

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

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Marital Rape: Sanctioned by Law and Society?

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ABSTRACT

“Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.” - F. H. Batacan Rape codified in Section 375 of the Indian Penal Code (“IPC”) includes all forms of sexual assault which involve non-consensual intercourse with a woman. Exception 2 to Section 375 exempts forceful and unwilling sexual intercourse between a husband and a wife over fifteen years of age from the definition of “rape”, thus providing legal immunity to marital rape. The Law assumes the wife as the property of the husband. The unwilling physical contact is a violation of various constitutional rights of women which includes Article 14 and Article 21. Almost every country in the world has certain laws regarding marital rape except 36 countries which also include India. There are several cases filed in different courts of India to provide legal recognition to Marital Rape and challenging the constitutionality of the exception to Section 375 of the Indian Penal Code.

The author will be critically analyzing the constitutionality of exception 2 and will be discussing the necessity to criminalize marital rape. The paper is an attempt by the author to expose the discrimination and fallacies of the system in India regarding marital rape. The paper contains certain suggestions and some legal reforms that are essential to achieve the objective to criminalize marital rape and provide humane conditions to the wife.

Keyword(s): *Constitutional rights, Sexual Intercourse, Unwilling, Marital Rape.*

I. INTRODUCTION

Marriage is a social institution and a socially approved relationship between man and woman. The institution is acceptable in society to satisfy the physical, social, psychological, cultural, and economic needs of men and women. Almost in every religion, there is a concept of the consummation of a marriage, the institution is considered incomplete without the creation of the physical relationship between husband and wife and this can be a ground of annulment in a marriage. Sex between husband and wife is legal and just because of the legality of sex the

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consent and condition of women are not considered and this results in marital rape.

Marital rape refers to the sexual intercourse between a husband and a wife, where the wife does not give her consent to such intercourse. Being a spouse does not permit the husband to force his wife for sex. It should be consensual and should not be forced on the wife, There are several reasons which this issue is not much discussed and highlighted like fear of society and family among women, their financial dependence on the husbands, lack of awareness about women empowerment due to illiteracy, the lack of sexual education, poverty, religious beliefs, social customs, etc.

There are several reasons and beliefs due to which even after 200 years of independence, we still follow the law made in the British era, and they're not even a minute change made regarding marital rape. Indian social structure does not approve of women who 'take up arms against their families, especially husbands. In most of Indian society, the role of a wife as a homemaker, obedient, and who is available to husband for all his needs is still commendable and also Sex is viewed as a marital obligation and it is still believed by many men that there is implied consent by the wife for all the sexual relations.

The word "rape" is defined in section 375 of the Indian penal Code³. In India, there is no punishment or any provision related to marital rape provided as per current law, according to the current scenario the wife is presumed to deliver perpetual consent to have sex with her husband after entering into marital relations. Only sexual intercourse with a wife under the age of 15 is considered rape according to current law.

Rice Institute, a non-profit organization in 2014 reported that the number of women who have experienced sexual violence by their husbands is 40 times women suffering sexual violence by non-intimate partners.⁴

According to a survey conducted by The National Family Health Survey in the year 2015-16, up to 56% of women have experienced physical and/or sexual assault and 71% of the women have experienced physical or sexual assault from the hands of their drunk husbands. 13% of the women have suffered what would be considered marital rape in wedlock. More than one in three women in the age group of 15-49 years has suffered some form of violence in their married life. 83 percent of women reported their current husband and 9 percent reported former husband as perpetrators.⁵

³ Indian Penal Code, 1860, §375, No. 45, Imperial Legislative Council, 1860 (India).

⁴ Aashish Gupta, *Reporting and incidence of violence against women in India*, Rice Institute, (Sep. 25, 2014), <https://riceinstitute.org/research/reporting-and-incidence-of-violence-against-women-in-india/>.

⁵ International Institute for Population Sciences (IIPS) and ICF. 2017. National Family Health Survey (NFHS-4),

According to a report of WHO almost one-third that is around 27% of women of age group 15-49 years who have been in a relationship claim that they have been subjected to some form of physical and/or sexual violence by their intimate partner.⁶

II. CURRENT STATUS OF THE MARITAL RAPE IN INDIA

The word rape is defined in section 375 of the Indian Penal Code and the section itself is an origin of the legality of marital rapes in India. Exception 2 of the Section reads as “Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.”⁷ The term marital rape can be defined as any unwanted and forceful sexual intercourse between husband and wife, however, the term is not defined in any statute or law. As per Section 376 of the Indian Penal Code,⁸ Which defines the punishment for rape, While the law does not criminalize marital rape, a specific form of marital rape is criminalized, i.e. non-consensual sexual intercourse when the wife and husband are judicially separated or otherwise. Section 376B of the IPC mentions some instances where the husband can be held liable for the offense of rape

