

MARITAL RAPE: A NON-CRIMINALIZED LAW IN INDIA

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ABSTRACT

Marital rape is the most common repugnant form of masochism in the Indian society and is hidden behind the sacrosanct of marriage but still it is not criminalized in India. Women are regarded as mere objects by the society in today's world also, though we keep on stressing on the fact that we, women are equal not only in the eyes of law but also in the society. But the increasing instances of violence against women never fail to amaze us that how society and the law treats us with equality. Women are used to satisfy a man's sexual desire, and her consent doesn't matter. Once she is married she has to surrender herself to her husband. She is regarded as the property of her husband and a man cannot be punished for violating his own property. There are laws which consider rape as an offence and have penal provisions for punishing the offenders. But our law of the land is silent when it comes to this form of violence, i.e., marital rape. How can marital rape be considered a rape, when upon marriage she has already given her implied consent to satisfy her husband? Unless our society and law considers us, the women as only human beings, we cannot expect some strict legal action to be taken for safeguarding the women. If the society's thoughts regarding women are limited to only as a material to be used for physical needs, then the laws will remain silent in this type of severe crime. It is a high time for India to consider marital rape as a rape and punish the offenders as per the penal provisions.

Keywords: Marital rape, women, masochism, India, property.

INTRODUCTION

The word “rape” is derived from the Latin verb “*rapere*” which means ‘*to seize*’. Thus, rape is defined as, forcible seizure, or the ravishment of a woman without her consent, by force, fraud or fear. It involves coercive, non-consensual sexual intercourse with a woman. The Supreme Court of India has correctly described rape as ‘deathless shame and gravest crime against human dignity’.¹ Rape is an offence committed against a woman, violating her dignity and self-respect. When it occurs within four-walls of her matrimonial home, it reduces the status of a woman to an object merely used for sexual pleasure. In most of the cases, women are treated as objects in order to satisfy men in all respect. When we hear the word “rape”, the thought which comes to our mind is that it is done by a malicious person. But, no one can think “rape” in context of marriage.

Marital rape is one of the major under-reported crimes that are committed overtly, without the offender being punished since it is socially tolerated without any objection. A woman considers marital rape to be a personal shame which they do not want others to know and sometimes they even find it difficult to believe that, a husband can rape his wife. The questions which come across our mind are - how can a man be accused of rape, if he is only utilizing his conjugal rights? It highlights the most common fact that a woman has no right to her own body, once she is married; she has to surrender herself completely to her husband. Her body, mind and soul now belonged to her husband. Marital rape is the most common repugnant form of masochism in the Indian society and is hidden behind the sacrosanct of marriage. The law of the land did not conceptualize it as an offence against the person of the woman, one that destroys her freedom; rather it considered rape as an instrument for protecting a man’s property from the sexual aggressions of other men.

Therefore, the act of rape by the husband was not recognised as an offence because a woman is considered the property of the husband, and a man could not be punished for violating his own property. Marital Rape is more complicated because here the victims find it difficult to see themselves as victims. Women who consider themselves as victims are reluctant to approach the concerned authorities because they are financially dependent upon their husbands, reporting the matter would result in withdrawal of financial support by the husband, leaving them and their children without the basic amenities. The lack of public awareness about the

reality of marital rape plays a pivotal role to its increasing cases day by day. Victims are ashamed to raise voice and the abusers take this golden opportunity to pressurize them to keep quiet, not to inform others, the authority and also make them feel that they are to be blamed. Even we feel awkward, uncomfortable and helpless to do anything for them and so we keep quiet. This intolerable behaviour of the entire society leads to the rising cases of marital rape in today's world. Here, in today's world we consider both the spouses to be equal, but still we could see this kind of disparity when it comes to this form of relationship between husband and wife.

Marital Rape is criminalised in many countries such as, Armenia, Austria, United States, Poland, Netherlands, etc. In the 20th century especially in 1970s, women's rights groups initiated 'Anti- Rape Movement', demanding that they should be given sexual autonomy of their bodiesⁱⁱ. These rights have increasingly been recognised, and consequently rape has been criminalised, in other cases law makes no differences between rape by one's own husband or anyone else. Its 2021, still India is one of those 36 countries in the world where marital rape is not criminalised. Even though marital rape is prevalent in India, still it is not recognized as a crime and is under the veil of holy union of marriage.

