

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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SEX OR RAPE? THE DIFFERENCE IS CONSENT

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ABSTRACT

“Woman is not a sex object; Marriage is not a Sex contract; Force is not a right Act”

This article is intended to speak on behalf of commiserate souls who were subjected to marital rape. We all know how rape vilifies the woman but no one came forward to voice against the male chauvinists who often perplexes pleasure with compulsion. Women were been inclined to sexual objectification in her early period of teenage and it almost continues till her demise. She neither conveys her preference nor refrains from consummation when she doesn't hanker. Nevertheless, if she speaks for herself she is condemned of her chastity by a bunch of hypocrites and constantly pressurized to think about her family thereby neglecting her own desires. Furthermore, Indian Penal Code jeopardizes the life of a taciturn woman by decriminalising the marital rape under Exception clause (2) of Section 375 which ultimately encompasses higher vulnerability and to punt their own emotions completely. The new act Bharatiya Nyaya Sanhita, 2023 which will upheaval the society to a greater cause anachronistically disregarded the interpretation of marital rape under Section 64. The authors of this article aimed to unravel the melancholy of victims and revalorize the optimal solution for them.

INTRODUCTION:

We the authors of this article commensurate our opinion by quoting a poem encountered by the renowned social reformer and independence Activist “Mahakavi Subramania Bharati” who reiterated the belief of woman empowerment through his inspirational songs which are patriotic and yet gallant to celebrate the Idea of Womanhood in Southern part of India. “PUTHUMAI PENN” meaning “New-age Woman” was his magnum opus poet which envisaged that women must be given their own liberation, Dignity and Status by the society to look after her and therefore she may assuage herself in terms of intelligence, Ability, Strength to stay in par with the man in every other field.

“Nimirntha nannenjum naer konda paarvaiyum
 Nilathinil yaarukkum anjaatha nerigalum
 Thimirntha gnanach cherukkum iruppadhaal
 Semmai maadhargal thirumbuvathillaiyaam”

The above line expresses that the new age woman must endow her thoughts of wisdom and set her ideologies indubitably, step forward retaining a fierce glare without looking behind or qualm about it.

India known for curbing out the age-old religious superstitions, erroneous discrimination, reckless traditional practices which obstructed the growth of Woman, by implementing sophisticated judicial pronouncements and bewildering government schemes which had remarkably established the path for Gender Equality, Reservation Quota, Equal Inheritance Rights, Right to Divorce, Right to against Workplace Harassment, Maternity Benefit and so on. Nevertheless, these climate changes still retrenches the reproductive freedom of woman, persist the rapist culture, detest the ethnicity and dignity of woman by delineating her corpus lewd in random social media advertisements, Movies, Music etc and thereafter neglecting the Importance of Criminalizing Marital rape which is at great peril. Marriage *ipso facto* merges husband and wife with one another, serving notion of “implied consent” which enables husband to acquire absolute fidelity. In the result, it gives the men the sovereignty to have ownership and unrestricted access over the corpus of Woman. Furthermore, with accordance to UN WOMEN STUDY REPORT of 2018, it laid out that 1 in every 7 woman were been raped by their own spouse which instigates the risk of PTSD (Post Traumatic Stress Disorder), Depression, Agitation over a period of time. In the bottom Line, we the authors will knuckle down the onerous blunder in the municipal laws and urge to sought for criminalization under all circumstances.

COMPARATIVE ANALAYSIS ON MARITAL RAPE:

BASIS OF DISTINCTION	POLAND	MALAYSIA	USA	NEPAL
BACKGROUND/ HISTORY	<ul style="list-style-type: none"> It is the first country to criminalise marital rape. 	<ul style="list-style-type: none"> Malaysia is a country which still hasn't explicitly 	<ul style="list-style-type: none"> The US was following the Hade's – Implied Consent 	<ul style="list-style-type: none"> Before 2000, Muluki Ain (criminal law) followed by the Nepal did not

<ul style="list-style-type: none"> • Before 1969 –it did not criminalised marital rape in its Criminal Code 1932. • After second world war there were many protest for marital rape.¹² • There was opposition to include marital rape under Chapter for Offences of Morality, so it was included under chapter Offences against freedom and it was followed as such from January 1, 1970³ 	<ul style="list-style-type: none"> • Malaysia was also following the Implied consent theory of Justice Hale for a long time. • The section 375 A of the Penal Code of Malaysia does bring the marital rape in an indirect way and that there would be no mention about marital rape in this act. • The section 375 A was in effect from the year 2007. 	<p>criminalised marital rape.</p> <p>Theory for the marital rape, where once a women gets married she gives consent to sexual relation for her entire life.⁴</p> <ul style="list-style-type: none"> • In 1978 – Oregon v Rideout⁵ case had made the public go frenzy about the marital rape issue in this case, eventhough the husband was acquitted in it. • In 1987 – only 12 states 	<p>criminalise the marital rape.</p> <ul style="list-style-type: none"> • After the landmark case of Forum for Women, Law and Development v His Majesty’s Government/Nepal⁸, the court held that marital rape immunity is unconstitutional and that it is against the ICCPR • In 2006, the marital rape was criminalised under section 3 of rape.⁹ • In the case of Meera
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¹J. E. Hasday, Contest and Consent: A Legal History of Marital Rape, California Law Review, Vol. 88, No. 5 (Oct., 2000)

