



## Marital Rape and Indian Jurisprudence

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Abstract :

The present study throws light on the challenge with the rape provisions contained in the Indian Penal Code as it does not deal with the offences getting committed with the women of every age group but only with them who are under a certain age , this article discusses about the rights of the other women who are not protected under the purview of law and cannot be served justice only because of the lack of provisions for the protection of their rights . This study also provides a critical analysis of Section 63 of The BNS and specifically it's exception 2 as it doesn't protects the rights and dignity of the whole women community but of only a certain age group and it is also prominently a violation of Article 14 and 21 of the Indian Constitution and how a private sphere between a couple restricts the State and law to get involved just because it can be disturbed by this and no fundamental right can be indulged into it just by the cause that it is contradictory to a Hindu Marriage and this article will also discuss about the requirement of new law for the specification of this heinous act.

**Key Words :** Section 63 and it's exception 2 of BNS as contradictory elements , status and requirements of specified law , breach of prevalent articles of Indian constitution, review of existing laws , challenges regarding criminalization of Marital Rape .

### Introduction :

In India , Marriage is considered as a sacred ritual or relationship which is more than a mere contractual obligation. It comes with several marital stipulations and as well as marital rights and intimacy is also considered as a part of this relationship , but it is a common and moral fact that in the act of intimacy or sexual activity, the consent must be from both of the sides , only then the act can be termed as a sexual activity between a couple .

The definition of rape consists an element ' without consent ', which means a sexual activity got committed by the male without the female one's consent or permission here and this act becomes rape , but this element lacks where the relationship gets the married title but only by getting a title of marriage does not makes this phenomena of non-consensual intercourse, valid both morally and legally and it comes under the definition of 'Marital Rape'.

Over 36 countries in the world have not criminalized this form of violence within marriage and India is one among though protection against every kind of abuse is provided by different jurisdictions but as in the purview of offence of rape , the marital relationship is exempted and it keeps victims unprotected from this abuse and violence in marriage and many jurisdictions even do not consider this conduct as rape just because of the exemption of marriage from the rape laws .

In Indian Jurisprudence, rape outside marriage is absolutely a criminal conduct and punishable too but the problem arises when the same sexual activity without the consent of the women takes place in a marriage, it is not considered as Rape , even not an offence.

The provisions of rape in India in context of marriage is only limited to the fifteen years of age of the girl or younger who is married to the man and if any sexual activity happens with her , it will amount to rape but it raises a question now that what about other victims who are above the prescribed age mentioned in the rape provision , it is an undermining invasion on the dignity and autonomy of the women .

Today , among the offences and violence within the marriage, sexual violence is the least attended offence and this shows that how much this type of conducts and misbehavior with the married women is neglected in the society.

This forceful non-consensual sexual activity with the women not only can harm them physically but also leaves a very negative impact on them mentally and morally and also imposes a question mark on their reputation, self-esteem and dignity.

Being in a marital relationship does not permit a husband or provides him an open right to force his wife for intimacy with him without her consent and it throws light clearly on the violation of the Article 21 of the Indian Constitution which provides the Right to life and in its ambit , provides everyone a life to live with dignity.

As in the case of *A.K. Gopalan vs. Union of India [1]*, the Supreme Court by the majority held that the 'personal liberty' in Art. 21 means nothing more than the liberty of physical body and choice of the women should be respected whether it is her 'Yes' or 'No' because her bodily integrity and autonomy must be respected by this purview.

## Meaning of Marital Rape :

Marital Rape is also called as Spousal rape , because this conduct is only related to marital relationships and any kind of violence within it.

Marital Rape means act of sexual intercourse or intimacy by the husband on his wife without her consent to do so and due to non-providence of consent, the forceful intercourse by the husband on the wife which may lead to harm on her physical as well as mental health and dignity.

Though since the ancient times it has been believed and implemented that having sexual intercourse after the marriage is the spousal right of the husband but today in the time of 21<sup>st</sup> century any kind of sexual intercourse which is done without the consent of the woman whether it is a complete vaginal penetration or not , is considered under the category of rape .

It is not necessary that in all cases there must be some kind of physical violence be present, but a mere non-consensual sexual act by the husband against his wife is categorized under the violence against women purview because of the disintegrity of the physical and mental harmony of women .