India is a country where our law either lets the perpetrators of predatory behaviour roam free and sometimes even if they get punished; it will be years after such heinous and barbaric crime is committed. That is what was done in Nirbhaya case (2012). If this is the scenario in the most brutal rape of our time, then how can we expect marital rape to be punishable? The common belief is that now she is a wife and it is her moral duty to satisfy her husband, whenever he pleases, because, it is presumed that her consent is applicable 24 hours in a day and 365 days in a year.

ORIGIN AND RATIONALE

The traditional definition of rape in most countries was 'sexual intercourse with a female not his wife without her consent'. This provided the husband with an exemption from prosecution for raping their wives – "a license to rape".

The “marital-rape exemption” as it is known, is not just an accidental loophole of law, but it is a doctrine with firm roots in our legal heritage that go back at least three hundred years. It is based on a theory of marriage and of sex that was first officially enunciated in the seventeenth century by Mathew Hale, an influential legal scholar. He wrote, “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.”ⁱⁱⁱ

For instance, Susan Brownmiller, in her book ‘Against our Will’, led the women’s movement into the fight against rape. She wrote’ “A sexual assault is an invasion of bodily integrity and violation of freedom and self-determination wherever it happens to take place, in or out of marriage bed.....Compulsory sexual intercourse is not a husband’s right in marriage, for such a ‘right’ gives lie to any concept of equality and human dignity.”

Our mothers, grandmothers may have also faced marital rape, but they could not raise their voice against it. I think one of the reasons of not raising their voices can be the fact that they were taught from childhood that men are always superior to women and as per religious doctrine, among other required tasks falling under the rubric of “wifely duty”, satisfying one’s husband was per prime duty. It can also be seen sometimes that irrespective of their illness (physical or mental) they are forced to please their husband ignoring their own health condition. So, they failed to victimize themselves as a rape victim, as it was the right of the husband to have sexual intercourse with his wife, with or without her consent. In addition to traditional interpretation of religious doctrine, social acceptance of traditional sex-role stereotypes has also resulted in maintaining the view that marital rape is not a serious offence. The widespread cultural belief that marital rape is not real rape prevents the identification of these crimes and, as a result, invalidates the traumatic experiences of marital rape victims. Thus, there is often a failure to label oneself or others as crime victims in the case of marital rape. Before a woman can label herself as a victim of marital rape, these cultural biases serve to impede the identification of marital rape victims, and consequently limit their help seeking.

In the case of **Phulmoni Dasi**, where an eight year old child died of excessive bleeding due to sexual intercourse by her husband who was in his mid-thirties at the time. But the husband was convicted, not for rape, but for ‘*causing grievous hurt by doing a rash and negligent act*

dangerous to life' with one year of imprisonment. The court observed that: "The branch of the law which has no connection with this case is the law of rape. It is probably within the knowledge of you all, gentlemen, that the crime of rape consists in having sexual intercourse with a female either without her consent, or when she is of such an age that she cannot in law consent, and that the crime consists in the fact of intercourse independently of circumstances, of intention, of knowledge, and of consequences. And, in the case of married females, as you probably know, the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape does not apply as between husband and wife, if the wife has attained the age of ten years that the law regards a wife over ten years of age as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law."^{iv}

The dogma of the marital rape exemption was based on the notion of 'irrevocable implied consent'. As per this notion, once a woman is married to a man, there is believed implied consent to sexual intercourse, which is irrevocable nature. Men, as the dominated class, have internationalised this belief that women are their property and the value of women as a property is measured largely by their "sexual purity". Rape, therefore, can be theorised as a property crime against woman's husband or father. In ancient times, a raped woman was considered relatively less valuable as property, and penalties for such crime often involves fines or other compensation paid not to her, but to her husband or father.

Kersti Yllö states in the prologue of 'Understanding Marital Rape in a Global Context', "In some cultures, consent is not even something that an individual wife can give. The families that arranged the marriage guarantee her permanent consent."^v A husband's control over his wife's body could also be seen in the way adultery between a wife and another man was constructed; for example in 1707, English Lord Chief Justice John Holt described the act of a man having sexual relations with another man's wife as "the highest invasion of property".^{vi}

Types of marital rape:

There are three kinds of marital rape as identified by legal scholars are –

- i. *Battering rape* - In "*battering rapes*", women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some

are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to *make up* and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

- ii. *Force-only rape* - In what is called “*force-only*” rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.
- iii. *Obsessive rape* - Other women experience what has been labelled “*sadistic*” or “*obsessive*” rape; these assaults involve torture and/or “*perverse*” sexual acts and are often physically violent.^{vii}

Effects of Marital Rape:

Often marital rape has severe and long-lasting effects on women. These effects are broadly classified as physical, gynaecological and psychological effects.

