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MARITAL RAPE LAW IN INDIA

AUTHORED BY - AARATRIKA CHANDA

The law in India does not yet criminalize marital rape, i.e., the Indian Penal Code of 1860 does not recognize that a husband can rape his wife. The reason given includes protection of sanctity of the institution of marriage¹. Through this paper, we explore the existing laws of marital rape in India and how the laws prevent a woman from seeking remedy in case she is raped by her husband.²

1. Introduction

Marital rape explained in **Blacks Law Dictionary 8th Edition** is the process where the husband has sexual intercourse with his wife without her consent. In the early days the law and traditions dictated that the wife owed her body to her husband. In Anglo-American tradition the wife was considered to be subservient to her husband in the eyes of law and henceforth they surrounded their independent life and legal status. This process was referred to as the coverture³

In a marriage the spouses are entitled to their own rights. An individual is guaranteed with liberty and any encroachment into such is a breach of privacy. That would further constitute to be defined as cruelty.

Rape has been broadly categorised into three forms, i.e., battering rape, force-only rape, obsessive rape.

Battering rape where there is physical violence and then the husband proceeds the wife to have sexual intercourse with against her will. Majority of the marital rape falls under the type of battering rape.

Force-only rape is also occurrent in many households where the husband uses only that much of force that is necessary to coerce the wife.

¹ <http://docs.manupatra.in/NEWSLINE/ARTICLES/UPLOAD/8787A55C-D93F-4589-8A68-A9A032AFAF0E.PDF>

² Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019).

³ Sir Matthew Hale (1609 – 1676) in *History of the Pleas of the Crown*

2. Historical Overview of Marital Laws in India

In the earliest legal texts like Dharma shastra, the marital relations in the Hindu Society were underlined. These texts said the importance of dharm or duty a man owed to his wife, his family, his society.

Previously, marital rape in marriages were considered to be legal. In the year 1994 marital rape was criminalised.

During the 1960s in England, the Chief Justice stated that there can be no such thing as marital rape. Once a wife marries a husband, she handovers her rights to her husband therefore the wife doesn't carry any right to refuse sex to her husband. This idea was brought down in the 1800s when the Indian Penal Code and the Code of Criminal Procedure were formed. There were no provisions for marital rape or bringing justice to the same.⁴

The first notable change towards the marital rape law started with the establishment of a committee by late J.S. Verma. In this committee it was suggested to change the mindset towards marital rape as it is believed to be an old mindset where the women were considered to be the property of their husband.

A two-fold recommendation was made. The topic of immunity available to the women in case where husband is the perpetrator comes from the old notion that women are the possession of their husband and the husbands have a legal right upon their women.⁵

In 2015, a debate was put up by the Ministry of Home Affairs to criminalise the process of marital rape. A bill on this same topic was introduced in 2015 December but the matter was rejected by the parliament stating that criminalising the process of marital rape will result in excessive in the private sphere of a married couple.⁶

⁴ Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019)

⁵ Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013)

⁶ RAJYA SABHA DEBATES, Discussion on the Indian Penal Code (Amendment) Bill, 2015, 53, Session Number 237, December 4, 2015

3. Statistical Findings

According to the **National Family Health Survey** around 80 % of the married women of India claim that their current husband has raped them⁷

In the **2011 census**, around 30,000 girl child were below the age of 15 and were forced to give birth to children, further indicating the possibility of marital rape. Out of that 29,714 girl children were forced to give birth to a single child.⁸

In 2013, **181 Abhayam** collected data that states that out of all the survey has reported about domestic violence. The authorities and the project head of 181 Abhayam stated that majority of the women were unwilling to discuss the issue and they don't think it is wrong when their husband insists on having sexual intercourse despite of them not feeling like it. The project head of 181 Abhayam further said that, *"When we tell them that they have equal rights to agree or disagree to a sexual act, more often than not 'pati ki baat manni padti hain na' is the reply we get,"*⁹