### *Status of Marital Rape in India and review about other rape provisions in Indian law :*

As per the Section 63 of the Bharatiya Nyaya Samhita 1960 <sup>ii</sup>–

: A man is said to commit “Rape” if he –

- a) 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
- b) 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
- c) Manipulates any part of the body of a woman so as to cause penetration into the vagina , urethra , anus or any part of the body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus , urethra of a woman or makes her to do so with him or any other person,

### **Under the circumstances falling under any of the following seven descriptions :**

First – against her will .

Secondly – without her consent.

Thirdly – with her consent when her consent has been obtained by putting her or any other 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 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 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 eighteen years of age.

Seventhly – when she is unable to communicate consent.

The section 63 explains seven situations in which the act committed shall be considered as rape and the first two circumstances tells about the lack of consent and will by the woman but further the sixth situation only talks about a woman under sixteen years of age with whom if non consensual sex happens then it will be considered as rape .

But this thing raises a big question mark here that there is a law all about a girl or woman under a certain age then what about the woman of above ages ?

According to the report of 2015-16 by **National Family Health Survey** , almost 84.6% of married women aged between 15-49 years blamed their husbands for sexual violence and the 8.1% of women have called their bygone husband and offender.

By the reports of **NFHS 4** , the 5.5% of women were forced by their husbands for sexual intercourse and 3.5% for the unnatural sexual acts and 2.4% were threatened to be abandoned when they refused to perform as their husbands will .

### **Some statements by the women coming from higher authorities in this context as follows:**

According to Maneka Gandhi, the Indian Union Cabinet Minister for Women and Child Development, regarding Marital Rape at Rajya Sabha in 2015 , “ It is deemed that the concept of Marital Rape in the International context cannot be suitably applied in the Indian context because of different factors like the educational/illiteracy level, poverty, orthodox social customs and mindset of society and it’s values, their religious beliefs to consider the marriage as a sacramental commitment, etc. ” It is a quite surprising statement to observe a woman coming from higher authorities to make such a statement despite the fact that she is herself a woman and it is expected by such lady for good work regarding betterment of women and definitely not making such statement.

Another statement by a women's right activist and a famous lawyer Vrinda Grover that, "There can be seen an increment in the evidence in the form of documentation related to high incidence of rape within marriages". She bears the opinion that it is the responsibility of the legislature and the judiciary to do the needful for protection of women's rights.

### ***Lack of criminalization of Marital Rape as a Fundamental Rights' Violation :***

As per the above arguments, opinions and facts, it can be justified that one of the most prominent reasons of not criminalizing marital rape is that it would amount to excessive interference with the institution of marriage.

In India, marriage is considered as the 'Sacrament' that forms the foundation of the society, this thing is seen as a very sensitive and delicate agenda to touch and the state hesitates to disturb this deeply personal thing and it comes with the objective of maintaining the citizen's private space and any kind of interference by the state can disrupt this privacy. Therefore, the State does not get involved in between two individuals and do not compel them to marry or get separated from this sacrament. But, States devolvement from this matter can be troublesome and their refusal even in certain specific instances can be problematic. We can clear it with an illustration that if a wife gets beaten up and gets subjected to cruelty on her marriage, then the State shall anyhow have to intervene between this private sphere to criminalize this cruelty of which the woman is subjected but, if the State does not get involved in it to save to women by criminalizing this, then then woman will have nothing to approach or redress legally, thus it is a requirement that the State gets involved and interferes this private sphere at some occasion.

## **Why Marital Rape should be Criminalized in India ?**

### ***Breach of Article 14 of the Constitution of India :***

As per the Article 14 of the Indian Constitution<sup>iii</sup>, "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India." The Bharatiya Nyaya Samhita partially operates against those women who were raped by their husbands, notwithstanding the Constitution because it provides equal protection to each and every person.

The historical aspect of India tells about the real condition of women at that time, a married woman was considered as a chattel or the property of the husband and she was not contemplated as an independent legal body before the passing of the previous Code i.e. the Indian Penal Code in the 1860's resulting her to never be able to procure any rights for her dignity but not after passing some provisions, things have changed and now she is recognized as a separate legal body bearing a right to file a complaint against the accused.

