

# Criminalizing of Marital Rape: A Critical Analysis

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## ABSTRACT

Marriage unites two people and their separate families in a sacred covenant. A marriage, however, may fail if there is no consent or if the parties are not happy. Our ancestors, who were farmers, left us a patriarchal social framework. Men naturally display feelings of dominance as a result. Over the world, standards for human conduct are established and upheld in large part by law and order. The Indian Criminal Code, 1860, states that appropriate penalties have been applied for breaking the law. However, the majority of people don't realize that the British created these regulations a long time ago. Marital rape was not seen as a crime at the time, which may be one of the reasons it was excused from the penal laws. Women's rights have changed over time, and this study only examines the effects of marital rape and the reasons it is illegal in India.

**Keywords:** - Marital rape, violations of women's rights, and Indian law

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## INTRODUCTION

The traditional job of a woman in a marriage has been to care for the home and children as well as her husband's physical, emotional, and sexual needs. Men assume the position of domination, sometimes going too far, and this kind of stigma has been generated by society itself. The position of women was not the same as that of their male counterparts; prior to marriage, they were regarded as their fathers' property, and upon marriage, they were regarded as their husbands' chattel. The father had the right to marry off his daughter to anybody he saw fit.

To assure progeny and the continuance of the family line, the lady was required to provide her husband sexually, with or without her consent. This led the woman to believe that it was her responsibility and a necessity to always be sexually available to her spouse; she could never refuse her husband's requests. Nevertheless, these regulations were drafted decades ago, at a time when everything was considered permissible.

The nation was dominated by wicked traditions like Sati and child partnerships, and women were seen as the captors of men. But, after Raja Ram Mohan Roy's rise to power, the situation in the country transformed. When women were finally participating in the same activities as men during the Indian Independence War, Mahatma Gandhi himself demonstrated great initiative to improve the socioeconomic conditions of women. The result of these very activities was a constitution that granted women equality and nearly all the rights accorded to men, including the ability to vote and the right to run for office.

Following independence, there were advancements and improvements in almost every field, with a focus on improving the quality of life for women.

Given their direction, they were fairly distant from one another. One of the main reasons why the status of women and men was compared in the Indian Constitution was because women have always fought for their rights. As the nation gained its independence, numerous legislative changes were made to support women and raise their status in society so that they are not subjected to prejudice. Since the establishment of the Constitution, women now have the same social and political rights as males.

The constitution grants women complete freedom and assistance so they can contribute to determining the nation's future. There are many areas where our country lags behind, despite the fact that women have achieved remarkable statures and are actively working in almost every industry, including education, regulatory authorization organizations, science, and innovation.

## RAPES, MARITAL

In layman's terms, conjugal assault is defined as having sex with one's life partner without the other person's consent.

According to I.P.C. Section 375, 'Rape means any other sexual penetration of another person's vagina, anus, or mouth,

with or without force, by a sex organ, other bodily part, or foreign object, without the victim's permission.'

There is an exception to the norm that non-consensual sexual interactions between married spouses do not constitute rape. Although most men think that marriage gives them the right to have sexual relations with their wives at any time, whether or not they are consenting, this sort of domestic violence is defined as the violent or aggressive behavior in the home, which includes the violent abuse of one's spouse or partner. A patriarchal society looks like this, and that is harmful for marriage. Sections 375 and 376 of the IPC, 1860, deal with rape and its punishment, respectively.

Almost all nations have criminalized marital rape either the amendment of existing laws or the enactment of new ones. More than 150 countries throughout the world currently forbid marital rape, and many of those approved new laws to that effect.

In contrast to the UK, where the maximum sentence for marital rape is life in prison, marital rape is prohibited in all 50 states in the US. The offense has been made a crime in these nations as a result of a court decision in nations including the United Kingdom<sup>4</sup>, Fiji, and Brunei, among others. In Bangladesh, India<sup>6</sup>, and other countries where women are regarded as the property of their husbands and marriage is not governed by the state, marital rape is prohibited.

Despite various laws being put in place to protect women from domestic violence, dowry, and other types of abuse, marital rape has not yet been made a crime in the nation. The victim of marital rape is aware that she must live the rest of her life with the perpetrator, which is harmful to both her mental and physical health. Most of these women are scared to come forward and report the crime because there are no laws against marital rape because they believe that if they do, society will reject them.

In the twenty-first century, laws must be revised to reflect society's expanding understanding of its rights and obligations. It is forbidden to have sex with a girl younger than 15 according to the Indian Criminal Code of 1860. In India, child marriage is just voidable and not void, which means that it is not immediately outlawed, according to the Prevention of Child Marriage Act of 2006. After reaching the age of majority, minors may file for divorce, but only if they do so within one year after becoming of age.

