



International Journal of Research Publication and Reviews

Journal homepage: www.ijrpr.com ISSN 2582-7421

Marital Rape: Need for Criminalization?

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ABSTRACT

Marital rape or Spousal rape means a severe violation of Fundamental right, Dignity and Personal autonomy. In India marital rape is not criminalized due to many factors even though according to the National Family Health Survey (NFHS-5), nearly 1 in 3 Indian women have suffered some form of spousal abuse and around 6% have suffered sexual violence. According to UN Women report cited by the Indian express in 2022 stated that by 2019 approximately 150 countries had criminalized marital rape.

Criminalization means action of turning an activity into a criminal offence by making it illegal. India comes under those countries who till now does not criminalize the marital rape.

Through this research paper we will examine the History, Law commission report, Parliamentary views, Constitution element, Judicial decisions and International convention. After examination we will get to know what are the hurdles to achieve Criminalization of marital rape and will give suggestion to achieve it.

Key words:— Rape, Sexual assault, marital rape , consent , etc

Rape

Rape is a severe form of sexual assault involving sexual activity with the victim's consent. It can be done through physical force, threat, manipulation or when the victim is not capable of giving consent¹. The term "consent" is essential.

Section 375 of India Penal code, 1860 defined the term Rape² :- (Now section-63 of Bharatiya Nyaya Sanhita, 2023)

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 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 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.

¹ Definition of Rape <https://share.google/bF9HcTSF4dNendxdR> and <https://share.google/f5EaUdnxvptxZ9g8i>

² The Definition of Rape from The Indian Penal code, 1860 (Indiankanoon.org)

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

(Seventhly.) — When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Exceptions:—

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Above mention exception (2) of section 375 of the IPC, 1860 clearly ignore the marital rape concept above the age of 15 years.

On 11 the October 2017, A land mark judgement was delivered in case Independent Thought v. Union of India³ by supreme court in which it stated that the exception 2 of section 375 of IPC, 1860 is arbitrary and a husband cannot have sexual intercourse with his wife if she is between 15 to 18 years of age even with her consent. So here the consent age was raised from 15 to 18 but it clearly ignore the force sexual intercourse without consent above the 18 years age women³.

Marital Rape: –

Marital Rape or Spousal rape means a rape committed by the person to whom the victim is married. Marital rape means sexual intercourse against spouse will and it is done without consent. Consent is necessary. In today's world it's known as crime but in ancient time it was right of husband. In India marital rape are not recognised as crime even though according to National Family Health Survey (NFHS-5) clearly stated that 32% of ever married women have suffered spousal, physical, sexual or emotional violence and 27% have suffered at least one form of violence in the 12 months preceding the survey⁴.

Section- 376 (Now sec-64 of BNS,2023) of IPC, 1860 give punishment for rape. In this punishment for rape is mention of wife aged between 12 to 15 or below 12 years but if wife is above 15 years then that rape it is not punishable under law due to exception (2) of section- 375 of IPC, 1860 which is also known as marital Rape exception.

But it Criminalize “non- consensual sex” with separated wife. In sec 376-B of IPC, 1860 states that sexual intercourse by a husband with his wife, who is living separately, without her consent, it will carries a punishment of imprisonment for a term between two to seven years and a fine⁵.

From this we get to know that they recognize marital rape if wife is living separately and if force sexual intercourse happens than that is punishable but if she is not separated, then it is not rape.

Historical context:—

- In ancient time, marital rape was not consider as crime due to the patriarchy system which means that the man hold most power and authority over women. They used to believe that the man have right to sexual access to wife, which wife cannot deny. Marriage was considered as “permanent consent”.
- We can see this patriarchy view in British Common law. Marital Rape exception (MRE) in Indian Penal Code, it's often related to what we called as Matthew Hale's principle & Doctrine of Coverture.
- Hale's principle⁶:— referring to a statement made by a British jurist Matthew Hale, who said “ but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath give up herself in this kind upto her husband, which she cannot retract.
- Doctrine of Coverture⁷:— The Doctrine states that upon marriage a women's legal existence was essentially merged with that of her husband. The married women are legally dependent on her husband, losing autonomy over her legal rights and property.
- Gender Role Socialization Theory⁸:— In this theory Socialization is done by society in a way that individuals learn and adopt expected behaviour, attitudes and roles for their assigned gender from birth through social interactions.

³ Independent Thought v. Union of India AIR 2017 SC 4904 from drishti judiciary.com <https://share.google/jxbxB0wVKQBmet6jB>

⁴ Information related to National Family Health survey (NFHS-5) <https://share.google/1Ii3Lob21pLOUilrF>

⁵ Section- 376 B of IPC, 1860

⁶ Hale's principle from <https://share.google/v58X2hHFeX6cZg2vA>

⁷ Doctrine of Coverture from <https://share.google/gGCSEm8PJmZrbEYNL>

⁸ Gender Role Socialization theory from <https://share.google/IFAFxK91pGwQOmGO8>

- From birth Women wear taught to be dress in typically feminine ways, to be polite, to be sensitive, to have empathy, sweetness and nurturing and for Men that they should be physically strong, emotional toughness and to be dominant.
- Because of this theory, in marriage men is excepted to be strong & dominant and women is expected to be submissive.
- This views were prevalent till 20th century, but after the societal view point change towards women due to women's right movement in 1970 and feminist concept which resulted into gradual criminalization of marital rape in many countries.

