



Marital Rape Exception:

Challenges and Arguments

07
22

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Issue Brief

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July 2021

ISSUE BRIEF

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ABSTRACT

Marital rape refers to the act of sexually assaulting one's spouse. It is a crime in most countries except thirty nations including India. Section 375 of the Indian Penal Code [IPC] defines and criminalises rape but contains an exception clause for when it happens between a married couple. This exception declares 'sexual intercourse by a man with his own wife' legal in the absence of circumstances like willingness or consent, listed under Section 375. Such an exception legally absolves the aggressor if sex is demanded or imposed within a marriage. In 2015, a husband raped and sexually assaulted his wife, leading to her hospitalisation. Despite approaching the Supreme Court, her petition was dismissed stating that the law cannot be changed based on one individual's experience, and her husband was never prosecuted. In view of this incident and numerous other petitions filed in the court for striking down the exception clause, the discussion was reopened for hearings on 7th January 2022. A two-judge bench of the Delhi High Court presided over the hearings and on 11th May 2022, giving a split verdict and shelving the criminalisation of marital rape under the IPC.

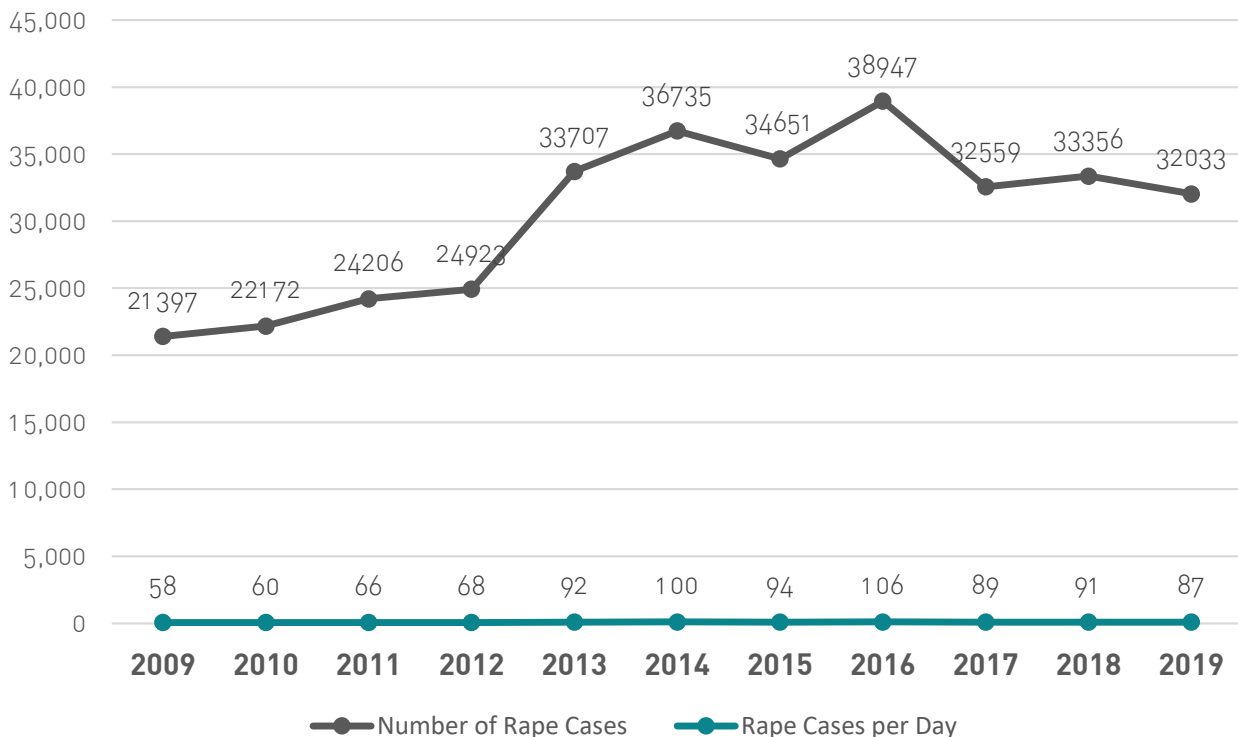
This issue brief assesses the historical challenges in the removal of the marital rape exception clause of Section 375 of the IPC. In doing so, it also examines the judicial arguments on the issue of marital rape in light of the recent Delhi High Court ruling.

