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## Criminalization of Marital Rape in India

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### Abstract

*In the Article entitled as “CRIMINALISATION OF MARITAL RAPE IN INDIA”, the author will analyse the current condition of laws in the country regarding the offence of marital rape. The legal system of India has not yet considered marital rape as a criminal offence and getting married is considered as a form of consent given by the married women to their legal husbands to force them to involve in sexual/physical intercourse with them. This Short article analyses the current situation of Marital Rape followed by the Interference of Judiciary to resolve the conundrum of Marital Rape in Indian Society. The Author has also used Data from the Various Indexed & reports to support his research findings in this Article.*

**KEYWORDS:** MARITAL RAPE, CRIMINAL OFFENCE, CONSENT, FORCE, INTERCOURSE.

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## Introduction

Rape is defined as “the act of sexual intercourse by a man with a woman without her consent or against her will. It is an act of ravishment of a woman by force, fear, fraud, or misrepresentation.”<sup>2</sup>

A man is considered to have committed rape under the following seven circumstances:<sup>3</sup>

1. Firstly, the act was done against the will of the woman
2. Secondly, the woman didn't provide her consent
3. Thirdly, having the consent of the woman under the undue influence (threatening for death)
4. Fourthly, the man committing the act is not the legal husband of the woman
5. Fifthly, having the consent of the woman, when she is in the condition of unsound mind, due to consumption of alcohol or other toxic substances
6. Sixthly, without or with the consent of the woman aging below 18 years<sup>4</sup>
7. Seventhly, when the woman is unable to communicate her consent because of the force used by the man.

Under Section 375 of the Indian Penal Code, to indulge in sexual intercourse, the consent of the woman is a must (except after marriage). Without any consent, the intercourse is entitled to rape as in *Mukesh and Another v. State (NCT of Delhi) and others*<sup>5</sup>. Sexual intercourse which has taken place between husband and wife (legal partners), above the age of 18 years, even without the consent of the woman partner, is not entitled under the criminal offense of Rape as defined in the landmark case of *Independent Thought v. Union of India and others*<sup>6</sup>. The sexual intercourse between the legal partners, without the consent of the woman, who is above the age of 18 years, is entitled “Marital

<sup>2</sup> C.K. Takwani, Indian Penal Code (2021).

<sup>3</sup> K.A PANDEY, B.M. GANDHI'S, INDIAN PENAL CODE (4th edition ed. 2021).

<sup>4</sup> Criminal Law Amendment Act, 2013, Acts of Parliament, 2013 (India); In the amendment, the age was shifted from 15 years to 18 years, (Legal Age under which Sexual Intercourse will be considered as Rape), <https://iitk.ac.in/wc/data/thecriminallaw.pdf>.

<sup>5</sup> Reportable in the Supreme Court of India Criminal, [https://main.sci.gov.in/supremecourt/2019/44603/44603\\_2019\\_5\\_302\\_19276\\_judgement\\_18-dec-2019.pdf](https://main.sci.gov.in/supremecourt/2019/44603/44603_2019_5_302_19276_judgement_18-dec-2019.pdf) (last visited Feb 8, 2022).

<sup>6</sup> Judgment Madan B. Lokur, j. - Supreme Court of India, , [https://www.main.sci.gov.in/supremecourt/2013/17790/17790\\_2013\\_judgement\\_11-oct-2017.pdf](https://www.main.sci.gov.in/supremecourt/2013/17790/17790_2013_judgement_11-oct-2017.pdf) (last visited Feb 8, 2022).

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Rape”<sup>7</sup>. The term marital term is defined as “unwanted sexual intercourse by a man on his wife obtained by force, threat, of force or violence or when she is unable to give her consent. The word ‘unwanted sexual intercourse’ refers to all kinds of penetration (anal, vaginal or oral), against her will or without her consent.”<sup>8</sup>

The concept of marital rape is covered under Exception 2 of Section 375 of the Indian Penal Code, which is defined as “exception to the offense of rape in cases of forced sexual intercourse by a man with his wife if she is of 18 years of age or above”<sup>9</sup> as in the case of Independent Thought v. Union of India and others<sup>10</sup>.

The topic of Marital rape is of great significance, especially in a country like India, where almost 60-70% of the population is not aware of the legal rights provided by the Indian legal system because of the high illiteracy rates in the country. Marital rape is a serious problem, which the legal system of the country has failed to recognize as a criminal offense.

Through this article I would like to spread awareness about the concept of marital rape, which is a huge problem because around 5-6% of married woman in India is forced to indulge in sexual intercourse with their husband, against their consent<sup>11</sup>.

### Conceptual Analysis of Marital Rape

In a country like India, the woman belongs to the most vulnerable community which is prone to discrimination, inequality, crimes, violence, social exclusion (in terms of politics, society, decision making in the family), and many more social wrongs. Despite various effects to bring down these social wrongs against the women community, Indian society has failed to treat women equally and the discrimination continues. Even after almost 75 years of independence, a woman has failed to get independence from the shackles of society. From that time past till now, a woman has to face

<sup>7</sup> Inc. US Legal, US LEGAL MARITAL RAPE DEFINITION, <https://definitions.uslegal.com/m/marital-rape/> (last visited Feb 8, 2022).