- i. Physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands also face other injuries like, broken bones, black eyes, bloody noses, and knife wounds that occur during sexual violence.
- ii. Gynaecological consequences/ effects according to the doctors may include miscarriages, stillbirth, bladder infections, infertility and potential contraction of sexually transmitted disease like HIV.
- iii. Severe psychological consequences of marital rape are faced by women, which may include anxiety, depression, suicidal thoughts, and post-traumatic stress, disordered eating, sleep problems, problem in establishing trust on relationships, increased negative feelings about themselves.

Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.^{viii}

Position of marital rape in India:

Though, we are advanced in every possible field, marital rape is still not considered as an offence in India.

➤ **Section 375 of the Indian Penal Code, 1860:**

The definition of rape as stated in section 375 includes all forms of sexual assault involving non-consensual intercourse with a woman.

- Non- criminalisation of marital rape emerges from exception 2 of Section 375.
- Exception 2 of section 375 exempts unwilling sexual intercourse between a husband and wife over 15 years of age. Thus, it can be inferred that sexual intercourse with own wife, the wife not being below 15 years of age is not a rape. As per current law, a wife is presumed to give consent to sexual relationship with her husband after entering into so-called “sacred union of marriage”.^{ix}
- Any other form of sexual intercourse by the husband upon his wife during the period of separation is punishable under Section 376 B of the Indian Penal Code, 1860.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

The act did not consider marital rape as an offence, but considered it as a form of domestic violence.^x Under this Act, if a woman is subjected to marital rape, then she can move to the court for judicial separation from her husband. This is only a progressive legislation and more measures should be taken by Parliament with regard to marital rape.

- **Article 2 of the Declaration of the Elimination of Violence against Women** includes marital rape clearly in the definition of violence against women. Emphasis on this provision is to give the victim, and not the criminal, the benefit of doubt.
- **172nd Law Commission Report** – There are following recommendation given by the Law Commission of India for substantial change in law with regard to rape –
 - a) “Rape” should be replaced by the term “sexual assault”.
 - b) Sexual intercourse as per Section 375 of the Indian Penal Code, 1860 should include all forms of penetration: penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

- c) In the case of *Sakshi v. Union of India and others*^{xi}, it was held that sexual assault on any part of the body should be construed as rape.
- d) Rape laws should be made gender neutral as custodial rape of young boys has been neglected by Law.
- e) A new offence, Section 376E with the title ‘unlawful sexual conduct’ should be created.
- f) Section 509 of the Indian Penal Code, 1860 was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- g) Exception 2 of section 375 of the Indian Penal Code, 1860 should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against his wife is treated as an offence.^{xii} On the same reasoning Section 376A should also be deleted.
- h) Under the Indian Evidence Act, 1872, when alleged that a victim consented to the sexual act and it is denied, the Court shall presume it to be so.^{xiii}

Constitution v/s Marital Exemption to Rape:

- **Doctrine of Coverture –**

Non- criminalised nature of marital rape emanates from the British era. It was derived from the doctrine of merging women’s identity with that of her husband. At the time when Indian Penal Code (1860) was drafted, a married woman had no independent legal entity. It was drafted on the basis of Victorian Patriarchal norms which did not consider men and women equal, and did not allow married women to own property, and this is called as “doctrine of coverture”.

- **Violative of Article 14 –**

Marital rape violates the right to equality enshrined in Article 14 of the Constitution of India; exception makes possible the victimization of married women for no specific reason, other than their marital status while protecting unmarried women for those same acts.

- **Defeats the spirit of section 375 of the Indian Penal Code, 1860 –**

The purpose of section 375 is to protect women from the heinous offence of rape and punish the offenders who commit it.

However, exempting husbands from punishment (by raping their wives) is entirely contradictory to the objective of the Section 375 of the Act, as the consequences of rape are the same, whether a woman is married or unmarried. Moreover, married women find it difficult to escape from their abusive condition at home because they are legally and financially tied to their husbands.

Even after the **Delhi Gang rape case (NIRBHAYA)**, **Justice J.S. Verma** Committee suggested including marital rape also crime under section 375 of the Indian Penal Code, 1860. But Government of India did not include the same.

According to **Frederick Meijer**, UNFPA representative, “when women experience coercion and violence within relationships, it violates their fundamental right to live in safety, security and with dignity. An intimate relationship particularly marriage, should be space of mutual trust and respect.”^{xiv}

- **Violative of Article 21 –**

Article 21, as interpreted by the Hon’ble Supreme Court of India, includes the rights to health, privacy, dignity, safe living condition and environment. Marital rape violates a woman’s right to live in a safe condition and safe environment (because it is her matrimonial home where she is raped by her husband, which invades her sexual privacy, her right to live safely and hampers her health).