In 2016, **The National Crime Records Bureau (NCRB)** made a survey where the total number of victims to child marriage ranged to 16,938. Among those 139 children were found to be below the age of 6 years, these children had been kidnapped, or trafficked for the sole purpose of marriage and was later forced to bear children.¹⁰

4. Legal Provisions

Section 375 of The Indian Penal Code in 1860 provides us with the definition of rape categorically leaving out marital rape from it.¹¹

In 2012 a committee headed by Justice JS Verma recommend to criminalise marital rape in India. In response to the recommendation of the committee, the topic was debated in Lok Sabha where Haribhai Chowdhury claimed that if marital rape is criminalised in India it will complicate the family and marriage system in India.

⁷ <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece>

⁸ *2011 Census of India*. Registrar General and Census Commissioner of India/*

⁹ The Times of India, "25% of helpline calls about marital rape"

['25% of helpline calls about marital rape' | Vadodara News - Times of India \(indiatimes.com\)](#)

¹⁰ National Crime Records Bureau, 2016 report on Marriages in India

¹¹ Agnidipto Tarafder and Adrija Ghosh, 'The Unconstitutionality of the Marital Rape Exemption in India' (2020) 3(2) University of Oxford Human Rights Hub Journal 202, 204 accessed 19 May 2021

Section 376 B of Indian Penal Code, 1960 states that a husband can be punished for having unconsented sexual intercourse with his separated wife. The minimum punishment is of two years and the maximum is for seven years

Section 498A of Indian Penal Code underlines a punishment of maximum three years of imprisonment of a husband or the relative of the husband if they subject their wife to cruelty.

Protection of Women From Domestic Violence Act, 2005 defined marital rape as a form of domestic abuse but doesn't criminalise it.

Section 13 (1) of Hindu Marriage Act, 1955 states that any form of cruelty on a wife by the husband including desertion, neglect can be a ground for divorce

Section 198 (6) of Code of Criminal Procedure, 1973 allocates provisions where minor victims who has suffered from marital rape can file a complaint against her perpetrator till the age of 20 years of agreement

Exception 2 to Section 375 of Indian Penal Code following the case of *Independent Thought v. Union of India & Anr.* Interpreted the follow:

Sexual intercourse in a marriage where the wife is a minor is not a rape despite of the fact that the minor wife cannot give consent which can be legally recognised in India¹²

In the case of *Raju Ahmed Laskar v. The State of Assam and Ors.* the court interpreted that marital rape is only considered in case of non-consensual with a wife between the age of 12 and 15 years. Section 375 of Indian Penal Code doesn't identify non consensual intercourse of a man and a wife as marital rape if the woman is above the age of 18 years.¹³

Section 506 of Indian Penal Code, 1860 guarantees punishment to perpetrators if they use criminal intimidation to force a woman into illicit act including married women

Section 377 of Indian Penal Code, 1860 underlines punishment of maximum of 10 years for

¹² *Independent Thought v. Union of India* 10 SCC 800, AIR 2017 SC 4904

¹³ *Raju Ahmed Laskar v. The State of Assam and Ors.* LQ/GauHC/2023/187

anyone who performs illicit act with a man, woman, child or animal against the natural course of nature

Section 493 of Indian Penal Code, 1860 states that whenever a man deceit a woman into thinking that she is married to him and then continues to perform illicit act with her is punishable under the Indian law and the punishment can extend up to a period of ten years.

Section 354 of Indian Penal Code, 1860 is a provision which helps the victims of marital rape to hold their perpetrators guilty. If anyone is found to outrage the modesty of a woman in any non-consensual manner then that person can be held guilty.

5. Doctrine of Coverture

This doctrine was introduced in England in 1936 where the court stated that once a husband and wife enters into marriage, the woman by herself has no independent legal identity and therefore the issue of marital rape doesn't arise as if the woman by herself doesn't have any right then the husband is not infringing or violating any right by having sexual activities using force

The Indian Constitution doesn't recognise the doctrine of coverture but holds the fact that a woman loses her legal identity and her individual rights following marriage.

