

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 COMPARATIVE LEGAL

ANALYSIS

Authored By- Nending Sonia

Abstract

Marital rape is an act where husband forcefully sexual intercourse with his wife without the consent. Marital rape has been criminalised in more than 100 countries and India comes within the 36th Countries that have not criminalised marital rape as crime. Section 375 of Indian Penal Code has defined all kind of rape but it does not recognised marital rape as rape within its ambit. Exception 2 of section 375 of IPC (herein Indian Penal Code) is the most controversial in the contemporary era, this is the exception which clearly says that sexual intercourse by the husband against the will of his wife, who is above the age of 15 years will not be considered as rape. The age was increased from 15 years to 18 years in case of Independent Thought v. Union of India (2017) 10 SCC 800. Institution of married is considered as sacred and therefore marital rape is not being criminalised in India. Further, the solemnization of marriage of two persons is taken as an implied consent between them. In India there is no legislation that deals with marital rape. On the other hand In U.S.A all the 50 states has criminalised marital rape. The law might differ from state to state but it has recognised marital rape as crime upholding the dignity, privacy, and respect of women as a human being without discriminating the right of women and man with regards to 'consent to have consensual sexual intercourse'. In this paper, researcher has try to analysed why marital rape is not criminalised in India and how this particular issue violates constitutional provision. Further, the researcher has also mentioned the law related to marital rape in the state of U.S.A and has also mentioned 'why' and 'why not' marital rape should be criminalised in India and suggestions.

Key words: Marital rape, Implied consent, criminalised, Constitution of India, Indian Penal Code, India, U.S.A

Introduction

The word 'consent' plays an important role in every aspect. Whether it has been given by men or women, anything against the will of a person is unacceptable. We live in the 21st century and many things have change till now, when we talk about the empowerment of women, simply using the word empowerment without creating difference in the status of women with regard to their will won't work. While even the parties under Indian Contract Act, 1972 has been given the right to make a contract as per their consent and if an agreement without consent is void then why not the consent of a wife is necessary while having a sexual intercourse with husband. It's been 75th years India got its Independence but still women are not fully independent and act freely by their own. While rape signifies sexual act by any men without the consent of women as an offence but it does not consider it as rape when it is done against the will of wife in a marriage. Rape law has recognised all forms of rape but it does not consider marital rape as rape. Right on one's self body and sexual autonomy is derived from Article 21 of Constitution of India, every individual have rights that state must protect, further one should always remember while enjoying one's liberty they should not interrupt or hampered other's liberty. In the case of A.K. Gopalan v. Union of India¹, the Supreme Court by the majority held that the 'personal liberty' in Art. 21 means nothing more than the liberty of the physical body ; Whether by nature or by law it is on women to have a choice to say 'yes' or 'No'. In Suchitra Srivastra v. Chandigarh Administration² the Supreme Court has held that personal liberty in Article 21 includes the right to make reproductive choice (to produce child or not to produce). In view of this women's right to privacy, dignity and bodily integrity should be respected.³

Meaning Of 'Marital Rape'

The three main component of rape include (i) sexual intercourse or penetration, (ii) against her will and (iii) without her consent. In marital rape these three elements are present; the only difference is the act is done by husband and is against the will and consent of wife in a marriage.

Now the institution of marriage in India is considered as sacred and therefore marital rape has not been criminalised in India yet. Thus, it violates women's right to refuse sexual intercourse against her will further it also violates her right to liberty recognised under Article 21 of Constitution of India. In more than 100 counties has criminalised marital rape as offence but India has still not

¹ AIR 1950 SC 27

² AIR 2010 SC 235

³ Dr. J.N. Pandey, Constitutional Law Of India, Fifty Third Edition

criminalised marital rape and therefore there is debate related to this particular issue.

- Here, the issue is that India is cultural and religious centric country and from the historical era they treat women as a property and have a mindset that women should be under the shadow of male figure. When we talk about the institution of marriage which in India is considered as sacred and therefore society is not ready to accept that rape can be done by a husband in a marriage and this is why unfortunately India is one of the country among the 36th countries which has not criminalised marital rape.

