



PURC Journal of Law,
Vol. 1, Issue 2, July-December, 2025, pp. 124- 136

The Struggle for Gender Justice: Criminalizing Marital Rape in the Indian Legal System

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Introduction

The pervasive issue of rape, a grave crime against women, continues to afflict Indian society. Regrettably, according to Section 375 of the Indian Penal Code, rape is defined as non-consensual sexual intercourse with a woman.¹ Alarming as it may be, if a woman above the age of eighteen is subjected to rape by her own spouse, it is not recognized as a criminal offense in India. The absence of legal provisions against marital rape is a matter of deep concern, particularly considering that a vast number of women in India have experienced domestic violence. It is concerning that India, a signatory to the Universal Declaration of Human Rights, remains one of the few countries that does not explicitly criminalize marital rape.² Marital rape pertains to coerced sexual intercourse between spouses, where the wife is compelled to engage against her will, devoid of her consent. Despite amendments made to protect women under criminal law, India remains one of the 36 countries where marital rape is not criminalized.³ This lack of criminalization carries severe repercussions as it undermines the dignity of women and perpetuates the notion that a husband possesses the right to enforce sexual acts upon his wife without her consent. It is noteworthy that if anyone other than the husband were to force sexual activity upon a woman, it would be categorized as rape. However, if the same act is committed by her spouse, it eludes the classification of rape. This differential treatment within marital relationships creates an unequal standard, encroaching upon women's bodily autonomy and agency. It raises legitimate concerns regarding the constitutionality of such discriminatory treatment,

potentially violating Articles 14, 15, and 21 of the Indian Constitution.

Former Chief Justices of India have voiced reservations about the criminalization of marital rape, expressing concerns about potential societal upheaval. They suggest that factors such as illiteracy, lack of economic empowerment, societal mindsets, poverty, and others should be taken into consideration before any legal changes are implemented. In the case of *Independent Thought v. Union of India*,⁴ the Supreme Court of India decreed that the age of consent for sexual intercourse should be set at 18 years, regardless of marital status. However, the court exhibited reluctance in criminalizing marital rape for women over 18 years, citing the sanctity of marriage and the potential harm such a law might cause. Similarly, in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*,⁵ the Gujarat High Court opined that criminalizing marital rape might jeopardize trust and confidence within a marriage. In 2018 and 2021, the Gujarat⁶ and Chhattisgarh High Courts⁷ respectively deemed marital rape non-criminal, though the Gujarat High Court judge acknowledged the need for legal reform to prevent marital rape and promote gender equality. To comprehend the concept of marital rape fully, it is imperative to grasp the fundamentals of marriage and rape. Marital rape encompasses instances of sexual violence occurring within a marriage, where the husband employs force or coercion to engage in sexual activity against his wife's will. Rape, in general, refers to any non-consensual sexual activity, irrespective of the relationship between the parties involved. Currently, The SC is yet to decide if the marital rape exception to Section 376 of the IPC violates the fundamental rights of married women.⁸

Is Marriage a contract?

In order for a marriage to be deemed legally valid, it is required that both parties involved have attained the age of majority and have provided their written consent. Marriage entails the union of two individuals, establishing a specific matrimonial bond. While various religions may have their own specific prerequisites for a valid marriage, the fundamental principle remains consistent, with the ceremony conforming to the respective religious customs. These principles are elucidated in Section 5⁹ and 7¹⁰ of the Hindu Marriage Act of 1955, Section 112 of the Evidence Act, and Section 2(a) of the Indian Majority Act.

Section 375 on Marital rape

Section 375 of the Indian Penal Code, enacted in 1860, defines the criminal offense of rape, encompassing all forms of non-consensual sexual activity and penetration perpetrated against a woman. The punishment for rape is stipulated in Section 376 of the IPC. However, it is disconcerting to note that Section 375 incorporates an exception that excludes marital rape of women above the age of fifteen from being categorized as rape. In other words, if a man engages in non-consensual sexual intercourse with his wife, it is not considered a crime if the wife

is fifteen years of age or older. As per Section 375, a man is deemed to have committed rape under the following circumstances:

- Against the woman's will,
- Without her consent,
- With her consent obtained through coercion, threats, fear, or while she is under the influence of intoxication or mentally incapacitated,
- When she believes she is legally married to the perpetrator, even if he is not her husband, or
- When she is below the age of 18 or unable to provide consent.

