



## Marital Rape: A Legalised Sin

### KEYWORDS

Rape, Laws, Marital Rape, Criminalisation.

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**ABSTRACT** *The current study covers the current position of marital rape in India and as well as other countries, its history and evolution, consequences of a marital rape and the need to criminalize it. A marital rape is such an evil which still exists in the male dominated orthodox Indian society and is not even recognized by the lawmakers leaving Indian married woman in a helpless situation without a remedy. Rape has always been considered the biggest crime against mankind, by not recognizing and criminalizing it only shows the double standards of a male dominated society. From the studies it is clear that women raped by her own husband suffers much more psychologically effect than a woman being raped by a stranger. Even though first two essentials of Rape as defined under Section 375 of Indian Penal Code, 1860 i.e. without the consent and against the will of a woman and still not recognizing it as a crime is clearly unconstitutional and immoral.*

The word "Rape" literally means a forcible seizure and that element is a characteristic feature of the offence. According to Wharton Rape is defined as unlawful carnal knowledge of a woman by force against her will.

Section 375 of the Indian Penal Code, 1860, defines rape and gives seven instances when it would be considered a rape. The circumstances being:-

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 eighteen years of age.

Seventhly.—when she is unable to communicate consent.

**The following exception is also given under the aforementioned section:**

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.

Before the meaning of the word 'Rape was only confined to 'sexual intercourse with a woman' but after The Criminal Law (Amendment) Act, 2013 which was originally an ordinance issued by the President of India, Pranab Mukherjee, on 3 February 2013, in light of the protests in the 2012 Delhi gang rape case, it has been modified to constitute other aspects as well.

**Section 376B of the Indian Penal Code, 1860**, says that-

**376B.** Intercourse by a man with his wife during separation. Whoever has sexual intercourse with his own wife, who is living separately whether under a decree of separation or otherwise, without her consent shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years and shall also be liable to fine.

Explanation- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Only two groups of married women are covered by the rape legislation — those being under 15 years of age and those who are separated from their husbands. While the rape of a girl below 12 years of age may be punished with rigorous imprisonment for a period of 10 years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is married to the victim. However, once the age crosses fifteen, the rape legislation affords absolute immunity to the husband to impose himself on his wife and exercise complete sexual control over her body, in direct contravention to Human Rights Regulations.

### Marital Rape

All history attests that man has subjugated woman, to minister to his sexual pleasure, to be instrumental in promoting his comfort... he has done all he could do to debase and enslave her mind and now he looks triumphantly on the ruin he has wrought, and says the being he has thus injured is his inferior.

The term 'marital rape' refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent.

### Physical and psychological effects of marital rape

Most experts agree that marital rape survivors suffer longer term psychological consequences as a result of the rape as a stranger rape victims do. (The more severe reactions may be a result of prolonged physical and emotional abuse, lack of recognition and ability to share the pain, and the profound sense of a betrayal of trust rather than the rape itself, but the research is not clear.)

Despite the historical myth that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women

who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.

Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.

Aside from the above effects, the victim also has a feeling of helplessness as she may find it difficult, for cultural reasons, to define the other spouse's conduct as rape or identify someone she married and loves as a "rapist." Moreover there is a higher likelihood of the repeated assaults as the married perpetrator is more likely to humiliate, punish and take 'full' ownership of their partners. Nonetheless the victims who are dependent on their spouses has no way to leave the situation as they lack outside employment and may face additional pressure from family members or friends to remain with the perpetrator.

### History and Evolution

Ancient India presented a picture of gender equality and independence. Men and women were treated at par with each other and enjoyed their rights with equal fervour and zeal. It was, but natural, that in such an enlightened society the offence of rape was viewed as an invasion of a woman's bodily integrity- and infringement of her self-esteem, dignity and honour.

The western notion of female inferiority and its subsequent influence on Indian soil exhibited itself most blatantly in Thomas Babington Macaulay's drafting of the Indian Penal Code. Clauses 359 and 360 devoted to the offense of rape perceived it as a non-consensual sexual intercourse perpetrated through fear, force, or fraud. Sexual intercourse by a husband was not to be treated as a rape in any case. Thus there was clear preference of the rights of the husbands over his wife against the wife's right to herself.

The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of covertures, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared:

'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 herself up in this kind unto her husband which she cannot retract'.

### Current Position

This immunity has now been withdrawn in most major jurisdictions. In **England and Wales**, the House of Lords held in **1991** that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband.'

### Other countries

In **U.S.A.**, as of July 5, 1993, marital rape became a crime in

all 50 states under at least one section of the sexual offense codes.