The issue in marital rape is that it violates certain fundamental right that have been given to all persons such as:

- It violates Article 14 of Constitution of India
- It violates Article 21

History Of Marital Rape

18th century English law had a set of rules where the wife was considered being dependent on her husband, incapable of independent existence. Husband and wife were marked as one entity, and all the rights of the wife (including her sexual rights) were subsumed by those of her husband⁴. Further, there is blind believed that it is impossible for a husband to rape his wife. Basically Sir Matthew Hale justified this believe by three separate theories: the implied consent theory, the unities of person theory, and the property theory⁵. The most common theory behind the impossibility of marital rape is the implied consent theory, which is structured around contract law⁶. The British Jurist Matthew Hale said that marriage is a legal contract by which a women 'gave herself' to her husband for life. He asserted that the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife had given up herself in this kind unto her husband, which she cannot retract⁷. This kind of backward thinking is and was present in India during 18th to 19th century. Consent or unities of person theory is another justification for not recognizing marital rape as rape. This theory stems

⁴ Vaishali Bansal & Soumali Roy, All you need to know about marital rape, Blog. ipleader, 19. May.22, 9:45 pm, <https://blog.ipleaders.in/need-know-marital-rape/>

⁵ Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, 39 Vanderbilt Law Review 481(2021), 8:25 pm

<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1484&context=vjtl>

⁶ Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, 39 Vanderbilt Law Review 481(2021), pg.483, 9:13 pm

<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1484&context=vjtl>

⁷ Adamo, Sonya A. Note, "The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries." American University International Law Review 4, no. 3 (1989): 555-589, 9:59 pm

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1682&context=auilr>

from the belief that when two people marry, they become one⁸. The being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage⁹. In other words women during 18th century were not considered as individual after marriage and was considered one this what the Indian culture also practice while performing saptapadi. In 1900 BCE in Babylon, a man could be sentenced to death for forcing sex upon someone's wife or daughter on the grounds of 'vandalising someone else's property'. The earliest law in the ancient world defined rape as property crime against the father or husband rather than the women herself and this is what the third theory i.e. property theory of Sir Matthew Hale. Under property theory, by marriage a woman becomes the property or chattel of her husband¹⁰. The same was stated by William Blackstone in 1753 when he defended the common law Doctrine of Coverture (the legal status of a married woman as her husband's property)¹¹. The goal behind this theory is to "inspire and perpetuate marital harmony. Under this view, sexual intercourse can never be rape because the husband is merely "making appropriate use of his property"¹². With this kind of mentality and morality the emphasis on women's chastity increased and rape began to be perceived as a threat that women faced outside the household, which their father and husbands had to protect them from. It was under the influence of these laws and attitude that the Indian Penal code was drafted in 1860. Section 375 of the Act categorically excluded the marital rape from the definition of rape. Later, to an century and half many activist come forward with regard to anti rape laws and till now 4 amendment have been done in Indian Penal Code, 1860 and has define various forms of rape but it has not define marital rape further the exception granted to marital rape still stands.

Comparative Analysis

Status Of Marital Rape In Usa:

Spousal rape is crime in USA today, but that wasn't always so, the English common law, the source of much traditional law in U.S.A had long held that it wasn't legally possible for a man to rape his wife¹³ which means while it was illegal for a man to force sex against a women without her consent, but it was legal for a man to rape his wife.