According to Section 375¹ of the Indian Penal Code, a woman must be at least 18 years old to give consent for consensual sexual activity. Even if a girl under 18 years of age consents to sexual activity, the man involved would be charged with rape. However, an exception exists for married women, who can provide consent at the age of 15 if they are coerced into engaging in sexual acts by their husbands. This inconsistency has sparked debates and raised questions about the justification for this age difference. Is it reasonable to assume that a young girl (below 18 years) who is married is capable of providing consent for sexual intercourse? Does marriage automatically imply that a woman has granted irrevocable consent to her body? Moreover, it calls for a reconsideration of the criminalization of marital rape for all women, irrespective of age.

History of the Anomaly of Marital Rape

In the 18th century, the legal system in England regarded wives as dependents of their husbands, lacking independent lives. Consequently, husbands were granted authority over their wives' bodies, including the right to engage in sexual acts without accountability for committing rape. Women were viewed as the property of their husbands, with their rights overshadowed by male dominance. Regrettably, remnants of this archaic law persist in present-day India, despite the passage of time and geographical differences. Despite advancements in legislation aimed at safeguarding women's rights, patriarchal attitudes and societal norms perpetuate a system that subjugates women to men. Sexual violence, including marital rape, and unequal opportunities in the workforce continue to plague women. Gender inequality has deeply entrenched itself in India's cultural, social, and economic fabric, presenting significant challenges to its eradication. While the Indian government has implemented laws to protect women's rights and safety, there remain gaps in implementation and enforcement. Consequently, women endure discrimination, harassment, and violence within their homes, public spaces, and workplaces. Therefore, it is crucial to advocate for gender equality, challenge patriarchal norms, and promote women's empowerment. Through collective efforts

encompassing education, awareness campaigns, and effective legislation, India can strive toward a society where women are no longer subordinated and can lead independent and fulfilling lives.

The Indian Constitution and Marital Rape

The treatment of women by their husbands in India, characterized by abusive behavior, violates their inherent and fundamental rights. The principle of equality and equal protection under Article 14 of the Indian Constitution applies to all citizens, including women, guaranteeing them the same rights as any other individual.¹² However, some men perceive their wives as possessions and deny them their basic rights. It is crucial to acknowledge that women are entitled to equal rights and cannot be treated as property. The differentiation based on marital status is unjustifiable and infringes upon the principles enshrined in Article 14. Marital status should not serve as a basis for discrimination, as every individual is entitled to constitutional protection.

Advocates of Exception 2 to Section 375 of the Indian Penal Code often invoke Article 15(3) of the Indian Constitution, which aims to provide protective discrimination for women. However, this exception has faced criticism for undermining the very objective of Article 15(3) by failing to offer protection to married women. By lowering the age of consent for sexual intercourse from 18 to 15 years, the exception renders sexual intercourse between a husband and wife non-punishable, irrespective of the wife's consent. This raises concerns about the validity of the exception and contradicts the protective nature of Article 15(3).

Article 21¹³ of the Indian Constitution guarantees the right to life and personal liberty, encompassing the right to live with dignity. The right to life extends beyond mere existence; it encompasses the right to live a life of dignity, as established in the landmark *Maneka Gandhi v. Union of India*¹⁴ case. Any exception that compromises this right violates a range of other rights, including the right to privacy, bodily autonomy, and the right to good health. In the *Bodhisattwa Gautam v. Subhra Chakraborty*¹⁵ case, the Supreme Court declared rape as a crime against society, thereby infringing upon Article 21 of the Constitution. Rape causes severe emotional distress and violates the victim's right to live with dignity.¹⁶

Consistently, the Supreme Court has held that rape destroys the victim's right to live with human dignity. Therefore, it is imperative to recognize and uphold women's fundamental rights, including protection from abuse, equal treatment under the law, and the right to live with dignity. The Indian government must take necessary measures to ensure that women are not subjected to abuse and that their rights are safeguarded. Women should be provided with equal opportunities to lead a life of dignity and exercise their fundamental rights.