6. Test of Manifest Arbitrariness

The manifest arbitrariness is a novel phenomenon in the context of standard of assessment of legislation under the **Article 14 of Indian Constitution**. Justice Nariman in the case of *Shayara Bano v. Union of India*, stated that when anything is done in an excessive manner, then the law is simply arbitrary.¹⁴

It is argued that whenever a non-consensual sexual intercourse is done by a man on a woman it is considered to be a crime when the same act is done by the husband on his wife , then the husband is granted immunity. This creates a false hierarchy between the two sexual acts, which removes the primary motive of rape law to hold the perpetrator to be accountable.

¹⁴ *Shayara Bano vs Union of India* 9 SCC 1 (n 82) [101] (Nairman J)

7. Marital rape provisions in Hindu law

Currently, The Hindu Marriage Act, 1956 doesn't necessarily criminalise marital rape. The provisions related to non – consensual sexual relations are discussed.

Section 9 of Hindu Marriage Act, 1956, states that in instances where a spouse is not giving consent for a sexual activity then, the other spouse can file a petition in the court to restore the conjugal rights and the privileges that are accompanied with marriage. However, this section has been used for ill purposes also like using legal options to force individuals into illicit act by their spouse.

Section 13 of Hindu Marriage Act, 1956, gives the spouses to live separately while being married in the eyes of law. The reason behind the separation includes cruelty by the spouse.

Section 24 of Hindu Marriage Act, 1956 provides cruelty as a ground for divorce. The Indian law specifically doesn't recognise marital rape however through this section the victims of marital rape can gain separation from their husband on the ground of cruelty.

8. Fundamental right in private sphere

When the notion of criminalising marital rape arises, it is often stated that the law of a country cannot interfere into the private sphere of a married couple however there exists restitution of conjugal rights as explained in **Section 9 of Hindu Marriage Act, 1956**. Restitution of conjugal rights was first present in the English law where a court can pass a decree encouraging a married couple to live together. In this the court does interfere into the private life of a married couple as opposed to the debate against criminalisation of marital rape where it was argued in the parliament that by criminalising marital rape we will be interfering into the private life of a couple¹⁵.

In the case of *T. Sareetha v. T Venkata*, Andhra Pradesh High Court struck down the constitutionality of restitution of conjugal rights, the argument stating that the *Section 9 of Hindu Marriage Act* violates **Article 14, 19 and 21 of the Indian Constitution**. In this the court agreed to the fact that a woman can be harmed of her rights and personal autonomy. The court in this case also agreed that “*no positive act of sex can be forced upon the unwilling persons, because*

¹⁵ In 1969, Justice Scarman recommended the abolition of this remedy

*nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act*¹⁶

9. Rape versus Cruelty

Section 376 of Indian Penal Code, 1860 defines rape as a non – consensual sexual activity forced upon a woman, where she has not given any form of consent. This section considers all form of penetrative and non-penetrative act done upon a woman against her will as an offence. The major element required to establish rape is absent of consent, coercing including using means of intimidation. The minimum punishment for rape is minimum of 7 years of imprisonment.

Section 498A of Indian Penal Code, 1860 defines cruelty as any form of abuse inflicted by the husband or his family after marriage. Cruelty can be inflicted in the form of physical, emotional or mental abuse. The punishment for cruelty is less severe than that of rape and there is 3 years of imprisonment. However cruelty can be a valid ground for divorce according to Section 24 of Hindu Marriage Act, 1956

10. Changes in marital rape law

10.1 Late Justice J.S. Verma Committee

The first notable change towards the marital rape law started with the establishment of a committee by late J.S. Verma. In this committee it was suggested to change the mindset towards marital rape as it is believed to be an old mindset where the women were considered to be the property of their husband.¹⁷