<sup>8</sup> Socio-Political Dimensions of Rape, <https://www.jstor.org/stable/24701029>.

<sup>9</sup> Exception to rape within child marriages, SUPREME COURT OBSERVER (2021), <https://www.scobserver.in/cases/independent-thought-union-of-india-exception-to-rape-within-child-marriages-case-background/> (last visited Feb 8, 2022).

<sup>10</sup> Supra Note 5.

<sup>11</sup> GOVERNMENT DATA ON MARITAL RAPES REKINDLES DEMANDS ITS CRIMINALIZATION, THE NEW INDIAN EXPRESS (2018), <https://www.newindianexpress.com/nation/2018/jan/13/government-data-on-marital-rapes-rekindles-demands-its-criminalisation-1752922.html> (last visited Feb 8, 2022).

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discrimination and problems in society. According to the National Crime Records Bureau in 2006, there has been an increase of 700% in rape cases from 1971 (where seven [7] rape cases were reported every day) to 2006 (where fifty-three [53] cases were reported every day).<sup>12</sup>

According to the latest reports, there has been a 63% increase in crimes against a woman in the year 2021<sup>13</sup>, which includes an increase in rape (section 375 of the Indian Penal Code), kidnapping of woman, abduction of woman, cruelty by husband and in-laws (section 498 A/ 406 of the Indian Penal Code), dowry death (section 304 B of the Indian Penal Code), insult to the modesty of a woman (section 509 of the Indian Penal Code), and assault on woman with intent to outrage their modesty (section 354 of the Indian Penal Code).

But one major problem which is not recognized by the legal system of India is “MARITAL RAPE”. Unfortunately, India’s 70% of the women are the victims of domestic violence. Marital rape is one of the most common incidents in domestic violence is not considered a criminal offense. Around the globe, 100 countries have already criminalized marital rape, and is punishable by law, according to their respective country’s policies. But, a country like India where women are more prone to domestic violence doesn’t recognize marital rape as a criminal offense and has not criminalized it. India is one of the 36 countries which has not considered the problem of marital rape and yet lacks steps to be taken in criminalizing marital rape in the country.

In the legal system of India, the concept of marital rape is taken into account under Exception 2 of Section 375 of the Indian Penal Code, which states that “*exception to the offense of rape in cases of forced sexual intercourse by a man with his wife if she is of 18 years of age or above*”. Under this exception, it is believed that by getting married legally, the wife is giving consent to her legal husband to involve in sexual intercourse or any kind of involvement in physical form, even if it is against her will or without her consent as taken into consideration in the case of *Dilip Pandey and Others v. the State of Chhattisgarh*<sup>14</sup>.

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<sup>12</sup> Supra Note 7.

<sup>13</sup> Staff reporter, CRIMES AGAINST WOMEN SAW OVER 63% RISE IN 2021 SO FAR, THE HINDU (2021), <https://www.thehindu.com/news/cities/delhi/crimes-against-women-saw-over-63-rise-in-2021-so-far/article35181148.ece> (last visited Feb 8, 2022).

<sup>14</sup> Editor et al., CHHATTISGARH HIGH COURT: “SEXUAL INTERCOURSE BY HUSBAND WOULD NOT CONSTITUTE AN OFFENCE OF RAPE EVEN IF IT WAS BY FORCE OR AGAINST HER WISH”; CAN A WIFE INITIATE PROCEEDINGS AGAINST HER HUSBAND FOR UNNATURAL SEX UNDER S. 377 IPC? SCC BLOG (2021), <https://www.sconline.com/blog/post/2021/08/27/rape-7/> (last visited Feb 8, 2022).

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There is an immediate need for the legal system of India to take into consideration the offense of marital rape. The problem of marital rape is against many legal and constitutional rights provided by the legal system of India. The rights violated are listed below:

(i) **The main motive of Section 375 of the Indian Penal Code is defeated:**

The main motive of the section is to protect the victims of the forceful involvement in sexual intercourse; Rape. The offense of rape is of the same consequences and the marital status of the woman doesn't matter. However, exempting the legal husband for the offense doesn't meet with the motive of Section 375 of the Indian Penal Code.

(ii) **Article 14 of the Constitution of India is violated:**

Article 14 of the Indian Constitution<sup>15</sup>, states that everyone who is a citizen of India is equal before and law is equal for all. This means that rules that are set by the legal system of India are equal for all and all the citizens should follow the rules and regulations. So, not criminalizing the problem of marital rape is a violation of article 14 of the married women of the country. In India, rape is a criminal offense under Section 375 of the Indian Penal Code but marital rape, which has the same consequences as rape is not considered a criminal offense and is put under Exception 2 of Section 375 of the Indian Penal Code.