“376B: Sexual intercourse by husband upon his wife during separation:

Whoever has sexual intercourse with his wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of §375”⁹

However, the rape of a wife above 15 years is not considered rape. According to current law establishment of a marital relationship is considered implied consent to have sexual intercourse. The legality of marital rape also violates Article 21 of the Indian constitution¹⁰ guarantees protection of life and personal liberty, it also covers the right to privacy and dignity of a human being. In *Bhodhisathwa Gautam v Subhra Chakraborty*,¹¹ SC held that Rape is a crime against basic human rights and is also violative of the fundamental right to live with dignity. Marital

2015-16: India, <http://rchiips.org/nfhs/nfhs-4Reports/India.pdf>.

⁶ *Violence against women*, WHO, (Mar. 9 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

⁷ Supra Note 3.

⁸ Indian Penal Code, 1860, §376, No. 45, Imperial Legislative Council, 1860 (India).

⁹ Indian Penal Code, 1860, §376B, No. 45, Imperial Legislative Council, 1860 (India).

¹⁰ India Const. art. 21.

¹¹ *Bhodhisathwa Gautam v Subhra Chakraborty* 1996 AIR 992, 1996 SCC (1) 490.

rape takes away the right to live in human dignity, right to privacy, and rights over the body of married women. The exemption for marital rape emanated from an outdated notion of marriage which regarded wives as the property of their husbands. However, in the same way, wives were treated in adultery law but some amendments were made in the law.

Protection of Women from Domestic Violence Act, 2005¹² offers civil remedies for crimes against women including marital rape, it protects against domestic violence and sexual perversions. It is quite unsatisfactory that violence against women should be seen as a civil wrong rather than a criminal offense. If marital rape is made into a criminal wrong then it would act as a deterrent and prevent future crimes.

The 42nd Law Commission Report in the year 1971¹³ suggested that marital rape should be criminalized the issue was taken up again and again by the law commission of India in the year 1976 and also in the year 2000 but not no conclusive steps were taken. The report made two important suggestions:

First, it noted that in instances where the husband and wife were judicially separated, the exception clause of section 375 of IPC must not apply. Although the reason for this was unclear. It stated that “in such a case, 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 offense of rape. This does not appear to be right”. The report does not discuss the reason for being it not right. It implies that consent is presumed in situations where the husband and wife live together and cannot be implied when they do not live together.

The second suggestion made in the report was regarding non-consensual sexual intercourse between women aged between twelve and fifteen. It stated that the punishment for such offenses must be in a separate section and preferably not be termed rape and should be a little different. The reason is that before the recent amendments in the IPC, there was a different punishment for rape committed by the husband when the wife was between twelve and fifteen years of age. The report can be summarized as it highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape, which consider marital rape less severe. The report, however, did not, comment on the exception clause itself, i.e. whether the exception clause of the section could be retained or deleted.

¹² Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005(India).

¹³ 42nd Report 1971, Indian Penal Code, Law Commission of India, <https://lawcommissionofindia.nic.in/1-50/Report42.pdf>.

In the year 2012 Justice Verma Committee was constituted to suggest certain changes in criminal law regarding the cases of rape. The committee published the 'Report of the Committee on Amendments to Criminal Law' ('J.S. Verma Report') in 2012. The committee more emphasized consent in any sexual intercourse. The recommendations made by the committee:

III. THE EXCEPTION FOR MARITAL RAPE IS REMOVED

The law ought to specify that:

- a) A marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation;
- b) The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
- c) The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

In light of the Report, the Criminal Law Amendment Bill, 2012 ('Amendment Bill, 2012') was drafted. The Bill replaced the word 'rape' with 'sexual assault' to widen its scope but the Bill did not contain any provision to criminalize marital rape. The Amendment Bill, 2012 did not take into account the suggestions made in the J.S. Verma Report.¹⁴

IV. THE LEGALITY OF MARITAL RAPE AROUND THE WORLD

According to a report published by World Bank in the year 2015, in 49 countries there is no specific law against domestic violence, in 45 countries there is no legislation to deal with sexual harassment, and 112 countries do not criminalize marital rape. As of today, only 36 countries have not criminalized marital rape.¹⁵ Most of the common law countries like Australia, South Africa, and Canada have followed the British system and have criminalized marital rape. Marital rape is a criminalized offense in all fifty states of the United States. The same is the status in the United Kingdom.

