
MARITAL RAPE EXCEPTION: AN ANTITHESIS TO WOMEN'S DIGNITY & AUTONOMY IN INDIA: AN EPITOME OF CONSENT IN PERPETUITY

Richa Roy, NMIMS, Indore, Madhya Pradesh

“When a woman is raped by a stranger, she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist.”

~ David Finkelhor and Kersti Yllo

ABSTRACT

The recent split- verdict of Delhi High Court on criminalization of Marital Rape has reignited the law framers and custodian of the Indian Constitutional Jurisprudence to ponder upon the pre-existing stereotypes in the Indian Realm. Marital Rape is a rape committed by the husband on the wife behind the so-called iron curtain of Marriage. The non-recognition of Marital Rape in the Indian Society has indirectly given the right to do forceful sexual activity on her wife, with wife having no specific remedy to deal with that, leading to the naked violation of women's fundamental right of life and sexual autonomy and thereby posing a big question on the Indian legal & legislative framework. The present paper will therefore try to critically analyze the conundrum created between legal, social, cultural & political on the criminalization of Marital Rape through the lens of Constitutional, family and criminal law, the role of culture in creating a façade for criminalizing it and examines the inefficacious remedies existing for the protection of women. In addition to this, the paper also tried to illustrate an empirical study of the current position of Marital Rape in India with the help of survey conducted on various sections of people in India and concluded by suggesting a proposed model for its criminalization.

Keywords: Marriage, sexual violence, women, dignity, Rape, criminalization.

RESEARCH DESIGN

I. Research Hypothesis

Due to lack of Socio- Legal recognition, Marital Rape has become prevalent in contemporary India where Husbands assumes marriage as a license to Rape.

II. Statement of Problem

The socio- political and judicial conundrum has restrained the criminalization of Marital Rape in India leading to unfettered violation of women's fundamental Right.

III. Research Questions

1. Whether Marriage means the implied consent of women for sexual intercourse?
2. Where does the fault line exist for non-criminalization of Marital Rape in India?
3. Does the Marital Rape is justified under the Indian Constitutional Jurisprudence?
4. What is the current position of Marital Rape menace in India based on the performed empirical study and statistical data?
5. Does the alternative legal Remedy efficient for protection of victim of Marital Rape in India?
6. What are the plausible solutions in order to make the Indian criminal system efficient for victims of Marital Rape in India?

IV. Research Methodology

The current research is based on doctrinal and empirical study conducted over various sections of society. The researcher used the traditional strategy of consulting libraries full of primary sources, books and e-journals. Along with it, various law commission reports, Case studies, Parliamentary committee report, news articles, NCRB data and National Family Health Survey Report has been taken into account.

I. INTRODUCTION

Marital Rape: A justified crime in India!

“If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”

State v. Oliver¹

Marital rape refers to forcible sexual assault or violence by one spouse towards the other which is done through using brutal and unnatural force². According to the **National Crime Records Bureau [NCRB]** report, the cases reported against women was 35,331 in 2020 in which around 30% of registrations were done under '*cruelty by husband or his relatives*'³. As per the data recorded by National Family Health Survey [NFHS] 2015-16, over 99% of the cases of sexual violence went unreported whereas the average Indian women likely tends to face sexual violence 17 times more from her husband than others.⁵ Marriage in India is considered as a sacred institution that promotes the principle of adjustment and commitment to be followed by all married women and as per the societal norms, "*a woman, who is not docile, disagrees to perform "sex", are portrayed as an anti-family rebel who breaks the sacred bonds that transform the bedroom into a battlefield.*"⁴

Now, the question pertinent to arise is that whether woman loses her sexual autonomy and integrity upon marriage. Do they become the 'property' of the husband and become the tool to fulfill sexual desire of her husband? Is their consent a consent in perpetuity?

Marital Rape has been recognized in the **U.N Declaration on Elimination of Violence Against Women (CEDAW)** in 1993, as violative of their fundamental rights, but despite India is a party to it, has not recognized Marital rape in India. The reason is deep rooted into the trajectory of patriarchal dominance and the presence of implied consent theory that reflects the notion of irrebuttable consent between married couple upon marriage. The exclusion of Marital rape under Section 375 of IPC and political agreement on criminalization of marital rape gives a free hand to the male perpetrator to initiate this unrecognized offence.

