

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

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

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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Marital Rape: An Unaddressed Stigma A Debate That Must Find Its End

Authored By- Aman Nigam

Abstract

Marital Rape refers to the act of sexual intercourse with one's spouse without his/her consent. Whenever one commits sexual intercourse with the other person without his/her consent we term it rape. Why, then we do not categorise marital rape as a rape even though it violates the consent of the other person? This article will examine the current scenario revolving around marital rape and as to why it remains unaddressed and is still subjected to stigmatisation in India. A comparative global approach will also be mentioned signifying the lessons that India can learn from the countries who have already criminalised marital rape, first being **Russia** as it was the first country to criminalise marital rape in **1922**. Analysing various viewpoints and also determining the impact of marital rape on people belonging to socio economic background, the article would then point out as to what can be the way forward for a country like India to address the issue of marital rape. This will be in the form of conclusion.

Keywords: Marital Rape; Current scenario; Consent; Sexual Intercourse

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Issues With Section 375-

Section 375 in The Indian Penal Code¹ says that a man is said to have committed rape when his Act of sexual intercourse with a woman falls under any of these six broad categories-

1. If he commits sexual intercourse **against** the will of the woman
2. If he commits sexual intercourse **without** her consent
3. If he commits sexual intercourse 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.

However, the exception makes this section a little problematic. The exception says that forced sex in marriage is not a crime, if the wife is above the age of 15 years.

When we look at the wordings of the Section, it clearly raises the issue of consent, which when not present can be termed as 'rape'. When a man gets involved in sexual intercourse with a woman when both of them are a married couple, suddenly the issue of consent does not come in the picture. Moreover, the exception makes this section more problematic as setting 15 years as age limit has no rationale behind it. If a man commits rape and his wife is of 22 years without her consent, the issue of age limit will render in not considering this as a marital rape and if the same is committed with a minor of 14 years, it will be considered as marital rape even though the consent is still violated in both the cases. The sexual act committed against a minor will be dealt under POCSO² and can also be tried under the Prohibition of Child Marriage Act, 2006³. However still the issue of marital rape will not arise because of Section 375 exception. A marriage is a **partnership of equals**, a woman can no longer be termed as a '**property**' of the husband. The Courts and the government say this and on the other hand, itself make a section so contrary to what they say. This section must be amended and better provisions such as making marital rape a valid ground to obtain divorce and maintenance can be added. However, provisions that needs to be added must see that there is no interference in the private lives of the citizens and the overall marriage as an institution.

¹ The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

² Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

³ Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2006 (India).

The Debate On Marital Rape-

There have been extensive debates on the issue of Marital Rape. The Supreme Court in **Independent Thought v. Union of India**⁴, indirectly raised the issue of marital rape, however did not extrapolate on this as it would then adjudicate upon the current legal issue of marital rape. The Courts, despite of various petitions being filed before it likes to play safe when such a sensitive issue arises. Ironically. The Law Commission of India in its **172nd report**⁵ has indirectly laid down that a man committing rape on her wife will not be treated as an offence. However, if the man molests his wife, he could be punished within the provisions of the Indian Penal Code. This stand is clearly ironical and extensively debatable. Most of the rapes in India, are committed by known persons, such as relatives, fathers, brothers etc.. These rapes mostly go unreported as there is always an apprehension on the mind of the victim that it can damage her reputation within the family or if that person has done a favour for the family, then even the parents who might not be so well educated or belonging to a good socio-economic background might prevent the victim from reporting rape. The state still does not realise that the same can be applicable to a women in marriage where her own husband without her consent is committing sexual intercourse. She might be more reluctant to report this as the state has provided no remedy to her. **‘Marriage is a social institution’** would not provide her the remedy she wants and the husband can anytime commit sexual intercourse on her. She suddenly, has no voice either in the court of law or when she is being “raped”.

Jeremy Bentham, an English philosopher, jurist and a social reformer said the following-

“It is not proper, by a gross and puerile joke, to deny the existence of this crime (rape) and to diminish the horror of it.”

Only the person who has been raped knows the horror of it and it turns into a horrific situation when the same person cannot avail any remedy for it. Nobody can understand the pain, who will provide the relief?

A report was released by the United Nations in 2015 titled- **‘The World’s Women 2015**⁶, where it was said that- ‘half of countries in developing regions report more lifetime

⁴ Independent Thought v. Union of India, [2017] 10 SCC 800.

⁵ Law Commission of India, <https://lawcommissionofindia.nic.in/> (last visited Mar. 30, 2022).

⁶ UN STATS- GENDER, <https://unstats.un.org/unsd/gender/chapter4/chapter4.html> (last visited: Mar. 30, 2022).

prevalence of intimate partner physical and/or sexual violence than the developed nations'. This affirms that sexual violence inside of marriage is prevalent not only in India but also to other developing nations as well.