⁸ Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, 39 Vanderbilt Law Review 481(2021), 11:11, pg.483

⁹ A comparison of Judicial and Legislative Approaches, supra note 8, 481 at 483

¹⁰ Theresa Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, 39 Vanderbilt Law Review 481(2021), 11:11, pg.483

¹¹ Pallavi Prasad, Why it's still legal for Indian men to rape their wives, 11:43, <https://theswaddle.com/marital-rape-india-decriminalized-crime/>

¹² A comparison of Judicial and Legislative Approaches, supra note 10, 481 at 483

¹³ Rothman Lily, when spousal rape first became a crime in the U.S., 28. July.2015, <https://time.com/3975175/spousal-rape-case-history/>

In U.S.A, the British common law view that the contract of marriage includes the husband's "right to sex"—the wife having given consent for all time by entering the contract¹⁴; the traditional view of wives as the property of their husbands with which they could do as they pleased under common law¹⁵, and the public interest in promoting privacy and harmony in marital relationships, which discouraged the state from interfering in the relationships¹⁶. Before criminalising marital rape or spousal rape as offence, an 1857 case in Massachusetts was the first in the U.S. to recognize the "contract" justification for the marital defense to rape¹⁷. The "right" of a husband to sex with his wife also provided a husband with grounds for divorce if his wife refused sex.¹⁸

That idea stood for centuries. Then, in 1979, a pair of cases highlighted changing legal attitudes about the concept. The State v. Rideout (1978), the defendant- husband was acquitted of charge of rape. This was the first case of marital rape tried under Oregon's revised law allowing such prosecutions¹⁹and the case believed to be the first-ever American conviction for spousal rape came that fall, when a Salem, Mass., bartender drunkenly burst into the home he used to share with his estranged wife and raped her. It's not hard to see how this case was the one that made the possibility of rape between a married couple clear to the public: they were in the middle of a divorce, and the crime involved house invasion and violence.²⁰ This case put a light on the concept of marital rape.

Today, marital rape is crime in more than 50thstate in U.S.A and affirmative consent is required where matter of sexual activity are concerned²¹.The parties must voluntary agree to participate in sexual intercourse.

In United State of America marital rape is crime in all the 50th states but the law might be vary from one state to another. Some of the country that has criminalised marital rape are as follows:

- Texas: Texas law²² also had an exception for marital rape until 1994. Texas law doesn't include a discrete statute regarding marital rape. A spouse may be charged with any type of sexual offense.²³ Texas law doesn't distinguish between the sexual assault of a non-spouse

¹⁴ Deborah C. England, The History of marital rape laws, Criminal Defense Lawyer,<https://www.criminaldefenselawyer.com/resources/criminal-defense/crime-penalties/marital-rape.htm> (last visited on May. 24, 2022)

¹⁵ Deborah C. England, supra note 14

¹⁶ Deborah C. England, supra note 14

¹⁷ Deborah C. England, supra note 14

¹⁸ When spousal rape first became a crime in the U.S., supra note 13

¹⁹ United State Government, Department of justice, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/marital-rape-exemption-legal-sanction-spouse-abuse> (visited on May. 24, 2022)

²⁰ When spousal rape first became a crime in the USA, supra note 13

²¹ Marital rape laws and penalties, <https://sharpcriminalattorney.com/sex-crimes-defense/marital-rape-laws-and-penalties/>, (visited on May. 24,2022)

²² The Texas Penal code is the principal criminal code of the U.S. state of Texas.

²³ Marital rape laws and penalties, <https://sharpcriminalattorney.com/sex-crimes-defense/marital-rape-laws-and-penalties/> (visited on May.25,2022)

and sexual assault of a husband or wife.²⁴ Charges considered in alleged marital rape under Texas Penal code can be simple sexual assault under section 22.011 it says, the accused may be charged with marital rape if the prosecutor has evidence that he or she knowingly and intentionally caused 1) penetration of the spouse's anus or sexual organ...without his or her consent, 2) penetration of the spouse's mouth with the sexual organ...without his or her consent, 3) the spouse's sexual organ was penetrated or came into contact with the other party's mouth, sexual organ, or mouth.²⁵ If the defendant is convicted of sexual assault, he or she faces a second-degree felony charge punishable by two to 20 years in a Texas prison and a maximum \$10,000 fine.²⁶

- California: California Penal Code has separate section of Marital/Spousal rape and separate for rape in general. Section 262²⁷ deals with spousal rape and 261²⁸ deals with rape in general.
- South Carolina - They also have a dedicated section for spousal rape which is Title 16, Chapter 3²⁹ and Section 16-3-615³⁰ and Title 16, Chapter 3, Section 16-3-651(h) [16-3-651(h)]³¹ of South Carolina Code of Laws³² for spousal sexual battery and sexual battery respectively.