The Indian Court in catena of cases have held the Marital Rape exception as violation of Article 14 & 21 of the Indian Constitution but even though avoid itself to take strict action towards it. In the case of ***Bodhisattwa Gautam v. Subhra Chakraborty***⁵, it was held, "*Rape is to a lesser degree a sexual offence than a demonstration of hostility gone for corrupting and mortifying the ladies. Therefore, the marital exception principle is violative of the spouse's entitlement to live with human dignity.*"

¹ (State v. Oliver, 1874)

² (Bisht, 2021)

³ National Crime Record Bureau (Crime in India, 2020)

⁴ (Aman, 2020)

⁵ (Bodhisattwa Gautam v. Subhra Chakraborty, 1996)

On the other hand, in the case of *Independent Thought v Union of India*⁶, it was ruled, “Constitutionally female have equal rights as of male, statutes taking these rights will be null and void and sexual intercourse or sexual act by the husband with his wife below the age of 18 years would result in the commission of rape.” The ruling only given protection to women below 18 years of age and not above it.

The Justice Verma Committee has vehemently advocated for its criminalization, on the other hand, it is disheartening to mention that the Government is reluctant to make penal provisions for Marital Rape citing that it will be ‘*excessive interference into their private sphere*’ & ‘*existence of Alternative Remedies*’.⁹ The reluctance along with socio-cultural stigma is also shown by both the judiciary and legislature on criminalizing it. Therefore, it is important to understand the need and challenges of criminalization of marital rape in order to curb the growing menace of the married women in our societies.

II. MARITAL RAPE CRIMINALIZATION STILL IN ABEYANCE

Where is the fault line?

The first report on marital rape i.e. the 42nd law commission report straightforwardly rejected the idea of criminalization of marital rape as offence of Rape, relying on the notion of ‘*implied consent of wife*’⁷. The exception was again examined under 172nd Law Commission report wherein it was again rejected, citing the reason that the same would lead to ‘*excessive interference of state*’.⁸ The light of hope arisen after the Justice J.S. Verma Report 2012⁹ which suggested criminalizing Marital Rape. In pursuance with this, the Criminal Law Amendment Bill, 2012 (‘Amendment Bill, 2012’) was introduced but not criminalized marital rape. It was held by the Ministry of Home affairs that the *notion of criminalizing Marital Rape is unsuitable for India and alternative remedy exists under different provisions* like Section 498A IPC, the Protection of Women from Domestic Violence Act, 2005 (‘PWDVA, 2005’) and other personal laws, therefore no specific need.

The Judicial attitude is also not very much in favour here. The courts have been found showing reluctance considering the criminalizing of marital rape as fictitious private sphere, unable to enforce the fundamental rights.

2.1. UNENFORCEABILITY OF FUNDAMENTAL RIGHTS DUE TO FICTITIOUS

⁶ (Independent Thought v. Union of India, 1996)

⁷ (Indian Penal Code, 1971)

⁸ (Review of Rape Laws, 2000)

⁹ J S Verma Committee Report, 2012.

PRIVATE SPHERE

This can be explained by connecting with the constitutionality of Section 9 of Hindu Marriage Act 1955 which states about Restitution of Conjugal Rights. The court in the case of *T. Saritha v. T. Venkata Subbaiah*¹⁰ has held the provision of RCR as unconstitutional stating that, “*it transferred the right of choice to indulge in sexual intercourse from the woman to the State. This would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual.*” The court further held that marital rape is totally different from RCR.

On the other hand, the court in the case of *Harvinder Kaur v. Harmander Singh*¹¹ has upheld the constitutionality of Section 9 stating, “*the purpose of RCR was not to coerce someone to stay with*

their partner but rather to protect the institution of marriage” and the court also express its reluctance to accept that, “*a decree of RCR would result in women being forced to resume conjugal relationships with their husband.*”

Now at one side, the court emphasized on that a marriage cannot be endangered merely based on sexual relationship but on the other hand, it ignored the vital facts women can face forced sexual indulgence during the restitution period by citing ‘*Marital Privacy*’ as “*The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces ‘two-in-one-ship’.*”¹²

2.2. IMPENETRABLE PRIVATE SPHERE: A BLATANT MANIFESTATION OF JUDICIARY

The creation of marital privacy with no penetration of Constitutional application is a blur notion of Judiciary. It is highly criticized as it leaves no recourse to the victim of private sphere in law.¹⁶ This private-public façade has been broken due to emergence of various legislations dealing particularly with marital sphere like the PWDVA, 2005 and Section 498A IPC which denotes that the law is highlighting only certain violence and shadowing the remaining.