But, non-consensual sexual activity between a 50-year-old male and a 16-year-old girl may be permitted. Consensual sexual activity between a 17-year-old boy and a 17-year-old girl is prohibited.

Abuse at home is well-defined by Section 3(a) of the Defense of Women from Domestic Violence Act, 2005, as conduct that 'harms or risks the comfort, security, life, appendage, or richness, regardless of whether mental or physical, of the oppressed individual or will generally do as such and includes causing actual maltreatment, sexual maltreatment, verbal and psychological mistreatment, and financial maltreatment.'

This act's disadvantage is that it has more of a civil than a criminal intent. It does not specify a sentence of incarceration. Instead, it offers financial benefit, restraining and protective orders, as well as compensation.

### IMPLICATIONS OF MARITAL RAPE

PTSD, fear, low self-confidence, rape shock syndrome, and sexual unpredictability, inability, or dysfunction are all indicators that marital rape sufferers face.

A woman is expected to immediately gratify her husband's sexual needs after marriage. A woman is likely to satisfy her husband's sexual desires as soon as they get married.

Any female to experience something like sex without her consent is quite shocking.

Rape Trauma Syndrome, which is the phrase used to describe the normal reaction of a healthy person to the trauma of rape, is the medical diagnosis given to rape survivors. Either a short-term or long-term effect could occur. It's possible for victims to feel ashamed or degraded. Victims can be baffled by what happened and how they were unable to stop it. Some people may hold themselves accountable for being too weak or unwilling to engage in sexual activity with their husbands because they don't want to.

Those who have been impacted by this may be embarrassed to talk about it because it isn't even acknowledged as an issue. They consequently refrain from discussing it with others out of concern that doing so will attract notice and lead to more probing. In the case of *Bodhisattva Gautam vs. Subhra Chakraborty*, a criminal complaint was filed against the couple because they chose not to get married. Furthermore, the Delhi High Court declared in 2018 that "rape is a crime" and that "force is not a pre-condition for rape."

A man can threaten to withhold money from his wife unless she has sex with him in order to put her in a financial bind. The victim and their children, if any, experience mental stress in each and every one of these situations. The children

may experience a mental breakdown or clinical depression as a result of this.

Although there is a provision for civil liability for sexual assault under the Protection of Women from Domestic Violence Act, 2005, this is not an all-inclusive statute. Some people use violence to demonstrate their dominance and to instill fear that they will use it as a last resort if they don't get their way in life.

As a result of frequent rape, a woman complains about physical unwellness; they sustain cracked ribs, knife wounds, physical scars, and black eyes. These are just a few of the more typical issues that women encounter. Patients frequently complain of vaginal bleeding and pain. Extreme vaginal rupture results in bleeding. Anal sex users frequently lament the adverse effects of bleeding, pain, and irritation. They could feel queasy if the memory of the abusive event is reactivated.

Additionally possible, unwanted pregnancies put additional stress on the victim's mental and emotional health. Especially if he or she is aged between 15 and 18. This would require becoming a mother at a young age, which could have an impact on the child for a long time. Another side effect of vaginal rupture is infertility, which prevents the person from becoming pregnant. This can be detrimental to the victim's ability to start a family in the long run. They might be scarred permanently. In certain cases, this can lead to the sufferer's considering self-destruction.

Because to the stigma associated with marital rape and the inability to tell anyone about the abuse, the victim may consider suicide as a final choice.

### **INDIA'S MARITAL RAPE LAWS**

Even if our nation has undergone many changes and adopted new laws, the act of marital rape is still not recognized as a crime in my country. There are no laws protecting women in the institution of marriage, and any disputes connected to it must be decided by the court.

According to the I.P.C., the following situations result in penalty for the husband for marital rape:

- i. If the wife is between the ages of 12 and 15 years, she may face up to two years in prison or a fine, or both;
- ii. If the wife is younger than 12 years old, she must face a minimum sentence of seven years in prison that may be increased to life in addition to a fine.
- iii. A prison sentence of up to two years and a fine may be imposed when the wife is judicially separated.
- iv. When done against a wife who is older than 15 years, rape is not a crime.

This leads us to the conclusion that women who marry beyond the age of 15 have no legal protection if their husbands make unwanted sexual advances toward them, which would be a violation of their human rights. The Constitution sets the legal marriage age at 18, but only females under the age of 15 are protected by the law from sexual abuse, and women over this age have no legal redress, which is disturbing.

The removal of Section 375's exception from the IPC is discussed in the 42nd Law Commission report because it is considered unconstitutional and discriminatory against women. In fact, deleting the special case for Section 375 and making conjugal violence a crime was supported by the 172nd Law Commission report. Yet, more than 20 years have passed and no action has been taken on a related subject.