Data

Marital rape remains a prevalent but underreported issue in India. According to data from the National Family Health Survey (NFHS) 2015-16,¹⁷ spousal sexual violence is alarmingly common, with 83% of ever-married women identifying their current husbands as perpetrators. Additionally, 9% of women reported experiencing sexual violence from their former husbands. The NFHS data also sheds light on the widespread underreporting of marital rape cases. It indicates that 99% of cases go unreported, suggesting a significant gap between reported incidents and actual occurrences. Despite this underreporting, the data underscores the urgent need for legal reforms to address the issue of marital rape and ensure justice for survivors.

Furthermore, the recent NFHS data from 2019-21¹⁸ highlights the persistence of spousal sexual violence in India. It reveals that 82% of married men admitted to being sexually violent towards their current wives, while 13.7% of former husbands were reported to have committed sexual violence. Top of Form

Legal Provision

The Justice Verma Commission put forth recommendations regarding the differentiation between rape within marriage and rape outside of marriage in the Indian Penal Code (IPC).¹⁹ The commission proposed the elimination of exceptions pertaining to consent in cases of marital rape, emphasizing that marriage should not be construed as consent to sexual acts. Additionally, the report underscored that the relationship between the victim and the accused should not be a determining factor in sexual crime complaints. The commission also suggested that the Juvenile Justice Act of 2000 should include definitions of “harm” and “fitness” encompassing physical and mental damage and the overall well-being of juveniles. Despite the Supreme Court’s condemnation of the exception clause for minors and its affirmation of the rights of victims of marital rape who are 18 years or older, the recommendations were not considered by the Parliament. Consequently, Exception 2 to Section 375 IPC, allowing sexual intercourse with a married woman who is 15 years of age or older, remains unaffected. Until the Parliament amends this clause to raise the age of consent for married women, the exception will continue to remain in force.

Section 375 of the Indian Penal Code (IPC) delineates six distinct circumstances of sexual intercourse with a woman that qualify as rape. Section 376B of the IPC criminalizes the rape of a judicially separated wife when the intercourse is non-consensual, irrespective of the woman’s age, as long as the parties are living apart.²⁰ The Domestic Violence Act of 2005, specifically Section 3, imposes penalties on individuals who commit or perpetrate domestic violence against a wife, encompassing sexual abuse that degrades, humiliates, or violates the dignity of

women.²¹ The legal provisions safeguard minors under the age of 15 against marital rape. The exception violated the legally prescribed age of consent as stipulated under the Protection of Children from Sexual Offenses (POCSO) Act, which sets 18 years of age as the minimum for the consummation of sexual acts. Individuals below the age of 18 are considered legally incapable of making decisions and differentiating between right and wrong. However, the exception has now been repealed.²²

Despite the existence of these laws, women in India continue to endure violence, including marital rape. It is imperative for the justice system to effectively implement the existing legislation to ensure justice for victims of sexual violence. Sensitization and awareness campaigns are necessary among law enforcement officials, the judiciary, and the general public to enhance understanding of the gravity and repercussions of sexual violence against women. The government and civil society organizations should collaborate to safeguard women's rights and ensure that perpetrators of sexual violence are held accountable and face legal consequences.

CASE LAWS

*Nimeshbhai Bharatbhai Desai v. State of Gujarat*²³

The court was confronted with the question of whether the act of a husband coercing his wife into engaging in oral sex constituted rape under Section 376 of the Indian Penal Code (IPC). However, the court determined that marital rape remains unrecognized as a criminal offense in India due to concerns from the Parliament about potential destabilization of the institution of marriage. The court further acknowledged the possibility of unscrupulous wives misusing such legislation as a means to harass their husbands by filing false and frivolous lawsuits. Nevertheless, the criminal justice system includes measures to identify and investigate fabricated or baseless marital proceedings, with legal provisions holding individuals accountable for initiating false and malicious charges.