10.2 Criminal Law Amendment Act, 2013

Then came the Criminal Law Amendment Act, 2013, where broader definition was given to Section 375 of Indian Penal Code where all forms of penetration was considered to establish rape. However, the Criminal law Amendment Act of 2013 failed to actually criminalise marital rape. However it criminalised sexual intercourse between a man and his separated wife¹⁸

¹⁶ *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356

¹⁷ Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (January 23,2013)

¹⁸ Criminal Law (Amendment) Act, No. 13 of 2013, PEN CODE 375, Exception 2; The Criminal Lw (Amendment) Act, No. 13 of 2013, PEN. CODE 376A

10.3 Supreme Court's Judgement

Next change came with the Supreme Court's judgement on the case of *Independent Thought v. Union of India*, in 2017 in relation to protect victims of child marriage from marital rape. In this any sexual intercourse of a man with his wife who is below the age of 15 is criminalised¹⁹

10.4 Parliament

The notion of marital rape was introduced in 2015 in the parliament. The parliament refused to bring about any sort of change as it believed that India is a country where the notion of marriage is considered to be sacred and therefore the provisions of marital rape cannot be introduced²⁰

11. Arguments against criminalisation of marital rape

11.1 Adequate legal remedy for marital rape

While it is considered there exists a gap in the Indian Law to address the matter of marital rape, the exception has already been filled with the sections of Protection of Women from Domestic Violence Act of 2005, Section 498A of Indian Penal Code, and Hindu Marriage Act. Additionally, The Domestic Violence Act also recognises non-consensual sexual abuse among the definition of domestic violence and provides remedies like protection orders, legal separation, monetary compensation. It also recognises cruelty done by the husband or any of his relatives against the wife and Section 13 of Hindu Marriage Act allows divorce under the grounds of cruelty.²¹

11.2 Cultural Significance

In the case of *Independent thought* the Supreme Court in its judgement stated that marriage is a personal process and the concept of criminalising marital rape goes against the institution of marriage²². In the case of *Nimeshbhai Bharatbhai Desai v. State of Gujrat*, the Gujrat High Court stated that marriage stands on the pillars of trust and confidence. The very act of marital rape in itself violates those pillars. The court furthermore added that the majority of the women are till now financially dependent on their husband therefore they will not be able to survive outside of the framework of marriage

¹⁹ PEN. CODE (1860), 375, Exception 2

²⁰ LOK SABHA DEBATES, Question on Marital Rape, 2016, Question No. 2872, March 15, 2016

²¹ Kanodia & Ray, *supra* note 47 at 53

²² *Independent Thought v. Union of India* 10 SCC 800, AIR 2017 SC 4904

11.3 Consent

Sir Matthew Hale of England in 1736 stated that whenever a man and a woman enters into the binds of marriage there is a mutual matrimonial contract signed between the man and the wife which later on the wife cannot retract.²³

Even though this immunity was retracted in the commonwealth states of England and Wales in 1991 the argument of marriage and consent was prevalent when the marriage laws were formed and is used to justify marital rape as seen by the Law Commission of India's 172nd Report on Review of Rape Laws of 2000.²⁴

12. Arguments for criminalisation of marital rape in India

12.1 Protection of Rights

Criminalising marital rape in India protects the rights of an individual which are guaranteed under the Protection of Human Rights Act, and the process of forced intercourse does violate the rights of an individual. The Domestic Violence Act, 2005 guarantees certain rights to women like protecting them from harm and injury. Allowing marital rape in India violates those rights which are guaranteed under the Domestic Violence Act.²⁵

12.2 Encroaching of Constitutional Rights

Article 21 of the Indian Constitution guarantees the citizens of India a right to live their life with dignity and is an umbrella for personal rights and liberty. The Supreme Court acknowledges that any form of violence which is led from non-consensual intercourse is a form of interference to the right of privacy²⁶

In the case of *State of Maharashtra v. Madhkar Narayan*, the Supreme Court in its judgement stated that women are entitled to sexual privacy. Thus, criminalising marital rape safeguards a woman's right to privacy and a good quality of life.²⁷

