

ISSN :2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

www.ijlra.com

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MARITAL RAPE: A NON-CRIMINALIZED CRIME

IN INDIA

Authored By- Mehak Sharma

ABSTRACT

Rape by a spouse is one of the worst crimes in India. Marital rape is nothing more than a crime of rape, it is the nature of rape. Married women are usually victims of spousal rape. Rape by a spouse is an aspect of marriage that is not covered by current law.

Rape is unlawful sex without the assent of a man because of physical drive or dangers, or due to deceitful demonstration of the perpetrator¹

This is one of the biggest threats to gender equality in India. It is such social evil that has existed in India for a long time and still causes great turmoil in India. There are many derogatory opinions about the idea of marriage law, but the criminalization of marriage law damages the marriage system and courts believe that it should not interfere with what happens between husband and wife. There are few people. Indian society has never seen marital rape as a problem. It is rarely rejected in Indian society for a variety of reasons. India is currently the seventh-largest country in the world, and the rate of increase in crime rates is very disturbing and embarrassing for a prosperous, multicultural, large and secular country like India. Marital rape is not only a major concern in the field of women's rights today, but also violates some constitutional provisions. The attitude of the Indian Parliament is no different in this regard. The Indian legislature is entrusted by the Constitution of India with the heaviest task of enacting legislation for national security, protection and development. However, parliamentarians have no interest in banning the evil of spouse rape from the country. Someone correctly points out that the growth and development of a country can be judged by its position and respect for women. The Indian judiciary offers little hope in this regard, but it is tied up because the legislative enactment is a privilege of the legislature, not the judiciary. There is no valid law on spouse rape in India. Whatever the laws that exist in India, they are not enough to curb evil things like spousal rape. To ring a spouse rape cat in India, some strict laws need to be enacted.

Keywords: Marital Rape, India, Section 375, Indian Legislature, Indian Judiciary.

¹SangamithraLganathan, More at Legal services India, "Marital Rape", (June28,2012), <http://www.legalservicesindia.com/article/2369/Marital-Rape.html>

Introduction

When one mentions the word rape, the tendency is to think of someone who is a stranger, a malicious person. Usually one does not think of rapes in the context of marriage. Women themselves find it difficult to believe that a husband can rape his wife. After all, how can a man be accused of rape if he is availing of his conjugal rights? It is indicative that a woman has no right to her own body, and her will is subject to that of her husband. Marital rape is the most common. A widespread and repulsive form of masochism in Indian society, which is well hidden behind the iron Marriage curtain. There are various legal definitions, but spouse rape can be defined as undesirable. Forced sexual intercourse or penetration (vaginal, anal, or oral), force threat, or My wife can't agree². Despite the epidemic of marital rape, this problem continues. Social scientists, practitioners, the criminal justice system, and A larger society as a whole. When a woman is compelled by her husband to participate in sexual encounters after marriage against her will and without her consent, this is referred to as marital rape. It is defined as one partner's forceful sexual intercourse with the other. In the last few years, the rate of marital rape has risen. The mental agony of being raped, the trauma of being victimised by her husband, the helplessness of staying silent, and the lasting scars of these episodes are all key parts of marital rape.

In light of this, the idea that a woman (wife) has to have sex with her husband irrespective of her will, consent, health, etc, is unacceptable to a civilized society.³ People in India are protected from crimes conducted on the streets, but women are vulnerable to crimes done within their own homes that go undiscovered. When it comes to the events in India, the concept of marital rape has always been in the spotlight. Although India has progressed in practically every aspect, sexual assault within the four walls of a married house is considered a private, family affair and is not subject to public examination by institutions such as the courts. In India, marital rape is not a crime, and the criminal justice system has failed to provide justice to married women who have been sexually assaulted. Marital rape is a widespread crime that goes unreported. Although the true rate of marital rape in India, like in most other nations, is unknown, several studies undertaken in India suggest that it is widespread, despite the refusal of many officials to admit it. India's laws have focused heavily on rape, sexual assault, and sexual abuse, but have largely ignored the concept of marital

