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# **A CRITICAL ANALYSIS OF THE LEGAL STATUS OF MARITAL RAPE IN INDIA**

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## **ABSTRACT**

Marital rape is an intense problem but is unaddressed in the Indian legal system. Despite facing such violence, women continue to lack legal protection against this. Sexual relationship within marriage is considered to be a right even without the consent of the wife. The stereotypical and outdated thoughts of the society lead to the normalization of marital rape. Consent of the women is considered irrelevant within the institution of marriage by strengthening patriarchy due to which the fundamental right of the women under article 21 is violated. It is high time for Indian law to recognize this issue and criminalize marital rape. This research will focus on the issue of marital rape, and it will cover the historical evolution of rape laws in India, status of marital rape in different countries, socio- cultural justifications for the non- criminalization of marital rape in India and relevant judicial pronouncements. The research also aims to give suggestions and recommendations for addressing the issue of marital rape in India and to help in the protection of the rights of the women within the institution of marriage.

Keywords: Marital rape, criminalization, rights, marriage, consent, women.

## **SCOPE OF THE STUDY**

The research paper aims to critically examine the status of marital rape in India and to examine the socio-cultural justifications for the non- criminalization of marital rape in India. The paper also includes a comparative analysis of the legal position of marital rape in Nepal, Brazil and Canada.

## **LITERATURE REVIEW**

Section 375 IPC: This section of the Indian Penal code lays down the provision for rape. Exception II of this is taken into account for this research and as per this section, it states that “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Section 63 of The Bharatiya Nyaya Sanhita: This section of the BNS lays down the provision for Rape. Exception II this is considered for this research, this section states that “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Marital rape laws in India: Bridging the Gap between Gender Equality and Criminal justice by Ganesh Makam: In this research paper, the writer examines the lack of specific legal provisions criminalizing marital rape in India. It explores the historical, legal and socio- cultural roots of the marital rape. The author recommends criminalization of marital rape, awareness campaigns to ensure justice and ensuring gender equality.

Indian government says criminalizing marital rape ‘excessively harsh’ by Geeta Pandey and Cherylann Mollan: This article informs the Government’s say on marital rape. The Indian government opposed to the criminalization of marital rape, stating that it would be ‘excessively harsh’ and could harm the institution of marriage. The article highlights the oppositions arising against the criminalization of marital rape in India.

### **HYPOTHESIS**

Non criminalization of marital rape in India violates the constitutional rights and promotes gender injustice.

### **RESEARCH PROBLEM**

Marital rape remains excluded from the definition of rape which highlights the gender injustice and violation of the constitutional rights of the women within the institution of marriage. This issue is linked with the socio-cultural factors existing in the society and leads to the denial of women protection in India.

### **RESEARCH QUESTIONS**

1. How does the current legal frameworks in India treat the issue of marital rape?
2. What are the social and cultural justifications behind the non- criminalization of marital rape in India?
3. What is the legal status of marital rape in countries like Nepal, Brazil and Canada

4. How can the Indian legal system be reformed to address marital rape while balancing personal laws and societal norms?

## **RESEARCH METHODOLOGY**

The research conducts doctrinal research with the help of primary and secondary sources. The primary sources include statutes, international instruments, Judicial decisions. The secondary sources employed in this research consist of scholarly articles, books, journals, newspaper articles, research papers, online websites, etc.

## **INTRODUCTION**

Marital rape is the term used to describe sexual acts committed without a wife's consent or against her will by the husband. As per many researchers husband – rapist conclude that they rape their wife to express anger and to reinforce power, dominance and control over their wives and families.<sup>1</sup> The concept of marital rape is not legally recognized in India and this non-criminalization of marital rape in India lead to the violation of the rights of the women within the institution of marriage and it reveals the stereotypical and outdated legal system of the nation.

