

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

EDITORIALTEAM

EDITORS

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019



Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

MARITAL RAPE: THE LEGAL RAPE

AUTHORED BY - DHARANI RAI

ABSTRACT

Marriage is a relationship of love and mutual respect towards each other violence has no place there. But in Indian culture there are different types of violence against wives one of which is marital rape, where the consent of the wife irrelevant. Marital rape refers to undesirable sexual intercourse by a husband with his wife without her consent or consent obtained by force or threat of force or physical violence. Rape is a rape whether it is a stranger rape, date rape or marital rape, but unfortunately our Indian law doesn't recognize marital rape as a crime as it is exempted from a definition of rape under section 375 of I.P.C(section 63 of Bharatiya Nyaya Sanhita 2023). Rape is not just a assault against women but it is a infringement of the fundamental right to life and personal liberty of a women any relation between a victim or a perpetrator cannot change it.

Keywords: Marital rape, consent, sexual violence, patriarchy

“The secret of a happy marriage is finding the right person. You know they're right if you love to be with them all the time.” _ Julia Child

INTRODUCTION

According to the National Family Health Survey 5 (2019-21), “Among married women aged 18-49 who have ever experienced sexual violence 83% report their current husband and 13% report a former husband as perpetrator.”¹But ironically, the Indian Government recently has opposed petitions in the top court that seek criminalization of marital rape saying it would be “excessively harsh”. Spousal rape is now disgraced by international conventions and increasingly criminalized by more than 100 countries, including Britain which criminalized it in 1991. But India remains among the countries like Pakistan, Afghanistan and Saudi Arabia

¹ National Family Health Survey (2019-21), <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece> (Last visited on 26th February)

which didn't criminalize the marital rape.²

These figure raises the serious concern regarding the problem of marital rape in India, where the victim doesn't have any remedy. This notion of the government firstly, creates an unjustified distinction between the rape victims based on their relation with perpetrator. Secondly, it shows the patriarchal mindset or ideology of the government of India.³

The above data somehow makes it clear that the patriarchal mindset of the people are still prevailing in the society. This concept of marital rape was not known earlier. Even though it was always prevalent in the society, people was not aware about how wrong it was and is actually the violation of fundamental rights of women. The women itself considers it as right of her husband and they still do.

MEANING OF MARITAL RAPE

Marital rape is often referred as a conjugal rape, is when a partner engages in sexual conduct without the other person's consent. Marital rape is when a man engages in sexual conduct with his wife against her will, out of risk to their physical safety. It is the term used to describe acts of domestic abuse and sexual abuse that takes place between the married couple. Consideration of marital rape as legal act in India inculcates a fear of insecurity in the hearts and minds of the women and also impacts on the women's sexual rights in India and gender equality.⁴

Marital rape broadly, may be classified in 3 parts as

- *Battering rape:* In this type the women experiences both physical and sexual violence in the relationship. It is the most common form of marital rape. 48 percent of all cases of marital rape are considered as battering rape.
- *Force Only Rape:* In this type of rape, the husband uses only the amount of force necessary to coerce their wives. It is the second most common form of rape.

²BBCNews, https://www.bbc.com/news/articles/c80r38yeempo#amp_tf=From%20%251%24s&aoh=17312901239292&referrer=https%3A%2F%2Fwww.google.com&share=https%3A%2F%2Fwww.bbc.com%2Fnews%2Farticles%2Fc80r38yeempo, (Last visited on 26th February)

³ Urvashi Shahi, "Rape behind closed doors": Making the case for removal of exemption clause, Vol. 45(4)2018, Indian Bar Review (A Referred Journal)

⁴ Pratiba Sahu, Marital Rape : An Impediment On Women's Rights In India,(Volume 9, Issue 1, 2023), International Journal of Law and Social Sciences

- *Obsessive rape or sadistic rape:* These assault involve torture and or perverse sexual acts and are often physically violent.⁵

HISTORICAL VIEW ON MARITAL RAPE:

About 10 million marriages takes place in India annually. In India marriage is considered as a holy institution in a society, it is a collaboration of two souls, a sacred bond based on trust, mutual love, and respect towards each other followed by rights and duties arising out of it. As observed by a British jurist Matthew Hale: “Marriage was a legal contract by which a women ‘gave herself’ to her husband for life”. It is because of this vague notion it is considered that the women has surrendered herself to her husband and he has all the legal right over his wife and he can fulfil his sexual desire through his wife in accordance with her will in a peaceful manner or even without her will and against her consent in a forceful manner.⁶