Since Indian law is highly influenced by English law, it gives enough reason for referring to the judgment of English law in this regard. In *CR v. the United Kingdom*,¹⁶ the European Commission for Human rights held that a rapist will remain a rapist even if he is related to the victim.

¹⁴ Justice Verma Committee Report, (2013).

¹⁵ *Gender Equality*, WHO, (2017), <https://datatopics.worldbank.org/sdgatlas/archive/2017/SDG-05-gender-equality.html>.

¹⁶ *CR v United Kingdom* (1995) 21 EHRR 363.

V. EFFECTS OF THE MARITAL RAPE

There is a myth that marital rape is less traumatic for the woman. The research shows that there are more intense effects on the wife because she has to live with the rapist for the rest of her life. The effects of marital rape can be classified into two categories:

- i. Physical effects- the physical effects of marital rape are usually gynecological like injuries and infections in private organs, miscarriages, torn muscles, lacerations, infertility, and sometimes also the chance of sexually transmitted diseases, etc.
- ii. Psychological effects- the psychological effects are worse than the physical effects like shock, fear, post-traumatic stress, suicidal tendencies, depression, sexual dysfunction, etc.

VI. VIOLATION OF FUNDAMENTAL RIGHTS OF WOMEN

Marital rape is also a violation of the fundamental right of a woman, specifically provided under Articles 14 and 21 of the Constitution of India.

(A) Violation of Article 14

Article 14 of the Constitution guarantees the fundamental right to equality it states that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”¹⁷. Article 14, therefore, protects a person from discrimination but the law under section 375 of the Indian Penal Code discriminates against sexual assault with wife and stranger. This section discriminates against female victims who suffered the rape from their own husbands. It violates the protection guaranteed under article 14 of the Constitution and thus violates the constitutional right to equality.

The reason for the addition of exception 2 to section 375 is because the Indian Penal code was drafted at the time when society was patriarchal and marriage was considered a sacrament only. Women were not considered independent legal entity but it was believed that the wife’s identity merged with the husband after the marriage. However, now husband and wife are recognized as independent legal identities which is evident from the statutes passed in the recent past to protect women from violence and harassment including ‘the protection of women from domestic violence act’¹⁸, ‘sexual harassment of women at workplace (Prevention, Prohibition and Redressal Act)¹⁹.’ So, now this exception clearly violates the right to equality enshrined in

¹⁷ India Const. Art 14.

¹⁸ Protection of Women from Domestic Violence Act, 2005, Supra Note 10.

¹⁹The sexual harassment of women at workplace (Prevention, Prohibition and Redressal) act, 2013, No. 14, Acts of Parliament, 2013 (India).

article 14 as it discriminates against married women.

(B) Violation of Article 21

Article 21 of the constitution has been interpreted by the supreme court in various judgments. It has been held that the scope of this article is much more than the literal guarantee of life and liberty. This right also includes the right to live with dignity, the right to privacy including sexual privacy, the right to self-determination, right to good health among others.²⁰

1. Right to live with dignity

The concept of a right to live with dignity was first highlighted by the Supreme court in the case of *Francis Coralie mulin v. Administrator, Union Territory of India*,²¹. The court held that the ambit of Article 21 includes the right to live with human dignity which includes basic necessities like enough nutrition, clothing, and shelter, etc. In many other cases, it was also held that rape abuses the right to live with the dignity of the victim of the crime. The marital rape was discussed by the court in the case of *Bodhisattwa Gautam v. Subhra Chakroborty*.²² The court held that the marital exception to rape is the violation of a woman's right to live with human dignity and any law which damages her such right and gives the husband an option to have sexual intercourse without the wife's will is along these lines unlawful.

2. Right to Privacy

If the husband forces his wife to the sexual intercourse without her will, it is a violation of her privacy. It is not open for anyone to violate her sexual privacy as and whenever he wishes to do so as was held in the case of *State of Maharashtra v. Madhukar Narayan*.²³ The Supreme court had held in *Suchita Srivastava v. Chandigarh Administration*²⁴ that the right to make choices about sexual activity is within the scope of rights of personal liberty, privacy, dignity, and bodily integrity under Article 21. In the case of *Justice K.S. Puttuswamy v. Union of India*²⁵, the right to privacy was recognized by the supreme court as a fundamental right and it was held that this right includes, "decisional privacy reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations." Now, this judgment does not distinguish between married and unmarried women and there is not any such ruling which is contrary to this one. Thus, it is evident that

²⁰ Supra Note 11.

