

## BREAKING THE SILENCE: CRIMINALIZING MARITAL RAPE IN INDIA FOR GENDER EQUALITY AND JUSTICE

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### ABSTRACT

Marital rape remains legal in India under Exception 2 to Section 375 IPC (now Section 63 of the Bharatiya Nyaya Sanhita, 2023), violating constitutional rights to equality, dignity, and personal autonomy. While most countries have criminalized it, India upholds outdated norms influenced by cultural and societal beliefs. This article examines the constitutional validity of the exception, its impact on women's rights, and ongoing legal challenges, including the Supreme Court's pending decision. Urging its repeal, the study emphasizes the need for legal reform to align India with global human rights standards and ensure justice for married women.

### 1. Introduction

Marital rape is non-consensual sexual activity within marriage, involving force or manipulation. It violates personal autonomy and bodily integrity, often leading to physical and emotional harm. Historically overlooked due to societal norms, many countries now recognize it as a crime.<sup>362</sup>

Section 63 of the Bharatiya Nyaya Sanhita, 2023 defines rape as non-consensual sexual intercourse, but Exception 2 exempts unwilling sexual intercourse between a husband and wife over the age of eighteen, effectively allowing marital rape. Despite marital rape being criminalized in most countries, India is one of thirty-six that has not done so.<sup>363</sup>

Rape is a crime that involves two key principles: Mens Rea (guilty mind) and Actus Reus (wrongful act). Often driven by ego and a desire to assert masculinity rather than just sexual desire, the intent (Mens Rea) behind rape is to force sexual intercourse without consent, while

the act (Actus Reus) is the actual forceful sexual act. The question arises whether this wrong intent is equally wrong regardless of whether the perpetrator is a husband or not. Rape is a serious offense that should not be excused by exceptions, as this contradicts both the law and the Constitution, which guarantees equality, dignity, liberty, and freedom.<sup>364</sup>

Section 375 of the IPC (Now Section 63 Bharatiya Nyaya Sanhita, 2023) exempts marital rape, reflecting outdated norms that violate women's rights to equality and dignity. Despite marital rape being a serious violation, it remains unaddressed in India, with most cases unreported. International bodies like CEDAW urge India to criminalize it, but the law continues to fail in protecting women's fundamental rights. Legal reform is necessary to ensure equality and uphold women's autonomy.<sup>365</sup>

### 2. Meaning

Marital Rape is made up of combining two words "Marital" i.e. Relating to Marriage and "Rape" i.e. Non Consensual Sexual Act.

<sup>362</sup> Aparna Srivastava, Behind Closed Doors: A Comprehensive Analysis of Marital Rape, Legal service India, (last visited , Jan,15,2025, 15:54 IST) <<https://www.legalserviceindia.com/legal/article-14378-behind-closed-doors-a-comprehensive-analysis-of-marital-rape.html>>

<sup>363</sup> Sarthak Makkar, Marital Rape A Non-criminalized crime in India,34, Harvard Human Right Journal (HHR),2021.

<sup>364</sup> Ibid

<sup>365</sup> J.S. Verma Committee Report, (last visited, Jan.14,2025,18:53 IST) <[https://www.thehindu.com/multimedia/archive/01340/Justice\\_Verma\\_Comm\\_1340438a.pdf](https://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf)>.

Marital or spousal rape refers to engaging in sexual intercourse with one's spouse without their consent. The key factor is the absence of consent, which may not necessarily involve physical violence. It is recognized as a form of domestic violence and sexual abuse. Historically, sexual intercourse within marriage was considered a marital right. However, many societies now classify non-consensual sexual acts within marriage as rape, with increasing criminalization. Despite this, some conservative cultures still reject this view.<sup>366</sup>

Non-consensual sexual penetration—whether vaginal, anal, or oral—using any body part or object, as well as other non-consensual sexual acts, committed by a spouse, ex-spouse, or current or former partner with whom the victim has lived in a legally recognized partnership.<sup>367</sup>

