

Marital Rape: To Criminalize or Not?

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ABSTRACT:

The aim of this paper is to make an attempt to paint a picture about the current scenario of Marital Rape in India. Rape has been defined as forced sexual intercourse without the consent of the woman/man being raped. Punishment has also been prescribed in Indian law for Rape. But nowhere under Indian laws has the problem of Marital Rape and the consequences arising out of it been addressed. And yet more than half of the countries have criminalized Marital Rape and have strict laws governing Marital Rape. So why hasn't India yet passed a legislation criminalizing Marital Rape? What are the statistics of this heinous act which violates the basic identity of a woman? What are the various arguments cited by those in favour of criminalizing Marital Rape and of those who are not in favour? Through this paper, I'll make an attempt to provide a thorough view on the subject of Marital Rape in India and the laws that govern this aspect? This paper also focuses on comparing marital laws of other countries and what can be done so as to tackle this growing problem in India.

Keywords: Marital Rape, Rape, Rape Law

I. INTRODUCTION

India with its vast and diverse cultures and traditions has placed a lot of importance on the concept of marriage. The institution of marriage is the only social relationship which connects two people for a whole lifetime and by Indian traditions, for a whole seven afterlives'. But with passage of time, this institution which was once considered to be sacrosanct and the purest of all has taken the toll of today's society. Previously, the institution of marriage meant equal rights of both the partners over each other but now it seems that men of today's society have completely forgotten this concept of our society. Various vices borne out of our patriarchal society have come out in the open in past few centuries like sati, dowry and child marriage. And among all of them is the inhumane practice of marital rape which although is not new, but has come to be recognised around the world, all thanks to various women empowerment rights movements

Rape has been defined as forced sexual intercourse carried out without the consent of a person or on a person incapable of giving valid consent because of intoxication, unconsciousness or due to mental illness. Rape has been defined in the Indian Penal Code 1860.¹ But nowhere under Indian Laws has the term Marital Rape been mentioned. And yet more than half of the total countries have criminalized Marital Rape and have strict laws governing Marital Rape. So why hasn't India yet passed a legislation criminalizing Marital Rape? What are the statistics of this heinous act which violates the basic identity of a woman? Through this paper, I'll be attempting to provide a thorough view on the subject of Marital Rape and what are the laws governing this area? This paper will also focus on comparing marital laws of other countries and what can be done so as to tackle this growing problem in India.

¹ Indian Penal Code 1860, Section 375.

II. MARITAL RAPE IN INDIA

“Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.” - F. H. Batacan.

Marital Rape is defined as any unwanted sexual acts by a partner or an ex-partner, committed without the consent or against the person's will, obtained by force, or threat of force, intimidation, or when a person is not in the condition to give consent.² Presently Marital Rape has been segregated into three types-

- **Battering Rape-** Battering Rape- is defined as rape when sexual and physical violence simultaneously. The former can be followed by the latter or can be subsequent to it. Generally, rape occurs after physical violence as an attempt to "make up."³
- **Force-Only Rape** – The element of physical violence is absent in this kind of rape. Like in most rape cases, it arises by a desire to exert power and to establish dominance over the victim. The perpetrator perceives sex as an entitlement from the victim.⁴
- **Obsessive/Sadistic Rape** – This type of rape contains the element of torture and perverse sexual conduct. It is characterised by violence and subsequently results in injuries.⁵

So the question that arises here is that what is the difference between Rape and Marital Rape in India? Marital Rape as of now is not an offense in India. Section 375 of Indian Penal Code 1860, which defines the provision of Rape, ironically mentions in its Exception 2, “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.” Hence it can be concluded safely that the law considers Marital Rape to be a Rape only when the spouse is under 15 years of age and the punishment to be meted out is also milder. The Indian Penal Code prescribes for the punishment of Marital Rape in the following categories-

- When the spouse is between the age of 12-15, offence is punishable with imprisonment up to 2 years or fine, or both;
- When the spouse is below the age of 12 years, the offence is punishable with a term not less than 7 years but can be meted out for life or can be stretched for up to 10 years and is also subject to fine;
- When the spouse is judicially isolated and separated, offence includes detainment for up to 2 years and fine;

²Sheri Stritof, *Understanding Marital Rape*, Live About (Jan.4,2019, 10:04 AM), <http://www.liveabout.com/what-is-marital-rape-2300724>.

³ Natasha Tracy, *Marital Rape, Spousal Rape*, Healthy Place (Jan.4,2019, 11:37 AM), <https://www.healthyplace.com/abuse/rape/marital-rape-spousal-rape>.

⁴Ibid

⁵Supra note 3

- When the spouse is above the age of 15 years, the act is not punishable.

