

## **A CRITICAL ANALYSIS OF LAWS RELATING TO MARITAL RAPE IN INDIA**

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### **ABSTRACT**

*Marital rape is an aspect of marriage that is solely not taken care of by the present existing laws. In spite of the increased recognition of various Penal laws in India, the Marital Rape has generated in the past two to three decades. There is a need for a special law on marital rape in India. There are many descending opinions on the idea of marital law, few are that criminalization of marital law would flaw the institution of marriage and courts aren't supposed to interfere within what goes around with a husband and wife. Women have been given with the right to fight for protection, but her own husband, who she married with full belief, tries to hurt and torture her by having a forceful sex without her consent which ultimately spoils her health and well-being. Marital rape is not only the chief concern in the field of women's rights at the moment, but it also violates several constitutional provisions at the same time. Somebody rightly pointed out that a country's growth and development can be assessed by looking at the position and respect that it gives to its women. In this paper, the researchers would like to give out the scope of marital rape in India, the laws that it violates, an analysis as to why has not been legalized yet and why it should be legalized and a final note on conclusion.*

*Key words: Marital Rape, Penal laws, Women's Right, Criminalization*

## INTRODUCTION

Rape is an act of sexual assault against a woman without her consent. The act may be carried out by force, abuse or against someone who is incapable of giving consent, such as a woman in an unconscious or intoxicated state. . Marital rape on the other hand can be determined as the act of forcing a woman to have sex with her husband just because they are married. It is a rape which happens within the four walls of the house and is a physical violence done on the woman by her husband. It is not just an assault, it is not just an abuse, it is rape. The only difference here is that the accused is the victim's husband. Marital rape occurs irrespective of age, social standing, education, race or ethnic origin. Research shows that rape by husbands is as terrifying and degrading as rape by strangers. Marital rape is seldom given the legitimacy or validity of other forms of sexual violence but it can be just as devastating. In ancient India, marital rape had legal and social backing which backed it up on the ground that a spouse was entitled to the right of having sexual intercourse with his spouse. That is rather a patriarchal claim in this context. Marital rape in India strongly depends on nonexistent, sometimes interpretative verses in the Indian Constitution or the Indian Penal Code and the varying understanding of Courts.

However, the central government alone cannot be blamed for such a heinous and gruesome act against women is still in place, it is the very patriarchal and male dominated set up of the Indian society that we live in. The very society gives its men the power to commit such crimes and get away with it at the end of the day. Marital rape, in itself, is a part of domestic violence. It is a means of forceful control of another individual's thoughts, ideas, body and mind. It invades an individual's Right to Privacy and Right to live a dignified life.<sup>i</sup>

## MARITAL RAPE – AN UNDERSTANDING

The word 'rape' has been derived from the term 'rapio', which means 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non-consensual sexual intercourse with a woman. Rape can be viewed as an act of violence of the private person of a woman, an outrage by all means. It is the ultimate violation of the self of a woman. The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity'.<sup>ii</sup> Rape is not merely a

physical assault, but is destructive of the whole persona of the victim. Marital rape is particularly complicated because the complex, personal nature of marital relationships makes it hard for the victim to even see herself as a victim, let alone reporting the offending act to the authorities, which is why Marital Rape is one of the highly under-reported violent crimes. Even the women who do consider themselves victims are disinclined to approach the authorities because they are financially dependent upon their husbands, and reporting the matter could very well result in withdrawal of financial support leaving them and their children without food and shelter.

There have been plenty of legislations and enactments passed in India in regard to violence against woman in her own house like laws against dowry, cruelty, domestic violence and female infanticide. However the biggest and the most shameful wrong within a marriage, where a husband forces himself upon his wife thinking that it is his nuptial right to have sex with his wife (with or without her consent), 'marital rape', has failed to gain recognition as a crime in the eyes of policy makers.

### **MARITAL RAPE AND LAWS IN INDIA**

In India we have advanced in every possible field, marital rape is not considered as an offence in India. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A woman has to protect herself in a marriage, the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts. The final version of section 375 of the Indian Penal Code, which emerged after deliberations in the Select Committee, is a crystallized form of Clause 359 of the Macaulay's Draft Penal Code. Section 375 the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."<sup>iii</sup>

Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which

case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 15 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 15, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. How can the same law provide for the legal age of consent for marriage to be 18 while protecting form sexual abuse, only those up to the age of 15? Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation.<sup>iv</sup>

As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

1. When the wife is between 12 – 15 years of age, offence punishable with imprisonment upto 2 years or fine, or both<sup>v</sup>
2. When the wife is below 12 years of age, offence punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.
3. Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine <sup>vi</sup>
4. Rape of wife of above 15 years in age is not punishable.<sup>vii</sup>

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. This is only a piecemeal legislation and much more needs to be done by the Parliament in regard to marital rape.<sup>viii</sup>

Marital rape reflects the perversity of an individual. It is not only the rape of a woman's body but a 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.