### 3. Constitutionality of Marital Rape

Marital rape is said to be unconstitutional from the start, though it is only now being examined in this context. The passage of time and evolving understanding of gender equality suggest that Marital Rape Exemption (MRE) should no longer be permitted in the statute.<sup>368</sup>

The Supreme Court primarily focuses on the issue of marital rape of minors, specifically girls aged 15-18, within the context of Exception 2 to Section 375 of the IPC, which currently allows a husband to have sexual intercourse with his wife aged 15 or older without it being considered rape. It emphasizes that while there is a legal distinction between rape under the IPC and penetrative sexual assault under the POCSO Act, both crimes are essentially the same. However, marital rape of a girl child between the ages of 15 and 18 is not recognized as rape under IPC due to the exception, even though it might

technically constitute aggravated penetrative sexual assault under the POCSO Act.<sup>369</sup>

As per the existing law, under Section 376 of the Indian Penal Code (IPC), a wife cannot file charges of rape against her legally wedded husband. This is due to a marital exemption in Indian law, which historically assumed that by entering into marriage, a wife gives irrevocable consent to her husband for sexual intercourse. The idea is that a husband cannot be charged with rape against his wife because marriage supposedly confers perpetual consent to sexual activity.<sup>370</sup>

The **Justice Verma Committee (2013)** recommended the deletion of the marital rape exception in Indian law (under Exception 2 to Section 375 of the IPC). This would have aligned India with the global trend of recognizing marital rape as a crime. However, the subsequent amendment replaced the term rape with sexual assault in Section 375, without fully addressing the issue of marital rape. As a result, marital rape remains legal in India for married women above 15 years of age. The situation creates inequality in the legal treatment of women, as the Constitution guarantees equality, but the IPC still maintains an exception for husbands who rape their wives.<sup>371</sup>

The **exception in Section 375 of the IPC** (which excludes marital rape) violates constitutional principles, particularly Article 14 (Equality before the law), Article 15 (Prohibition of discrimination on grounds of sex), and Article 21 (Protection of life and personal liberty).

Article 14 guarantees equality before the law and prohibits discrimination based on sex, which is in direct contradiction to the exception in Section 375, where marital rape is not recognized as a crime for married women (except under the POCSO Act for girls between 15 and 18).

<sup>366</sup> Grabanski, Chloe R.; Lamade, Raina V.; Guarini, Brandon C.; Rosa, Angie M. (2023). "Intimate Partner Rape". Encyclopedia of Sexual Psychology and Behavior. Springer, Cham. pp. 1–11. doi:10.1007/978-3-031-08956-5\_1241-1. ISBN 978-3-031-08956-5.

<sup>367</sup>European Institute for Gender Equality, Gender-Based Violence (last visited Jan. 15, 2025), <[https://eige.europa.eu/publications-resources/thesaurus/terms/1397?language\\_content\\_entity=en](https://eige.europa.eu/publications-resources/thesaurus/terms/1397?language_content_entity=en)>

<sup>368</sup> Farhan vs State & Anr on 11 May, 2022

<sup>369</sup> Independent Thought vs Union Of India AIR 2017 SUPREME COURT 4904

<sup>370</sup> Nimeshbhai Bharatbhai Desai vs State Of Gujarat (2018) 4 GLR 2906 (Gujarat).

<sup>371</sup> Xxxxx @ Xxxxx vs State Of Karnataka (2022) KLJ (Karnataka).

Article 15 prohibits discrimination on grounds of sex, but marital rape is treated differently for wives depending on their age, suggesting unequal protection under the law for women in marital relationships compared to unmarried women.