²D. E. H. Russel, Rape in Marriage, New York 1982

³ Aneta Michalska-Warias, Marital Rape in Poland from the Legal and Criminological Perspectives, Prawo W Działaniu, Sprawy Karne, 26/2016

⁴ See, Judgements of Justice Hale, recorded in “History of the Pleas of the Crown”, D. E. H. Russel, Rape in Marriage, New York 1982, Dobash, R. E., & Dobash, R. P. (1979). Violence against Wives: A Case against the Patriarchy. New York, NY: Free Press

⁵ Oregon v Rideout ,303 Or. App. 504

⁸Writ No. 55 of the year 2058 BS (2001-2002)

⁹Harsh Mahaseth, Nepal’s Parliament raises punishment for marital rape – but differentiates, South Asia Journal, <https://southasiajournal.net/nepals-parliament-raises-punishment-for-marital-rape-but-differentiates/> (23-02-2024, 21.03 P.M.)

	<ul style="list-style-type: none"> The present Criminal Code, 1997 of Poland also has the provision for marital rape in its Article 197. 		<p>criminalised marital rape⁶</p> <ul style="list-style-type: none"> In 1993 – all 50 states criminalised marital rape.⁷ 	<p>Dhungana vs. HMG¹⁰, the Supreme Court gave an directive order to include marital rape as a crime.</p> <ul style="list-style-type: none"> In the year 2018, Muluki Criminal Code, 2074 under section 219, it has increased punishment of marital rape.¹¹
Legal Position	Yes, it has criminalised in under Article 197, in Criminal Code of 1997	It is not explicitly criminalised, but it can be brought under the interpretation of section 375 A of its Penal Code	All states have criminalised the marital rape under its own law and differ from each other.	The marital rape has been criminalised under sec 219 of Criminal Code
Judicial precedent / the reason for criminalisation	The rationale behind the criminalisation of marital rape were the protest of the women after the	It still hasn't explicitly criminalised.	The case Oregon v Rideout ¹² was the turning point in the criminalisation of marital rape	The case of Forum for Women, Law and Development ¹³ , is the reason behind criminalisation of

⁶ Raquel Kennedy Bergen, Wife Rape, Understanding the Response of Survivors and Service Providers, Sage Publications, 1996.

⁷ Ibid.

¹⁰ Meera Dhungana vs. HMG, (NKP 2052)

¹¹ Report on Nepal: Contribution for the Special Rapporteur on Violence Against Women to the Human Rights Council, 2020.

¹² Oregon v Rideout, 303 Or. App. 504

¹³ Writ No. 55 of the year 2058 BS (2001-2002)

	second world war.			marital rape
Lacunae	It doesn't define about the degree or force or resistance for marital rape. As it may not penalise the husband, if the wife was only doing verbal protest and when she tolerated when he forced upon her.	It first needs to explicitly criminalise marital rape, as the interpretation may vary in every case. It should also make the offence gender neutral.	As each states in USA follow different law, it cant be accurately analysed. But it also lacks the clear definition of force for penalising.	It lacks a gender neutral law for marital rape.
Forced rape ¹⁴	✓	✗	✓	✓
Battering Rape ¹⁵	✓	✗	✓	✓
Combined Force and Battering rape ¹⁶	✓	✗	✓	✓
Sadistic rape ¹⁷	✓	✗	✓	✓

Judicial Development in India

Earlier in India, the women were merely treated as a property, regardless of gender, race culture nonetheless in the event of rape, the perpetrator would be liable to pay compensation only for deteriorating her modesty and would be acquitted after discharging his responsibility. It is certain that rights of woman are always transgressed in one way or another, anyhow the situation moved up now since many women have started to campaign in favour of #BREAK THE STEREOTYPE and demand for the equal rights as we vividly emancipated in the renowned Sabarimala judgement.

Still Today, the Implied Consent Theory of Justice proposed by Hale is been followed in India, it emphasize that once a women consents for marriage, it is often perceived as she had acknowledged

¹⁴Forced rape – where the husband forces himself upon his wife

¹⁵Battering Rape – where the husband beats his wife while raping her

¹⁶Combined Force-Battery Rape – where the husband uses both force and battery on his wife.