So as such no strict punishment has been meted out for those violating the very dignity and safety of women. With the passage of Protection of Women from Domestic Violence Act 2005, Marital Rape is now considered as a type of local violence. Under this provision, a person can go to the court and get a legal separation from her husband for marital rape. But still under this provision as well, Marital Rape is considered as a type of domestic violence and not as Rape and hence the most a lady can get is a legal separation which might include monthly allowances from the partner. Despite the brutal gangrape and death of 'Nirbhaya' in the national capital of India in 2012 and the massive uproar and protests that followed later and the Justice Verma Committee in their report for "Amendments to Criminal Law" recommending Marital Rape to be criminalised, no such law for married women have been passed yet. Hence married women when they need to file complaint against for marital rape or sexual assault, they only have the option of invoking Section 498A of the Indian Penal Code, which talks about cruelty and also the term cruelty has not been defined in the provision and has been left for the judges to interpret whether the said act falls under the ambit of cruelty or not. And surprisingly many times the accused go unharmed because of this interpretation clause.

III. STATISTICS

Although many times denied by the government and also by a huge chunk of our patriarchal society that Marital Rape exists, the statistics paint a completely different picture. The data by various think tanks and surveys suggests that the problem of Marital Rape has only overgrown with the passage of time. According to the latest National Health and Family Survey (NFHS-4) for 2015-16, 5.4% women have experienced marital rape, under this category.⁶ 4.4% of them say they have experienced marital rape in just the last 12 months before this survey. The figure recorded by NFHS-3 for 2005-6 was 9.5%.⁷ Although these numbers do not give the entire picture very clearly, because many of these incidents go under reported. It is very likely that women questioned under this survey would have suffered because of Marital Rape a number of times and many of the women wouldn't have answered correctly because of societal burdens and the fear of being ostracised from the society. Marital Rape is a crime committed in intimate spaces and hence it is very likely that it is almost impossible to get a clear picture. During a petition filed in Delhi High Court, seeking to criminalize Marital Rape, the Women and Child Development Ministry, on behalf of the Union Government said that the very idea of the crime is not suitable in the Indian context and if made a criminal offense it could become a phenomenon

⁶AnooBhuyan, *Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims*, The Wire (Jan. 7, 2019, 07:31 PM) <https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims>.

⁷Ibid.

which might be an easy tool for harassing husbands.⁸ India is among the 36 countries worldwide which have not recognised Marital Rape as a criminal offence.⁹ Considering the plethora of data that we have currently, Marital Rape exists in the data but not in the law as of now.

IV. MARITAL RAPE LAWS IN OTHER COUNTRIES

- **United States of America-** Marital Rape in USA has been illegal in all the 50 states and Washington D.C. since 1993 as stated under Model Penal Code.¹⁰ Before then, “marital exemption” allowed a person to rape a spouse without the fear of legal repercussion.¹¹ In the 1984 New York Court of Appeals case of *People vs. Liberta*, it was held by Judge Sol Wachtler that there was no need of differentiation between marital and non-marital rape.¹² Till 1975, every state had a “marital exemption “ law but South Dakota became the first state to drop it and North Carolina was the last.
- **United Kingdom-** UK used to follow the theory of Sir Matthew Hale, a former Chief Justice of the Court of King’s Bench in England who had in his treatise, *History of the Pleas of the Crown*, had laid that “husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract”.¹³ But in landmark case of *R v. R*¹⁴ in 1991, House of Lords held that “Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances”.¹⁵
- **Nepal-** Before 2002, there was no law criminalizing Marital Rape in Nepal. But in 2002 after the its Supreme Court held that Marital Rape went against the constitutional right of equal protection and the right to privacy, Nepal criminalized Marital Rape.¹⁶

Several other countries like South Korea, Sri Lanka, France, Japan already have well established Marital Rape laws or are working on them to criminalize this inhumane act which violated the basic human right. These changes show how people around the world have changed their attitude towards this centuries old custom and

⁸Kumar Rajesh, *Data on Sexual Violence in Marriages Shows Why India Should Progress Towards Criminalising Marital Rape*, Huffington Post (Jan. 7,2019 0747 PM) https://www.huffingtonpost.in/kumar-rajesh/latest-data-on-sexual-violence-in-marriages-shows-why-india-should-progress-towards-criminalising-marital-rape_a_23367102/.

⁹Legistify.com, *India is one of 36 Countries Where Marital Rape Is Not A Crime. Here Are The Changes We Need*, The Better India (Jan.7,2019, 08:01 PM) <https://www.thebetterindia.com/109672/marital-rape-an-unrecognized-evil/>.

¹⁰ Model Penal Code, HEINONLINE(2016), <https://home.heinonline.org/titles/American-Law-Institute-Library/Model-Penal-Code/?letter=M>.

¹¹ Jessica McLaughlin, *Marital Rape in the U.S.: What Are the Laws?*, Law Street Media (Jan. 10, 11:00 AM), <https://lawstreetmedia.com/issues/law-and-politics/marital-rape-u-s-laws/>.

¹² *The People of the State of New York v. Mario Liberta*, 64 N.Y. 152(1984).

¹³<https://www.theweek.co.uk/98330/when-did-marital-rape-become-a-crime>.

¹⁴ *R v. R*, 1991 ALL E.R. rep. 4at 481.