KEYWORDS: Marital Rape, Sexual Assault, Gender Violence, Dignity, Consent

INTRODUCTION

According to the World Health Organisation [WHO], one in three women worldwide are victims of physical or sexual violence during their lifetime (WHO, 2021). More regionally, the National Family Health Survey reported that 29% of married women experienced physical or sexual abuse from their husbands (Ministry of Health and Family Welfare, 2021). Violence against women takes various forms, one of the most prevalent being sexual violence. Between 2009 and 2019, India saw an increase in recorded rape cases from 21,397 cases in 2009, that is 58 cases per day, to 32,033 cases in 2019, amounting to 90 cases per day (National Crime Records Bureau, 2009, p.81; National Crime Records Bureau, 2019, p.31). However, marital rape is not reported since it does not qualify as a crime. On the one hand there is a dearth of laws for protection of the victim. On the other, reporting leads to alienation of the victim and the parental family from the larger society, accompanied with an aggravated threat of violence (Thaplu, 2020). In 2018 Nimeshbhai Bharatbhai Desai case, the Gujarat High Court told the appellant to file her case under Section 377 (Unnatural offences) and refused to prosecute the husband under the exception clause of Section 375 (Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018). Such cases are common and discourage marital rape victims from reporting the crime.

Figure 1: Recorded Rape Cases in India



Source: National Crime Records Bureau (2012, 2014, 2015, 2016, 2017, 2018, 2019)

In 2011, the International Men and Gender Equality Survey conducted by the International Center for Research on Women revealed that one in five men forced their wives into sexual intercourse (Barker et al., 2011). Taboos existing in society prevent conversations about sexual matters impeding the transition from traditional conservatism¹ to modern sensualism², and as a result Indian societies and legal systems fail to recognise marital rape as a crime (Janetius, 2017). Owing to marriage's cultural sanctity, viewing a husband as a rapist becomes difficult. It comes in strong conflict with the existing idea that a rapist is a stranger (Kumar, 2021). Therefore, despite recognising rape as a crime, Section 375 of the Indian Penal Code exempts the husband in recognition of an existing marital relationship between the perpetrator and the victim.

Following the state's failure to address marital rape in the Criminal Law Amendment Act of 2013, many women's organisations and human rights groups petitioned the court, vehemently advocating for the criminalisation of marital rape (Banerjee & Rao, 2022). Most recently, the four petitions filed in the Delhi High Court challenging the exception to the rape law in the IPC resulted in a split verdict.

UNDERSTANDING MARITAL RAPE EXCEPTION IN INDIA

The rape laws in India date to the 1800's Coverture Doctrine introduced under the British colonial rule. Herein, under sexual offences, rape was criminalised as sex without consent and also accounted circumstances wherein intercourse happened with consent but under fear of death or under false pretences. It stated that a woman has no individual rights after marriage and must fulfil her marital duties to her husband (Kumar, 2021). The basis for this was the belief that before marriage women belong to the paternal family, and belong to their husband after it. This view postures the husband as someone who gains ownership of the woman's body upon marriage (Kallakuru & Soni, 2018).

In 1860, the IPC was introduced, and in 1940, the outdated marital rape exception was updated to raise the age of married women in the law from 10 to 15 years (Gupta & Gupta, 2013) This was a result of continued efforts made by lawyers and law makers, between 1920 and 1940, who fought against the majority public opinion to prevent child marriages, consummation in marriages where brides were too young, and prevent child widows (Mahmood, 1980).