In **Canada**, the provisions in the Criminal Code, which denied criminal liability for marital rape, were repealed in 1983. It is now a crime in Canada for a husband to rape his wife. **South Africa** criminalised marital rape in 1993, reversing the common law principle that a

Husband could not be found guilty of raping his wife and Section 5 of the Prevention of Family Violence Act 1993 provides: 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.'

In **Australia**, the common law 'marital rape immunity' was legislatively abolished in all jurisdictions from 1976. In 1991, the Australian High Court had no doubt that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.'

In 1995, at the **United Nations Women's Conference** in Beijing, China delegates unanimously passed a resolution stating that a wife has a right to refuse sexual demands by her husband.

The "United Nations Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution entitled "The elimination of violence against women" recommended that marital rape should be criminalized.

### In India

The 42<sup>nd</sup> Law commission Report (1972) suggested that marital rape should be criminalised however actions were not taken place as the 84<sup>th</sup> report (1980) was not in favour of the criminalisation. In the year 1996 The Supreme Court of India in *Bodhisattwa Gautam v. Subhra Chakraborty* said that "rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape". The issue was again taken up by the Law Commission of India in 2000 but the efforts were inconclusive.

There have been not many significant developments over the period of time but in 2012, as an aftermath of the Delhi gang rape case of 2012, Justice Verma Committee was constituted to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women.

The Committee submitted its report on January 23, 2013 and gave the following views regarding marital rape:-

"The IPC differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant."

### Recommendations made by Verma Committee

- i. The exception for marital rape be removed.
- ii. The law ought to specify that:
  - a. A marital or other relationship between the perpetrator

or victim is not a valid defence against the crimes of rape or sexual violation;

- b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
- c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

Though the committee had recommended the removal of the exception for marital rape but no steps has been taken by the legislation regarding it.

### Opposition

1. The Indian social structure do not approve of women who 'take up arms' against their families, especially husbands. The wife's role is traditionally defined as homemaker, soft and obedient by nature who regards her husband as next to god( the concept of (Patiparmeshwar).
2. Sex (even though forced) is viewed as a marital obligation.
3. Sex is a taboo in Indian Society. Thus, women's sexual rights or their right to say no has never been talked about.
4. Section 122 of the Indian Evidence Act prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for an offence against the other. Since, marital rape is not an offence, the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in court, combining the provisions of the DVA and IPC will be a nearly impossible task.
5. It would give unlimited power in the hands of the wife which she could use as a bargaining chip every now and then to get her whims and fancies and her demands fulfilled. The husband would be forced to become a toy in the hands of his wife. The very law which was made to promote equality in the marriage would be used as a tool to hamper equality. Moreover it would ruin the sacred institution of marriage.

### Conclusion

Several states in the world have already recognized marital rape as an offence, breaking the age old male chauvinistic viewpoint. It was an old notion that women are male's sexual property. Now in a marriage both are equals.

The constitutionality of the exception of section 375 permitting a man to have sexual intercourse with his wife even without her consent can also be challenged on the basis of article 14 and article 21 of the Constitutional of India.

Article 14 protects a person from state discrimination. But the exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. A married woman is also a woman and rape by a stranger or her own husband with whom she cohabits is a rape nonetheless. Therefore such a classification between a rape by a stranger and a rape by her own husband is deemed to be unreasonable.

Article 21 provides the fundamental right to life and to live with human dignity. The current law only provides a small relief to wives not cohabiting with their husbands but what it fails to look at is that consent of a woman is the elementary condition for a sexual act and taking away the element of consent from a married woman when cohabiting is not only immoral but also unconstitutional. With the occurrence of an act like marital rape the right to live with dignity of a woman as interpreted under Article 21 of the Indian Constitution is directly violated and if we carefully look it can be clearly seen that a Marital Rape fulfils the first two essentials of Rape as defined in IPC i.e. firstly against her will and secondly without her consent but still due to the exception provided it does not fall under Section 375 (Rape) nor is punished under Section 376 (Punishment for Rape).

The Constitution of India also in its Article 51A (e) states that it is the fundamental duty of every citizen of India to denounce practices derogatory to the dignity of women.

As for the current scenario marital rape can be only seen as the legally permitted rape which takes away the element of consent from a married woman. The legislative framework of India has no provision to aid the plight of a married woman who constantly faces the evil because of the detrimental notion of the Indian society considering sex as an obligation. It is as if after marriage a woman ceases to be under the jurisdiction of the Indian law and enter the jurisdiction of a single man who would govern her life from then.

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