²³ *Independent Thought*, 382 SCC at 45

²⁴ Law Commission of India, 172nd Report on Review of Rape Laws (2000); Nigam, *supra* note 22, at 13

²⁵ Janani. G.S, Dr. S Pandiraj "MARITAL RAPE IN INDIA – NEED FOR CRIMINALIZATION" 120 International Journal of Pure and Applied Mathematics, (2018)

²⁶ *Independent Thought*, 382 SCC at 22; *Karnataka v. Krishnappa* (2000) SCC (India)

²⁷ *Madhukar Narayan Mardikar*, AIR 1991 SC 207

13. Judicial Approaches

In 2012 **Pam Rajput Committee** was set up by the then government to analyse the status of married women in India. The committee in its report recommend to illegalise marital rape. In 2015 Women and Child Development Ministry further reevaluated the report of this committee and agreed about the need to establish clear laws to illegalise non – consensual sexual conduct between a man and his wife

In 2018 Gujrat High Court gave its judgement against the process of criminalising marital rape stating that a man cannot be simply arrested due to forcing his wife to have sexual activities. However, later on Gujrat High Court under the ruling of Justice J.B. Pardiwala stated that the law is biased towards married and unmarried women. He further went on to elaborate the fact that whenever an unmarried woman is forced to have non-consensual sexual activity with then the perpetrator is charged with rape and the provisions in Indian Penal Code underlines clear punishment and remedies. However, if an unmarried woman is forced to perform illicit act with her husband against her consent then there is no such provisions in place. The court later went on to state that the law should not bias between women.

The Kerala High Court in 2021 issued that any form of marital rape between the partners can be a cause and reason for divorce. Justice Muhammed Mustaque added that post marriage a woman doesn't handover her rights on her body, rights to privacy to her husband and therefore the husband has no right to have any rights in that marital relationship.

Karnataka High Court in March 2022, held a man liable under the section 375 of Indian Penal Code for forcing her to have sexual activities with him. However when this appeal was made to the Supreme Court a stay was issued on this order.

In September 2022 the Supreme Court consisting of a division bench headed by the CJI Justice D.Y. Chandrachud stated that the only instance of marital rape can happen when a married woman is forced to be pregnant and bear child of her perpetrator against her will.

14. Landmark Cases

Queen Empress v. Haree Mohan Maiti

This is first case in India where the topic of marital rape was brought up. An eleven year old child bride died due to excessive bleeding when her husband in his mid-thirties tried to consummate the

marriage. There was an instance of ruptured vagina. The age of consent at that time was of 10 years and sex with a wife was not rape. The husband got away with 12 months of hard labour. Following this incident a bill was passed increasing the age of consent from 10 years to 12 years but the criminalisation of marriage did not take place²⁸

Sakshi v. Union of India (2004)

In this case, an NGO raised a question that whenever a husband performs cruelty on his wife the Indian Law considers it as a punishable offence but whereas whenever the husband performs sexual intercourse with his wife without her consent, the act should also be admitted as a punishable offence. Supreme Court upheld the existing definition of marital rape under Section 375 of Indian Penal Code where there is no provision for marital rape and refused to alter it.²⁹

Independent Thought v. Union of India & Anr. (2017)

In this case a minor victim had suffered from marital rape. A NGO named by Independent Thought filed a writ petition challenging Section 375 (Exception 2) of Indian Penal Code. Section 3 (3) of Prohibition of Child Marriage Act, 2006 states that a child marriage can be annulled if the child has suffered from marital rape and the marriage can even be declared as void. Previously the age was restricted till 15 years but following the judgement of this case the age got increased to 18 years. However, the shortfall of this judgement was it had no provision where victims of marital rape can seek remedy. This judgement was only restricted towards a certain age group and was not generalised.³⁰

Nimeshnai Bharatbhai Desai v. State of Gujrat

The issue addressed in this question is if a husband forces his wife to perform oral sex whether it would come under the ambit of rape as underlined in Section 377 of Indian Penal Code. Secondly, whether forcing the wife will be referred to as cruelty by the husband upon the wife under Section 498A of Indian Penal Code.