The Law Commission Reports:–

1. The 42nd Law commission report, 1971

- This report does not suggest to Criminalize marital rape but it commended to suggest related to it.
- The first suggest was that exception of section 375 of Indian Penal Code will not apply where the husband and wife were judicially separate.
- 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 offences of the rape. This does not appear to be right”⁹.
- It stated that consent is presumed when husband and wife live together and cannot be implied when they are separated.
- The second suggest was related to that sexual intercourse with a wife by her husband without her consent, should not be termed as rape. It should consider as less serious offence and should be separated from rape.

2. The 172nd law Commission Report, 2000

- The law Commission didn't recommend to Criminalize marital rape because it will amount to extreme interference within marriage.
- This recommendation was given because of case Sakshi v. Union of India¹⁰, this case was of public interest litigation filed by Sakshi , an NGO, advocating for victims of sexual abuse, particularly children.
- The petition was file for broader definition of “ sexual intercourse “ under section– 375 of Indian Penal Code to include various forms of penetration beyond penile – vaginal intercourse.
- The supreme court decline to widen the scope of rape through judicial interpretation, they stated that this step should be taken by legislature.
- Her one of the arguments was that almost all the violation by husband towards his wife is Criminalize, then there is no reason to not to Criminalize marital rape.
- Her recommendation was rejected by law commission report.

3. Justice J.S. Verma committee on martial rape:–

- The justice J.S. Verma committee was formed in response to the December 2012 gang rape if a young woman in Delhi. (The Nirbhaya Case)
- The Verma committee recommended to remove the second exception clause of sec–375 of Indian Penal Code,1860 stating that “ a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation”¹¹.
- The committee agreeing with the judgment of the European Commission of Human Rights, conclude that a rapist remains a rapist regardless of his relationship with the victim.
- The union government refused to Criminalize marital rape.

4. 167th Report of the Parliamentary Standing Committee on the criminal Amendment Bill, 2012:–

- Some member were if opinion that there should be Criminalization of marital rape but some member were of opinion that penalising marital rape had the potential of ruining the entire institution of marriage and putting the family system under great stress¹².

⁹ The statement of 42nd law Commission Report, 1971 from <https://share.google/5gJFtN1izF3pKMDr>

¹⁰ Sakshi v. Union of India (2004) 4 SCC 518 from (Indian Kanoon.org)

¹¹ Justice J.S.Verma committee recommendation from <https://share.google/spkI530mwLUSjY1xJ>

¹² 167th report of the parliamentary standing committee from <https://share.google/qQKzFHdsVm7XY5rB4>

- They believe such non-consensual sexual intercourse can be dealt under the heading of cruelty under the sec-498A¹³ of IPC and other statutes such as the Domestic Violence Act, 2005.

Parliamentary Discussions:-

- In 2015, the first time the question related to Criminalization of marital rape was asked by Ms. DMK MP Kanimozhi, that whether the government was planning to amend the law to make a marital rape a crime? And whether it is a fact that UN committee on Elimination of Discrimination against woman has recommended to India to Criminalize marital rape.
- In response to this question, the Minister of the State for Home, Haribhai Parathibhai Chaudhary said in Rajya Sabha that “it is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindsets of the society to treat marriage as a sacrament¹⁴.”
- In 2018, Shashi Tharoor introduced a private member’s bill in the Lok Sabha to Criminalize marital rape by removing exception 2 of sec- 375 of Indian Penal Code¹⁵.
- He argued that the existing laws fails to recognise a women’s autonomy within marriage.
- The government opposed this and private’s member’s bill rarely become law in India.

Constitution Elements:-

(1) Article 14 – Right to Equality

- Art-14 states that “the state shall not deny to any person equality before law or the equal protection of the law within the territory of India¹⁶.” Which means article 14 guarantees equality to all and equal protection to all the people. We can make classification but it should be based on two principles that:-(i) Intelligible Differentia (a clear, distinct reason to classification) & (ii) Rational nexus (a correct reason to object of law). This means classification should be on right criteria and there should be logical connect to achieve the object of law for which this classification is created.
- Marital Rape Exception (MRE) clearly discriminate article- 14 against women. It creates classification based on marital status. It discriminate between married women and unmarried women. It Criminalize rape for unmarried women but doesn’t not Criminalize rape for married women who got raped by their husbands. This classification is not based on proper criteria and there is no logic behind this. It is clearly arbitrariness. In case State of West Bengal v. Anwar Ali Sarkar¹⁷ the Apex court upheld “any stratification under Art-14 is contingent to a test reasonableness which can be decreed only when the stratification has some reasonable relation to the object that the act sought to achieve. In case of E.P. Royappa v. State of Tamil Nadu¹⁸, the court stated that right to equality is against arbitrariness. They both are enemies to each other.

