/her body and this right cannot be violated by any other person. An individual cannot be forced to perform an act which is contrary to his/her own will, more so when such an act has the adverse effect not only on the body of the person, but also on his/her soul. Having a sexual relationship with a partner is very intimate to the person, as the said activity involves body, mind and soul of the person, not only at the point of time of having intercourse, but even thereafter. Any person when forced to conduct a sexual activity without his/ her consent, amounts to gross invasion of the privacy and bodily integrity/ autonomy guaranteed under Article 21 of the Constitution.<sup>4</sup> The right to liberty enunciated in Article 21 would have no meaning if a wife has no control over her body and the manner/ time during which she wants to have sexual relationship.

The Supreme Court has recognised and clarified time and again that this right of bodily integrity is absolute with no exceptions.<sup>5</sup> Marriage as an institution cannot be interpreted to mean that the woman has abdicated and surrendered her right guaranteed under Article 21 of the Constitution. It is a settled law that no fundamental right, much less the one under Article 21, which is the most valuable right of the Constitution, can be abdicated, relinquished, renounced, abandoned or surrendered.<sup>6</sup>

The Supreme Court has in various cases even gone to protect the fetus inside the womb of the mother saying that it is entitled to a right on his/her body<sup>7</sup> and the mother cannot temper or play with the fetus as there is a life inside it. If the unborn are given protection at such a great level, there is no reason why a woman who is a living being, should be denied the same. Merely because a woman has got married she need not succumb to the wishes and dictates of her husband as it is the most severe form of violation of the personal liberty and right to life guaranteed under Article 21 of the Constitution. The concept of Gender Justice and Equality is flouted when the husband is given more power and autonomy. This imbalance needs to be

<sup>4</sup> Trivedi, D., Majumder, N., Bhatt, A., Pandya, M., & Chaudhari, S. P. (2021). Global research mapping on reproductive health: a bibliometric visualisation analysis. *Global Knowledge, Memory and Communication*, ahead-of-print(ahead-of-print). <https://doi.org/10.1108/gkmc-08-2021-0131>

<sup>5</sup> Suchita Srivastava v. Union of India, (2009) 9 SCC 1 (India).

<sup>6</sup> Debasish Banerjee & T. S. Sathyanarayana Rao, *The Dark Shadow of Marital Rape: Need to Change the Narrative*, 4 J. Psychosexual Health 11 (2022).

<sup>7</sup> Suchita Srivastava v. Union of India, (2009) 9 SCC 1 (India).

redressed.

## Suggestions and Recommendations

According to National Family Health Survey data<sup>8</sup>, it has come to light that from 2019-2021, the women, being married who have experienced violence in the form of physical, emotional or sexual through their current husbands was 32%. The data also revealed that married women in the age group of 18 to 49 years, about 82% have been the victim of sexual violence by their present husbands. What is startling is that only 0.1 cases of every 10 cases are reported.<sup>9</sup> Even a data from United Nations Population Fund<sup>10</sup> revealed that one in every three men rape their wife in India and what is more troublesome is that the offence though prevalent, is reported negligibly.

The aforesaid data clearly shows that the rape on married women by their husband is a real issue, more so a crime and happening in big numbers;<sup>11</sup> hence, it is important to curb down the exception and take away from the husbands the protection which they have been enjoying since centuries.

The author has discussed how and why is marital rape an offence and problem, though not recognised in India. But what is all the more important are the changes that needs to be bought in the existing statutes to make marital rape a crime in the statute book, which will be punishable by the Courts. The author suggests the following changes in the three major criminal statutes of the country:

- A. Changes required in Indian Penal Code, 1860 and Bharatiya Nyay Sanhita, 2023 (BNS)
- B. Changes required in Evidence Act, 1872 and Bhartiya Sakshya Adhiniyam, 2023 (BSA)
- C. Changes required in the Code of Criminal Procedure, 1908 and Bharatiya Nagarik Suraksha Sanhita, 2023

### A. Changes required in Indian Penal Code, 1860 and Bharatiya Nyay Sanhita, 2023 (BNS)

1. Addition of explanation to Section 90. **Consent known to be given under fear or misconception.** - *“Explanation. - Consent given by wife for sexual intercourse with husband is not free and cannot be implied, unless otherwise made explicit.”* (Section 28 of BNS)
2. Addition to clause (c) in **Section 100. When right of private defence of body extends to causing death.** *“Thirdly - An assault with the intention of committing rape, including marital rape.”* (Section 38 of BNS)
3. Addition of clause Eighthly to **Section 375. Rape.** - *“Eighthly - Without her consent,*

<sup>8</sup> Ministry of Health & Family Welfare, Gov't of India, National Family Health Survey (NFHS-5) 2019–21: India Report, Volume I (2021).

<sup>9</sup> RIT Foundation v. Union of India, (2022) 3 HCC (Del) 572, 2022 SCC OnLine Del 1404 (India).