**Article 21** guarantees the right to life and personal liberty, which has been interpreted by the Supreme Court in various cases as encompassing dignity and bodily integrity. The psychological and physical harm caused by marital rape (especially for child brides) is seen as a serious violation of this fundamental right, as the victim is deprived of personal autonomy and dignity.<sup>372</sup>

The **Delhi High Court** decided whether Exception 2 to Section 375 IPC, which exempts husbands from being prosecuted for raping their wives, violates the Constitution. Justice Rajiv Shakhder struck down MRE, ruling that it violates Articles 14, 15, 19(1)(a), and 21, as it denies married women legal protection against rape, unlike unmarried women. He argued that marriage does not erase a woman's right to consent. In contrast, Justice C. Hari Shankar upheld MRE, reasoning that marriage creates a distinct legal bond with inherent conjugal rights and that it is the legislature's prerogative to criminalize marital rape, not the judiciary's. The case now awaits the Supreme Court's final decision, which will determine the future of marital rape laws in India.<sup>373</sup>

In 2017, a woman accused her husband, Hrishikesh Sahoo, of rape, cruelty, and child sexual assault under the IPC and POCSO Act. Sahoo sought dismissal of charges by invoking the marital rape exception under Section 375 IPC, but the Karnataka High Court rejected his plea in 2022, deeming the exception regressive and unconstitutional. He then challenged this decision in the Supreme Court, which granted an interim stay. Meanwhile, the Delhi High Court delivered a split verdict on the constitutionality

of the marital rape exception, leading to further petitions, including one by activist Ruth Manorama. In 2023, Parliament passed the Bharatiya Nyaya Sanhita, 2023, retaining the exception under Section 63. The case remained pending until early 2024, when it was taken up by the Supreme Court. In October 2024, the Union government, for the first time, opposed striking down the exception, stating that while marital rape should be criminalized, equating it with rape outside marriage is excessive, and other legal provisions already provide redress for such violations.<sup>374</sup>

#### 4. Problems of Enforcing Laws Relating to Marital Rape in India

##### (a). Cultural and Religious Sentiment:

The resistance to criminalizing marital rape in India is largely rooted in cultural and religious beliefs, which view marriage as a sacred institution where consent is presumed and forceful sexual intercourse within marriage is unthinkable.<sup>375</sup>

##### (b). Marriage as an Idealized Institution:

The argument posits that criminalizing marital rape could taint the purity of marriage, which is considered a sacred bond, and disrupt societal norms and values associated with the marital relationship.<sup>376</sup>

##### (c). Social, Economic, and Cultural Readiness:

It is argued that India, being a developing country, is not socially, culturally, or economically prepared to make such a significant legal change. However, this reasoning is not sufficiently compelling, as historical precedents such as the abolition of Sati (1829) and widow remarriage (1856) show that India has successfully made progressive changes even when society was not "prepared."<sup>377</sup>

<sup>372</sup> Pradeep Tomar And Another vs State Of U.P. And Another (2021) 4 SCC 425 (SC).

<sup>373</sup> RIT Foundation v. Union of India (2022 SCC OnLine Del 1404)

<sup>374</sup> Hrishikesh Sahoo v. State of Karnataka, MANU/KA/1175/2022, decided on March 23, 2022.

<sup>375</sup> Sakshi Saxena at al, MARITAL RAPE- AN UNRECOGNISED CRIME, Vol. 2, International Journal of Advance Legal Research, February 2022

<sup>376</sup> ibid

<sup>377</sup> ibid

**(d). Misuse of Law:**

A concern is raised that criminalizing marital rape could lead to misuse by women for malicious purposes, potentially damaging the institution of marriage. However, this concern is not a strong enough justification to allow the continuation of a wrongful practice. Laws, even if misused at times, serve a greater societal purpose, and safeguards can be put in place to prevent misuse.<sup>378</sup>

**(e). Legal Precedents:**

Comparisons with other nations like Nepal, which made the progressive step to criminalize marital rape despite similar cultural and religious contexts, demonstrate that such a legal change is not only possible but also necessary. India's judiciary and parliament should follow suit, taking responsible steps to address marital rape.<sup>379</sup>

**(f). Misuse of Legal Provisions:**

Similar to other laws (such as the Dowry Prohibition Act), laws concerning sensitive issues like marital rape can be misused, but this should not deter their implementation. Safeguards can be introduced to penalize false complaints, as suggested by Justice J.B. Padiwala in the Nimeshbhai Bharatbhai Desai case. The focus should be on stopping the wrongdoing rather than suppressing necessary legal reform due to concerns about misuse.<sup>380</sup>

**5. Way Forward**

**(a). Repeal Exception 2 of Section 375 IPC (Now Section 63 BNS):**

Amend Section 375 of the IPC (Now Section 63 BNS) to remove Exception 2, which currently exempts marital rape. This would ensure that non-consensual sex within marriage is treated as rape, aligning Indian law with international norms and protecting women's rights to autonomy and dignity.