2.2.1. STATE’S DISCRIMINATORY PENETRATION INTO PRIVATE REALM.

The state’s involvement in decriminalizing Section 377 IPC illustrates its interference in private sexual relationships of two agreeing adults, along with it, framing of law on Abortion

¹⁰ AIR 1983 AP 356

¹¹ AIR 1984 DEL 66

¹² (Olsen, 1983)

rights of women, Domestic Violence and sexual harassment again upholds the interference of state to protect women's dignity and autonomy. The State on one hand criminalizes certain acts and on other refused to criminalize marital Rape citing it as a fictitious private sphere.

2.2.2. FROM 'PRIVACY' TO 'INDIVIDUAL AUTONOMY': A SHIFT NEEDED.

As highlighted by a renowned feminist personality, **Martha Nussbaum**, there is an urgent need to change the perspective of law and society to individual (Women) choice and autonomy rather than to focus on the marital privacy. The progressive approach must be applied in order to

conceptualize the private sphere emphasizing more on women's individual rights as followed in Justice KS Puttaswamy v. Union of India¹³.

III. MARITAL RAPE EXCEPTION THROUGH THE LENS OF CONSTITUTIONAL LAW

Marital Rape: A Justified Crime in India?

"The institution of marriage does not confer, cannot confer and should not be construed to confer, any special male privilege or a license for unleashing of a brutal beast,"

~Justice M. Nagaprasanna

Marriage is a social institution that gives a socio- cultural backing to the unfettered commitment of marital rape in India. As per the recent debates, the state is found to be hesitant to intrude in the privacy of a husband and wife although the women's right to life is hampering. Marital Rape of woman is violation of her fundamental rights of equality and to live with dignity. It infringes her right to sexual autonomy and right to privacy under Article 14 & Article 21 of the Indian Constitution. The Marital Rape Exception is also a sort of interference in women's right to make decision thus hampering her freedom of speech under Article 19 of Indian Constitution.

3.1. VIOLATION OF EQUALITY

Section 375¹⁴ defines rape and its exception 2 absolving the rape by husband as not punishable is an artificial & arbitrary distinction created between a married and unmarried woman having no reasonable nexus. Thus, violating the basic principle of equality under Article 14 based on

¹³ AIR 2017 SC 4161

¹⁴ Section 375 of IPC; Rape.

the case of *State of West Bengal v. Anwar Ali Sarkar*¹⁵ which states, “Reasonableness test can be passed only if the classification has some rational nexus to the objective” and Section 375 (2) is totally in contradiction with its purpose.

In India, two sociological notions emerged on Marital Rape, first, marriage as another word for sexual indulgence and second its criminalization would harm the sacramental values of Marriage. Marriage cannot be a license to sexual relationship, the consent matters here because a contract

becomes void if it is contrary to the public policy. Secondly, the stability of society will be more endangered if women tend to be harmed. This illustrates that there is no reasonable differentia associated with categorizing marital rape separately, hence violation of article 14.

3.2. VIOLATION OF LIFE & DIGNITY

Keeping in mind the expended scope of Article 21 in various cases like *A.K. Gopalan v. State of Madras*¹⁶, *Kharak Singh v. State of U.P.*¹⁷, it is worth to mention that a human life is worth more than animal existence. The same was extended to the right of women to *Sexual Privacy & Self-determination* wherein it has been ruled that, “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 decision in respect of intimate relations.”¹⁸ Sexual intercourse without consent of a woman amounts to infringement of sexual autonomy and sanctity of female and therefore violation of her dignity¹⁹.