²Dr. Bhavish Gupta & Dr. Meenu Gupta, More at Journal of Galgotias University, Marital Rape, (August 21, 2013), <https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf>

³Dr. Bhavish Gupta & Dr. Meenu Gupta, More at Journal of Galgotias University, Marital Rape, (August 21, 2013), <https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf>

rape. Not that marital rape doesn't exist in India, or that it is uncommon, but the central government appears to believe that it would undermine family values and be a strong blow to the institution of marriage. They further said that if the husbands are granted a formal role, they will be harassed. The act of starting sexual intercourse with one's spouse without the other spouse's consent is sometimes referred to as marital rape. To assure progenies and the survival of the family line, the lady had to offer her husband sexually, with or without her consent. This convinced the woman that being sexually available to her husband at all times was a need and a duty, and that she could never refuse her husband's wishes. However, these rules were enacted at a time when anything was socially acceptable. Women were believed to be man's slaves, and heinous practices such as Sati and child marriages were common, but the situation in the country altered with Raja Ram Mohan Roy's movement. India is today the world's seventh-largest country, and the rate at which crime rates are rising is disturbing and embarrassing for such a vibrant, multicultural, vast, and secular country. Marital rape is not just the most pressing issue in the realm of women's rights right now, but it also breaches several fundamental prohibitions. Someone correctly stated that a country's growth and development may be measured by the status and respect shown to its women.

The Impacts Of Marital Rape

Women who have been raped by their partners experience pain, humiliation and distress.⁴In India, marriage or a family disagreement is considered a private business of the family, but it also infringes on a woman's right to defend her body when she is in an abusive relationship with her spouse or even her in-laws. She is subjected to domestic violence. Domestic violence is one of the most common forms of abuse perpetrated against women after they marry, whether physically, emotionally, or mentally. The tragic element of such a brutal act done against a lady is that, even though her family is aware of it, she is told to remain silent, and as a result, we frequently lose an innocent soul. In all of these situations, it destroys a woman's mental health; she is traumatised day and night, for weeks and months, and she is judged by society if she takes any steps to protect herself or is viewed as a woman who disobeys her husband.

⁴: The African Population and Health Research Center, More at Policy brief The African Population and Health Research Center, "Marital Rape and its Impacts: A policy briefing for Kenyan Members of Parliament", (May 8, 2010), <https://assets.publishing.service.gov.uk/media/57a08b20ed915d3cfd000b4e/aphrc-brief13.pdf>

Laws Guarding Marital Rape In India

1. Article 21: Right to Life and Right to Live with Human Dignity The Indian Constitution's Article 21 deals with the right to life and personal liberty. "No one shall be deprived of his life or personal liberty unless by a procedure established by law," it adds. Without a doubt, the right to life is the most fundamental of all rights. All other rights contribute to the overall quality of life and rely on the presence of life to function. Because human rights can only be tied to living beings, the right to life is likely to be the most important because, without it, none of the other rights would be meaningful or useful. There would have been no Fundamental Rights worth mentioning if Article 21 had been understood in its original spirit. In the landmark case, *Chairman, Railway Board & Others v Chandrima Das & Others*², a foreign woman, Smt Hanuffa Khatoun, was raped at the Yatri Nivas by four men from the Railway Department, and then raped again by a member of the Railway Department, where she was gagged and abused. Hearing her screams, the residents of the rented flat rescued her, and the Court awarded her Rs10 lacs in compensation. In this sense, the Supreme Court stated that rape is not just a crime against the victim, but also a crime against society as a whole. Rape hurts both society and the victim.

2. The Indian Penal Code, 1860

As per current law, a wife is presumed to deliver perpetual consent to have sex with her husband after entering into marital relations. While unwilling sexual contact between a husband and a wife is recognized as a criminal offence in almost every country of the world.⁵ As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

1. When the wife is between 12 – 15 years of age, the offence is punishable with imprisonment upto 2 years or fine, or both;
2. When the wife is below 12 years of age, the offence is punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.