The status of the women in India had always faced immense discrimination and inequality. Even though women in the Vedic period had respectable position, towards the end of the Epic period, discrimination had started between men and women, and it increased over time where the females were dependents. Men married only for the purpose of progeny and household duties and women were always beneath their feet.<sup>2</sup> However considering the status of rape laws, Rigveda mentions rape where in one of the hymns where the victim is referred to as Ushas / Dawn and the rapist is punished and the society did not blame the victim, and the Rigveda also discourages physical or psychological violence against women.<sup>3</sup> The status of women remained almost the same in the medieval era and women had been doing the role of temple dancers, devadasis and so on.<sup>4</sup> However, during this time, Shariya law was in force and severe punishments were given to perpetrators of heinous crimes like rape. <sup>5</sup>Even though ancient and

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<sup>1</sup> Marital Rape, Indiana Coalition against sexual assault, [https://rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital\\_Rape.pdf](https://rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital_Rape.pdf), (May 4, 2025, 3:06 PM).

<sup>2</sup> Dr. Neeta Khandelwal, Gender sensitization among women in ancient India and their contemporary relevance, 2(3), International journal of home science, 214, 215 (2016).

<sup>3</sup> Brishti Guha, The moderns of ancient India, TOI, Dec 25, 2015.

<sup>4</sup> Id.

<sup>5</sup> Cruel punishments for rapists in ancient Surat, TOI, June 23, 2009.

medieval India had rules against rape they were inconsistent due to stereotypes and societal hierarchies.

Rape, from the very beginning was never regarded as a crime against women. It was regarded as a crime against property. Property in question was women, who belonged to husbands and fathers.<sup>6</sup> People were not even knowing the concept of marital rape and consent of the women was disregarded within marriage in the ancient and modern India. The pre- independence era is marked with the enactment of the Indian penal code in 1860, and section 375 was introduced. However, this section did not recognize marital rape unless the wife was 10. Later reforms raised the age of consent to 12 and later to 13 by reducing marital rape penalties. Later the age of consent committee recommended replacing marital rape with marital misbehavior suggesting lighter punishments and limiting section 375-376 to non-marital cases.<sup>7</sup> The law was further amended in 1949 with respect to the age of consent where it was raised to 15 years in case of marital cases.<sup>8</sup> The 42<sup>nd</sup> law commission report in 1971 recommended to criminalize rape during judicial separation and also propose to treat nonconsensual sex with a wife aged 12-15 as a lesser offense. While some argues for the removal of the exception for marital rape, the 42<sup>nd</sup> Report rejected it fearing it would cause “excessive interference in marriage”.<sup>9</sup> In 2023, the Bhartiya Nyaya Sanhita was also enacted under which section 63 deals with rape and 67 deals with criminalization of non- consensual sexual intercourse when spouses are living separately.

## **LEGAL PERSPECTIVE AND JUDICIAL APPROACH TO MARITAL RAPE IN INDIA.**

Even though laws are supposed to be gender- neutral, gender progressive- laws are biased and most of the authorities are unaware of the deep- rooted patriarchal bias in society that are responsible for acting as a shield towards bringing progressive reforms. During parliamentary debates, some legislators have expressed their concerns that women might abuse such reforms and laws, and this leads to the resistance of such reforms in the laws and gives stability to the

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<sup>6</sup> Shivani Singh, From property to person the historical evolution of rape laws in India and its impact on survivors, <https://legalonus.com/the-historical-evolution-of-rape-laws-in-india-and-its-impact-on-survivors/>, (May 29, 2025, 2:11, PM).

<sup>7</sup> Pamini Kasera, A historical analysis of rape laws in India, SSRN, (June 29, 2020).

<sup>8</sup> Id.

<sup>9</sup> Raveena Rao Kallakuru and Pradyumna Soni, Criminalization of marital rape in India: understanding its constitutional, cultural and legal impact, NJUS Law Review, 1, (2018).

patriarchy in the society.<sup>10</sup>

The offence of rape is criminalized under the Indian penal code of 1860 under section 375 and section 63 of Bhartiya Nyaya Sanhita. These sections do not criminalize marital rape and as per Exception 2 under this section, sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.<sup>11</sup> Even though the Justice Verma Committee recommended criminalizing marital rape, the Criminal law amendment bills ignored these raising concerns about disrupting the families.<sup>12</sup> While the law does not criminalize marital rape, a specific form of marital rape is criminalized under section 376 IPC and 67 BNS, when a non- consensual sexual intercourse takes place when the wife and husband are living together separately on account of judicial separation. This section explicitly protects the wives who are living separately and wives living with their husbands are not protected from marital rape and their consent is presumed.