The Rigveda mentions about the rape. The victim is Ushas (Dawn), who flees to the cave, traumatized. She is then befriended by minstrel rishis who offer her support and singers gather in front of the ushas’s cave praising her radiance and persuading her to come out. Societies did not judge her rather rallied her aid and helped her to emerge from post traumatic depression into a happy and normal life. In one of the hymns rapist is punished, one of the arrow is shot on him.⁷

Vatsyayana in his Kamasutra warns the husband (especially in case of arrange marriages) not to force themselves on their wives: “ women, being of a nature, want tender in the beginnings, and when they are forcibly approached by a men with whom they are slightly acquainted, they sometimes suddenly become haters of sexual connection, and haters of male sex. The man there fore approach the girl according to their liking.”⁸ But sadly the human race with evolution stopped following what is there in the scripture and considered women as a race weaker race and men have a dominance over them, and gradually this rape culture started to develop in India from time to time.

⁵ Abhayan, Types of Marital Rape, Legal Service India E-Journal, (15 March 2025 8.36 pm), <https://www.legalserviceindia.com/legal/article-5571-types-of-marital-rape.html>

⁶ Supra note 5 (64-65)

⁷ Brishti Guha, The Moderns of Ancient India, TOI Edit page, https://timesofindia.indiatimes.com/blogs/toi-edit-page/the-moderns-of-ancient-india/#amp_tf=From%20%251%24s&aoh=17319023831275&share=https%3A%2F%2Ftimesofindia.indiatimes.com%2Fblogs%2Ftoi-edit-page%2Fthe-moderns-of-ancient-india%2F, (Last visited on 26th February)

⁸ Ibid

- **Ancient Societies:** Historically the rape and sexual violence were often used as a tool of war and women were treated as spoils of war. In Mahabharata the Draupadi was molested in the public. But sadly this molestation is camouflaged as Krishna's divine intervention is praised but there was no protest that the her husband and family didn't intervene. Ramayana also revolves around the abduction of a women.
- **Middle Ages:** Rape was treated as a property crime, with fines or compensation being paid to victim's family or husband, rather than focusing on the violation of of the victim's right. Marital rape was not recognized as crime, as women were considered as a property of their husband.
- **Colonialism:** European colonisers frequently used sexual violence as a means of asserting dominance over a indigenous populations.
- **Early Modern Period:** In a Victorian era the rape was often seen as an attack on a woman's purity and honour. In many cases, victims were blamed for the assault, and perpetrators could escape punishment if they married their victims.
- **Legal Changes:** Over the year many legal reforms have taken place to address rape and sexual assault more effectively. These includes lowering the burden of proof, providing services for the rape victims, increasing public awareness⁹ and even many countries recognised marital rape as a crime but not India.

LEGAL POSITION IN INDIA:

Section 375 of Indian Penal Code 1860 (section 63 of BNS 2023) defines rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation, or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case, if she is under 18 years of age"¹⁰ In 1860 minimum age of consent is 10 years. Exception 2 of this section provides that "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."¹¹ Thus IPC which was drafted at 1860 didn't recognise marital rape as a crime.

⁹ Badre Afshan, Dark World Of Rape Culture In India, Mainstream Weekly, VOL 61 No 39, <http://www.mainstreamweekly.net/article13818.html> ,(Last visited on 26th February 2025)

¹⁰ Manik Tindwani, <https://lawfoyer.in/legal-provisions-on-rape-in-indian-penal-code> (Last visited on 26th February 2025)

¹¹ India Code, https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=424 , (Last visited on 26th February 2025)

For almost 30 years after the enactment of IPC 1860, rape laws remained same in India. Thereafter, a number of incidents in Bengal in which the child wife died due to consummation of marriage resulted in lot of agitation against the ambit of the offence and age of consent. One of the popular case was *Queen Empress v. Haree Mohan Mythee*¹²: In this case Phulmonee Dasse, who was eleven years and three months old when she died as result of rape committed on her by her husband. The medical evidence showed that she had died of bleeding caused by ruptured vagina. In this case it was held that the husband didn't have the right to enjoy the person of his wife without regard to the question of safety to her.¹³