¹⁷Sadistic Rape – where the husband does all kind of perverse, strange and torturous act towards his wife

for sexual relation with her partner till her demise. As a result, it subverts her right to body privacy and reproductive rights¹⁸ which has been envisaged by Article 21 of the Constitution. The offence of marital rape is still not been criminalised because of the Marital Rape Exception (MRE) envisaged under section 375 of Indian Penal Code.

Despite, the resultant Protection of Women from Domestic Violence Act 2005 (PWDVA) scrupulously regards the marital rape as a offence but failed to advert it as a punishment.

The article (1) of Convention on the Elimination of All Forms of Discrimination against Women says that there should be no discrimination against violence of women based on marital status and CEDAW had also recommended to cast out the MRE, in spite of stringent regulation, it was never put into operation by the Government of India. In the contrary, India have duly signed and ratified this convention way before.

The Justice Verma Committee which was constituted on 2012, had also recommended the deletion of MRE, after examining that over 18.8% of women gets raped by their partners. However, it was never confabulated in Criminal Amendment Bill, 2013.

It must be duly acknowledged that even in the proposed novel criminal bill Bharatiya Nyaya Sanhita, 2023, there is no explicit provision for penalising marital rape yet have only increased the age of married women under the exception clause.¹⁹

We live in a society where there exists discrimination, defragmentation between married and unmarried groups, which has resulted in a malevolent stealth among men to assert his sexual desire over his spouse corpus considering as a legitimate privilege surpassed by the institution of marriage. Justice J.B. Pardiwala in the case of, Nimeshbhai Bharatbhai Desai vs State Of Gujarat²⁰, held marital rape should be recognised without any discrimination of marital status.

¹⁸Suchita Srivastava & Anr. vs. Chandigarh Administration, 2009 (9) SCC 1

¹⁹ Section 63 of Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023.

²⁰Nimeshbhai Bharatbhai Desai vs State Of Gujarat, 2018 SCC OnLine Guj. 73227

SOCIAL INNUENDO WHICH CAUSES JEOPARDY:

When we juxtapose pleasure in par with the danger, we might able to understand the significance of protecting the modesty of women and her sexual autonomy, in relevance with other form of property. Let suppose husband named 'X' cohabits with wife named 'Y' forcefully, manipulatively and coercively to ravel his own pleasure, the hustle transmutes enlivening sexuality into unmitigated danger which in return causes indefinite amount of impairment to Y's fundamental rights guaranteed by the Constitution of India under Article 14, 15(1), 19(1)(a), 21 and 23(1) as well as mental traumatisation. It is very challenging to accurate the victim data, since woman are reluctant to report anywhere appertaining to safeguarding their children, family loyalty, society insistence to live as a family and fear of effect of retribution to their inmate relation. The ubiquity of sexual experience is often emphasized in a dangerous manner, thus woman finds difficult to grasp, disagree to speak about pleasure suffers victimization at last. Consecutively, they were unable to deny the unwelcome sexual practices mended by their husband which amounts to sine quo non disruption of their personhood and moral virtue. The society per say thinks that Consummation before marriage is improper to the sacrament of family and where rape demolishes the fragment of the society nevertheless forced sex in a non consensual way neither root the flavour of non discrimination nor regard the idea of constructive autonomy.

Remember, "PLEASURE SHOULD BE OBTAINED WITH NO PRESSURE"

DEMEANOR SOLUTIONS:

- a. Ensuring Mental Security – Nothing is worth sacrificing than losing mental health for. Boundaries must be set even it is within the Family.
"DO NOT NORMALIZE YOUR PAIN FOR THE SOCIETY'S GAIN"
- b. Onus of Consent – Court must apply the test of analysing voluntary or involuntary penetration similar as that of, the victims of Rape.
- c. Cognizance of Offence – Marital Rape should be given recognition considering the severity/gravity of offence and the mental turmoil caused to the women.
- d. Awareness Campaign: The government shall extend his wings in implementing a separate specialized training and awareness campaign in providing education and to accord feasible solutions.
- e. Amicus Curiae – the judiciary must lend out their own separate committee to address the sufferings of taciturn Woman living in rural and urban areas.

Conclusion:

The continuous exemption of Marital Rape from the criminal laws will sabotage the bodily integrity of woman provided by the Indian Constitution. The resonance of criminalization should not be examined on culture which puts away the institution of marriage rather must be done on the Constitution. In the light of attitudinal legal Amendments, the MRE will definitely leave a straw in the wind to serious violation of woman values. How does a woman can voice out against the perpetrators to the police when the law itself shield them? Thus, legislation or judiciary must intervene to acknowledge this heinous crime which happens within the sacrament of relationship, similar to that of its momentous intervention in the realm of cruelty, divorce and dowry. Indian Judiciary and Executive Authorities must prove once again in deploying paramount consideration to this imperative phenomenon and yield polarized, efficient end result to promote woman empowerment in the upcoming era.