India's non-recognition of marital rape as a crime violates international human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) in addition to CEDAW to which it is a party.<sup>13</sup> By not criminalizing marital rape, India fails to ensure equality and protection of the dignity of the women which are enshrined not only in these international frameworks but also its own constitution.

In *Sakshi v. Union of India*<sup>14</sup>, PIL was filed seeking to broaden the definition of "rape" under section 375 IPC to include all forms of non- consensual penetration. However, the Supreme court rejected it stating that such changes shall be made through the legislative amendments.<sup>15</sup> In *Independent Thought v. Union of India*<sup>16</sup>, the supreme court partially struck down exception for marital rape for wives ages from 15 to 18, stating that non- consensual sex in such marriages as rape under IPC 375 and highlighted that it violated article 14, 15 and 21. However, this case

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<sup>10</sup> Barbara Havelkova, *Gender Equality in law uncovering the legacies of Czech State Socialism*, Gender equality in law, Vol.22, (2017).

<sup>11</sup> Bhartiya Nyaya Sanhita, 2023. § 63.

<sup>12</sup> Supra note 9.

<sup>13</sup> Vaibhav Patel, *Marital Rape in India: An International Human Rights Law Violation*, BJIL, <https://www.berkeleyjournalofinternationallaw.com/post/marital-rape-in-india-an-international-human-rights-law-violation>, (May 4, 2025, 11:10 PM).

<sup>14</sup> 2004 Supp (2) SCR 723.

<sup>15</sup> *Sakshi v. Union of India* (2004), Law Foyer, <https://lawfoyer.in/sakshi-v-union-of-india-2004/>, (May 4, 2025, 12:24 PM).

<sup>16</sup> AIR 2017 SC 4904.

failed to address the issue of marital rape of adult women.<sup>17</sup>

In May 2022, the Delhi High Court release a split verdict on the constitutionality of marital rape exception in India. Justice Rajiv Shakhder struck it down as unconstitutional while justice Hari Shankar upheld it arguing that marriage points towards irrevocable consent and dismissed the severity of marital rape.<sup>18</sup>

The Kerala High Court in a progressive judgment, recognized marital rape as grounds for divorce under cruelty and rules that nonconsensual sex violates a women's dignity and privacy.<sup>19</sup> This can be seen as a positive initiative from the judiciary, but full criminalization of marital rape is essential to ensure the protection of women within marriage.

### **JUSIFICATIONS FOR NON- CRIMINALISATION** **OF MARITAL RAPE**

The non- criminalization of marital rape in India is deeply rooted in societal norms that view marriage as a sacrosanct institution which is based on traditional beliefs where the consent is presumed and is unconditional.<sup>20</sup> These patriarchal and outdated thoughts with ignorance about the concept of consent leads to the creation of barriers to legal reforms.<sup>21</sup>

The exemption of this evil is laid down on the foundation of outdated ideas which are unfair. The idea includes that after marriage, the wife's consent for physical relationship with her husband is automatically obtained and she does not have the right to say no to it anymore. The other idea treats women as property, passed from father to husband and then there is no legal identity for the women after marriage. These ideologies and outdated concepts in society deny women's fundamental rights.<sup>22</sup> A woman is expected to abide by the whims of the husband,

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<sup>17</sup> Latika Vashist, Independent Thought v. Union of India: A critical comment, Delhi Journal of contemporary law, Vol.1, 120 (2019).

<sup>18</sup> Ardhana Cherupara Vedekethil, sacrificing women's sexual autonomy to save marriage: reflections on Delhi High Courts' Split Verdict on marital rape exception, Oxford Human Rights Hub, <https://ohrh.law.ox.ac.uk/sacrificing-womans-sexual-autonomy-to-save-marriage-reflections-on-delhi-high-courts-split-verdict-on-marital-rape-exception-part-i/>, (May 4, 2025, 12: 40 PM).