Later the Indian Criminal Law (Amendment) Act 1891 raised the age of consent to 12 years both in cases of marital and extra marital rape. Then at 1925 age of consent in case of marital rape raised to 13 years and other rapes raised to 14 years, this remained the same even after the passing of child marriage restraint act 1929 which fixed the minimum age of marriage to be 14 years. Later on at 1940 with the with the amendment of child marriage act age of consent also raised to 15 years in case of marital rape and 16 years in case of other rape. Subsequently at 2013 the infamous Nirbhaya case lead to the formation of Justice Verma Committee and as a result criminal law amendment act 2013 was adopted which increased the age of consent to 18 years but no changes was made in case of marital rape and later at 2017 through amendment the age of consent in case of marital rape got increased to 18 years.¹⁴

In India marital rape is a civil offence under Protection of women from Domestic Violence Act 2005 that is it exists defacto but not de jure. Only two groups of women are covered by rape legislation in India- those being under age of 18 years and those who are separated from their husband. In 1983 Section 376A was added in IPC 1860, which criminalised the rape of a judicially separated wife, This amendment was based on recommendations of the Joint Committee on the IPC(Amendment) Bill, 1972 and the law commission of India. The committee rejected the contention that the marriage is the license to rape. Thus husband can now be imprisoned upto 2 years, if there is sexual intercourse with his wife, secondly without the consent, thirdly she is living separately from him.¹⁵

Recently the Indian government opposed the petitions in the top court that seek to criminalise

¹² Queen Empress v. Haree Mohan Mythee (ILR 1891 Cal 49)

¹³ Supranote 3 (189)

¹⁴ Ibid (189-192)

¹⁵ Supranote 4 (174-175)

the marital rape saying that it would be “excessively harsh”. The federal Home ministry told the Supreme Court that “a man doesn’t have a fundamental right” to force sex on his wife, there were enough laws to protect married women from sexual violence.¹⁶

JUDGEMENTS AND RECOMMENDATIONS ON MARITAL RAPE:

In the case of the *Harvinder Kaur vs. Harmander Singh*, The Delhi High Court held that the Constitution of India could not intervene in household matters as it would destroy the institution of marriage. The court also stated, "in the privacy of the home and married life neither Article 21 nor Article 14 of the Indian Constitution have any role to play". In the case of the *State vs. Vikash*, 2014, Special fast track court in Delhi stated that "the petitioner and respondent (accused) being a legally married husband and wife, the petitioner being major, the sexual intercourse between the two, whether forcible, cannot be considered as rape and no conviction can be fixed upon the accused." In 2016, Maneka Gandhi, then minister for Women and Child Development stated that due to illiteracy and poverty in India the concept of marital rape could not be applied here even if it is accepted and understood globally.¹⁷

SUGGESIONS:

Thinking of criminalising the marital rape, following two questions would pop up in my mind, that is:

1. Whether criminalising marital rape will effect the rights of men in the country ?
2. Whether only by criminalising the marital rape, the misery of the women in the country comes to an end ?

Coming to the 1st question the men’s right organisation and government of India has put forward certain arguments against the criminalisation of the marital rape in India. Some of the arguments are as follows:

- Difficulty in proving the cases of marital rape.
- Availability of adequate alternate remedies in the form of Section 498-A IPC(Section 85 of BNS).
- It would destroy the institution of marriage.
- Probability of misuse of such law is more.

¹⁶ Supranote 2

¹⁷ Bhagyashika Saptarshi, Marital Rape and Law, manupatra articles, <https://articles.manupatra.com/article-details/Marital-Rape-and-Law> , (Last visited on 26th February 2025)

Before writing this article, I have conducted a small survey among my friends and family circle, where most of my female friends were in support of criminalisation of marital rape whereas my male friends gave a mixed opinion on it. This doesn't mean that most of the men are misogynist but rather they are concerned about the misuse of the law. But only because the law may be misused the criminals cannot be left unpunished. Every law will have its own loophole, to look into this the appropriate committee has to be formed. I agree that if marital rape is criminalised some women may put a false case on their husbands, but as we all know before punishing any accused there is a court proceedings where the evidences are ascertained only after that the appropriate judgement is passed by the court, so accused is also given an opportunity to prove his innocence. And fine has to be imposed on a woman who has instituted a false case against her husband.