This gives us a clear conclusion that the status of women determine today where a country stands. This affirms that when women are treated with respect, dignity and they have assurance that their rights are protected, then automatically the country as a whole improves. Moreover, when it comes to an issue of 'rape' women deserve the full protection and the right to say 'no' when they do not feel like they are ready to engage in a sexual act.

The View Of The Courts And Our Constitution-

There have been various judgements given by the hon'ble courts on the issue of marital rape in India. However, in none of the judgements did the court give the message that marital rape exception should be removed. It has dealt with this issue extensively in many judgements, however at the end did not really recognise marital rape as a crime.

In *Independent Thought v. Union of India*, the courts punished the person who committed marital rape on minor, however the courts also held that marital rape is not a crime and the wife can make her husband liable only under Section 377⁷ of the Indian Penal Code and that too under sodomy, buggery and bestiality. The Courts were reluctant to include marital rape on the list of crimes.

In ***Bodhisattwa Gautam v. Subhra Chakraborty***⁸, the Supreme Court held that rape violates basic human rights, not only basic human rights, but it also violates the fundamental rights of women such as **Article 21**⁹ which also includes right to life. The Supreme Court clearly by themselves say that rape violates the basic human rights, why then there arises a problem in a situation of marital rape. How can consent be so easily presumed when it comes to marital rape? Marital Rape is no less than the actual rape. This is evident from the horrific cases being reported. When the girl from Barrackpore married, she was only 19 years old. The marriage didn't last long; she returned home after 10 months, traumatised by her husband's **insatiable desire** for sex. She was literally raped on the first night of her marriage, and she was forced to have sex in a variety of ways more than twice a day.

⁷ The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

⁸ *Bodhisattwa Gautam v. Subhra Chakraborty*, 1996 AIR 922.

⁹ INDIA CONST. art. 21.

Which of the courts will give her the relief that she wants, moreover will she ever get the relief?

The High Court of Karnataka has shown some light when it said in a recent case dated 23 March 2022, that the exception to **Section 375 cannot be absolute** and men cannot consider women as their own property. The High Court rejected the petition of the husband who was contending that he should be given the protection under the exception of Section 375 and hence, he should not be made liable even though he committed forceful sexual act on his wife¹⁰.

"The exemption of the husband on committal of such assault/rape, in the peculiar facts and circumstances of this case, cannot be absolute, as no exemption in law can be so absolute that it becomes a license for commission of crime against society", the Court said.

The Court stated that the exemption for marital rape is "regressive" and would violate the equality principle established in **Article 14**¹¹ of the Indian Constitution. **Articles 14, 15**¹², **19**¹³, **and 21 of the Constitution** provide fundamental rights such as the right to live in dignity, personal liberty, bodily integrity, sexual autonomy, reproductive autonomy, privacy, and freedom of speech and expression. The Constitution guarantees equal rights and therefore it implies equal protection too to be given. Hence, this clearly then should consider marital rape as a rape.

A single bench of Justice M Nagaprasanna also said the following-

"The Constitution, a fountainhead of all statutes depicts equality. The Code practices discrimination. Under the Code every other man indulging in offences against woman is punished for those offences. But, when it comes to Section 375 of IPC the exception springs. In my considered view, the expression is **not progressive but regressive**, wherein a woman is treated as a subordinate to the husband, which concept abhors equality". Further he also said the following-

"A man is a man; an act is an act; rape is a rape, be it performed by a man the "husband" on the woman "wife".

This one line alone should urge our lawmakers and the topmost judiciary to step up and address the issue that is a clear blot on our Indian Society.

¹⁰ Hrishikesh Sahoo v. The State of Karnataka, 2022 LiveLaw (Kar) 89.

¹¹ INDIA CONST. art. 14.

¹² INDIA CONST. art. 15.

¹³ INDIA CONST. art. 19.

The argument often given by the government that marriage is a social institution and state must not interfere in this sacred institution and the private life of Indian citizens has by itself is very contradictory when the court ruled in **K.S Puttaswamy v. Union of India**¹⁴. In this landmark privacy decision, privacy was defined as "the ability of individuals to control vital aspects of their lives and safeguard the autonomy exercised by them in decisions concerning personal intimacies, matters of home and marriage, and sexual orientation."

This infringement of the same privacy is violative of Article 21 of the Constitution. Hence, this clearly fails the argument of the government that marriage as a social institution must be protected. On the pretext of this argument, today many women in India are getting raped inside of marriage where her consent and her right to manage her own affairs falls in a deep well where there is no way out. This now clearly lays bare the "double standards" that the government is following. The time is ripe to criminalise the marital rape until it is too late for the women of our country to hold on.