- In the case of **State of Karnataka v. Krishnappa**,^{xv} the Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It also stated that non-consensual sexual intercourse amount to physical and sexual violence.
- In the celebrated case of **Francis Coralie Mullin v. Administrator, the Union Territory of Delhi**,^{xvi} the Hon’ble Supreme Court stated that one cannot arrive at a perfect definition of right to life. Until that, Courts can give varied interpretations to the right and thus, further explore the ambit of the right. It might also mean that an individual can enjoy right to a decent and dignified life.

- In the landmark case of **Chairman, Railway Board and Others v. Chandrima Das and others**,^{xvii} a foreign woman, Smt. Hanuffa Khaton was raped in the Yatri Nivas by four men, belonging to the Railway Department, where she was gagged and abused. Hearing her hue and cry people from the rented flat had rescued her. She was given Rs. 10 lacks as compensation from the Court. The Supreme Court in this regard, also pointed out that rape is not only a crime against victim individual, but it is also a crime against the society at large. Rape disturbs the entire society as well as victim equally.
- In **Justice K.S. Puttuswamy (Retd.) v. Union of India**,^{xviii} the Supreme Court recognised the right to privacy as a fundamental right of all citizens. The right to privacy 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.”

Therefore, “**forced sexual cohabitation**” is a violation of the fundamental right under Article 21.

- The **United Nations Declaration on the Elimination of Violence Against Women**, defines ‘Violence Against Women’ (VAW) as “any act of gender-based violence that results in, or is likely to result in physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”

★ 2013, the UN Committee on Elimination of Discrimination against Women (CEDAW) recommended that the Indian Government should criminalize marital rape.

★ The **J.S. Verma Committee** recommended the same in December 16, 2012, (NIRBHAYA) by criminalizing this offence, women will be safer from abusive spouses, can receive the help needed to recover from marital rape and can save themselves from domestic violence and sexual abuse.

- The Supreme Court in the case of **State of Maharashtra v. Madhkar Narayan**,^{xix} it was held that every woman has been entitled to sexual privacy and not open to every person to violate her privacy as an when he wished or pleased.
- In the case of **Independent Thought vs Union of India (2017) 10 SCC 800**,^{xx} the Supreme Court held that a girl between 15 and 18 years of age who is married could be

a victim of “aggravated penetrative sexual assault under The Protection of Children from Sexual Offences (POCSO) Act, 2012 but she cannot be a victim of rape under the IPC” if she is raped by her husband since the Indian Penal Code, 1860 does not recognize such an assault as rape.

- In a recent petition filed by **Mr. Vinay Pratap Singh**, the issue of marital rape was brought up before the Supreme Court of India. Wherein the apex Court questioned the fact that whether or not sexual intercourse between a man and his wife constitute rape. The court while hearing the matter, of a man who was accused of rape by a woman, with whom he had been in a live-in relationship for more than 2 years. After the man married another woman, she lodged a rape complaint against him. A bench headed by Chief Justice of India SA Bobde asked, “If a couple is living together as man and wife, the husband may be a brutal man, but can you call the act of sexual intercourse between a lawfully wedded man and wife as rape?” The woman also said that the accused had "brutally abused" her. “Then you file a case for assault and marital cruelty. Why file a rape case?” Chief Justice of India asked. For the next eight weeks, the man will be protected from prosecution by the judge. Thus, still the judiciary fails to entertain such serious matter and have not specified what actually constitutes marital rape.^{xxi}

Recently, the Kerala High Court in a landmark judgement deemed marital rape to be a valid ground for divorce. The Division Bench comprising of Justice Kauser Edappagath and Justice A Muhamed Mustaque opined that “husband’s licentious disposition disregarding autonomy of wife is marital rape”. The bench held that while marital rape is not penalised in India, it would not deter the court from recognising it as an act of cruelty and granting a divorce. But on the other hand Chhattisgarh High Court in a case held that sexual intercourse between a legally wedded man and woman will not be constituted as rape even if it is done against the wishes of the wife or forcefully. Mumbai Additional Sessions judge Sanjashree J Gharat observed that the grievance of a woman who had accused her husband of committing sexual intercourse with her against her wish does not stand legal scrutiny. The judge said that the accused "being the husband cannot be said that he committed any illegal thing".^{xxii}

The trouble is that, it has been widely accepted that a marital relationship is practically sacrosanct. Apart from making the wife worship husband’s whim, especially sexual, it was

supposed to be based on mutual respect and trust. It is more traumatic by the victim to be raped and cohabit with the rapist. How can the law ignore such a massive violation of fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

CONCLUSION

Marital Rape reflects the perversity of an individual. It is not only rape of a woman's body but rape of her love and trust as well. Being subject to sexual violence by her own husband envelopes her in a sense of insecurity and fear. Her human rights are sacrificed at the altar of marriage.