**(b). Constitutional Alignment:**

Legal reforms should be in line with the Constitution of India, particularly Articles 14 (Equality), 15 (Non-discrimination), and 21 (Right to life and personal liberty). The current law contradicts these principles by allowing exceptions based on marital status.

**(c). Public Awareness and Education:**

Launch nationwide campaigns to educate the public about consent, gender equality, and the legal definition of rape. This can help shift societal attitudes and break the cultural and religious barriers that justify marital rape.

**(d). Strengthening Support Systems:**

Establish robust legal and social support systems for victims of marital rape, including access to counseling, legal aid, and shelters. Ensure that women have safe avenues to report abuse without fear of social or familial repercussions.

**(e). Judicial and Police Sensitization:**

Train law enforcement, judiciary, and healthcare professionals on handling cases of marital rape with sensitivity and impartiality. Establish a victim-centered approach to ensure that survivors receive justice and support.

**(f). International Collaboration and Precedents:**

Look to international examples such as Nepal, where marital rape has been criminalized successfully, and align with global human rights standards. India should actively engage with international organizations like CEDAW for guidance on best practices.

**(g). Safeguards Against Misuse:**

Address concerns about misuse of the law by implementing safeguards to penalize false claims. As suggested by Justice J.B. Padiwala, ensure that any malicious complaints are penalized while still allowing for the protection of genuine victims.

**(h). Encouraging Progressive Legislative Actions:**

Draw on India's history of progressive reforms, such as the abolition of Sati and widow

<sup>378</sup> ibid

<sup>379</sup> ibid

<sup>380</sup> ibid

remarriage, to make legislative changes in favor of gender equality, even if society is not "fully ready." This requires strong political will and commitment to women's rights.

**(i). Comprehensive Review of Existing Laws:**

Conduct a comprehensive review of related laws, like the Dowry Prohibition Act, to understand how legal provisions can be fine-tuned to prevent misuse while maintaining their effectiveness in protecting women's rights.

**(j). Continuous Monitoring and Evaluation:**

After legal reforms, continuously monitor their implementation and impact to ensure that they are effectively addressing marital rape and improving the status of women in society. Regular evaluations can help address any emerging issues or loopholes.

## 6. Conclusion

The persistence of the marital rape exception in Indian law represents a significant violation of constitutional rights, gender equality, and personal autonomy. While many countries have criminalized marital rape, India continues to uphold outdated legal norms that undermine women's dignity and bodily integrity. The resistance to reform is rooted in cultural, religious, and societal beliefs, but history has shown that progressive legal changes, such as the abolition of Sati and the recognition of widow remarriage, can be successfully implemented despite societal reluctance.

To address this issue, Exception 2 of Section 375 IPC (now Section 63 of the Bharatiya Nyaya Sanhita, 2023) must be repealed, aligning Indian law with constitutional principles and international human rights standards. Public awareness, legal and institutional reforms, judicial sensitization, and robust support systems are essential to ensuring justice for survivors. While concerns about misuse exist, they should not obstruct necessary legal protections—rather, safeguards should be put in place to address false allegations without denying justice to victims.

The ongoing legal battle at the Supreme Court presents a historic opportunity to correct this injustice. Criminalizing marital rape is not merely a legal necessity but a moral imperative to uphold the fundamental rights of women in India. The time for change is now, and it is crucial for the judiciary, legislature, and society to work together to ensure that no woman is denied her right to dignity, autonomy, and justice within marriage.