The Lessons For India From The Global World-

Russia, then known as the Soviet Union criminalised marital rape as early as 1922¹⁵. The Russian law says that rape is against the law, and a relative, including a spouse, who commits rape faces the same penalties as a nonrelative. Many countries such as United Kingdom, United States of America, Canada, New Zealand and many more have criminalised marital rape. Even countries like Rwanda, Nepal, Vietnam all have criminalised marital rape and the punishment can go as far as life imprisonment for a person committing the marital rape¹⁶. The countries such as USA, UK are said to be developed and a part of this development can be attributed to the protection these countries grant to the women of their countries. The women have the freedom to say 'no' even when they are married. Force implies Fear and Fear eats us inside while Freedom implies confidence and freedom blossoms us from inside and make us an empowered decision maker who can make his own decision when the time arises. Relying on this logic, India must give freedom to women to make their own decisions when it comes to their sexual autonomy and their dignity.

¹⁴ K.S Puttaswamy v. Union of India, (2008) 1 SCC 234.

¹⁵ Wikipedia, https://en.wikipedia.org/wiki/Marital_rape (last visited: Mar. 30, 2022).

¹⁶ Wikipedia, https://en.wikipedia.org/wiki/Marital_rape_laws_by_country (last visited: Mar. 30, 2022).

The social fabric of marriage will become more strengthened instead of weakened when women have the freedom to say 'no'. Fear is what today making the institution of marriage as 'weakened'. This is exactly when they will become empowered, not just by talking about 'women empowerment' can anything be achieved.

The Sociological Perspective On Marital Rape-

Let us take the example of Canada's legislation¹⁷ and with the help of this country let us try to explain "collective solidarity" in light of Emile Durkheim's theory and establish connection between them. Collective solidarity refers to a group of individuals that group together from the responsibilities shared by all, i.e.- which are common. Durkheim uses the term "social solidarity" instead of collective solidarity. Social solidarity is that which holds society together. This social solidarity can be measured through law. According to Durkheim, legislation acts in a way that can be experimentally tested to reflect social solidarity, because it confirms a society's norms and ideals (Pavlich, 2011). Prior to 1983, it was lawful in Canada for a person to rape their spouse (marital rape), but this was altered in 1983. (Koshan, 2010). According to Durkheim's theory, in this example, the contemporary 'collective conscious' (society's norms and values) believes rape, even with one's spouse, is immoral; however previous to 1983, the collective conscious did not believe raping one's spouse was immoral.

I believe there are two major components to how the law influences social solidarity: codification of the law and discretionary powers obtained from the law. The language of the laws; the written laws themselves are referred to as the codification of the law. This form is related to the marital rape legislation example, which has been written in a way that fosters social solidarity (bonding people via common responsibilities): everyone's desire for safety and well-being, and everyone's obligation not to hurt others (since 1983). The last aspect, discretionary powers derived from the law, relates to those who enforce the law, such as judges, police officers, and border guards, who all have discretionary powers.

B.R Ambedkar, a great sociologist said the following lines-

"Realising the depth of the degradation to which the so-called leaders of the people had fallen...Could any sane man, could any man with a sense of shame, oppose so simple a measure? But it was opposed..."

¹⁷ CODE CRIM. PROC. § 283.

He wanted to point out the great necessity of laws that this society needs in order to be governed properly. Dr. Ambedkar would be surprised to see that no one is willing to criminalise the issue of the marital rape. The Justice Verma Committee's report even recommended that marital rape should be criminalised in the wake of the horrific Nirbhaya Rape Case¹⁸ that happened. Justice Verma said that the relation of the perpetrator to the victim should not be a defence against the crimes of rape or sexual violation. Moreover, he said that marriage or any other intimate relationship should not justify the lesser sentences for rape of women. The sentence for the rape must be same for all and it is high time the exception to Section 375 be immediately removed.



¹⁸ Mukesh & Anr v. State of NCT of Delhi & Ors, (2017) 6 SCC 1.

Conclusion

“The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices”. This was the opinion given by Hon’ble Justice Nariman in K.S Puttaswamy v. Union of India. Several judges while giving judgements and in their reports have said that marital rape should be criminalised, one report being of Justice Verma Committee only. Extending this opinion further, today women of our country are facing injustice when they are left with no remedy in case of rape on the pretext of marriage. How can the marriage of two people survive ahead when there is rape involved. If not completely removing the exception enshrined in Section 375, the government should at least allow women to take divorce and claim maintenance.

The Debate must find its end because the arguments have now come to an end

The Debate must find its end because the women are empowered to defend

The Debate must find its end because we as citizens cannot pretend

The Debate has ended because India realised there is no dead end.

At last, this poem gives us hope that one day the issue of marital rape will be criminalised and that is when India as a country would have finally realised that all it is and all it was, was just a dead end.

Let us progress and progress in a way so that the women progresses, the society progresses, India progresses and the World progresses.