<sup>10</sup> Vikas Kumar, Marriage or License to Rape? A Socio-Legal Analysis of Marital Rape in India, 6 Dignity: J. Analysis Exploitation & Violence, no. 3, art. 6 (2021).

<sup>11</sup> Trivedi, D., Majumder, N., Pandya, M., Bhatt, A., & Chaudhari, S. P. (2022). Evaluating the global research productivity on domestic violence: a bibliometric visualisation analysis. Collection and Curation. <https://doi.org/10.1108/cc-12-2021-0040>

*when committed by a husband on his wife assuming implied consent.” (Section 63 of BNS)*

4. Deletion of Exception (2) to **Section 375. Rape.** - “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*”
5. Addition of clause (k) **Section 376. Punishment for Rape.** - “*(k) being in a position of control or dominance over a woman including a husband on his wife, commits rape on such woman or his wife; or*” (Section 64 of BNS)
6. Substitution of existing **Section 376B.** “*Sexual intercourse by husband upon his wife in ordinary course or during separation.- Whoever, being a husband has sexual intercourse with his own wife, against her will and where she has not given her consent either in the ordinary course of them living as a husband and wife or during period of separation, whether under the decree of separation or otherwise, shall be punished with imprisonment of either description for a term which shall not be less than ten years, and shall also be liable to fine.*”
7. Addition of explanation (2) to **Section 376B** “*Explanation - The consent of the wife for engaging in sexual intercourse or sexual acts with her husband has to be explicit and clear and the husband cannot assume the same by implication just because they are married.*” (Section 67 of BNS)

#### **B. Changes required in Evidence Act, 1872 and Bhartiya Sakhyam Adhiniyam, 2023 (BSA)**

1. Addition of new **Section 103A. “Burden of Proof on husband in cases of Marital Rape.** - *When the wife alleges that her husband has committed sexual intercourse with her, without her consent, the burden of proving that the sexual intercourse was consensual, shall be on the husband.*” (Section 106A of BSA)
2. Addition of new **Section 113C. “Presumption as to Marital Rape.** - *When the question is whether the husband has committed the offence of marital rape on his wife and it is stated by the wife that the husband has committed the offence of marital rape on her, the court shall presume that the husband has committed the crime, if the sexual intercourse is proved.*” (Section 118A of BSA)
3. Addition of illustration to **Section 4. “Shall Presume** - *(i) A, a wife accused her husband B of committing sexual intercourse with her, without A’s consent thereby committing offence of Marital Rape. The Court shall presume it to be proved unless it is disproved.*” (Section 2(l) of BSA)
4. Addition of explanation and short title to **Section 114A.- “Presumption as to absence of consent in certain prosecution for rape including marital rape.** - *Explanation.- The word ‘woman’ shall include ‘wife’ and the word ‘accused’ shall include the ‘husband’, meaning thereby when a wife states she did not consent for sexual intercourse with husband, the court shall presume that she did not consent.*” (Section 120 of BSA)

#### **C. Changes required in the Code of Criminal Procedure, 1908 and Bharatiya Nagarik Suraksha Sanhita, 2023**

1. Addition of Explanation to **Section 53A. Examination of person accused of rape by medical practitioner** and **Section 157. Procedure for investigation** -

*“Explanation. The term ‘rape’ includes ‘marital rape’ and the offence of rape committed by husband on his wife.” (Section 52 & 76 of BNSS)*

2. Deletion of **Section 198B. Cognizance of offence**- *“No Court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code (45 of 1860) where the persons are in marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.” (Section 221 of BNSS)*

If the aforesaid changes are implemented in the criminal laws of the country, the author believes that the offence of marital rape would not just remain in talks, but in the statute book where offenders will actually be punished.

It is interesting to note that as of 2019, about 150 countries in the world have criminalised marital Rape,<sup>12</sup> either by bringing a legislation or through the efforts of the judiciary, which portrays increasing awareness of law making institutions towards the rights and autonomy of women. It is time that India too recognises this, upgrading itself from the orthodox notion and belief of ‘nothing like marital rape’ to ‘marital rape is a crime and violative of woman’s fundamental right’. Throughout the world today, a stand is taken that the rape in marriage is degrading to the fundamental right to live of the wife and it affects her autonomy to take decisions with respect to her body. Countries with a population of about thousands have recognised this women’s right to bodily integrity to be kept intact by criminalising Marital Rape. India, as on date having a population of around 145 crores, fails to do so. Taking into consideration the numbers and prevalence, India too should legalise the right to claim protection by a married woman from their husbands from sexual intercourse and if husband forces, make it an act of crime under rape.

The author believes that changing the law is crucial for bringing deterrence and curbing the violent acts of the husbands, because very negligible amount of husbands recognize marital rape to be unacceptable and large number of wives believe that they do not have a right to refuse their husbands sexual advances. It is time for India to give women the much prolonged right which she deserves, whether she is married or unmarried.

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<sup>12</sup> Mansi Patel, History of the Movement to Criminalise Marital Rape Across the World, Indian Express (Feb. 3, 2022).