⁵Sarthak Makkar, *More at Harvard Human Rights Journal, "Marital Rape: A Non Criminalized Crime in India"*, (January 1, 2019), <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

3. Rape of a judicially separated wife, an offence punishable with imprisonment upto 2 years and a fine;

4. Rape of a wife above 15 years of age is not punishable.

Section 319 – Hurt Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320- Grievous Hurt The following kinds of hurt only are designated as "grievous":- First- Emasculation. Secondly- Permanent privation of the sight of either eye. Thirdly- Permanent privation of the hearing of either ear and Fourthly- Privation of any member or joint. Fifthly- Destruction or permanent impairing of the powers of any member or joint. Sixthly- Permanent disfiguration of the head or face. Seventhly- Fracture or dislocation of a bone or tooth. Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 321- Voluntarily causing hurt Whoever does any act to thereby cause hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said: "voluntarily to cause hurt".

Section 322- Voluntarily causing grievous hurt Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous, and if the hurt which he causes grievous hurt, is said: "voluntarily to cause grievous hurt."

Section 339- Wrongful restraint Whoever voluntarily obstructs any person to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Section 349- Force A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact effects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

Section 351- Assault Whoever makes any gesture, or any preparation intending or knowing. it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force on that person, and is said to

commit an assault.

Section 375-protects husbands from prosecution by wives on charges of rape.⁶ Rape A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

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, because 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 sixteen years of age.

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3. Justice Verma Committee Report (2013)

The Justice Verma Committee was established in 2012 in the aftermath of the Delhi gang-rape case to recommend changes to criminal law that would allow for a faster trial and harsher punishment for criminals accused of sexual assault against women. the Justice J.S. Verma Committee, in its landmark report on gender laws, had recommended setting up of an employment tribunal instead of an internal complaints committee (ICC) in sweeping changes to the Sexual Harassment at the Workplace Bill.⁷The Committee's report on marital rape was submitted on January 23, 2013, with the following conclusions: "The IPC distinguishes between rape within

⁶ **Vageshwari Deswal**, More at Times of India, Marital Rape,(February 12, 2022),<https://timesofindia.indiatimes.com/blogs/legally-speaking/marital-rape-demystifying-consent-within-marriage/>

⁷**Jagriti Chandra**, More at The Hindu,Marital Rape,(OCTOBER 15, 2018),<https://www.thehindu.com/news/national/2013-justice-verma-panel-report-wanted-changes-to-sexual-harassment-law/article25221588.ece>

marriage and rape outside marriage." Sexual intercourse without consent is banned under the IPC. However, there is an exception to the crime of rape in the case of unconsented sexual contact between a husband and his wife. The exception for marital rape should be deleted, according to the Committee. Marriage should not be viewed as a binding agreement to engage in sexual behaviours. As a result, the relationship between the victim and the accused should not be relevant in determining whether the complainant consented to the sexual conduct." The panel based its findings on court rulings from around the world: "Our view is supported by the judgement of the European Commission of Human Rights in C.R. v UK, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim," the 630-page report stated, slamming popular beliefs on the subject.

4. Criminal Law (Amendment) Act (2013)

The Criminal Law (Amendment) Act, 2013 (Nirbhaya Act) is an Indian law passed by the Lok Sabha on March 19, 2013, and the Rajya Sabha on March 21, 2013, that amends the Indian Penal Code, the Indian Evidence Act, and the Code of Criminal Procedure, 1973, to address laws relating to sexual offences. The 2013 Criminal Law (Amendment) Act¹⁵ refuses to add marital rape in the IPC, and rape of a separated wife by a husband still carries a reduced penalty. The exclusion for rape committed by a man on his wife when she is over 15 years old remains in the Act. Only rape perpetrated within the confines of a marriage when the spouses are living apart is punishable. Not every 'non-consensual' sexual conduct is rape, according to the law. Even though the wife and her husband are no longer married, the law will be 'understanding' and 'lenient' towards him if he rapes her because she was "formerly his wife." This means that the Act still views the wife as the husband's sexual property, rather than a person with the same right to say "yes" or "no" to sex as any unmarried woman. To protect women from sexual assault in marriage, this rule needs to be seriously reconsidered. In this context, the government should consult widely with women's organisations as part of its reform of rape and sexual abuse laws and procedures.