²¹ *Francis Coralie mulin v. Administrator, Union Territory of India*, 1981(2)SCR516.

²² *Bodhisattwa Gautam v. Subhra Chakroborty* AIR 1996 SC 133.

²³ *State of Maharashtra v. Madhukar Narayan*, AIR 1991 SC 207.

²⁴ *Suchita Srivastava and Another vs. Chandigarh Administration*, AIR 2010 SC 235.

²⁵ *Justice K.S. Puttuswamy v. Union of India*, AIR 2017 SC 416.

the Supreme court has recognized the right to sexual privacy for all women irrespective of their marital status as a right that comes under the ambit of article 21.

3. Right to bodily self-determination

The concept of the right of self-determination depends on the belief that a human being is the final decision maker in the matters connected with his body or prosperity. The more private the decision, the more strong is the privilege of the person making such decision is. The decision to have sexual relations is the most private decision that a woman takes as it is a type of self-assurance and self-expression. Exception 2 of Section 375 of IPC, which excludes the married women from the ambit of being the rape victims in the wedlock, takes away the right of communicating and rejecting the assent. This in turn denies the married woman the right of real self-assurance and interferes in her most individual decision-making. However, the judicial stand on this concept has been tragic, in the case of *State of Maharashtra v. Madhukar Narayan Mandikar*,²⁶ the supreme court has held that prostitution has a right to deny sex but shockingly, the wife is excluded and has not been given the protection over her own body.

4. Right to good health

The right to life recognizes the right to good health as its part as has been held in the case of *CESC Ltd. v. Subhash Chandra*.²⁷ This right is required for the intellectual and spiritual well-being of a person. Marital rape as discussed above causes serious psychological and physical harm which violates the right to the good health of the victim.

*Nimeshbhai Bharatbhai Desai v. State of Gujarat*²⁸ - the Gujarat high court held that marrying a woman does not give a license to forcibly rape her. He does not own her body by the reason of marriage. Marriage cannot deprive her of the human right of exclusive autonomy over her body. She has the right to lawfully give or withhold her consent to sexual relations at any point in time. Many women have gone through this issue but can't do anything because this practice is non-criminalized and also bear there is a fear of society and the reputation of the family as the patriarchal Indian society does not see Marital rape as an issue. The high court was of the view that a husband having sexual intercourse with his wife without her consent should be charged for infuriating the modesty of his wife.

However, the Delhi high court in another case, fully dismissed the petition to make marital rape a criminal offense. It held that making and drafting a law is the duty of the legislature and the

²⁶ Supra Note. 24.

²⁷ *CESC Ltd. v. Subhash Chandra*, (1992) 1 SCC 441.

²⁸ *Nimeshbhai Bharatbhai Desai v. State of Gujarat* 2018 SCC Guj 732.

court is more concerned with the interpretation of the law, rather than drafting it.

VII. ARGUMENTS AGAINST THE CRIMINALISATION OF THE MARITAL RAPE

(A) It is against the culture of India

In August 2019, Justice Deepak Mishra said that if marital rape is made a crime in India, it will create absolute anarchy in families and India is sustaining itself because of its family values.²⁹ The Indian government has suggested that people asking for making marital rape an offense were blindly following western customs. The government also argues that if marital rape is criminalized, women will stand against their rapist husbands and a majority of the marriages will break. If by this argument, the government is agreeing on the fact, that this issue exists in the society and if criminalized, the women would want to end the sexual violence that they are suffering in the wedlock.

(B) Women's perpetual consent is implied after marriage

There is a notion that after marriage a woman handles her constant consent to the sexual activities of her husband. But laws are supposed to be above the preconceived ideas of people whereas, Indian laws date back to the Victorian era when patriarchy had a huge role to play. Nowadays, a woman is a separate individual, and the notion that the husband and wife become one soul after marriage needs to be done away with.

(C) Any such law will be misused by the women

The union government once submitted an affidavit to the Union government stating that this law will become an easy tool to harass the husbands. This argument has been used as an issue time and time again. Two out of every five women suffer from domestic, emotional, or sexual violence. First of all, the law needs to be there and women should be able to use it. Judiciary is there to keep a check on the false cases and to make sure that this law is not misused by women.

VIII. THE RECENT DEBATE BEFORE THE JUDICIARY

A PIL was filed by an NGO, RIT Foundation, before the Delhi HC which lead to the debate on the constitutionality of exception 2 to section 375. The bench which was hearing the PIL noted that marital rape is a serious issue, which has infamously become a part of the culture.