As from analysing the above mention law it is clear that in this state marital rape has been recognised as a crime; similarly all the 50 states in U.S.A has criminalised spousal rape as crime though it is differ from state to state i.e. some has separate section that recognised marital rape as crime and have specific punishment under it while other have criminalised spousal rape but punishment is not specified separately but what matter is that it has recognised spousal rape as crime and has protected the dignity of women and making equal the rights of women in the eyes of law.

Status Of Marital Rape In India

The Indian law does not criminalised marital rape as an offence. Section 375³³ of IPC defines that a men is said to commit "rape" if he sexually intercourse or tries to perform oral sex under the following seven descriptions:

²⁴ Marital rape laws and penalties, supra note. 23

²⁵ Marital rape laws and penalties, supra note. 23

²⁶ Supra note 23

²⁷ California Penal Code, 1872, section 262, United State of America

²⁸ California Penal Code, 1872, section 261, United State of America

²⁹ Sakshi Mehta, Criminalizing Marital Rape: A Comparative Analysis of Indian and US Laws, 13 PA, 1 (Dec. 2020), <http://www.penacclaims.com/wp-content/uploads/2020/12/Sakshi-Mehta.pdf>

³⁰ South Carolina Code, 1976, section 16-3-615, United State of America

³¹ South Carolina Code of 1976, section 16-3-651 (h), United State of America

³² South Carolina Code of 1976, United State of America

³³ Indian Penal Code, 1860 , No.45, Act of Parliament, 1860 (India)

“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.”³⁴

Now the most controversial part under section 375 is the Exception 2 which differentiate married and unmarried women with regard to marital rape. The Exception consider forced sexual violence in a marriage as a crime only when the wife is below the age of 15 years. This age has been increased by the judiciary from 15 to 18 years in the case of *Independent Thought V. Union of India*.³⁵The issue with this exception is that it does not consider marital rape as crime if sexual intercourse is done by the husband against the consent of a women above 15 or 18 years.

Why It Is Necessary To Criminalised Marital Rape?

Marriage is considered as sacred in India but the fact that women has been always treated as a property of others this kind of mentality is the changing need of society. Today, women are doing great in many fields keeping in mind the present scenario it becomes important to recognised that the “consent” of women is equally important as of a men. Especially, when it comes to one’s right to its own body. Marriage is a holy bond between husband and wife which includes trust and when such heinous disgust act is done by a person whom one has know it for a long time, a person that promise to protect one another and support each other. Than it not only breaks trust and causes huge psychological trauma as well as physical effect but it also attacks the dignity of a women.

The impacts of such effects that are caused due to marital rape are discussed below:

³⁴ Indian Penal Code,1860, supra note 33

³⁵ *Independent thought v. Union Of India*, (2017) 10 SCC 800

1. Physical effects - It will include injuries to private organs, fractures, bruises, fatigue etc. and if any assault has been committed against them causing darkened eyes, bleeding wounds and broken bones. At times, due to the assault the victim also experiences certain gynecological issues such as miscarriages, infertility etc.³⁶

2. Psychological effects - The psychological effects are worse than the physical injuries. The agony that women suffer when her husband rapes her repeatedly cannot be put into words. The women not only lose her confidence but also her self-respect due to post traumatic stress. She develops suicidal tendencies, depression, eating disorders, sexual dysfunction etc.³⁷

India does not have any specific provision which deals with marital rape, India comes within the 36th country that has not criminalised spousal rape as offence, the only protection can seek by a women is under Protection of women from domestic violence Act,2005. Under this act marital rape is consider as a form of domestic violence in order to protect the institution of marriage.³⁸