Exception 2 of the Section 63 of the Bharatiya Nyaya Samhita exempts sexual acts committed by husbands to their wives from being regarded as an act of 'rape', is mainly derived from the already existing doctrine and which blends out the identity of woman into her husband's identity but as the time passed on, laws in India started to prevail and through which now the law considers the husbands and the wives as the separate and independent legal body and in some cases, justice is also served unequivocally in favor of the security of women. This thing can be witnessed in the form of a compilation of statutes which are made to protect women and to keep them secure from 'violence and harassment' by the time when "The Protection of Women from Domestic Violence Act" and "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act" has been passed.

The Exception 2 of the section 63 becomes ultra vires with the Right to Equality incorporated in Article 14 of the Constitution of India because it discriminates against those women who are married and not guaranteed that they will be secured in that marriage from cruelty, abuses and sexual violence. Thus, this exception basically creates two classes of women which are based on their Marital status – firstly, who are secured under the Exception 2 of Section 63 and others who are above the prescribed age group and not secured under purview of law and this exempts the second class of women to take action against crime committed by husband against their wife.

Simultaneously, only due to marital status of women, Exception 2 makes their exploitation even more viable but it's not same in the condition of unmarried women because similar acts with them amounts to rape and sexual harassment and are criminalized in the context of them and it imposes a question mark that only due to a marital status, is sexual violence valid with the women just because the offender here is her husband and not any other man? It is clear exploitation of these married women's dignity and health.

This difference between married and single women is ultra vires to Article 14 as the provisions has no reasonable nexus to the prime object of the statute. In the case of "*Budhan Chaudhary vs. State of Bihar*"<sup>iv</sup> and "*State of West Bengal vs. Anwar Ali Sarkar*"<sup>v</sup>, the Supreme Court upheld that, 'any stratification under Article 14 is contingent to a test of reasonableness which can be decreased only when the stratification has same reasonable relation to the object that the act sought to achieve'.

Immunizing husbands from the penalty and punishment is wholly opposite and contradictory to the main objective of the act and statute.

In simple words, the consequences of rape will remain same whether the woman is married or single, so should be the penalty on man and furthermore, it is a difficult thing for a married woman to set herself free from this abusive situation they are facing in their husband's home because of their knot tied with him in a religious sacrament and to get separated from the abusive husband is still a very far thing for most of the Indian Women.

In generality and actual sense, absence of penalty provisions in context of marital relationship promotes husbands to engage in the forceful and vigorous sexual activities because they are free and aware that they can't be punished for their act and they have been provided every right to do so by this patriarchal society and orthodox community. Since, no reasonable nexus can be established between the stratification generated by Exception 2 and the real objective of the Act, so it does not comply with the validity and unbiased test and then it becomes the violation of Article 14 of the Indian Constitution.

### ***Breach of Article 21 of the Indian Constitution :***

Exception 2 of Section 63, BNS , also violates the Article 21 of the Indian Constitution i.e. “ no person shall be denied of his life and personal liberty except according to the procedure established by the law.” The Apex Court has interpreted this clause and by the time and in further judgements has stretched the meaning of this clause rather than to shrink it to the extent of the literal meanings of the life and liberty. It is supposed that rights which are guaranteed under the am Article 21 consist of all the aspects which are necessary for the good life , e.g. Right to Privacy, Health, Dignity, Safe environment , Safe living conditions etc.

In the recent times , the Courts are laying emphasis upon the right to ‘refrain’ sexual activities and right of one to excuse their self from the unwanted sexual activity and it is associated with the broader aspect of the right to life and personal liberty.

In the case of the “*State of Karnataka vs. Krishnappa*”<sup>vi</sup>, the Apex Court stated that , “sexual violence except being a barbaric act is an unlawful interference with the right to privacy and sanctity of a female” and it also held that sexual intercourse without consent amounts to physical and sexual abuse.

After that , in the “*Suchita Srivastava vs. Chandigarh Administration*”<sup>vii</sup>, the Supreme Court established a comparison of the right to choose alternatives related to sexual activity with that of right to personal liberty, dignity, and bodily integrity within the meaning of Article 21 of the Constitution of India.

In the most recent judgement of Supreme Court has expressly acknowledged the right to make own choice regarding sexual or intimate relations under Article 21 of the Indian Constitution.

