

**International Journal of Policy Sciences and Law**

**Volume 1, Issue 3**

**Marital Rape: A Felony Without  
Substantial Legal Consequences**

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## **Abstract**

*Marital Rape is a crime that continues to persist behind the four walls of the house. The underreporting due to the social norms is a pity. But how does a woman report to the police when the law itself is shielding this heinous crime? The revelation of the enormous rise in domestic violence cases during the lockdown compelled us to conduct this research. The essay gives an overview of how a large proportion of women are denied their fundamental rights. It briefly presents a few marital rape cases, while stating the take of different countries on this matter. The remedies that the aggrieved married women have are also explained concisely. At last, the research provides its suggestions, concluding on a positive note hoping that at least the judiciary would come in and take the required actions. It is expected from the justice provider to give justice to all the women who have been grieving for way too long for their basic rights.*

**Keywords:** *Marital Rape, Fundamental Rights, Legal, Domestic violence*

## **1.0 Introduction**

Globally, one of the most common forms of violence perpetrated against women is that by their husband or an intimate male partner.<sup>1</sup> 1 in 5 ever-partnered women aged 15-49 have been subjected to intimate partner violence in the previous 12 months.<sup>2</sup> Despite all this, there are still 36 countries where marital rape is not criminalised and is being shielded by the law, India being one of them.<sup>3</sup>

According to the World Health Organization, “rape is defined as physically forced or otherwise coerced penetration - even if slight - of the vulva or anus, using a penis, other body parts or an object.” Rape within marriage or dating relationships is clearly mentioned as one of the wide ranges of sexually violent acts.<sup>4</sup> The international standards allow no exception for marital rape.<sup>5</sup>

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<sup>1</sup> World Health Organisation Geneva, 2002, “World Report on Violence and Health ,” World Health Organisation, 2002

<sup>2</sup> UN Women, “Progress of The World's Women 2019-2020: Families in a Changing World,” UN Women, 2019

<sup>3</sup> Namita Bhandare, “The Conversation India Refuses to Have,” Hindustan Times, January 8, 2021

<sup>4</sup> World Health Organisation, “Sexual Violence,” World Health Organisation, 2002

<sup>5</sup> Directorate-General for Internal Policies Policy Department Citizen's Rights and Constitutional Affairs, “Overview of the Worldwide Best Practices for Rape Prevention and for Assisting Women Victims of Rape,” European Parliament, 2013

In fact, criminalizing marital rape would be a progression towards achieving the United Nations Social Development Goal 5- Gender Equality, one of whose targets is to eliminate all forms of violence against all women and girls, including physical, sexual or psychological violence by a current or former intimate partner.<sup>6</sup>

However, even when 31.1% of the ever-married women have been subjugated to physical, sexual, and emotional violence at the hands of their spouse in India, the Indian Law keeps on living in denial.<sup>7</sup> Although Section 375 of the Indian Penal Code (IPC) criminalizes rape, Exception 2 excludes its application on sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age.

According to the Indian Penal Code, Explanation 2 and Exception 2 under Section 375 read as follows:

*“Explanation 2.* Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

*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.”

In Explanation 2, consent is being talked about. However, even non-consensual sexual intercourse or sexual acts by a man with his wife who is above 15 years of age, is not considered as rape under Exception 2. This indicates that within marriage, a perpetual implied consent by the women is presumed for her whole married life for all sexual acts since there is no specification in the Constitution as to why marital rape of a woman above 15 years of age is not considered rape.

However, recently in 2017, a notable change was made in the exception. The Supreme Court gave a verdict stating that sexual intercourse by a man with his wife, who is below 18 years of age, is rape, which though historically significant, was just a small step towards the criminalisation of marital rape. Dealing with the issue of marital rape of a woman aged above 18 was nevertheless refrained by the court.<sup>8</sup>

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<sup>6</sup> United Nations, “Goal 5 | Department of Economic and Social Affairs,” United Nations (United Nations, 2020)

<sup>7</sup> International Institute For Population Sciences and Ministry of Health and Family Welfare, “India Fact Sheet, National Family Health Survey(NFHS-4),” District Level Household and Facility Survey, 2016

<sup>8</sup> Krishnadas Rajagopal, “Sex with Minor Wife, despite Consent, Is Rape: Supreme Court,” The Hindu (The Hindu, October 11, 2017)

Thus, the law continues to legalise the rape of women above 18 years of age by their husbands.