### **INDIA'S CONSTITUTION ON MARITAL RAPE**

There are a number of ways to challenge this law, which appears to permit rape in marriage, among them those mentioned above. The Indian Constitution stipulates that the core structure philosophy of the Constitution shall be followed by all laws passed by the legislature. Any statute that conflicts with this can be ruled unconstitutional by the courts. Every law or regulation that supports rape must adhere to constitutional norms in order to be passed.

#### **ARTICLE 14**

The fundamental rights to equality before the law and equal protection under the law are guaranteed throughout India's territory by Article 14 of the Indian Constitution. The discrimination that marital rape victims experience, however, is still unaddressed by criminal law. You won't be legally protected if you're married and your husband is harassing you for unexplainable, fabricated, or evasive reasons under the exception to Section 375 of the IPC, a legislation that discriminates against married women.

The provisions of Sections 375 and 376 do not encompass sexual assault by a husband against his wife. If a person's marital status is shielded from its jurisdiction, then strictly speaking, Section 375 of the Indian Criminal Code (IPC) is discriminatory and violates Article 14 of the Indian Constitution. The victim is raped in the same manner in both situations. The only distinction between the two is that they are already married in the latter case, but aside from that,

they are both rapists. A married victim is forced to live the rest of her life with the perpetrator and is entirely dependent on him for her existence, which only makes the situation worse.

Practically, this clause makes it simpler for husbands to perform coercive sexual actions because they are confident, they won't be held responsible. Since the female victims of marital rape do not receive equal protection, Article 14 of the Indian Constitution expressly forbids it since it does not pass the two requirements of a comprehensible difference and a reasonable linkage.

#### ARTICLE 21

'No person should be deprived of his/her right or personal freedom- in accordance with a procedure provided by law,' - Indian Constitution (Article 21).

The Hon'ble Supreme Court (S.C.) stated in the matter of *Kharak Singh v. State of Uttar Pradesh* that "by the term "life" as employed here, something more is intended than only animal existence." In numerous instances, the S.C. has interpreted this article and given it a completely different shape. The citizens are granted a number of rights under Article 21, including the right to health, dignity, a safe environment, sexual privacy, and human dignity, among others.

Supreme Court stated: in the case of *v. Krishnappa (State of Karnataka)*; 'sexual violence, aside from being a brutalizing act, is an unlawful imposition of a female's right to privacy and sanctity,' and that rape in and of itself is a serious blow to the victim's self-esteem and dignity and degrades her, leaving behind a traumatic experience.

The Hon'ble Supreme Court concluded in the matter of *C.E.S.C. Ltd. v. Subhash Chandra* that the right to life also includes the right to live a healthy and dignified life, which is one of the most crucial elements to protect a citizen's individuality in the nation. Exempting women from Section 375 breaches their right to good health because marital rape can hurt a woman physically, emotionally, and mentally and can result in despair; in addition, there is always a chance that coerced sexual contact will result in the transfer of STDs. In various cases presented before the Hon'ble Supreme Court, rape was deemed a crime against society and a violation of Article 21 of the Indian Constitution.

The Supreme Court has ruled in a number of cases that Article 21 of the Constitution guarantees constitutional protection for the right to privacy. As a result, any form of coercive sexual behavior toward a woman is against her right to privacy because it is her body and she has every right to provide her consent and keep it private. *V. Madhkar Narayan*; In the case of *State of Maharashtra*, Supreme Court addressed the issue of sexual confidentiality and ruled that 'every female is permitted to her sexual confidentiality and that no individual is to violate her privacy.'

Notwithstanding this, it is against the law to exclude conjugal assault from the IPC because no one has the right to force a married woman to have sex against her will. This exception should therefore be deemed unlawful since it violates the right to privacy.

IPC views the latter as rape when it happens between a married woman and an unmarried person, while the former is defined as sexual intercourse. Rape is defined as occurring when a woman refuses to engage in sexual activity and is forced into it, but IPC does not define rape when a married woman is forced into it. Section 375 infringes on a married woman's freedom to manage her own body because marriage does not imply that consent is not required for sexual activity.

The fact that Section 375 of the Indian Penal Code permits a crime like marital rape in contravention of Articles 14 and 21 of the Indian Constitution is obviously unconstitutional. This exemption does not meet the requirements of 'just, impartial, and reasonable law' and 'reasonable categorization' since it discriminates against married women.

The Domestic Violence Act and Section 498A of the IPC are the only legal remedies available to women who have been the victims of marital rape because this exemption is now out of date and does not need to be included in the IPC. Instead, India should take strict measures to protect the rights of married women.

#### Human Perspective

There is broad public support for the idea that rape in a marriage-related relationship shouldn't be made a crime. This shapes public perception and paints a poor picture of the country. These opinions have gained popularity because the majority of Indians are interested in their culture. Many individuals think that the rules that governed India a thousand years ago still apply now. These justifications are invalid in today's culture since this exemption is discriminatory. These are a few arguments in opposition.