(iii) **Violation of Article 21 of the Constitution of India:<sup>16</sup>**

Article 21 mentioned in the Constitution of India states that "No person shall be deprived of his life or personal liberty except according to a procedure established by law". The article provides the right to life and personal liberty to all the citizens of the country, which means that all the citizens of the country have the right to live life according to their will. But, by not criminalizing domestic violence or marital rape, the liberty provided by the law to the married women of the country is violated as they do have a choice to indulge themselves in

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<sup>15</sup> Constitution of India, CAD, [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/article%2014](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/article%2014) (last visited Feb 8, 2022).

<sup>16</sup> Constitution of India, CAD, [https://www.constitutionofindia.net/constitution\\_of\\_india/fundamental\\_rights/articles/article%2021](https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/article%2021) (last visited Feb 8, 2022).

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sexual intercourse with their legal husband and it is believed that by getting married, they have given the consent to their legal husband to involve in sexual intercourse with him.

**(iv) The doctrine of Coverture<sup>17</sup>:**

Since the 1860s, when the concept of the Indian Penal Code was introduced in India, the married woman is considered as of the same identity as his husband. After marriage, her identity in society doesn't exist and her identity merges with the identity of her legal husband. The wife is restricted to have a social life and is kept behind the curtains. They do not have a say in the decision-making of the family and are discriminated against. Women after marriage are exposed to the cruelty of the husband and in-laws and are criticized for dowry.

As per the International Men and Gender Equality Survey of 2011, 1 out of 5 husbands forces his wife to involve in sexual intercourse with him, without her consent or against the will of the legal wife.

As per the UN Population Fund, two-thirds of the married women in India aging 18-49 years, are forced to have sex or indulge in any kind of physical relationship with their legal husband, even if she is not willing to involve in any such relationship.

**Role of Supreme Court of India**

The problem of marital rape has led to differences between the courts of India. For example, Kerala High Court ruled that the offense of marital rape should be considered as a ground to divorce<sup>18</sup>. Delhi High Court believes that by getting married the legal partners have not given consent to involve in sexual intercourse. Both men and women should have a say in involving in sexual intercourse, even after getting married<sup>19</sup>.

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<sup>17</sup> Mervyn Vivek Tamby, MARITAL RAPE - WHOSE BODY IT IS? LAW TIMES JOURNAL (2021), <https://lawtimesjournal.in/marital-rape-whose-body-it-is/> (last visited Feb 8, 2022).

<sup>18</sup> Shaju Philip, MARITAL RAPE A GOOD GROUND TO CLAIM DIVORCE, SAYS KERALA HIGH COURT, THE INDIAN EXPRESS (2021), <https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/> (last visited Feb 8, 2022).

<sup>19</sup> Delhi HC on Marital Rape: 'Irrespective of marital status, every woman has the right to say no', THE WIRE, <https://thewire.in/rights/delhi-hc-on-marital-rape-irrespective-of-marital-status-every-woman-has-the-right-to-say-no> (last visited Feb 8, 2022).

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The Supreme Court of India, being the apex court of the country, has put in a lot of effort for the protection of women of the country but has not yet given a say on the problem of marital rape in the country. In 2017, the apex court of the country passed the judgment which defines sexual intercourse with a minor under the offense of rape. The Indian Judiciary has changed the age from 15 years to 18 years but has stated that sexual intercourse with a legal wife will not amount to the offense of rape. This means that once the legal wife has turned 18 years of age, sexual intercourse with the legal husband cannot be covered under the offense of rape.

Being the apex court of the country, the Supreme Court of India's judgments and statements has a major effect on the Judicial system of India. Supreme Court should take into consideration the prevailing problem of marital rape in the country. Marital rape is a part of domestic violence, violates a lot of fundamental and legal rights of the married women of the country. The most senior and experienced judges of the country belong to the Supreme Court, they should pass their judgment on the topic of marital rape so that the Indian Judicial system would consider the problem of marital rape and provide protection to the victims of the offense.

### Conclusion

I would like to conclude by stating that the Indian legal system should immediately take steps to solve the problem of marital rape in the country and it is high time to consider the problem. The legal system of India doesn't provide any kind of legal provisions which consider the offense of marital rape as a criminal offense and consider it as a punishable act.

The Indian legal system should criminalize the offense of marital rape as it violates many legal rights and removes the protection under Exception 2 of Section 375 of the Indian Penal Code. Consent of both men and women should be made mandatory to indulge in sexual intercourse, even they got married and are entitled as legal partners.

Due to the lack of proper function of the legal system in the country, many victims of the offense do not come up and complain against the wrongdoer. Despite, two-thirds of married women or 1 out of 3 married women having to face domestic violence, 70% of the cases are not reported. This is because of the major lag in the legal system of the country. The cases in the country take a lot of

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time to provide justice and give relief to the victims of domestic violence as it is not seriously considered in the country.

The author believes that the existence of “Exception 2 of Section 375 of the Indian Penal Code” is not at all justified as it restricts the married women of the country to exercise their legal and fundamental rights.

So, India should criminalize marital rape and consider it as a criminal offense and it should be made punishable by the law.