## **172ND LAW COMMISSION REPORT**

Even the 172nd Law Commission report which was passed in March 2000<sup>ix</sup> had made the following recommendations for substantial change in the law with regard to rape.

- a. 'Rape' should be replaced by the term 'sexual assault'.
- b. 'Sexual intercourse as contained in section 375 of IPC should include all Forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- c. In the light of *Sakshi v. Union of India and Others*<sup>x</sup>, 'sexual assault on any part of the body should be construed as rape.
- d. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
- e. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- f. Marital rape: explanation (2) of section 375 of IPC 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 the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
- g. . Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

## **CONSTITUTION OF INDIA AND MARITAL RAPE EXEMPTION TO RAPE**

As per the Indian constitution, every law that is passed in the country has to be in conformation with the principles and ideas enshrined in the Constitution of India. Any law that fails to meet

this standard is considered ultra vires and is liable to be struck down by the Courts and declared unconstitutional. Now it will be seen as to how the doctrine of marital exemption to rape fails to meet the standard of conformity with the provisions of Article 14 and Article 21 of the Constitution of India.

## **EQUAL PROTECTION OF LAW**

Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India.<sup>xi</sup> However, Article 14 does not call for every individual to be treated equally in every circumstance but requires that the equals within a society are not treated unequally and that the unequal of the society are not treated equally.

The two requisites of a valid classification were laid down by the Supreme Court, as early as in 1952:

- a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and
- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.<sup>xii</sup>

Married women, exactly like men and unmarried women need protection of the law in their private spheres. While the rest of the section 375 of the IPC is interested in protecting the right of a victim from the crime of rape, such a right is withdrawn on marriage and the focus of the law instead shifts to protecting, the perpetrator of the crime of rape. It takes away a woman's right of choice and indeed effectively deprives her of bodily autonomy and her personhood. Thus the classification is unnecessary, unintelligible and violates the mandate of Article 14. Withdrawing the protection of Section 375 of the IPC from the victims of the crime of rape solely on the basis of their marital status is irrelevant for the purposes of legislation and thus violates the test of classification under Article 14.

## **RIGHT TO LIFE AND PERSONAL LIBERTY**

Article 21 of the Indian Constitution enshrines in it the right to life and personal liberty<sup>xiii</sup>. Article 21 although couched in negative language confers on all persons the fundamental right

of life and personal liberty. Post the case of *Maneka Gandhi v. Union of India*<sup>xiv</sup> it has become the source of all forms of right aimed at protection of human life and liberty. The meaning of the term 'life', has thus expanded, by the Supreme Court of India in the case of *Bandhua Mukti Morcha v. Union of India*.<sup>xv</sup>

In light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression 'right to life and personal liberty' under Article 21. There cannot be a more obvious and blatant violation of Article 21. The marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time.

## **RIGHT TO LIVE WITH HUMAN DIGNITY**

The concept of right to life under Article 21 of the Constitution includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings.<sup>xvi</sup> The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape.<sup>xvii</sup> The Supreme Court has held that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society.

## **RIGHT TO SEXUAL PRIVACY**

Right to privacy is not mentioned in the Indian Constitution. Nevertheless, in a series of cases, the Supreme Court has recognized that a right of privacy is constitutionally protected under Article 21.<sup>xviii</sup> The right of privacy under Article 21 includes a right to be left alone. Any form of forceful sexual intercourse violates the right of privacy. It is submitted that the doctrine of marital exemption to rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her wishes. The right of privacy under Article 21 includes a right to be left alone. Any form of forceful sexual intercourse violates the right of privacy. It is

submitted that the doctrine of marital exemption to rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her wishes.

The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*<sup>xix</sup> has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v. State of Rajasthan*,<sup>xx</sup> the Supreme Court extended this right of privacy to workplaces. Further, along the same line that there exists a right of privacy to enter into a sexual relationship even within a marriage. By decriminalizing rape within a marriage, the marital exemption doctrine violates this right of privacy of a married woman and is hence, unconstitutional.

## **REASONS WHY MARITAL RAPE IS NOT CRIMINALIZED**

There are many reasons which lead to non-criminalization of marital rape under Indian Penal Code. The main of all is the idea of marriage. These reasons are briefly explained below:

**Implied consent and contract theory:** There is an implied consent and contract between husband and wife. The terms of this contract state a women's irrevocable consent to have sexual intercourse with her husband, whenever he wishes. According to the theory of implied consent, marital rape can never occur because all sexual contact within a marriage is assumed to be consensual. when a woman marries, she forms a contract with her husband whether it is implied or expressed. It automatically gives a right to a husband to have sexual intercourse with her wife. Here the consent of the wife does not matter as the marriage indicates an implied consent itself.