<sup>19</sup> Sanyukta Dharmadhikari, in a landmark judgement, Kerala HC recognizes marital rape as a ground for divorce, The news minute, (Aug 2022).

<sup>20</sup> Shumbul Khan, Marital Rape: A legal and social analysis in the Indian Context, SSRN, (December 2024).

<sup>21</sup> Id.

<sup>22</sup> Vibha Yadav, Marital Rape, S3WaaS, <https://cdnbbsr.s3waas.gov.in/s37a68443f5c80d181c42967cd71612af1/uploads/2025/03/202503191325136963.pdf>, (May 5, 2025, 2:10 PM).

especially sexual, and the marriage is supposed to thrive on mutual respect and trust.<sup>23</sup>

Another justification of the non- criminalization of marital rape is that it is hard to prove it in the court and wives might fabricate fake scenarios against their husbands. <sup>24</sup>However, these justifications are baseless because the laws shouldn't ignore real victims just because of rare false claims. The government has told the Supreme Court that there is no need to criminalize marital rape as there are other measures and they believe that this issue affects the society deeply, so any changes must be made after the consultation with all stakeholders.<sup>25</sup>

It is well known fact that women are subjected to violence at home and majority of such victims do not seek legal remedies because they are educationally backwards and do not have familiarity or trust in the legal system.<sup>26</sup>

Even after 78 years of Independence, India still lags behind in identifying and protecting their women. Consent of the women within the institution of marriage is neglected due to the age old traditional and cultural beliefs that forces women to be submissive and surrender herself to the man. Even though many advocate for criminalizing marital rape, the societal pressure and deep-rooted patriarchy in the society acts as a shield in bring such reforms.

## **COMPARATIVE ANALYSIS OF MARITAL RAPE IN DIFFERENT COUNTRIES.**

In Nepal, marital rape is criminalized through the Muluki Criminal Code 2075, following the Directive of the supreme court's directive in the case of Meera Dhungana v. HMG. In Nepal, the husband who rape his wife is punished with up to five years imprisonment.<sup>27</sup> Even though the law criminalizes this, marital rape remains unreported because of the social stigma and the provision has become invisible because of lack of policies to implement the law.<sup>28</sup> Nepal, even though is a less developed country compared to India in many aspects, it has taken a crucial step by legally recognizing marital rape as a crime even if the enforcement remains weak due

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<sup>23</sup> Id.

<sup>24</sup> Subash Mishra & Sarvesh Singh, Marital rape- Myth, Reality and need for criminalization, EBC-India, <https://www.ebc-india.com/lawyer/articles/645.htm>, (May 5, 2025, 2:22 PM).

<sup>25</sup> Ashish Kumar Bhargava, "No need to criminalise marital rape": Centre to Supreme Court, NDTV, (Oct 3, 2024).

<sup>26</sup> Dr. S.C. Tripathi & Vibha Arora, Law relating to Women & Children, 6.Edn (2015).

<sup>27</sup> Muluki Criminl Code § 219(4).

<sup>28</sup> Ruchi Dhital, Analyzing marital rape laws in Nepal, Republica, (April 7, 2024).

to social stigma. However, India still refuses to criminalize it and normalizes the sexual intercourse with a wife against her consent.

In Brazil, marital rape is not explicitly criminalized which means that technically the cases are treated as general rape but often faces lighter penalties or dismissal due to societal norms. Reports shows that most victims are aged 30- 40 in long term marriages and despite filing complaints, 60% of couple stay together and 70% of the cases gets dropped after the wife withdraws it under pressure.<sup>29</sup> By all accounts, marital rape is seriously under-reported in Brazil.<sup>30</sup> In Brazil, though this offense is rarely punished because of the societal pressure or stigma, The Brazil Penal code does not give any exceptions for marital rape unlike India, and it can be technically prosecuted under the general rape laws. The burden of proof lies within the criminal and penal prosecutor, who must prove “beyond a reasonable doubt” that the accused committed a crime.<sup>31</sup>