There is also an argument that, there is an alternative remedy for marital rape in the form of section 498-A (section 85 of BNS). But there is a difference between a crime of rape and cruelty and maximum punishment given under this section is imprisonment for a term of 3 years which is inadequate to punish offender of such grave offence.

Other argument is that such law would destroy the institution of marriage. But criminalising marital rape will only free the innocent souls from the clutches of her husband. Criminalising Marital rape doesn't disturb the marriage, what actually destroys it is the rape committed by a husband on his wife.

Coming to the second question only by criminalizing the marital rape, women will not be free from the agony. Because as we all know, except the marital rape all other rape laws are well developed in India, but still today many of the rape cases go unreported because of the lack of awareness. So even after criminalising the marital rape women may not come forward to report it, as many of the women still believe that her husband has all the right over her body. Thus spreading awareness about such laws among people is more important. Awareness has to be spreaded through public campaign, movies and serials which influences the people more.

There is another argument that due to illiteracy, in India the marital rape cannot be criminalised but we all know that this question also arised at the time of introducing digital payment in India, which we have proved wrong so society may gradually adapt itself to the new law if marital rape is criminalised.

Another reason for the marital rape in India is the patriarchy. Here parents play a important role, it is their duty to teach their male child how to respect a women from very young age and also to teach that the doing dishes, cooking, washing cloth and all the other daily courses are not the duty meant only to the women but the basic duties which everybody need to learn to lead their life. Most of the victims of the marital rape are okay with their husband forcing them to have sex. They consider it to be the right of their husband which is not okay, but here we cannot blame women, because that is what they have been thought from the childhood, to cook for men, to serve the men first, wait until the men had their food which might not be the case in the modern household but we cannot deny that its still happening in the rural society.

CONCLUSION:

A marriage is the bond of trust and love, sexual intercourse is a normal commitment of marriage but use of force in sexual intercourse cannot be accepted. Under Domestic violence act the husband can be punished for sexual violence against a women with a matrimonial relief. But what is lacking is the criminalization of marital rape in our legal system. But right now our Indian laws provides a absolute immunity for a husband against rape laws. Marital rape is not a privilege of a husband, but is a injustice against a women which need to be criminalised.

1) REFERENCES:

- 2) National Family Health Survey (2019-21), (15 March 2025 8.19 pm), <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece>
- 3) BBCNews, (15 March 2025 8.24pm), https://www.bbc.com/news/articles/c80r38yeempo#amp_tf=From%20%251%24s&ao_h=17312901239292&referrer=https%3A%2F%2Fwww.google.com&share=https%3A%2F%2Fwww.bbc.com%2Fnews%2Farticles%2Fc80r38yeempo
- 4) Urvashi Shahi, “Rape behind closed doors”:Making the case for removal of exemption clause, Vol. 45(4)2018, Indian Bar Review (A Referred Journal)
- 5) Pratiba Sahu, Marital Rape : An Impediment On Women’s Rights In India,(Volume 9, Issue 1, 2023), International Journal of Law and Social Sciences
- 6) Abhayan, Types of Marital Rape, Legal Service India E-Journal, (15 March 2025 8.36 pm), <https://www.legalserviceindia.com/legal/article-5571-types-of-marital-rape.html>

- 7) Brishti Guha, The Moderns of Ancient India, TOI Edit page (15 March 2025 8.45 pm) ,
https://timesofindia.indiatimes.com/blogs/toi-edit-page/the-moderns-of-ancient-india/#amp_tf=From%20%251%24s&aoh=17319023831275&share=https%3A%2F%2Ftimesofindia.indiatimes.com%2Fblogs%2Ftoi-edit-page%2Fthe-moderns-of-ancient-india%2F,
- 8) Badre Afshan, Dark World Of Rape Culture In India, Mainstream Weekly, VOL 61 No 39, (15 March 2025 8.49 pm), <http://www.mainstreamweekly.net/article13818.html>
- 9) Manik Tindwani, (15 March 2025 8.52pm),<https://lawfoyer.in/legal-provisions-on-rape-in-indian-penal-code>
- 10) India Code, (15 March 2025 8.57 pm) , https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=424
- 11) Queen Empress v. Haree Mohan Mythee (ILR 1891 Cal 49)
- 12) Bhagyashika Saptarshi, Marital Rape and Law, manupatra articles, (15 March 2025 9.06 pm), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