Section 375 of the IPC criminalises rape, defining it under four conditions as when a man:

“penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under circumstances: against her will; or without consent; or consent obtained under threat or force; or with her consent because she believes that he is another man to whom she is

¹ Traditional conservatism emphasises the significance of higher moral principles revealed via natural laws that society should follow. In this context, traditional conservatism is used to refer to the inability of the wider society to look at sexual intercourse as anything beyond the means of reproduction and pleasure for the male counterpart.

² Modern sensualism is the belief that sensations and perception are the most basic forms of real knowledge. In simple terms, it refers to a philosophy dedicated to the pursuit of physical and sexual pleasure for both men and women.

or believes herself to be lawfully married; or with her consent with reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance; or with or without her consent, when she is under eighteen years of age; or when she is unable to communicate consent.” (Indian Penal Code, 1860, §375).

However, Exception 2 to Section 375 states, “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age³, is not rape” (ibid.). This implies that violence or aggression against a partner during sexual intercourse or sexual acts between a married couple do not amount to rape.

As previous ideas about women’s status and role in society became obsolete upon women becoming equal citizens with socio-political and legal rights, there began a shift away from expecting basic rights to demanding equal opportunities and protection against violence (Katzenstein, 1989). In 1971, the issue of marital rape arose and the 42nd Law Commission Report brought up the issue for the first time in official legal discourse. It discussed instances of rape within marriage in the course of separation but failed to implement changes. It stated that “the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right” (Law Commission of India, 1971). This suggestion implied that consent differs if a couple lives together or separately. However, changes were made in the law and under Section 376B of the IPC recently. The development considers non-consensual sexual intercourse between a husband and wife, during or after their separation, marital rape. This was a landmark judgment on the matter of marital rape since it protected spouses undergoing separation or living separately (Criminal Law (Amendment) Act, 2013).

Followed by the acknowledgement of the issue of marital rape as rape during separation, the 172nd Legislative Commission Report questioned the validity of Exception 2 under Section 375 arguing that while various forms of violence by husbands against wives are criminalised, marital rape should also be recognised as a statutory offence. However, this argument was rejected by the law commission because of concerns that criminalising marital rape would compromise the institution of marriage (Law Commission of India, 2000). Since marriage is widely considered a personal affair, any dispute arising in marriage is expected to be solved between the family members. In some cases, the judiciary has even encouraged victims seeking redressal to resolve the matter in their homes (Kallakuru & Soni, 2018).

With no legal recognition of marital rape several feminist organisations, lawyer groups, and citizens expressed frustration over poor legal protection. Following this, Justice J. S. Verma Committee published the Report of the Committee on Amendments to Criminal Law in 2013. It called for the deletion of the exception from Section 375 and recommended criminalising marital rape. The report asserted that marriage alone does not constitute consent and the perpetrator should not be protected by such a primitive notion (Chhibbar, 2016). Subsequently, the Criminal Law (Amendment) Act (2013), expanded the scope of the term ‘rape’ and replaced it with ‘sexual assault’. In spite of this, criminalisation of marital rape was again rejected on the grounds that it would disrupt the Indian family system and that such an issue can be dealt with under Section 498A of the IPC. The section punishes the husband or his relative, for ‘wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical)

³ Even though this exception states that the married woman must be fifteen years of age, the courts interpret it to mean 18 years, given that sexual activity with any minor (with or without consent, married or not) are a crime under the Protection of Children from Sexual Offences Act, 2012.

of the woman; or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand, with imprisonment to whoever has subjected such cruelty upon a woman. (Indian Penal Code, 1860, §498A).

In 2015, Delhi High Court received numerous petitions on the criminalisation of marital rape. Some even protested the criminalisation to protect men from false allegations or misuse of law and harassment by wives (Wallen & Lateef, 2022). The issue was then raised in Parliament and the Ministry of Home Affairs responded in stating that “marital rape cannot be appropriately applied in the Indian context as the mindset of the society is to treat marriage as a sacrament.” (Kallakuru & Soni 2018). This was followed by an organically renewing focus put on Section 498 of the IPC as resolution by lawmakers. In 2017, the central government upheld the decision against removal of the exception by stating that India could not blindly follow the West and restated that criminalising marital rape would destroy the institution of marriage (PTI, 2017).

