



## Marital Rape Laws and Women Security in India: A Critical Analysis

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### ABSTRACT

*A women privacy and integrity is brutalized by any kind of sexual offence against her. After Nirbhaya case in 2013, rape laws were amended on the recommendation of the justice j.s.verma committee report. However in India, marital rape is not yet criminalized, as it is presumed that in a marriage there are implied consent by both partners. But, reality is not so.*

*Rape is rape even if it is between husband and wife. Marital rape is sexual intercourse without the consent where the perpetrator is victim's spouse. Most of the developed countries have criminalized marital rape as it is violation of fundamental rights. However, in India it is not yet criminalized although it was recommended by law commission and the justice verma committee as well.*

### KEYWORDS :

#### INTRODUCTION:

In Indian society, marriage is considered as a sacred institution as a basestone for a stable family and a civilized society but unfortunately it veils like sexual cruelty and other form of brutality. Marital rape can be defined as an unwanted intercourse or penetration (anal, vaginal or oral) obtained by force, threat or force or when wife is unable to consent.

Marital rape is most common crime against married women in India, and also most under reported crime in the country. Because people are not aware and also because it is not an offence under Indian penal code, 1860. Victimization of women and conjugal rape being a common phenomenon in India.

#### TYPES OF MARITAL RAPE:

The following three kinds of marital rape are identified by legal scholars as generally prevalent in the society-

##### BATTERING RAPE:

In battering rapes, women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to make up and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

##### FORCE-ONLY RAPE:

In what is called force-only rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.

##### OBSESSIVE RAPE:

Other women experience what has been labelled sadistic or obsessive rape; these assaults involve torture and/or perverse sexual acts and are often physically violent.

#### HISTORY OF MARITAL RAPE IN ENGLAND:

In the seventeen century England in C.J, *Sir Matthew Hale* received much criticism after he commented that: "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up her in this kind unto her husband, which cannot retract."

He explained this point of view by stating that husbands may not be charged with rape of their wives, according to the cautionary rule of matrimonial consent.

However, soon this view was changed when the doctrine of marital rape was for the first time discussed in appellate court of England in *R v. Clarence*, though the defendant was not charged with rape but the case became a precedent for a wife to protect herself from non-consensual sex as opposed to Sir Hale's statement. However for the first time marital rape was prosecuted in *R v. Clarke* where the

court held that consent was revoked due to non-cohabitation.

Finally, in the case of *R. v. R*, it was stated that the marital rape exemption was illogical and it was held that "the fiction of implied consent had no useful purpose to serve today in the law of rape". Consequently R's appeal was dismissed and he was convicted for committing rape. That was the beginning of criminalization of marital rape in the English laws.

#### LAWS IN OTHER COUNTRIES:

Most of the common law countries like Australia, South Africa and Canada have followed the England system and have abolished marital rape law exemption. For instance, in Australia under Section 73(4) of the Criminal Law Consolidation Act, 1953 provides "No person shall, by reasonably of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person."

Similarly, in South Africa the concept of exemption on spousal rape has been repealed. Under Section 5 of Family Violence Act 1993: "Notwithstanding anything to the contrary contained in any law or in common law, a husband may be convicted of the rape of his wife."

Even Canada also has repealed the exemption in the spousal rape in 1983.

#### INDIAN LEGAL POSITION ON MARITAL RAPE:

A marital rape is not an offence in Indian law. Section 375 of Indian penal code, 1860, which defines rape does not include marital rape even though marital rape includes first two conditions of the said section.

Marital rape is an exception under section 375 of Indian penal code, 1860- the only provision of punishment in marital rape is in two conditions (i) if the victim is legally separated from her husband, or (ii) if the victim is less than 15 years of age it is so, because Indians still believe in patriarchal norms which created mindset that domestic violence should be settled within the house. In 1983, under section 376-A of Indian penal code, 1860, marital rape of legally separated wife was criminalized. Justice J.S.Verma committee report recommended abolition of exception of marital rape. This is the only major recommendation by any committee for criminalizing marital rape.

#### MARITAL RAPE: INFRINGEMENT OF FUNDAMENTAL RIGHTS:

In *B. Gautam v. Subhrachakraborty*, the honorable Supreme Court of India held that "Rape is a crime against basic human rights and a violation of the victims most cherished of fundamental rights, namely, the right to life enriched in Article-21 of the Indian constitution". But still the present criminal law negates this said judgment by not criminalizing marital rape. And eventually violating the fundamental right under Article-21 i.e. Right to life with dignity. Hence law making bodies should amend Section 375 of Indian Penal Code, 1860 and save woman's victimization of marital rape.

### **PROTECTION OF WOMAN FROM DOMESTIC VIOLENCE ACT, 2005:**

Protection of Women from Domestic Violence Act, 2005 offers civil remedies for crimes against women including marital rape; it provides protection against domestic violence and sexual perversions. It is quite unsatisfactory that violence against women should be seen as a civil wrong rather than criminal offence. If marital rape is made into a criminal wrong then it would act like a deterrent and prevent future crimes.

### **RECOMMENDATIONS:**

Marital rape is violation of Fundamental Rights and of Human Rights. Most of the developed countries have amended and repeals the exemption of marital rape. This repealment should also be made effective in India and marital rape should be criminalized under Indian Penal Code, 1860 as recommended in 172<sup>nd</sup> Law Report.

In addition, decree of divorce should be made possible if the charges of spousal rape are proved.

### **CONCLUSION:**

Awareness among women against marital rape is must. Women empowerment and education for women will make them to stand against such heinous crime. Right to live with dignity is our fundamental right and marriage shouldn't be an excuse for such an inhumane act against women. Rising voice against this injustice against women is the need of hour.

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- 4) Mathew Hale ,The History of Plea of the Crown(1778).
- 5) Cautionary rule is a rule to assist judges with analyzing evidence. It requires judicial officers to exercise caution before adopting evidence of certain witnesses on ground that evidence of such witnesses is unreliable.
- 6) R v. Clarence, (1888) 22 Q.B.D 23.
- 7) R v. Clarke,(1949)2 All ER 448.
- 8) R v. R,(1992) 1 A.C.599, House of Lords.
- 9) Sec. 498A, Indian Penal Code, 1860-Whoever being the husband of the relative of the husband of a woman, subjects such women to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
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