IV. CURRENT POSITION OF MARITAL RAPE IN INDIA

Revealing the Reality

“I Couldn’t understand the number of faces he had, whenever he wants to get physical with me, nomatter how big my mistake is, he used to forgive me, and when he was done, he resumed behaving the way he usually does, the last time this happened, when I left my house was because he said, ‘YES, I AM RAPING YOU, AND I WILL KEEP DOING IT UNTIL WE ARE DIVORCED.’”

¹⁵ 1952 SCR 284

¹⁶ AIR 1950 SC 27

¹⁷ 1964 SCR (1) 332

¹⁸ K.S. Puttaswamy (Retd.) v. Union of India AIR 2017 SC 4161

¹⁹ State of Karnataka v. Krishnappa 2000 (3) SC 516

4.1 STATISTICAL DATA

In India, women have never been given priority and importance. Even now, their position is not what it should be. In our country women have always viewed as inferior to men which ultimately resulted in a patriarchal society full of male chauvinism.

A human rights activist of a Bangalore-based NGO named '*Global Concern India*', **Bindra Adiga** said that "*Education and professional employment are no guarantees of protection from patriarchal expectations and mindset*". He also stated that in about 80 to 85 percent of Marital Rape cases, the victims claimed that their husbands really tease and taunt them by asking if you can complain/report about the involuntary sex.

The National Family Health Survey (NFHS 2019-21) statistics shows that 1 out of every 3 Indian women suffered from spousal abuse and about 6% of them actually suffered sexual assault by their husbands.²⁰ NFHS conducted its survey from 2019 to 2021 in 707 districts of 28 states and 8 Union Territories. It included 724115 women and 101839 men. The aim was to produce disaggregated estimates regarding spousal abuse including sexual violence. The findings of NFHS survey (2019-21) said that 32% of married women have suffered spousal abuse either it is physical, sexual or emotional violence. The report stated that 82% of the women confirmed that they have been exhibited to forced sex by their husbands.²¹

A large majority of women (nearly 84%) said that their husband "physically forced her to have sexual intercourse with him even when she did not want to". This is same as what the Indian Penal Code, 1980 defines 'Rape'. Instead of that, Marital Rape is decriminalized or can say legalized in India.

Based on the NFHS (2019-21) data from 28 states, few states emerged as higher reporting sexual violence including Marital Rape. The percentage is noticeably higher in Karnataka (9.7%), Bihar (7.1%), West Bengal (6.8%) and Assam (6.1%). The survey said that 1 out of every 25 Indian women reports sexual violence by her husband which means 3.9% women in whole of India.²² This reporting is remarkably low and it is so because Indian law does not recognize '*Marital Rape*' as a Crime.

²⁰ <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>

²¹ http://timesofindia.indiatimes.com/articleshow/91491367.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

²² <https://theprint.in/india/3-9-indian-women-who-were-ever-married-reported-sexual-violence-from-spouse-9-7-in-Karnataka/809825/>

4.2. ANALYSIS BASED ON EMPIRICAL STUDY

Interviewing general public on a controversial and a closed-door issue like marital rape was in itself a task. We discovered that most of the women, especially those who were married were reluctant to give interview and agreed only by being anonymous. We witnessed those men in general, neither accept nor know about marital rape and consider this as a part and parcel of marriage. Quoting a 45yr old Man, the refusal of indulging into sexual relationship was considered disinterest of the wife into the marital relationship itself. Education however truly leads to societal awareness. Educated class recognized and was reciprocative enough to the questions raised. Their education and capacity to earn was seen to be as a moving factor for them to actually recognize the crime.

V. EXISTING REMEDIES: AN INEFFICACIOUS RECUSAL UNDER INDIAN LEGISLATIVE FRAMEWORK

“I have the license, you are my wife, I can do what I want, try and send me to the jail”

There's a common misconception and assumption that there exists already a framework for criminalizing marital rape in the contemporary laws. In order to prove it fallacious, we will dig upon the criminal and civil laws separately and try to find out the lacunas in them, because of which criminalizing marital rape seems to be the only viable option left.

5.1. CRIMINAL LAW

Section 498 A of IPC is the backbone over which the criminalization of marital rape lies upon. However, it is inadequate because of the underlying difference between the very nature of rape and cruelty. Rape has the component of patriarchy and power dynamic involved. The analogy can be made to the treatment of rape as a distinct offence grievous hurt or assault. Also, the quantum of punishment varies with the gravity of offence. Cruelty under Section 498A IPC has no lucid definition; they differ from case to case. Rape cannot come under its purview.