## **2.0 Reasons for Criminalizing Marital Rape**

### **2.1 Violation of Legal and Constitutional Rights**

Exception 2 of Section 375 is in violation of Article 14 of the Indian Constitution- Equality Before Law, since it classifies women into two groups- the married and unmarried. It is discriminatory towards married women and legalizes their rape for no reason other than their marital status while protecting the unmarried women from those same acts.

It is also clearly in violation of Article 21- Protection of Life and Personal Liberty, since it makes sexual intercourse against the consent of the wife possible and denies her the right to make decisions over her own body and personal life.<sup>9</sup>

It defeats the purpose of Section 375 of the IPC, which is to protect women and punish those who engage in the inhumane activity of rape. Sparing the husbands who force themselves on their wives and not protecting the women legally just because of their marital status is entirely contradictory to it, since the consequences of rape on the married and unmarried women is the same. In fact, the effect on a married woman will be much more since she is tied to her rapist legally and it is far more difficult for her to escape from the abusive environment.

The fact that Exception 2 violates the Fundamental Rights (Articles 14 and 21) of the Constitution is proof enough of its invalidity and the prejudice it inflicts towards married women due to the flawed idea of marriage.

### **2.2 Health Problems Faced by the Victims**

Despite the historical myth that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women.

The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence.

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<sup>9</sup> Government of India, Ministry of Law and Justice Legislative Department, "THE CONSTITUTION OF INDIA," Legislative Department, 2020

Gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.

Women who are raped by their partners are also likely to suffer severe psychological consequences. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.<sup>10</sup>

### **3.0 India's Judicial Stand on Marital Rape**

In *Emperor vs. Shahu Mehrab*, 1917, the husband was convicted under section 304A IPC for causing the death of his child-wife by rash or negligent act of sexual intercourse with her.

In *Sree Kumar vs. Pearly Karun*, 1998, the Kerala High Court observed that because the wife was not living separately from her husband, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376A, IPC will not be attracted. In this case, there was an ongoing dispute on divorce between the parties. Thereafter, a settlement was reached between the husband and wife and parties agreed to continue to reside together. The wife stayed with the husband for two days during which she alleged that she was subject to sexual intercourse by her husband against her will and consent. Hence the husband was held not guilty of raping his wife though he was de facto guilty of having done so.<sup>11</sup>

According to the High Court of Delhi, a hearing on criminalising marital rape has been going on since 2015. The petitions of the RIT Foundation, Abdulla Khan, Khusboo Saifi, All Women Democratic Women Association and Farhan have now been combined into one case. They have challenged Exception 2 of Section 375 and Section 376B to be unconstitutional.<sup>12</sup>

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<sup>10</sup> Saurabh Mishra and Sarvesh Singh, "Marital Rape — Myth, Reality and Need for Criminalization," Eastern Book Company - Practical Lawyer, 2003

<sup>11</sup> Dr. Bhavish Gupta and Dr. Meenu Gupta, "Marital Rape: - Current Legal Framework in India and the Need for Change," Galgotias University, 2013

<sup>12</sup> Soibam Rocky Singh, "Criminalising Marital Rape 'May Destabilise Institution of Marriage': Centre Tells Delhi HC," Hindustan Times, August 29, 2017

#### **4.0 Current Legal Stance on Marital Rape Worldwide**

In 1976, Australia became the first common law country to pass reforms that made marital rape a criminal offence. In the two decades before that, several Scandinavian countries and countries in the Communist bloc passed laws criminalising spousal rape, including Sweden, Norway, Denmark, the former Soviet Union and Czechoslovakia. Poland, in 1932, was the first to have a law explicitly making it a criminal offence. Since the 1980s, many common law countries have legislatively abolished the marital rape immunity, including South Africa, Ireland, Canada, the United States (US), New Zealand, Malaysia, Ghana, and Israel.

In the US, between the 1970s and 1993, all 50 states made marital rape a crime. In 1986, the European Parliament's Resolution on Violence against Women of 1986 called for the criminalisation of spousal rape which was done soon after by several nations including France, Germany, the Netherlands, Belgium and Luxembourg. In 1991, the House of Lords in the United Kingdom struck down its common law principle that a marriage contract implied a woman's consent to all sexual activity.