#### CONTRADICTIONS TO CRIMINALIZING MARITAL RAPE

There is a compelling argument against criminalizing marital rape since doing so would compromise the sanctity of marriage and the family as a whole. The sacred bond between a husband and wife would be broken in the absence of marriage. If marital rape is declared a crime, the state would be blurring the line between domestic and legal matters, which will be difficult for the courts to handle. By passing legislation for this reason, the state would have violated its

international boundaries and violated international law. A decision is likely to encounter opposition and harsh criticism if it crosses a boundary dividing two people.

When two persons enter into a valid marriage, they are acting independently. Some have asserted that the wife has already given her approval if these two have consented to this marriage contract on their own. It is assumed that the parents have approved of the marriage as long as they are in charge of matching the matrimonial relationship. It has long been customary to never ask the lady being harassed about her sexual orientation. The spouse is seen to have given his consent for a sexual connection when a pair decides to get married or has their union mended by their parents.

An "arranged" or "forced" marriage does not exist. As contrast to a forced marriage, both parties in an arranged marriage agree to get married as soon as they meet. In fact, they agree to marry before ever meeting.

People are brainwashed with a set of customs, norms, and values from an early age. Any action that departs from or runs counter to these values, which are imprinted in our psyches, is regarded as banned. Men have been socialized to expect their spouses to satiate their sexual needs in light of these cultural norms.

Polls show that more than half of people think that wives will use the threat of legal action against their husbands as a way to end their marriages or coerce their partners into doing what they want. According to the Supreme Court's ruling in *Arnesh Kumar v. State of Bihar*, disgruntled women are employing Section 498A as a weapon rather than a protective measure. As a result, the judiciary would have to constantly keep an eye on the guys. An onslaught of phony cases filed could stymie legal proceedings and delay justice in more significant situations. India cannot possibly make up for all the cases that have been postponed for years.

The Protection of Women from Domestic Violence Act of 2005 was created to address domestic abuse. There are arguments that, given that this legislation is now in effect, a different regulation for its equivalent in the state is not necessary. Conjugal assault is covered by Section 3(a), which includes 'actual ill-treatment, sexual mistreatment, verbal and psychological abuse, and financial damage; hurts/harms or risks the wellbeing, security, life, appendage, or wealth, regardless of whether mental or physical, of the distressed individual or will in general.'

### **EXPLANATIONS FOR CRIMINALIZATION**

The sacredness of marriage has already been violated without his wife's consent. There is no way to argue that marital rape may be exempt from the law because it crosses the lines of issues between a man and his wife. The non-consensual act of marital rape undermines the trust and confidence inside a marriage, and the frequency of marital rape in India is what has harmed the institution of marriage, according to the High Court of Gujarat's ruling in the case of *Nimeshbhai Bharatbhai Desai v. the State of Gujarat*. This justification is unethical once the idea of sanctity has been refuted.

The 2006 Prohibition of Child Marriage Act changes the status of child marriage from void to voidable. Parents are free to marry off their young children to whoever they like, and until they reach the age of majority, which is generally 18 in most countries, the children cannot dissolve their marriages or file for divorce. Contrarily, Section 375 of the CPL 1860 prevents a man from engaging in sexual activity with a woman who is less than 15 years old. However, there is a gap in the law for those who are between the ages of 15 and 18.

They have to live with someone who may or may not coerce them into having sex against their will. This is a long-standing custom that pledges consent. These antiquated rules can be modified in the 21st century to reflect societal growth.

Since ancient times, women have been treated like mere chattel and dehumanized. It is called 'kanyadaan' when the father gives the bride to the husband. She is seen by her family as an outsider and her husband's property. Because women today have rights and cannot be objectified, traditional practices like these should be logically discussed. Supporting the paradigm shift in culture is crucial. As a result, outmoded traditions that are no longer necessary might be consigned to history.

### **CONCLUSION**

The state has previously established regulations that apply to marriage when a man and a woman get hitched, including those that cover dowries, infidelity, cruelty, and divorce. It would be nothing short of a historic success for India's mental health to add rape to the list. The state is against making marital rape a crime because it 'destroys the institution of marriage' & 'harasses spouses.'

How will the two people's relationship be impacted by obtaining justice for an act that has already tarnished marriage's sacredness? The foundation of the marriage has already been destroyed by sexual assault attempts or incidents involving one of the spouses. The second issue, 'harassing husbands,' can be solved with fast-track courts and their

accelerated proceedings. The elimination of bogus cases would benefit from the creation of additional fast-track courts across the nation.

It might take years, though, if the state is determined about not trying to make marital rape a crime. It is essential to make this practice illegal so that married women can use the legal system to address their issues. We won't be able to classify this crime as marital rape until we clearly distinguish between rape and non-consensual sexual activity between married couples.

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