Despite recognizing the significance of addressing marital rape, the court highlighted the absence of legal protections for women's bodily autonomy within the institution of marriage in Indian law. Consequently, an assault by a husband upon his wife would be considered an offense under the IPC. However, if the same husband coerces his wife into sexual intercourse, he would be charged solely with assault rather than rape, solely due to their marital relationship.

The court's ruling raises pertinent concerns regarding the existing inequality within Indian law. Women possess the right to refuse sexual intercourse, and the absence of legal safeguards in cases of marital rape undermines their rights. It is crucial to acknowledge the necessity of consent, even within the bounds of marriage. Accordingly, the government should undertake efforts to criminalize marital rape

and foster a society that is safe and equitable for women.

During the proceedings, the court also discussed three prevalent forms of marital rape within society:

- Battering rape: This form of marital rape encompasses both physical and sexual violence perpetrated against women in the context of the marital relationship. It may transpire during sexual encounters or subsequent to a physical altercation wherein the husband coerces the wife into non-consensual sexual acts. Battering rape represents the most prevalent type of marital rape.
- Force-only rape: In this type of marital rape, husbands employ varying degrees of force to compel their wives into engaging in sexual intercourse. Physical violence may not necessarily be present, but women who decline sexual advances may encounter this form of assault.
- Obsessive rape: Obsessive rape involves extreme torture and perverse sexual acts, constituting the most severe manifestation of marital rape. This type is also known as sadistic rape.

The court's examination primarily revolved around whether a husband's coercion of his wife into performing oral sex could be prosecuted as rape under Section 376 of the IPC. After careful deliberation, the court concluded that, presently, marital rape lacks legal recognition as an offense in the country. The apprehension among politicians about potential ramifications on the institution of marriage and the potential for false accusations by women has hindered the enactment of legislation addressing marital rape. While the act of marital rape shares similarities with the offense of a husband raping his wife, it does not warrant prosecution as rape under the current legal framework. Instead, if a husband perpetrates assault against his wife, he can be charged with assault under the IPC. However, if he coerces her into engaging in sexual activity, he can only be charged with assault within the confines of a valid marital relationship, and not with rape.

Independent Thought v. UOP⁴

In a momentous court verdict, the matter under consideration was whether sexual intercourse between a man and his minor wife, aged between 15 and 18, could be categorized as rape. In a landmark judgment, the court declared the Exception to section 375 of the Indian Penal Code (IPC) unconstitutional, thereby establishing the criminality of marital rape involving minors below 18 years of age under section 375 of the IPC.

Previously, the Exception to section 375 espoused a negative standpoint on this issue. However, the court unequivocally held that engaging in sexual intercourse with a girl below 18 years of age amounts to rape, regardless of her marital status. This Exception was deemed to be in violation of Article 15(3) and Article 21 of

the Indian Constitution, which prohibit gender-based discrimination and safeguard the rights to life and personal liberty. Despite the Prohibition of Child Marriage Act (PCMA) of 2006 already rendering child marriages illegal, section 375 of the IPC had not been subsequently amended to decriminalize marital rape involving minor girls. Consequently, while a married girl between 15 and 18 years of age could be recognized as a victim of “aggravated penetrative sexual assault” under The Protection of Children from Sexual Offences (POCSO) Act, 2012, she could not be classified as a rape victim if her husband committed the act, as the IPC did not recognize such acts as rape.

This landmark judgment carries profound implications as it upholds the rights of minor girls, who are frequently coerced into marriage, to protect themselves from sexual violence within the confines of marriage. It also underscores the urgent necessity of amending the IPC to acknowledge marital rape as a criminal offense, irrespective of the age of the victim. The court’s decision constitutes a significant stride towards ensuring that the law reflects evolving societal attitudes towards women’s rights and aligns with India’s international commitments to safeguard women’s human rights.

The court directed the striking down of the Exception to section 375 of the IPC, specifically concerning girls below 18 years of age, on the following grounds:

- The Exception is deemed arbitrary, oppressive, and devoid of fairness, justice, and reasonableness. It infringes upon the rights of minor girls, thereby violating Articles 14, 15, and 21 of the Indian Constitution.
- The Exception exhibits discriminatory characteristics and contravenes Article 14 of the Indian Constitution.
- It directly contradicts the provisions enshrined in the POCSO Act.