In the most trending case of ‘*Justice K.S. Puttaswamy (Retd.) vs. Union of India*’<sup>viii</sup>, the Supreme Court of India considered the ‘Right to Privacy’ as a ‘fundamental right of all citizens under Article 21’ and stated that the right to privacy embraces “ decisive privacy contemplated by an ability to build intimate decisions mainly comprising one’s sexual or reproducing nature and decisions regarding intimate relations” .

This statement by Apex Court truly says that it is always one’s will and desire to build a sexual relationship to give birth to a child and one cannot be forced only on the singular basis of mere marital relationship and it definitely comes under the purview of right of privacy to maintain the dignity and self esteem of a woman .

Living along with somebody who commits abuse in any manner and commits any sort of coercive sexual intercourse is regarded as the infringement of the fundamental right i.e. of Article 21 of the Indian Constitution.

The above mentioned judgements by the Apex Court don’t discriminate between the rights whether these are of married women or single women because rape is rape , it is conducted in the same brutal way and with the same maniac mentality in both cases no matter what status the women carries , and it causes the same consequences and effects on the physical, mental and social health of the victim, so it can’t be discriminated on any basis to any group of woman .

The judgement by the Supreme Court of India clearly states there doesn’t exist anymore contradictory judgement that declares that the ‘Right to Privacy’ which is guaranteed to a person of India is lost after getting a marriage tag .

Hence , the Apex Court has observed that the right to refuse to the sexual act for all the women , notwithstanding their status of marriage, as granted by Article 21 of the Indian Constitution.

Furthermore, the Exception 2 is an infringement of the Right to live the life with dignity as granted by Article 21 of the Indian Constitution , as per the above mentioned facts , it is well established that the right to life associated in Article 21 is not merely a right to subsist.

In this context, with the time passing on , the courts again adjudged, “right to life” as it lays emphasis on right to live a dignified life , but still the significant existence of Exception 2 in the Penal law , falls insufficient to dissuade men from committing acts of coerced venereal proximity with their wives severely affecting the psychic, physical and social health negatively and sabotage their right and capability to live a life with dignity.

Later on , the Legal Service India acknowledged three reasons against the criminalization of marital rape :

1. Marriage is a sacred institution and criminalizing such act can lead to the disturbance and destabilization in the society.
2. There is a apprehension of a large number of cases that will be fraudulent which can be filed against the husband.
3. To prove it medically is another lacuna that has helped the offenders to continue to molest or abuse their wives and let themselves excuse from the crime .

This points state the circumstances which can be happening if marital rape gets criminalized , hence in context of considering marriage as a sacrament is that marriages are seen as a religious ceremony and not a mere contractual obligation but the question arises here is if it is a religious and sacred institution then how the coercive sex and violence will be valid in this sacrament ? We don’t even wear shoes and talk in bad language in a temple or at a religious place then it should also be considered as a sin if abusive activity takes place in a sacred relationship and this ‘sin’ will be taken as a ‘crime’ in the vision of law .

This is also deemed that if marital rape gets criminalized then some people can misuse it and can file false cases to keep things in their favor , this thing can be real at some extent but here the question arises that what about the real victims of this act who are facing this problem on a daily basis?

There is an anticipation that men will be falsely charged of committing marital rape but there is no anticipation about how many women are getting abused silently in their households and no one is concerned about it and even the women don’t have any legal platform to redress this serious issue .

It can be anticipated properly about the false cases but we should also fetch our minds on a thing that if this act gets criminalized then how many women can be set free from this torture thing and law can actually help the victim and can serve the justice to the deserving ones and rest all about the false cases, then if a good investigation gets done by the appropriate authority then it can also be justified that whether a case is true or false and things could get better for the actual victims.

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### Prominent Judgements regarding Marital Rape :

#### *Shyam Narain vs. State*<sup>ix</sup>

In this case it was stated that, “ since rape is an assault on individuality and inherent dignity of a woman and a crime against whole body of a woman and the soul of the society hence, it demands just punishment from the court ” .

#### *Deepak Kumar vs. State of Haryana*<sup>x</sup>

Here it was mentioned that, “ crime against women and children violates human rights and it’s a crime against society as it causes psychological, physical harm and degrades and defiled victim’s soul, honour and dignity and leaves a permanent scar on their life ” .