Considering the status of marital- rape in Canada, before 1983 it was legally permissible for a man to rape his wife, however through the reforms made to the criminal code, marital rape was categorized as a criminal offense.<sup>32</sup> The way Canadian courts have handles marital rape cases has different approaches where some judges have applies the law by respecting women’s right to equality and control over their own bodies. However, at times, courts gets influenced by outdated beliefs such as thinking that the women must report abuse right away to be believed and marriage means implied consent to sex.<sup>33</sup>

## **SUGGESTIONS AND RECOMMENDATIONS**

Marital rape is a very serious issue as it affects the basic right of the women adversely and it denies safety of the women at her own home. Indian legal system continues to ignore this heinous act that affects the lives of the women in India leading to the strong violation of the fundamental rights including article 14, 15 and 21 of the Constitution. Therefore, India has to

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<sup>29</sup> Violence against women in Brazil, A report to the committee on economic, social and cultural rights, [https://www.omct.org/files/2004/07/2409/eng\\_2003\\_02\\_brazil.pdf](https://www.omct.org/files/2004/07/2409/eng_2003_02_brazil.pdf), (May 6, 2025, 12:07 PM).

<sup>30</sup> Criminal Injustice violence against women, An American watch Report, <https://www.hrw.org/sites/default/files/reports/BRAZIL910.PDF>, (May 6, 2025, 12:12 PM).

<sup>31</sup> Criminal Justice Process in case of sexual assault, INSPQ, Quebec, <https://www.inspq.qc.ca/en/sexual-violence/legislation/judicial-process>, (22 Sep,2025 18:00 PM).

<sup>32</sup> Jennifer Koshan, The legal treatment of marital rape and women’s equality: an analysis of the Canadian experience, equality effect, <https://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>, (May 7, 2025, 11:00 AM).

<sup>33</sup> Id.

immediately recognise and address these issues and measure has to be taken.

The Bhartiya Nyaya Samhita must be amended to include marital rape as a crime and remove the exception II which paves the way for marital rape in India. Consent must be made a basic requirement for all sexual relationships including those within the marriage.

Fast track courts and legal aid must be strengthened to support victims who do not have access to resources. Legal literacy must also be enhanced so that the people will know their rights and they can advocate for it.

Providing support for the survivors are also necessary at the same time. They should be given proper counselling, medical care and legal support. If the victim is a survivor of marital rape and she is a complete dependent on the husband, then she should be given shelter homes for her safety.

Moreover, it is evident that even countries where marital rape is considered as a crime, the enforcement remains problematic due to the social stigma and outdated thoughts wherein the women are always considered submissive. This is the major factor that acts as a barrier in bringing such reforms. To overcome this, legal reforms should be backed by educating the people and gender sensitization programmes and training must be given to all.

### **CONCLUSION**

The paper clearly reveals that there is an urgent need for India to criminalize marital rape. Through this step, India can protect the equality, dignity and fundamental human rights of the women within the institution of marriage. Being in the 21<sup>st</sup> century, it is high time to move beyond the outdated laws and beliefs and adopt a more progressive approach which holds on to the principles of justice, equality and the protection of human dignity.

It is important to note that even Nepal which is a neighbouring country which is still developing in many areas has taken a progressive step of criminalizing marital rape, where India still lags behind. In countries like Canada and Brazil, even though they have criminalized marital rape, they still face challenges in implementations due to social stigma. In India, the scenario is even more concerning because there is not only stigma and stereotypes attached to the minds of the people but also there is a complete lack of legal protection for women against marital rape. The

burden of proof remains on the prosecution in Brazil, Nepal and Canada. Aspects such as witness testimony, forensic and photographic evidence plays a significant role. Proving consent in the case of a marital rape is comparatively difficult. However, it is understood and examined with the help of statements given by the victim at different stages, circumstantial evidence and medical evidence. The concept of burden of proof is relatively a gray area when it comes to marital rape as it happens in a private space between the husband and the wife.

By not criminalizing marital rape, India not only highlights the legal injustice but also strengthens inequality and gender- based discrimination leading the violation of the rights guaranteed under the constitution of India. This legal inaction is a clear violation of the Constitution and reflects the status of women in India especially within the institution of marriage.