**Women as property:** Another common law origin which was a building-block in the foundation for the marital rape exemption was the idea that a husband owned his wife as property. A husband was no more capable of raping her wife since he could not take what he already owned. Since women were regarded as property, the common law treated rape not as a crime against women, but rather as a violation of a man's property interest.

**Marital unity:** A marital unity generally talks about the non-existence of woman as soon as she gets married. It means that after marriage, the wife's identity merges into the existence of her husband.



**Public and private divide:** Marital rape cannot be considered real rape the argument being that public law cannot enter the confines of the bedroom. There is a distinction between a public and personal life and Law cannot interfere in someone's personal matters. Compulsory sexual relations in marriage are always advantageous to the male, as he can muster up more resources - material and physical. It is not logical to consider that law respects the public-private divide only in regard to the regulation of abortion and unnatural acts but not marital rapes. Although it is also a very serious crime to be considered.<sup>xxi</sup>

## **WHY IT SHOULD BE CRIMINALIZED**

The major question evaluated by the courts in cases of rape is whether the woman consented to having sex. In the past, the main factor that prohibited all rape victims from having the court rule in their favor was the fact that, as the plaintiff, the burden of proof was on the woman to show that she did not consent. However, in the 1995 case of *Kernel Singh v. State of M.P.*<sup>xxii</sup> the Court held that the woman should not be considered an accomplice of the crime, but rather as the victim. As the victim, her testimony should not be considered with the same amount of suspicion as you would the offender's.

In *Haryana v Prem Chand.*<sup>xxiii</sup> As this is the case for rape victims, the same should be allowed for marital rape victims. Based on this principle, the idea that married women cannot be raped because they have had a sexual history with their husbands is no longer valid. Regardless of a woman's past or her character, rape must be determined based on the particular facts of the incident. Additionally, the argument that a married woman's testimony cannot be relied upon because it may be tainted with malice is wholly unreasonable. The rape trial procedure, harsh cross examinations and the general shame of publically admitting to have been raped, is an ordeal that most women would not put themselves through willingly. In fact, it would be much harder on the woman to prove the lie of having been raped.

The issue faced by marital rape victims is that they generally do not have injuries showing their resistance. One reason for this is because they feel overpowered by their husband's authority and submit to his will without putting up a physical fight.

## JUDICIAL RESPONSE

Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court in *Queen Empress vs. Haree Mythee*<sup>xxiv</sup>, observed that in case of married women, the law of rape does not apply between husband and wife after the age of 15; even if the wife is over the age of 15, the husband has no right to disregard her physical safety, for instance, if the circumstances be such that intercourse is likely to cause death. In the present case, the husband was convicted under section 338, Indian Penal Code, for rupturing the vagina of his eleven-year-old wife, causing hemorrhage leading to her death.

In *Emperor vs. Shahu Mehrab*<sup>xxv</sup> the husband was convicted under section 304A Indian Penal Code for causing death of his child-wife by rash or negligent act of sexual intercourse with her.

In *Saretha vs. T. Venkata Subbaiah*<sup>xxvi</sup> the Andhra Pradesh High Court held: “There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person”. If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman’s right to privacy is equally violated in case of non-consensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association.

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*<sup>xxvii</sup>, has referred to the right of privacy over one’s body. In this case it was decided that a prostitute had the right to refuse sexual intercourse. What is sad to know is that all stranger rapes have been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby envisaging the right to withhold consent and refuse sexual intercourse.

*Nimeshbhai Bharatbhai Desai v State of Gujarat*<sup>xxviii</sup>, the wife accused her husband for rape and lodged an FIR against him for offence under sections 376, 377, 498(a) and 114 of the IPC. The husband’s lawyer argued that marital rape is non-existent in India and hence it is not an offence and thus, was seeking the quashing of the FIR lodged by his wife. The bench led by Justice JB Pardiwala stated that the complaint under Section 376 would not be applicable in this case as rape of a wife by her husband is not punishable. However he ordered the

investigating officer to file a new report for offence under Section 354 of the IPC, which covers assault or criminal force used by a man on a woman to outrage her modesty.

Justice Pardiwala, while giving the judgment in this case, said that sex is not a husband's privilege and that marital rape should be criminalized and the Exception 2 of Section 375 of the IPC should be removed totally by giving the following remark:

*“Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed”*

In the case of *Joseph Shine v. Union of India*<sup>xxix</sup>, the five-member bench of the Supreme Court was in favor of striking down Section 497 of the IPC, which criminalizes adultery. In this case, Justice Chandrachud questioned that “does a man or a woman lose their degree of sexual autonomy after marriage. I think ‘no’. He further stated that “the right to say no to sex should be there after marriage also.