The Gujrat High Court stated that any husband cannot have infinite right against his wife and therefore any form of crime against the women will not be criminalised and therefore took a chance to criminalise marital rape and in that process acknowledging the right of married

²⁸ *Queen Empress v. Haree Moahn Maiti*, (1886) ILR 8 All 622

²⁹ *Sakshi v. Union Of India* Writ Petition (Criminal) No. 33 Of 1997

³⁰ *Independent Thought v. Union of India* 10 SCC 800, AIR 2017 SC 4904

women.³¹

Raju Ahmed Laskar v. The State of Assam & Ors.

The appellant in this case was a woman married under the Muslim law. There was separation between the man and the wife, and evidence of sexual intercourse was there. The first question arose whether at the time of sexual intercourse during was consensual or not. Indian law states that any type of sexual intercourse at the time of separation falls under the ambits of rape.³²

Samar Ghosh v. Jaya Ghosh

The supreme court recognised that there are some fundamental rights that are guaranteed to every citizen under the Indian Constitution. Any force of forceful illicit act is a form of mental and physical act without consent is a breach against the rights guaranteed. Supreme Court further added that any form of marital rape even though is not criminalised falls under the umbrella of cruelty and thus marital rape can be a ground for divorce under Section 13 of Hindu Marriage Act³³.

Harvinder Kaur v. Harmander Singh

In a case of marital rape the Delhi High Court refused to interfere into the matters. The court held that the case involved household ³⁴matter and the constitution had not remedy for it and any interference can possibly destroy the essence of marriage.³⁵

State Through Reference v. Ram Singh & Ors.

This case eventually led to enactment of Criminal Law (Amendment) Act,2013. The Amendment Act established several eminent changes in the rape law of India. Previous to this rape only was comprising of penetration into a women's private part but later on it stated that the inability of the woman to give consent is also a ground for rape.³⁶

³¹ *Nimeshnhai Bharatbhai Desai v. State of Gujrat* 2018 SCC Online Guj 732, [104] 62

³² *Raju Ahmed Laskar v. The State of Assam and Ors.* LQ/GauHC/2023/187

³³ *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511

³⁴ Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019)

³⁵ *Harvinder Kaur v. Harmander Singh* AIR 1984 Delhi 66, ILR 1984 Delhi 546

³⁶ 'The Criminal Law (Amendment) Act 2013', No. 13 of 2013 (Amendment Act 2013)(2013) *State Through Reference vs Ram Singh & Ors.* (2014) App. No. 6/2013

15. Conclusion

Marital rape law is not yet an established law in India. Evaluating through the evolution of marital law, and understanding the changing notion of marital rape to a discourse shaped by individual right and societal expectations and their boundaries.

Despite of significant improvement in the legal provision, and the statistical finding is a sobering reality. Reports from the National Family Health Survey and the National Crime Records Bureau underscore the nature of marital rape, demanding urgent legal at the current prevalent gap.

Section 375 of Indian Penal Code, 1860 defines rape but excludes marital rape. The criminalisation of marital rape gained a momentum in 2012 with the report of Justice JS Verma Committee. However, when this debate was taken to the Lok Sabha it gave rise to potential issues in the family structure.

Section 376B of Indian Penal Code, 1860 regards non-consensual intercourse with separated wife as an offense. Section 498A emphasizes the punishment for inflicting of cruelty on a wife. The Protection of Women from Domestic Violence Act, 2005 labels marital rape as domestic abuse. Section 13(1) of Hindu Marriage Act, 1955 identifies cruelty as a ground for divorce.

There is a great emphasising upon the protection if the rights of an individual under the Constitution. The encroachment on constitutional rights, particularly Article 21 guarantees the citizens their right to live with liberty and dignity.

In conclusion, the topic of criminalising marital rape expands more than legal provisions and delves into the safeguarding the rights and values.