Exception 2 Of Section 375 Of IPC Violates Article 14 Of

Constitution Of India:

Article 14 of Constitution of India, 1950 ensure that “state shall not deny to any person equality before law and equal protection of the laws within the territory of India.” Exception 2 of IPC violates Article 14 by denying equal protection to married women. Women where never treated as equal to men, from the British era women are treated as the property of father or her husband this conservative thinking of society is known as Doctrine of Coverture and due to the increasing crime against women there was a need to draft the Indian penal code of 1860. The penal code define all kinds of rape but it does not recognised marital rape as crime, further exception 2 of section 375 clearly states that sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape. Which means it is considered as rape only if the wife is under 15 years. Thus, it violates Article 14³⁹ as it differentiates between married and unmarried women as there is no reasonable classification. Further, while legislation like ‘POCSO’⁴⁰ and ‘Juvenile Justice Act’⁴¹ recognised child below the age of 18 years as a child where as Exception 2 of section 375 of IPC

³⁶ Sakshi Mehta, Criminalizing Marital Rape: A Comparative Analysis of Indian and US Laws, 13 PA, at 4 (Dec. 2020), (25.May.2022, 9 pm)<http://www.penacclaims.com/wp-content/uploads/2020/12/Sakshi-Mehta.pdf>

³⁷ *Ibid*

³⁸ Criminalizing marital rape: a comparative analysis of Indian and US laws, supra note 36 at 4

³⁹ The Constitution(One Hundred and First Amendment)Act,2016

⁴⁰ Protection of Children from Sexual Offences Act, 2012

⁴¹ The Juvenile Justice(Care and Protection of Children) Act,2015

considered only child below the age of 15 years. In *State of West Bengal V. Anwar Ali Sarkar*,⁴² the Supreme Court has held that any classification to be reasonable as per Article 14 of the Constitution of India should be based on Intelligent Differentia. Hence, the classification has no reasonable nexus with the object of Section 375 of IPC exception 2 as it is violative of Article 14.⁴³

Exception 2 Of IPC Violates Article 21 Of Constitution Of

India:

Article 21 of Constitution of India says that: “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Article 21 is the heart of the constitution. Cases like *Maneka Gandhi v. Union of India*⁴⁴, *A.K. Gopalan v. Union of India*⁴⁵, *Kharak Singh v. State of U.P.*⁴⁶, etc. have expended the scope of Article 21⁴⁷. The Supreme Court has held that the term — ‘life’ under Article 21 is restricted to merely animal existence but it is much more than that⁴⁸. Several rights have been recognised under Article 21 and “right to privacy” is one such right that has been recognised as fundamental rights. The Supreme Court in *K.S Puttuswamy (Retd) v. Union of India*⁴⁹ recognized the right to privacy as a fundamental right of all citizens and held that —the right to privacy includes decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decision in respect of intimate relations.⁵⁰In the same case the court held that privacy is about an individual's autonomy which means an individual full control in its body as well as mental space, the offence of rape and injury caused remains the same irrespective of who the offender is. Irrespective of who the perpetrator is, forced sex mars the women-victim physically, psychologically and emotionally. Thus, exception 2 of section 375 is violative of Article 21 as it does not allow a women to have personal right her body. Further, in the case of *Suchita Srivastava V. Chandigarh Administration*⁵¹ the Supreme Court held the right to make choices related to sexual activities is personal liberty also Honorable Justice DY.Chandrachud while delivering the Joseph shine judgment⁵² has held that man is not the owner’

⁴² *State of West Bengal v. Anwar Ali Sarkar*, (1952) 75 SCR 284

⁴³ Criminalised marital rape : a comparative analysis of Indian and US Laws, supra note 36 at 6.