RIT Foundation vs Union of India ²⁵

In a recent development, the Delhi High Court rendered a divided verdict on a petition challenging the exception to Section 375 of the Indian Penal Code, which prohibits a married woman from lodging rape charges against her husband. Justice Shakti Singh opined that marital rape infringes upon the constitutional rights enshrined in Article 21 and 19(1)(a), whereas Justice Harishankar Das supported the continuation of the exception under the Code, citing the necessity to safeguard the institution of marriage. This split verdict signifies the existence of divergent perspectives regarding the validity of the exception and underscores the imperative for further deliberation and discourse on the matter.

Sanjeev Gupta v. State of U.P.²⁶

The wife filed a complaint alleging cruelty, dowry harassment, and forced sexual acts. The lower courts found the husband guilty on most charges. However,

upon appeal, the High Court upheld the convictions for cruelty and harassment, but overturned the charge of forced sexual acts. The court's reasoning for acquittal rested on two points: firstly, the absence of medical evidence to substantiate the claim of forced sex, and secondly, the legal reality that marital rape is not a criminal offense in India. Nevertheless, the court recognized the wife's right to protection under existing laws against cruelty, and the husband's sentence for the upheld charges was reduced. The High court took reference of several cases and specially *Sucha Singh v. State of Punjab*.²⁷

***Ruth Manorama v. Union of India*²⁸**

In late 2022, Dalit activist Ms. Ruth Manorama filed a fresh petition at the Supreme Court challenging the marital rape exception. On January 9th, 2023 a Bench comprising Chief Justice D.Y Chandrachud and Justice P.S Narasimha clubbed these petitions and listed them all for hearing on March 21, 2023.

***Hrishikesh Sahoo v. State of Karnataka*²⁹**

India's Supreme Court is grappling with the legality of marital rape. The current law, enshrined in Section 376 of the IPC, exempts husbands from rape charges. This exemption is facing legal challenges for being discriminatory and violating a wife's bodily autonomy. The debate is playing out in several courtrooms. In Karnataka, a High Court judge rejected a husband's plea to dismiss rape charges based on the marital exception, calling it regressive. Conversely, a split verdict emerged from the Delhi High Court, with one judge finding the exception unconstitutional and the other upholding it. Activists have also filed petitions against the exception. The Supreme Court has consolidated these challenges and is scheduled to hear them in March 2023. The ultimate decision will determine whether marital rape remains shielded from criminal prosecution in India.

Doctrines Supporting Marital Immunity

Historically, legal doctrines impeded the prosecution of marital rape. Sir Mathew Hale's "Implied Consent Theory," established in 1736, presumed a wife's irrevocable consent to sexual relations upon marriage.³⁰ This concept became ingrained in British common law and its colonies. Further reinforcing this notion was the "Doctrine of Coverture," prevalent in England until the mid-19th century. This principle merged a wife's legal identity with her husband's, stripping her of independent rights and solidifying the idea of complete marital submission.³¹

The landmark British case of *R v. R* in 1991 finally challenged these outdated notions.³² The House of Lords unanimously ruled that marriage does not imply perpetual consent to sex, marking a turning point in legal recognition of marital rape.

Global Movement Towards Criminalization

The fight against marital rape has gained significant international momentum. Poland became the first country to explicitly outlaw it in 1932.³³ Inspired by feminism, Australia became the first common law country to criminalize marital rape in 1976. Since the 1980s, numerous countries, including South Africa, Ireland, and the United States, have followed suit.³⁴ This movement has also expanded to include former communist nations and Scandinavian countries. Marital Rape is punishable for a lifetime of the convict, especially if the victim is killed in Liechtenstein, Mongolia, Rwanda. In Guatemala, the Philippines, Serbia, Grenada marital rape can be punished for up to 30-50 years. Marital rape is punishable with up to 10-30 years of imprisonment in Mozambique, Ecuador, Luxembourg, New Zealand, Greece, Argentina and Monaco.³⁵

International Pressures on India

The United Nations Committee on Elimination of Discrimination Against Women (CEDAW) has repeatedly urged India to abolish marital rape immunity.³⁶ This aligns with various human rights treaties India has ratified, guaranteeing equal protection and freedom from discrimination. Specific articles within CEDAW and other international instruments condemn marital rape as a violation of human rights. India's obligation to comply with these conventions is emphasized, even though they have not signed the CEDAW Optional Protocol.