In *Sree Kumar vs. Pearly Karun*<sup>xxx</sup> the Kerala High Court observed that because the wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376A, IPC will not be attracted. In this case, there was an ongoing dispute on divorce between the parties. Thereafter, a settlement was reached between the

husband and wife and parties agreed to continue to reside together. The wife stayed with the husband for two days during which she alleged that she was subject to sexual intercourse by her husband against her will and consent. Hence the husband was held not guilty of raping his wife though he was de facto guilty of having done so. The judiciary seems to have completely relegated to its convenience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist.

## CONCLUSION

Marital rape is one of the worst types of sexual violence occurring at the level of family. Due to the nature of the activity and the associated issues of privacy of relationships, internalization

of patriarchal subjugation and most of the times, because of their economic dependency, the women victims don't come forward with their sufferings. Taking into account the laws of other countries in comparison to the Indian nation, India is far behind from taking a step to create an exclusive law for MARITAL RAPE at the moment. Till a new law comes into being, the provisions from IPC and the Indian Constitution could be used as a defense. However, in the changing times every law needs to go through a change as one is discovering new things every day and human mind is constantly evolving. Thus, till a new law is in place, one can use the existing provisions. After a scrutinizing study one can bring a new law in place for Marital Rape or add relevant sections to IPC or the Domestic Violence Act.

## ENDNOTES

<sup>i</sup> VANDANA, Sexual Violence Against Women-Penal Law and Human Rights Perspectives, 3 (2009). Lexis Nexis Butterworths Wadhwa Publishers, Delhi.

<sup>ii</sup> Bodhisattwa Gautam v. Subhra Chakraborty (1996) S. C. 922(India)

<sup>iii</sup> INDIAN PENAL CODE section 375 (45 of 1860) reads: —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

First.— Against her will.

Secondly.—Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

<sup>iv</sup> INDIAN PENAL CODE Section 376A. Intercourse by a man with his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

<sup>v</sup> INDIAN PENAL CODE 1860, Section 376(1).

<sup>vi</sup> INDIAN PENAL CODE ( 1860), Section 376A

<sup>vii</sup> INDIAN PENAL CODE , Exception to Section 375

<sup>viii</sup> The Protection of Women From Domestic Violence Act, 2005, Acts of Parliament Section 3 Explanation 1 (ii).

<sup>ix</sup> Report of Law Commission of India on Review of Rape Laws, 172<sup>nd</sup> Report March 2000,

<sup>x</sup> Sakshi v. Union of India and Others, ( 2004 ) S.C.C . 518 (India)

<sup>xi</sup> INDIAN CONST. art. 14.

<sup>xii</sup> State of West Bengal v. Anwar Ali Sarkar, (1952 ) S.C.75 (India)

<sup>xiii</sup> INDIAN CONST . art. 21

<sup>xiv</sup> Maneka Gandhi v. Union of India , ( 1978) S.C. 597 (India)

- <sup>xv</sup>Bandhua Mukti Morcha v. Union of India, (1984) . S.C. 802, 811.(India)  
<sup>xvi</sup> Francis Corallie Muin v. Union Territory of Delhi, ( 1981 ) S.C. 802 (India)  
<sup>xvii</sup> Bodhisattwa Gautam v. Subhra Chakraborty , ( 1196) S.C. 922 (India)  
<sup>xviii</sup> Kharak Singh v. State of U.P, ( 1963) S. C 1295(India) , Govind v. State of Madhya Pradesh, (1975) S.C. 1378(India) ,Neera Mathur v. LIC, (1992) 1 S.C.C 286. (India)  
<sup>xix</sup> State of Maharashtra v. Madhkar Narayan ,( 1991) S.C .207 (India).  
<sup>xx</sup> Vishakha v. State of Rajasthan ,(1997), S.C. 3011 (India)  
<sup>xxi</sup> Shalini Nair, High-level panel slams legislature for failing to criminalize marital rape, The Indian Express, (January 20,05:48 pm),  
<sup>xxii</sup> Kernel Singh v. State of M.P, (1995) 5 S .C .C. 518 (India)  
<sup>xxiii</sup> Haryana v Prem Chand, (1990) S. C. C. 538 (India)  
<sup>xxiv</sup> Queen Empress vs. Haree Mythee , (1891) Indian Law Review 18 Cal. 49  
<sup>xxv</sup> Emperor vs. Shahu Mehrab ,(1917) S.C.C 42(India)  
<sup>xxvi</sup> Saretha vs. T. Venkata Subbaih , ( 1983) A.P 356 (India)  
<sup>xxvii</sup> AIR (1991) S .C. 207 (India).  
<sup>xxviii</sup> Supra note 21  
<sup>xxix</sup> Joseph Shine v. Union of India, 2018 S .C. C. 1676 (India)  
<sup>xxx</sup> id



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