(2) Article – 21 Right to Life and Personal Liberty:-

- Article 21 of the Indian constitution state that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” Art- 21 not only include it’s literal meaning but it also includes right to privacy and right to live with dignity, personal liberty and autonomy over their own bodies.
- A women’s right to make reproduction choice includes the women’s right to refuse participation in the sexual activity.
- In the case Suchita Srivastava v. Chandigarh Administrative, the Supreme court compared the right to choose alternative related to sexual activity with that of right to personal liberty, dignity and bodily integrity within the meaning of article – 21 of the Indian constitution.¹⁹

Judgements of the court on marital rape exception:-

- (1) Independent Thought v. Union of India (2017)²⁰ :-

¹³ Sec -498A of Indian Penal Code, 1860

¹⁴ Statement of Minister of State for Home, Mr. Haribhai Parathibhai Chaudhary from <https://share.google/pXWMg8fcjj9uq9jIV>

¹⁵ Shashi Tharoor Private Bill’s commendation from <https://share.google/ouP9SYqzDoObAl7h>

¹⁶ Article -14 of the Indian constitution, 1950

¹⁷ The State of West Bengal v. Anwar Ali Sarkar, 1952 AIR 75, 1952 SCR 284

¹⁸ E.P. Royappa v. State of Tamil Nadu, 1974 AIR 555, 1974 SCR (2) 348

¹⁹ Suchitra Srivastava v. Chandigarh Administration (2009) 13 SCR 989

²⁰ Independent Thought v. Union of India (2017) 10 SCC 800

The judgment makes sexual intercourse by a husband without consent of his wife, who is under 18 year of age, a crime.

(2) RIT Foundation v. Union of India (2019)²¹ :-

The Delhi High court directed the government to consider amending laws to make marital rape a criminal offence.

(3) Nimesh bharat bhai Desai v. State of Gujarat (Gujarat High court case)²² :-

The court held marital rape is a disgraceful offence that has scared the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non- Criminalization of the practice.

(4) X v. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi & ANR²³ :-

The Supreme Court of India ruled that unmarried women as well as survivors of marital rape have the legal right to terminate their pregnancies at 20–24 weeks under rule 3P of the Medical Termination of Pregnancy (MPT) rules.

(5) The Delhi High Court Case Split Verdict on Marital Rape Exception:-

- The Delhi High court on 11 may 2022, gave a split verdict on the issue of criminalizing marital rape in response to a bunch of petitions urging the court to strike down exception (2) of section 375 of IPC as unconstitutional.
- Justice Rajiv Sheth's view:-

He highlights the difference between unmarried victim of rape who is legally protected vis-à-vis the fact that “ the same regime does not kick in if the complainant is a married women. Further, he opines that a woman reserves the right to withdraw consent at any point in time, irrespective of her relationship with accused. There is no justification to treat husband separated in a manner different than any other rapist.

- He held the exception is unconstitutional.
- Justice Hari Shankar's view point :-
- He in the judgment, draws a comparison between non- consensual sexual activity with stranger and a non- consensual sexual activity with husband. It was noted that the level of outrage likely to be experienced by a woman over being raped by a stranger would be far more intense than the outrage over non-consensual sex by husband.
- It was expressed in the judgment that the exercise of judicial authority on the issue would amount to interference in the legislative sphere
- He held the exception is constitutional.

International conventions :-

- In 2013, the UN Committee On Elimination of Discrimination Against Women (CEDAW) advised India to abolish legal impunity for marital rape.
- India is bound to uphold women's right regardless of marital status under clause (f) of Article 2 of the convention on the Elimination Of All Forms Of Discrimination Against Women (CEDAW) mandates state parties to take specific actions to eliminate discrimination against women.
- Marital Immunity in India also violates the International Covenant On Civil And Political Rights (ICCPR) and the Universal Declaration Of Human Rights (UDHR). According to Article 26 of the clause of the covenant member states must ensure equal protection of dignity and status for all citizens regardless of their marital status or other factors.

Marital rape creates a distinction between married and unmarried women, this constituting discrimination²⁴.

Recommendations:-

1. Marital rape should be recognised as an offence under the Indian penal code.
2. The fact the parties are married should not make the sentence lighter
3. It should not be a defence so the charge that the wife did not fight back²⁵.

²¹ RIT Foundation v. Union of India (2019) w.8.(c) 284/2018

²² Nimesh Bharat Bhai v. State of Gujarat, 2018, Guj 732

²³ X. V. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi & ANR, 2022 SCC ONLINE SC 1321.

²⁴ International conventions from <https://share.google/iKGSrHBQkVckg1CB4>

²⁵ Recommendations from <https://www.rostrumlegal.com/criminalising-marital-rape-in-india-and-its-legal-aspects/>

Conclusion:–

In conclusion, the need for Criminalizing marital rape is essential in India for a variety of reasons. It would help the victims to get justice. By criminalizing, India also reaffirms it's commitment to the human rights principle.