Violation of International Human Rights Standards

By allowing marital rape immunity, India fails to meet international human rights standards. The global consensus overwhelmingly condemns marital rape. To harmonize its laws with international best practices, India must reform its legal system and criminalize marital rape.

Significance of Marital Rape in India

In the context of India, it is pertinent to observe that the legal validity of a girl's consent for engaging in sexual intercourse ceases to exist if she is below 18 years of age. However, an Exception to section 375 of the Indian Penal Code (IPC) continues to uphold the exemption of Marital Rape from criminalization. This Exception stipulates that sexual intercourse between a man and his wife shall not be considered rape, except in cases where the wife is below 15 years of age. Under the IPC, Rape is defined as sexual intercourse without a woman's consent, against her will, or under any form of misconception or fear. The Exception, therefore, excludes non-consensual sexual intercourse between spouses from the ambit of rape, provided the wife is above 15 years of age (currently 18 years), thereby attributing a notion of perpetual consent to sexual intercourse within the institution

of marriage, commonly referred to as “implied consent”.

In 1997, a series of petitions were filed seeking to broaden the scope of the definition enshrined in section 375. The petitioners contended that the term “sexual intercourse” should encompass all forms of intercourse or penetration, irrespective of the object employed. In the case of *Sakshi v. Union of India*,³⁷ the question arose as to whether the definition of rape under section 375 should be expanded to include all forms of sexual intercourse. However, the Supreme Court upheld the existing definition of rape and declined to include other forms of penetration within its purview, citing potential confusion and ambiguity.

Following the heinous *Nirbhaya gang rape* and murder, the Indian Parliament constituted the Justice J.S. Verma Committee, which made recommendations that formed the basis for the Criminal Law (Amendment) Act of 2013. This legislative enactment incorporated several recommendations of the committee, including revisions to the definition of rape under section 375 of the IPC. However, the committee’s proposal to criminalize marital rape was not adopted. The amended definition of section 375 now aligns with the prayers presented in the Sakshi case.

In summary, while the *Sakshi* case did not result in an expanded definition of rape, it represented a pivotal milestone in acknowledging the necessity for reform within the criminal justice system’s treatment of sexual assault. The subsequent enactment of the Criminal Law (Amendment) Act of 2013 constituted a significant stride in addressing certain loopholes in the legal framework pertaining to sexual violence in India.

Justifications for Marital Rape not being a Crime in India

In conclusion, the issue of marital rape in India remains a complex and deeply ingrained challenge that demands urgent attention and action. Despite significant strides in legislation and judicial interpretation, the absence of explicit criminalization of marital rape continues to perpetuate gender inequality and violate the fundamental rights of women. The prevailing legal framework, characterized by exceptions and discrepancies, fails to adequately protect married women from sexual violence within the confines of marriage. While efforts have been made to address gaps in the law, such as the recent striking down of the Exception to Section 375 IPC concerning minors, there remains a pressing need for comprehensive reform to criminalize marital rape for all women, regardless of age. Furthermore, societal attitudes and cultural norms that prioritize the sanctity of marriage over women’s bodily autonomy contribute to the perpetuation of marital rape and hinder efforts towards gender equality. It is imperative for policymakers, lawmakers, and civil society to challenge these entrenched beliefs and advocate for legal reforms that prioritize the safety and dignity of women. Moreover, the underreporting of marital rape cases underscores the importance of creating a supportive environment for survivors to come forward and seek justice. Sensitization

efforts aimed at law enforcement agencies, the judiciary, and the general public are crucial in fostering understanding and empathy towards survivors of marital rape. In essence, addressing the issue of marital rape requires a multi-faceted approach encompassing legislative reform, societal change, and robust support systems for survivors. By recognizing the rights of women to live free from violence and ensuring equal protection under the law, India can move towards a more just and equitable society where every individual is treated with dignity and respect, regardless of their marital status.

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