On 7 January 2022, the Delhi High Court resumed the final hearings of various petitions. The hearing were with regards to the removal of the exception clause to reassess the validity of the marital rape exception. Justice Rajiv Shukdhher and Justice C. Hari Shankar presided. The Centre filed an affidavit opposing criminalisation. The affidavit argued that criminalisation would destabilise the institution of marriage and also be used as a tool to harass husbands and flood litigation. On 11 May 2022, the Delhi High Court delivered a divided verdict on the matter. Justice Rajiv Shukdhher allowed the petition’s plea for criminalisation, stating that the exception violated Article 14 of the Constitution of India. However, Justice C. Hari Shankar held that the exception was appropriate and that marital rape should be judged under other offences on a case-by-case basis based on a couple’s history of violence and abuse (*Khushboo Saifi v. Union of India and Anr*, 2022).

MARITAL RAPE AS A VIOLATION OF WOMEN’S RIGHTS

While the previous section of the paper outlined the history of debates on marital rape, this one brings forth the arguments in favour of criminalisation. The argument is based on international laws and treaties and it also outlines which constitutional provisions get violated by marital rape’s non-criminalisation.

Violation of International Treaties and Laws

In accordance with the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], India has a responsibility to protect women from “physical, sexual, and psychological violence occurring in the family including battering..., marital rape..., and violence related to exploitation” and gender-based violence [GBV] (Randall & Venkatesh, 2015). However, the existence of the marital rape exception and the refusal of the Central government to conform to the ‘standards of the West’ denies women the right of protection against this violation. Under international human rights law, it further also infringes a woman’s right to life, liberty, security, equality, well-being and non-discrimination, making it imperative to criminalise marital rape (*ibid.*)

Violation of Article 14

Under the Constitution of India, lack of criminalisation of marital rape also violates a woman's Right to Equality as Article 14 of the Constitution says, "the state shall not deny to any person equality before law and equal protection of the law." This article provides protection to every citizen of India except for married women in denying them the right to seek redressal against sexual violence within a marriage. The Centre's recent stand on the matter stating that deletion of the exception would result in harassment of husbands also undermines women's right to equality. It only encourages the patriarchal mindset which gives precedence to the victimhood of men over women's.

It's important to note that the socio-historical context in which Section 375 was drafted was different. Women's rights were severely limited in 1860. They were only availed because the rights of women were merged with their husbands' since they were viewed as independent legal entities and enjoyed full legal, social, and political rights (Mishra, 2019). However, while context has changed entirely with time, what remains is the legal inheritance of Section 375's exception. Today, a section that was created in colonial India comes in direct contention with the Indian constitution's Article 14 as it disregards women's right to equal treatment and protection.

Violation of Article 21

Marital rape further violates Article 21 of the Constitution of India which states, "no person shall be deprived of his life and personal liberty except according to procedure established by law." Over the years, the expanse of Article 21 has been elaborated in meaning and effect. As a result, right to healthy life, privacy, choice in matter of sexual activity has been read by the Supreme Court as flowing from and protected under Article 21. Recently, the Supreme Court has also recognised the woman's right to abstain from sexual intercourse in recognition and protection of her fundamental right under Article 21 (Makkar, 2022). In marital rape, a married woman's right to sexual privacy and bodily integrity are infringed upon. This further violates her right to a healthy dignified life as it affects her self-esteem, physical health, and mental health directly (Mehta, 2021).