5.The Protection Of Women From Domestic Violence Act **(2005)**

The Protection of Women from Domestic Violence Act 2005 is an Act of the Parliament of India enacted to protect women from domestic violence. It was brought into force by the Indian government and the Ministry of Women and Child Development on 26 October 2006. The Indian Domestic Violence Act classifies marital rape as a type of domestic violence that has a shorter prison sentence than non-marital rape. 17 In India, this is the sole means to punish marital rape, and it is a civil rather than a criminal procedure. If a woman has been the victim of marital rape, she can seek judicial separation from her husband under this Act. A wife's sense of uncertainty and anxiety is heightened when she is subjected to sexual assault by her spouse. On the altar of marriage, her human rights are sacrificed. However, this is simply a patchwork regulation with numerous loopholes. However, the passage of particular domestic violence legislation has paved the way for legislation criminalising marital rape since it reflects a shift in the state's non-interventionist approach to family life. Spouse rape reflects personal adversity. It's not just about raping women Violation of their love and trust, not just their bodies. Being sexually assaulted by her husband Wrap them in a sense of anxiety and fear. Their human rights are sacrificed at the altar. Before. Indian criminal law has treated this form of rape in a very fragmented way. Various IPC provisions related to sexuality not only strengthen Victorian morality but also Women's laziness. This makes it clear that the law is considered the saviour of the victims. Inappropriate and inadequate to protect the interests of those affected by spousal rape. The basic argument in favour of these so-called "laws" is consent to marriage. In itself, it includes consent to engage in sexual activity. But implicit consent to engagement Engaging in sexual activity does not mean agreeing to be exposed to sexual violence. It can often be felt It is considered that rape by a spouse has been agreed upon by a woman, like sexual activity in sadomasochism. violence. However, rape and sex cannot be distinguished by violence alone. Violence creates fear and anxiety, which leads women to submit to sex and more. It cannot be interpreted as consent to sex. This fear can be exacerbated by their numbness. After fulfilling her husband's wishes. The difference between consent and disagreement. Opposition is the basis of criminal law.

The Madras High Court in the case, *Vandhana v. T. Srikanth*⁸ further stated the Protection of Women from Domestic Violence Act, 2005 “is an Act to provide for more effective protection of

⁸*Vandhana v. T. Srikanth*, (2007), SCC (India)

the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto”.

Judicial Stand

Follow the history of a court ruling that a husband has done serious harm to his wife. The court in the case of Queen-Empress v. HareeMythee⁹ found that the law applies to married women. Rape does not apply between men and women over the age of 15. Even if women exceed it After the age of 15, her husband has no right to ignore physical integrity. It is a situation where sexual intercourse is likely to be fatal. In this case, the husband Under Article 338 of the Indian Criminal Code, was convicted of tearing his 11-year-old wife's vagina, causing bleeding and dying. In Emperor vs. ShahuMehrab, her husband was convicted under Section 304A Indians Criminal law to kill his child's wife by deliberate or negligent acts of sexual intercourse In Sareetha vs. T. Venkata Subbaih,¹⁰ the Andhra Pradesh High Court held: “There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person” If State-enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman's right to privacy is equally violated in case of nonconsensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution, are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association. The Supreme Court, in the State of Maharashtra vs. Madhukar Narayan Mandikar, has referred to the right of privacy over one's body. In this case, it was decided that the prostitute ha0d The right to refuse sexual intercourse. Sadly, all the strangers are raped Becoming a criminal, all women except her wife were given the right to privacy. Authorities withhold consent and provide for the right to refuse sexual intercourse.