5.2 QUANTUM OF INTENSITY TOO HIGH TO ESTABLISH CRUELTY.

The degree of intensity of the unjust act is so high that it may lead to the women resorting to suicide or to cause danger to life, limb or health. Section 498 does not have the tedious requirements as such of evidence as section 375 have.

5.3. REPETITION OF CRUEL ACTS

Section 498 requires repeated or continuous repetition of the cruel, inhumane acts which is

clearly harmful in the cases of marital rape.

DIFFERENCE BETWEEN QUANTUM OF PUNISHMENT

This difference tells that cruelty and rape cannot be dealt in the same pedestal.

5.4 CIVIL LAW

The flaw with civil law is that it makes gendered violence as a matter between the perpetrator and victim only, unleashing the responsibility of the State. At the same time, it provides women a platform to 'choose resources'.

The personal laws of India have 'cruelty' as a ground for divorce but still do not mention sexual violence as a ground for the same. On one hand, the success of family laws lies upon the importance of sexual relationships in marriage and the refusal to do so leads to mental cruelty. In the same line, forced sexual intercourse must also amount to cruelty. Our argument for placing marital rape as a crime gets diluted when the husband files for divorce on his wife's No.

VI. CONCLUSION

The Need of a Paradigm Shift

To conclude, the present study has vehemently analyzed the framed Research questions which were formed to establish the Hypothesis of the researcher. It is evident by our empirical study done through both Interview method and Questionnaire form, that the current position of women is not good in the contemporary society. It has also been felt that due to the judicial and political conundrum created for not criminalizing the marital rape under the Indian Criminal Law, reflects the serious neglect on the part of custodian of our society. This made the women in our society feel more vulnerable and without support, on the other hand giving men an enormous power to assume that they have the license to do forceful sexual violence upon women when she becomes their wife.

The inference drawn from the current study also showed that the defense of existing alternative remedy for not criminalizing marital rape is worthless. Therefore, there is great need to shift the current legal position of Marital Rapes in India.

VII. A PROPOSED RECOMMENDATION

To erode the socio-legal intricacies and obstacles and for smooth functioning of the society for married women, the reliance is made on the proposal of J.S Verma Report on

criminalization of Marital Rape in India. The report mainly focused on removal of exemption clause, consent of wife cannot be presumed and lastly marriage is not a defense for committing marital rape.

7.1. MARRIAGE NOT A VALID DEFENCE & REMOVAL OF EXEMPTION CLAUSE

In this case of Marital Rape, the removal of Section 375(2) from the Indian Penal Code will not be enough as it will lead to the judicial discretion. Reference can be made to Ghana where it is criminalized but there is no mention that marriage will be no defense in such kind of sexual intercourse. Therefore, it leads the space for arbitrariness.

7.2. PRESUMPTION OF CONSENT DEPENDS ON CORROBORATIVE EVIDENCE.

The criminalization of Marital Rape posed a very serious issue of proving the lack of consent under Evidence law. Therefore, it is proposed to prove it based on the circumstantial evidence. The wife's testimony is the only recourse in this crime; thus, it is suggested to adopt the corroborative evidence particularly the husband's nature and his pattern of committing sexual violence. Even though, this may be in contradiction with Section 53 & 54 of Evidence Law²⁹ as past mala fide character is not admissible. But it becomes relevant in present context.

7.3. NO VARIATION IN SENTENCING POLICY

The punishment for rape under Section 375 IPC is 7 years extended to life imprisonment whereas in case of husband and wife not living together, the sentence mentioned under Section 375B IPC is 2-7 Years. This shows the legislative intention of lesser sentencing policy on inclusion of Marriage per se. therefore, it is suggested to repeal the provision of Section 376B IPC.

7.4. REFORMATION IN INDIAN EVIDENCE ACT & IPC

Removal of Section 375(2) and inclusion of Explanation clause under Section 375 IPC stating marriage is not a defense, repeal section 375B under IPC. The amendment of Section 54 of Indian Evidence Act to exclude the general provision over the cases of Section 375 IPC.