CONCLUSION

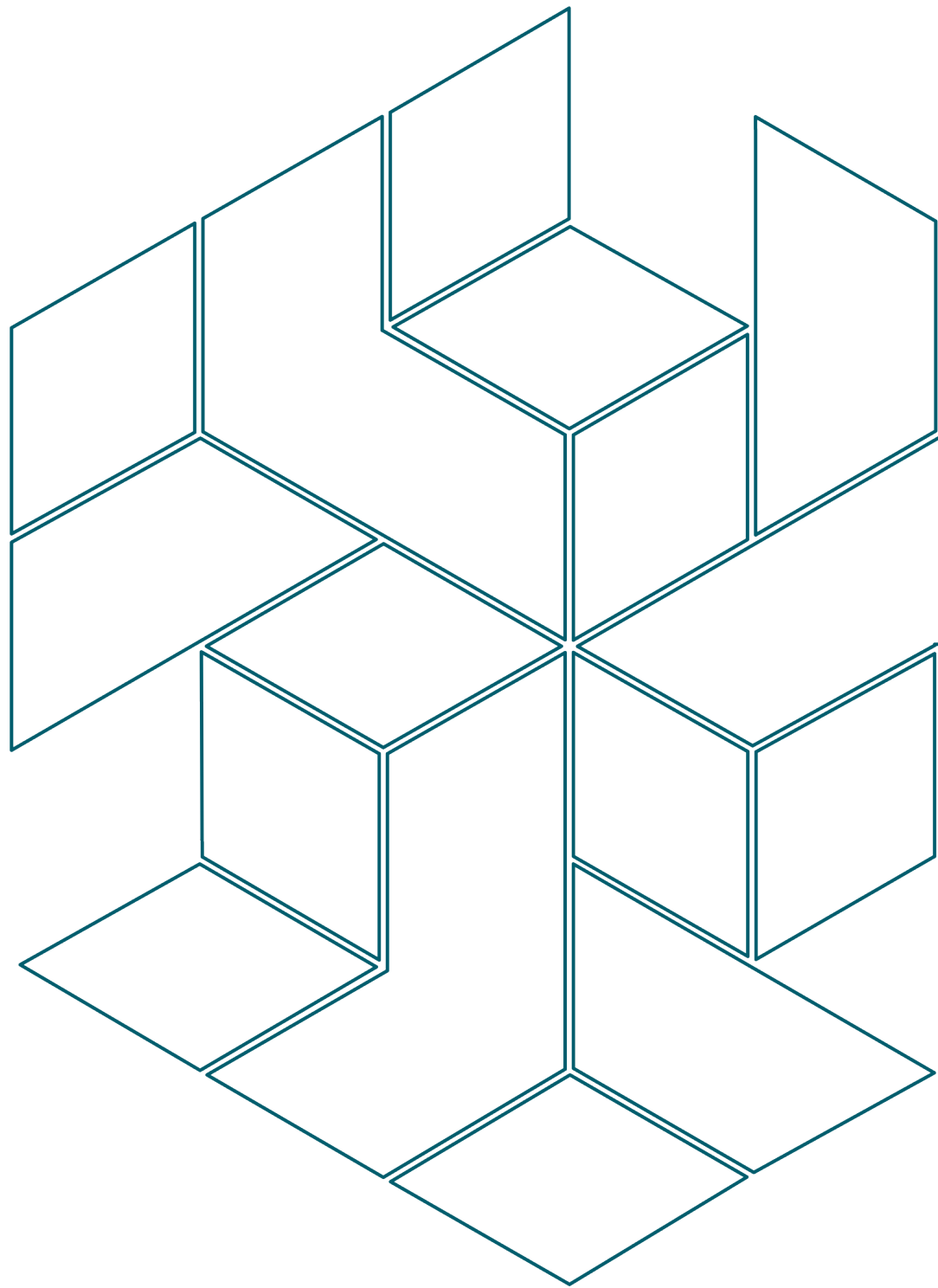
The lack of discussion and recognition of marital rape's grave implications, both within the private and the public sphere, leads to undermining the impact and consequences of rape inside or outside marriage. Criminalising marital rape is necessary. The 1860s exception 2 of Section 375 of the IPC is iniquitous and inapplicable since it fails to uphold the basic constitutional rights of women such as right to life and liberty. The split verdict suggests that pre-existing ideas against criminalisation based on the state's primary duty to protect the sanctity of marriage prevail. Such an outlook assumes consent to sex through marriage, merges woman's identity with the legal identity of the husband after marriage. These attitudes need to be challenged and re-evaluated through passing sound legislations that protect women.

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