#### *Sakshi vs. Union of India and Ors.*<sup>xi</sup>

In this case, an NGO named ‘Sakshi’ mainly focused on the violence against women, they filed a petition before Apex Court of India to recognize all kinds of forced penetration as ‘Rape’. Later after this case, in 172<sup>nd</sup> Law Commission Report<sup>xii</sup>, Rape law was amended India under Section 375 of the previous code IPC and now also it has been amended by altering Exception 2 in the Section 63 of BNS but, Marital Rape is still not acknowledged in all cases as crime.

All the above mentioned cases are related to rape and the Supreme Court has also given statements on this and recognised rape as the most heinous crime but still silent on the case of marital rape. Irony is that a prostitute also has right to file a case in this context but not a married woman and this cannot be the fate of the married women in the 21st century.

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### Conclusion :

The debate on Marital Rape is unending till it is recognised as a specific crime in the purview of law but until it gets acknowledged, many women will be facing this brutality on daily basis and it will only increase as it will be promoted because of lack of legal provision and this is a major lacuna in criminal law at current time which beats the constitutional provisions that provide Equality and Separate Identity to a woman.

This study has analyzed the factors which are mainly based on the societal and religious beliefs which are the prominent barriers against the criminalization of Marital Rape and some political and cultural arguments have also thrown light on the orthodox mindset of the society whether it comes from the uneducated people or from the hierarchy, because the tag of marriage which is termed as a sacred ritual will not be able to make it permissible for married woman to stand against the sexual and mental abuse and forceful sexual intercourse happening with them by their own husbands.

Thus, there is a strict requirement that Marital Rape must be treated as a crime and it should be made clear by the law that it is nowhere a right of the husband to force or threaten his wife to enter into any sort of sexual activity. It is a peak time now, that the State has to intervene in the private sphere and fundamental rights must be penetrated inside this sphere to protect the women from exploitation whether she is married or unmarried.

Therefore, a woman must be recognized as a separate legal body and new laws must be made and enforced in immediate manner by keeping her fundamental rights in the vision by the State and Judiciary.

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### REFERENCES:-

1. <sup>i</sup> AIR 1950, SC 27
2. <sup>ii</sup> Bharatiya Nyaya Samhita, 2023 ; Section 63
3. <sup>iii</sup> The Constitution of India, 1950 ; Article 14 and 21
4. <sup>iv</sup> AIR 1955, Supreme Court 191
5. <sup>v</sup> AIR 1952 ; SC 75
6. <sup>vi</sup> AIR 2000 ; Supreme Court 1470
7. <sup>vii</sup> AIR 2010 ; Supreme Court 235
8. <sup>viii</sup> AIR 2017 ; SC 4161
9. <sup>ix</sup> AIR 2013 ; SC 2209
10. <sup>x</sup> AIR 2012 ; SC 1386
11. <sup>xi</sup> 1999 AIR SCW 4827
12. <sup>xii</sup> 172<sup>nd</sup> Law Commission Report by Govt. available at <https://www.researchgate.net/publication/325217164> (last seen on 15 Nov. 2024)

**Sites reached :**

1. <https://lawctopus.com/clatalogue/clat-pg/marital-rape-in-india/> (last seen on 10 Nov. 2024 )
2. <https://articles.manupatra.com/article-details/Marital-Rape-and-Law> ( last seen on 12 Nov. 2024)
3. [https://www.researchgate.net/publication/374418837\\_Exploring\\_Concerns\\_Associated\\_With\\_Marital\\_Rape\\_In\\_India\\_An\\_In-Depth\\_Legal\\_Analysis\\_Section\\_A-Research\\_paper\\_Eur](https://www.researchgate.net/publication/374418837_Exploring_Concerns_Associated_With_Marital_Rape_In_India_An_In-Depth_Legal_Analysis_Section_A-Research_paper_Eur) ( last seen on 10 Nov. 2024)
4. <https://www.ijlra.com/paper-details.php?isuurl=marital-rape-a-comparative-legal-analysis-by-nending-sonia-> (last seen on 15 Nov. 2024 )
5. <https://pmc.ncbi.nlm.nih.gov/articles/PMC10021972/> ( last seen on 12 Nov. 2024)
6. <https://www.researchgate.net/publication/325217164> (last seen on 15 Nov. 2024)