In 2002, Nepal got rid of the marital rape exception after its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy.<sup>13</sup>

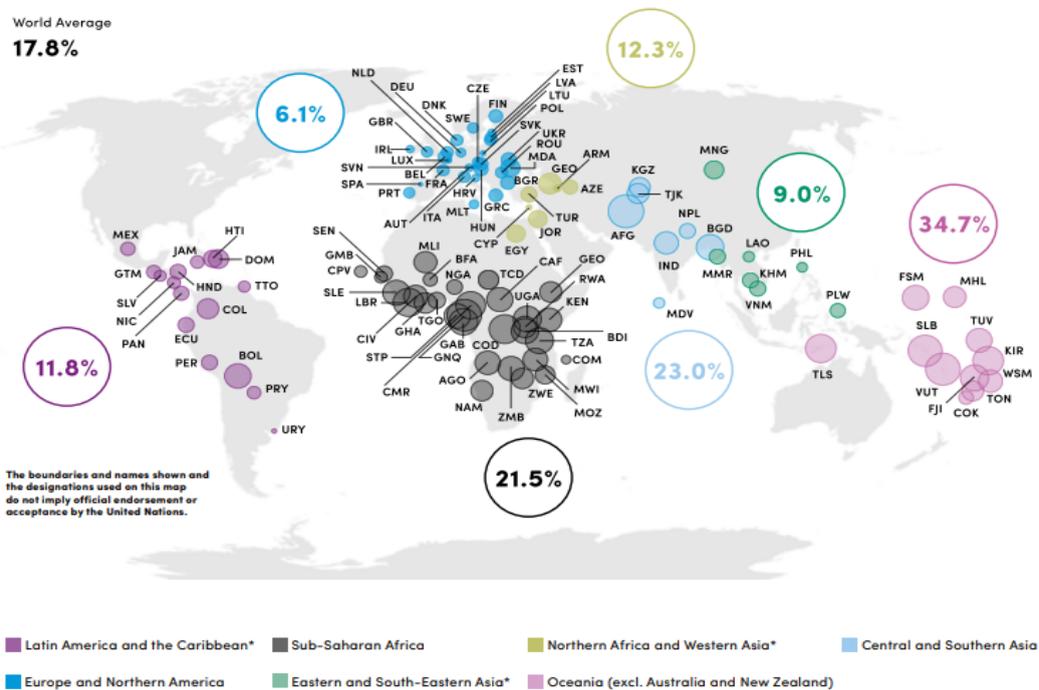
Nonetheless as of June 2017, only 77 out of 185 countries have explicit legislation criminalizing marital rape. Moreover, there are still several countries that retain clauses exempting perpetrators of rape from prosecution if they subsequently marry the victim, which is highly discriminatory and in conflict with human rights standards.<sup>14</sup>

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<sup>13</sup> Shalini Nair, "Marital Rape a Crime in Many Countries, an Exception in Many More," *The Indian Express*, August 31, 2017

<sup>14</sup> UN Women, "Ad Campaign: A Spotlight on Legal Gaps to End Violence against Women," UN Women, 2020

**FIGURE 6.2** PROPORTION OF EVER-PARTNERED WOMEN AND GIRLS AGED 15-49 SUBJECTED TO PHYSICAL OR SEXUAL VIOLENCE BY A CURRENT OR FORMER INTIMATE PARTNER IN THE PREVIOUS 12 MONTHS, BY REGION, LATEST AVAILABLE YEAR



Source: UNSD 2018.

Notes: The circles show population-weighted averages per region for women aged 15-49 in a total of 106 countries and territories. Population weights are based on 2017 figures for countries and territories on which sex- and age-disaggregated data are available from World Population Prospects. This analysis covers 106 countries and territories, comprising 54.4 per cent of the population of women and girls aged 15-49. For Eastern and South-Eastern Asia, Latin America and the Caribbean and Northern Africa and Western Asia, data cover 12.7, 48.4 and 41.7 per cent of the region's population and should be treated with caution. The regional and global aggregates marked with an asterisk (\*) are based on less than two thirds of their respective population and should be treated with caution. In all other regions, aggregates are based on data covering two thirds or more of the region's population. Population coverage was insufficient to calculate a regional average for Australia and New Zealand and therefore not shown. For 75 of the 106 countries, the age group of women is 15-49 while for 30 countries the age group is 18-49. In the case of Paraguay, the sample is for women aged 15-44 and for Portugal, the age group is 18-50. Data for Côte d'Ivoire are for currently married women only. Definition of sexual violence differs from standard for Nicaragua, Panama, Paraguay and Uruguay. Definition of physical and sexual violence differs from standard for all the European countries in the sample.