⁴⁴ AIR [1978] P.P. 597

⁴⁵ AIR [1950]P.P. 27

⁴⁶ AIR [1963] P.P. 1295

⁴⁷ Prateek Mishra, Marital rape and violation of constitution provisions, 2,IJLMH,1 at 4,2019,<https://www.ijlmh.com/wp-content/uploads/2019/10/Marital-Rape-and-Violation-of-Constitutional-Provisions.pdf>, (27.May,2022)

⁴⁸ Marital Rape and Violation of Constitution Provisions, supra note. 47

⁴⁹ Justice K.S Puttaswamy (2017) 10 SCC 1

⁵⁰ Marital rape and violation of constitutional provision, supra note. 47.

⁵¹ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

⁵² *Joseph Shine v. Union of India*, (2018) SC 1676

of the sexuality of wife.⁵³

Thus, from the above judgement it is clear that Exception 2 of section 375 violates Article 14 and 21 of Constitution of India and therefore marital rape should be criminalised in India as well.

Pros And Con Of Criminalisation Of Marital Rape

PROS OF CRIMINALISING MARITAL RAPE

1. When the state exempt Criminal act such as forced sex within marriage, it unwillingly engages in unequal disbursement of rights conferred by the constitution⁵⁴.
2. It is violates of Article 14 of constitution of India, as in make differentiates between married and unmarried women.
3. Exception 2 of IPC violates a women right to autonomy under Article 21 of Constitution of India, also it does not give right to women to have control on her body and enjoy its personal liberty as granted to a women by constitution and provided to a women for being a human (natural right).
4. The Exception 2 of section 375 of IPC is out dated as the age provided there is 15 years which means it does not include women above 15 years as well as it also does not consider it as rape if sexual intercourse is done by a husband without as consent with a child between the age of 15 to 18. Whereas, act like POCSO and Juvenile Justice Act considered children as child if he or she is below 18 years.
5. Also section 498a does not specifically marital rape.

CONS OF MARITAL RAPE:

1. Exception 2 of section 375 of IPC does not violates constitution and is based on intelligible differentia.
2. Any assumption that a wife, who is forced to have sex with her husband on a particular occasion when she does not want to, feels the same degree of outrage as a women raped by a stranger is not justified. Further, there is implied consent of married women to indulge in sexual intercourse.
3. Already an offence under section 498a IPC and Domestic Violence Act.

⁵³ Sakshi Mehta, Criminalizing Marital Rape: A Comparative Analysis of Indian and US Laws, 13 PA, at 4 Dec. 2020, (27.May.2022, 10 pm)<http://www.penacclaims.com/wp-content/uploads/2020/12/Sakshi-Mehta.pdf>

⁵⁴ RIT FOUNDATION v. UNION OF INDIA,2022

4. Further the contention to criminalised marital rape is not that simple, the issue itself have wide societal and sociological ramification, which cannot be ignored.

Suggestion

1. Marital rape should be criminalised in India also and Exception 2 of section 375 of Indian Penal Code be remove.
2. Marital rape should be considered as crime with differentiating married and unmarried women.
3. Indian Penal Code should be amended.
4. While deciding the case of marital rape there should be at least one women judge in the penal while deciding the case.
5. The offence of marital rape should be considered as a valid ground for divorce under all personal laws.

Conclusion

Marital rape violates women's right to her body and it attacks on the dignity of a women. Justice Rajiv Shakhder has rightly said that, "certain sexual offences need to be called out for what they are. Sexual assault by the husband on his wife which falls within the fold of section 375 of the IPC, need to called out as rape as that is one of the ways in which the society expresses its disapproval concerning the conduct of the offender. Oddly, the prevailing mores in the society appears to stigmatize the victim rather than the rapist." Further, on one hand we promote fundamental rights such as equality before law and on the other hand by not criminalising such crime as offence than we are unwilling engage in unequal. Also not recognising the consent of a women and her right on her body id gross violative of Article 21 of the constitution of India. Further, Consensual sex is at the heart of a healthy and joyful marital relationship. And once by way a marriage if women have given right to have sexual intercourse that does not mean she does not have or have withdrawn her right to refuse sexual intercourse. Therefore, researcher would like to submit that marital rape should be criminalised and Exception 2 of section 375 should be removed.