The recent case of NimeshbhaiBharatbhai Desai v. the State of Gujarat,¹¹2018 observed that a wife is not a chattel and a husband having sexual intercourse with his wife is not merely using a property, he is fulfilling a marital duty with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing his wife to engage in a sexual act without her full and free consent. Furthermore, the Court urged that the time is ripe that

⁹Queen-Empress v. HareeMythee (1890)

¹⁰Sareetha vs. T. Venkata Subbaih (1983), SCC (India)

¹¹NimeshbhaiBharatbhai Desai v. the State of Gujarat (2018), SCC(India)

the legislature intervenes and goes into the soul of the issue of marital rape as it is a serious matter which unfortunately is not attracting serious discussions at the end of the Government. The Court however noted that as per the current legal position the wife cannot initiate proceedings against her lawfully wedded husband for the offence of rape punishable under Section 376 as the idea is that, by marriage, a woman gives irrevocable consent to her husband to have sex with her any time he demands it. The Bench however strongly stressed that marital rape is not merely a concept and stated, "It is time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status."

Violation Of Fundamental Rights

The marital rape exception infringes Articles 14 and 21 of the Constitution of India which guarantees the right to equality and equal protection, and of the right to life and personal liberty. ¹²Section 375 of the Indian Penal Code, 1860, states that sexual activity contrary to a man's free will or consent to a woman constitutes rape. However, there are two exceptions to this. The first exception states that "a medical procedure or procedure does not constitute rape." In the second exception, "sexual intercourse or sexual activity by a man with his wife" when a woman is 18 years of age or older is not considered rape. This provision is under constitutional review. Marital rape is not a criminal offence in India, but women can file proceedings under other provisions of the Indian Criminal Code such as Cruelty and could also file for a divorce. The exception placed "privacy of marriage as object above private of an individual within the marriage," according to the petitioner NGOs in the Delhi high court, violating multiple fundamental rights given to married women, including Articles 15 and 19(1)(a) of the Constitution. Exception limits a woman's ability to express herself sexually. A woman is not allowed to express her desire to have sex with her husband. It not only denies a married woman the freedom to say no, but it also denies her the ability to express a joyful yes. The prosecution for grievance injury, cruelty, or other violations for forced sexual intercourse could not replace the prosecution for rape because a wife's permission and desire are reduced to a nullity." The problem is that it has long been assumed that a marital relationship is sacrosanct. Rather than forcing the wife to worship her husband's every whim, especially sexually, mutual respect and trust are expected to flourish. Being raped by a known person, such as a family member, is far more traumatic, especially if you have to cohabit with him. How can the law overlook such a flagrant breach of a married woman's fundamental right to her body, which is meant to protect her from abuse?

¹² SoumaliRoy, More at ipleaders, "Marital Rape", (April 22, 2021), <https://blog.ipleaders.in/marital-rape-review-rights-women/>

Conclusion

The presumption of the wife as the exclusive property of the husband is maintained by the continued exclusion of marital rape from criminal law. Katherine O' Donovan put it this way. It is believed that in India, marital rape should be criminalised, as this may be accomplished by taking a rights-based approach to violence against women. Although Indian women's organisations have succeeded in raising public awareness and passing domestic abuse legislation, marital rape has not been fully criminalised by eliminating the distinction between marital and stranger rape. Marital rape, on the other hand, will not be criminalised or punished until politicians and society recognise women's individual rights within marriage. As previously stated, marital rape in India is not entirely criminalised. It is undeniably a significant kind of violence against women, deserving both public and governmental attention. Women who are raped by their spouses are more likely to undergo several assaults and often suffer long-term physical and emotional effects, according to research to date. Given the devastating consequences, it is evident that marital rape should be made a criminal offence. India is making progress toward positive legal reform for women in general, but more work is needed to ensure both legal and social change, which will lead to the criminalization of marital rape and a shift in underlying cultural assumptions about women in marriage. Although the Protection of Women from Domestic Violence Act protects most Indian women, it has many flaws, including the fact that it does not explicitly prohibit marital rape. However, the passage of particular domestic violence legislation has paved the way for legislation criminalising marital rape because it would reflect a shift in the state's non-interventionist approach to family life. Man and society have mistreated women in the past and continue to do so today. It is necessary to recognise her as a human being, move away from the outdated image of her being a mere property, and treat her with the respect and dignity she deserves. Marriage has been viewed as a licence to legalise unwilling sex by patriarchal power institutions. There is a total negation of the self-worth of a woman.