## 5.0 Present Remedies for the Marital Rape Victims in India

According to the Indian Penal Code, 1860, a woman can file a case against her husband or his relatives under Section 498A, if subjected to cruelty, who if proven guilty will be imprisoned for a term up to 3 years. Here, cruelty includes any wilful conduct which is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or health (mental or physical); or her harassment by coercing her or any person related to her to meet any unlawful demand. However, it wouldn't be fair to apply this to marital rape since there is a marked difference between cruelty and rape. The Law already acknowledges this difference by placing rape under a separate category of violence in the IPC. Moreover, the unjust conduct of the perpetrator is not considered enough for conviction, leaving many women who have undergone marital rape out of the clause.

Under Section 376B, when the woman and her husband are living separately, whether under a decree of separation or otherwise, if the husband has sexual intercourse with her wife without her consent, he shall be imprisoned from two to seven years. This section seems to imply that consent is presumed when the wife and husband live together and cannot be implied when they are living separately. It supports the rape of a woman by her husband if she is living together with him, which is highly erroneous.

As per the Protection of Women from Domestic Violence Act, 2005, a woman can file a case within a “domestic relationship”, wherein domestic violence includes physical, sexual, verbal, emotional and economic abuse, sexual abuse being defined as any conduct of a sexual nature that abuses, humiliates, degrades or violates the dignity of woman. Under this Act, marital rape is recognized as domestic violence and the victims are given various reliefs like protection orders, monetary relief orders, custody orders, residence orders, etc. However, these reliefs are not enough for the grievances of the marital rape victims.

In conclusion, these "remedies" don't do justice to the marital rape victims. Under them, the perpetrator can only be imprisoned from two to seven years at the most, as opposed to the term of 10 years to life imprisonment under Section 376 of IPC for committing rape. There is a lack of viable alternatives and a need to criminalize marital rape, as opposed to pointing at alternative remedies.

## **6.0 Suggestions**

- Marital Rape should be recognized by the Parliament as a criminal offence under the IPC; while Exception 2 of Section 375 of IPC should be completely removed because of the injustice it does to married women.
- The punishment for committing marital rape should be the same as the one prescribed for rape under Section 376 of IPC since marital rape is the same as rape. The relation between the perpetrator and the victim should not have any effect on the sentence of the criminal.
- Marital rape should be included as a cause for divorce in the matrimonial laws. However, it should be up to the woman whether she wants to resort to divorce.

- A separate committee that is trained specifically to receive reports from the marital rape victims should be formed so that the victims don't hesitate to report their husbands from the fear that they might not accept their complaints and judge them instead, which usually happens in the case of reporting to the police.
- Organisations of marital rape victims should be created which in turn would inspire other victims to come forward. These organisations could act as an intermediary, encouraging the victims to file a case against their husbands and could also provide help in the legal proceedings of the court.

## **7.0 Conclusion**

In India, women have to surrender to their animalistic husbands losing their bodily integrity every time they rape them. They are told to let it go and adjust, even when they know they will not be able to forget the inhumane act conducted against them. The fact that the law legalises marital rape just gives encouragement to the husbands and grief to the wives. It is high time that something be done about this. The archaic approach to this matter that the wife is obligated to sexual activities within marriage will not work in this developing world. The excuse that the legislators and Judiciary cannot interfere with the sanctity of marriage is unreasonable since they are already doing so in the case of divorce, dowry and cruelty. The right to equality and right to life and personal liberty should be on a higher pedestal than the institution of marriage. Awareness must be spread countering the prevailing myth that rape by one's spouse is inconsequential. If not the legislators, then at least the Judiciary should render complete justice by criminalizing marital rape.

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