As stated by **Katherine O' Donovan**, "Its immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant familial ideology and female sexuality which treats a wife as property and having no sexual agency or decision making in sexual activity within marital contract."^{xxiii}

Marital rape is an endemic problem. India is far behind from taking step to create exclusive law for "marital rape" at the moment. The State enters the realm of the home in cases of cruelty, divorce, dowry demands, then why not in case of marital rape? Why must the area of marital rape behind the drape of social customs and privacy? The State must protect a woman's right to her body.

Women are still victimized by men and society. There is a need to acknowledge her as a human being away from the ancient notion of her being a mere chattel, and give her the respect and dignity she deserves. Thus, the heinous offence of "marital rape" should be criminalized. No one must be allowed rather no man should be allowed to exploit his wife sexually. A woman's body is her own choice. Marriage is regarded as a sacred social institution in India, but, now marriage is a licence to rape. Then the question arises, how can marriage be regarded as a sacred social institution, if women suffer physically, mentally, emotionally?

A RAPE is a RAPE, be it done by a stranger or husband. When a woman is raped by a stranger, she lives with the dreadful memory of the attack, but when she is raped by her husband, she

lives with the rapist. It destroys the psyche of the woman and completely shatters her. Approximately everywhere and in every sphere, women are subjected to inequalities, injustices and other various forms of oppression. It's high time that we give women the right they deserve and value their opinion and voice. At any cost, marriage should not be considered as an implied consent of a spouse to engage in sexual relation with the other person. Even women should also have the right to refuse sexual relationship with her intimate partner. A woman's "NO means NO". This "NO" should be accepted, respected and recognised by everyone in the society.

ENDNOTES

- ⁱ Bodhisattva Gautam v. Subhra Chakraborty, AIR 1996 SC 922
- ⁱⁱ Available at https://en.wikipedia.org/wiki/Marital_rape_laws_by_country
- ⁱⁱⁱ 1 Hale, History of the Pleas of the Crown 629 (1778).
- ^{iv} Available at <https://indiankanoon.org/doc/1410526/>
- ^v Kersti Yllo, Gabrielle M. Torres (2016). *Marital Rape: Consent, Marriage, and Social Change in a Global Context*. ISBN 978-0190238360.
- ^{vi} Pillsbury, Samuel H (2000-07-01). *Judging Evil: Rethinking the Law of Murder and Manslaughter*. ISBN 978-0-8147-6680-4
- ^{vii} Gosselin, D.K., *Heavy Hands — An Introduction to the Crimes of Domestic Violence* (1st Edn. Prentice-Hall Inc., New Jersey, 2000).
- ^{viii} Available at <https://www.ebc-india.com/lawyer/articles/645.htm#Ref2>
- ^{ix} Available at <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>
- ^x Section 3, Explanation 1(ii)
- ^{xi} 2004 (5) SCC 518
- ^{xii} Available at https://www.academia.edu/35885964/MASS_MEDIA_AND_SOCIAL_JUSTICE_MARITAL_RAPE_IN_INDIA
- ^{xiii} Available at https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf
- ^{xiv} Available at <https://www.hindustantimes.com/india/when-no-is-not-an-option-marital-rape-denies-right-over-her-body/story-MJ3OIHpn9mtVfC3AXbbWOP.html>
- ^{xv} (2000) 4 SCC 75
- ^{xvi} 1981 AIR 746
- ^{xvii} AIR 2000 SC 988
- ^{xviii} Available at <https://indiankanoon.org/doc/127517806/>
- ^{xix} AIR 1991 SC 207
- ^{xx} Available at <https://indiankanoon.org/doc/87705010/>
- ^{xxi} Available at <https://www.ndtv.com/india-news/false-promise-of-marriage-wrong-but-top-court-on-partners-alleged-rape-2381323>
- ^{xxii} Available at <https://www.indiatoday.in/law/story/forced-sex-in-marriage-cannot-call-it-illegal-says-mumbai-court-1840328-2021-08-13>
- ^{xxiii} Donovan, Katherine O., Family Law Matters, 1, London: Pluto Press, 1993.