Another PIL was filed in 2015 in the Delhi high court which challenged the same exception as violative of the fundamental rights of the married women under articles 14, 15, 19, and 21 of

²⁹*Ex-CJI Dipak Misra Says Criminalising Marital Rape Would Lead To 'Absolute Anarchy'*, Huffpost, (Sep. 04 2019, 04:42 AM). https://www.huffpost.com/archive/in/entry/marital-rape-dipak_misra_in_5cac4e0fe4b02084ce8f3b51.

the constitution. An NGO named Men's welfare trust intervened in the hearing and claims that with the removal of exception 2, men will be at the risk of victimization by women who already file false cases of sexual harassment, domestic violence, etc. They also pointed out that around 62,000 men commit suicide every year because of marital problems.³⁰

Even the government of India has filed an affidavit before the Delhi HC advising the court to ensure that marital rape cannot be used as an easy tool by women to harass husbands. It is very disheartening to see such comments of the government which are unpleasantly against the womenfolk. It shows that the government sees all women as potential liars. The idea of the government that women need to be prevented from filing complaints about rape to keep marriage stable points out that the true mindset of the society is still patriarchal and conservative.

Maneka Gandhi, the child and women development minister in 2016 said that 'the concept of marital rape' could not be applied in India like it is applied internationally as the levels of illiteracy and poverty are much more in India as compared to developed countries.

In 2019, Shashi Tharoor while introducing the 'The Women's Sexual Reproductive and Menstrual Rights bills, 2018' said, "Marital rape is not about sex, but about violence; it is not about marriage, but about lack of consent".³¹

IX. SUGGESTIONS AND REFORMS

Marital rape is a violation of the fundamental rights of women and also a brutal offense and it should be criminalized. It makes no sense to discriminate between the woman who is married and less than 15 years and the one who is married and above 15 years because at the end of the day both are the victims of sexual violence and deserve justice. Various countries around the world have either criminalized marital rape or are in the process of doing so. Even the Supreme court of Nepal which has just recently abolished monarchy has recognized the forced sex in marriage as marital rape. India should take inspiration from these countries and criminalize marital rape. A proper bill should be introduced by parliament for this and this should be recognized as an offense under the Indian Penal Code.

The Punishment of marital rape should be the same as prescribed in Section 376 of the Indian Penal Code as only the fact that the victim is married to the rapist does not make the crime less brutal only on the ground of the existing relationship. There is no justification for having a

³⁰ Dr. Vandana, Marital Rape - Exemption Under Indian Penal Code: Quest For Recognition And Liability, *ILI Law Review* Vol. II, 14 (2017). <https://ili.ac.in/pdf/vandana.pdf>.

³¹ The Women's Sexual, Reproductive And Menstrual Rights Bill, 2018, Bill No. 255 of 2018. <http://164.100.47.4/billtexts/lbills/lbills/asintroduced/2271as.pdf>.

lesser punishment policy as it will be a violation of equality given in Article 14 and Section 376B should be repealed and the rapist should be punished as prescribed in Section 376 of IPC.

If the criminalization of marital rape will be a long process then for immediate relief one most important remedy that should be provided to the wife is the decree of divorce. They should be provided with an option of separation if the charge of marital rape is proved against her husband.

The most important step that needs to be taken is the spread of awareness among women so that they don't suffer at the hands of their husbands. Many women are ignorant of the fact that what they are suffering from is not normal and it takes away their fundamental rights and bodily dignity. The only solution to this is to make them educated and empowered. Women should not be ashamed of coming forward and going against their spouses.

X. CONCLUSION

Most of the developed countries have amended the laws regarding marital rape. Considering the steps taken by other countries, India is far behind in leaving the provisions of the Victorian era. There is a need for exclusive law for marital rape. In the absence of such exclusive laws, the provisions of IPC can easily be used as a defense. If not, then marital rape should be criminalized under the Indian Penal Code, 1860 as recommended in 172nd Law Report.³² The huge hindrance in the way of criminalization of marital rapes is that it is difficult to prove and also in a country like India it is very difficult to alter statutes regarding marital laws due to the presence of separate personal laws.

The most important thing to consider here is not the difficulty to implement the law but it is the need for law. The implementation of the law will save the dignity of women in relationships and the fundamental rights of women.

³² 172nd Law Report on Review of Rape Laws, Law Commission of India, (Mar. 25 2000). <https://lawcommissionofindia.nic.in/rapelaws.htm>.