¹⁵<https://www.theweek.co.uk/98330/when-did-marital-rape-become-a-crime>.

¹⁶Shalini Nair, *Marital Rape A Crime In Many Countries, An Exception In Many More*, The Indian Express (Jan. 10, 2019, 11:53 AM), <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>.

are now moving forward with the idea of providing equal rights to both the sexes. Despite a trend worldwide criminalizing Marital Rape worldwide, why is it that we Indians are not criminalizing it yet? What are the arguments given for not criminalizing Marital Rape? We'll look over this in our next section.

V. WHY SOME PEOPLE CONSIDER MARITAL RAPE AS NO PROBLEM AT ALL

- The central government has said that if marital rape is criminalized then it might be used as a tool to harass husbands and to extort money from them which in turn would actually destabilize the very sacrosanct institution of marriage.¹⁷
- It has been further said that the concept of marital rape is that of a western society and we as Indians should not be following all the customs of west blindly. Advocates of this argument state that marital rape cannot be made a criminal offence in India because of high illiteracy rate, poverty, extreme religious beliefs and the very sanctity of marriage.¹⁸
- It is often cited by those not in favour of criminalizing marital rape that it would be almost legally impossible to prove a marital rape, as the only testimony we will have would be of the wife and which of course could not be proved scientifically. And the wife of course could have ulterior motives.
- Another argument cited by the critics is that an attempt to criminalize marital rape is to assume that sexual intercourse is not essential to the institution of marriage whereas according to them, it is the very basis on which the concept of marriage was founded.¹⁹
- One of the most important of all these arguments is that given that women in India do have legal recourses and hence there is no such need of such harsh measures to employ. The legal recourse being talked here is that of Domestic Violence Act 2005 and Section 498A of the Indian Penal Code. But these acts have their very own limitations like-
 1. Domestic Violence Act 2005 is basically a civil act and hence even it is proved that a wife was sexually violated by her husband, he cannot be punished.²⁰ Hence a woman only gets a civil protection against her husband on forced sexual assault and intercourse.²¹

¹⁷Pooja Chaudhari, "Marital Rape Laws Will Be Misused By Women" Is A Flawed Argument; Here's How The Accused Can Be Punished, The Logical Indian, (Jan. 9, 2019, 10:53 PM), <https://thelogicalindian.com/awareness/marital-rape-can-be-proven/>.

¹⁸Kalpana Sharma, *Why Isn't Marital Rape A Criminal Offence In India*, Times of India, (Jan. 10, 2019, 09:17 AM), <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/Why-isnt-marital-rape-a-criminal-offence-in-India/articleshow/54223996.cms>.

¹⁹Aankhi Ghosh, *Deconstructing The Marital Rape Debate*, Bar and Bench, (Jan. 9, 2019, 12:52 AM), <https://barandbench.com/marital-rape-deconstructing-debate/>.

²⁰Pooja Chaudhari, "Marital Rape Laws Will Be Misused By Women" Is A Flawed Argument; Here's How The Accused Can Be Punished, The Logical Indian, (Jan. 9, 2019, 10:53 PM), <https://thelogicalindian.com/awareness/marital-rape-can-be-proven/>.

²¹ Domestic Violence Act, 2005.

2. Section 498 of the Indian Penal Code states that if a husband treats his wife cruelly, then it is a criminal offence.²² Though nowhere cruelty has been defined under this section but the amount of punishment given under this law is quite lenient. It prescribes for imprisonment of 3 years only.

VI. ARGUMENTS AS TO WHY SHOULD MARITAL RAPE SHOULD BE CRIMINALISED

As we have already discussed regarding various laws on marital rape of other countries and how other countries are in the process of bringing a law on criminalising marital rape. Hence it can be inferred quite easily that why have Indians laws

- Article 14 of the Indian constitution talks about Equality before law. It states that “The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”²³ If we apply this article in the cases of marital rape it can be easily seen that victims of marital rape are not being given a fair chance to represent themselves in the court of law. Married women are also not provided with safe laws so as to protect them. Also there are various laws which discriminate amongst women on the basis of their marital status. For e.g. Unmarried women are allowed to raise a complaint if an act of rape is committed against them, whereas a married women’s cry to a rape is brushed off as her sacred duty towards her husband. This very act also violated the article 14 of the Indian constitution.
- Article 21 of the Indian constitution is also being violated here. It states that “Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.”²⁴ When looked closely it can be clearly understood that the exception provided to perpetrators of the marital rape clearly violates the very basic rights of a woman. It violates the right of a woman to live in society with dignity and respect which has been guaranteed by the constitution itself. In the case of State of Maharashtra and Anr. Vs Madhukar Narayan Mardikar²⁵, it was held that every woman is entitled to her sexual privacy.
- Critiques of making Marital Rape a crime has stated that marriage is a contract and hence when a wife gives her assent for marriage, it basically can be inferred that she is also giving her consent for having sexual intercourse. But this assumption is wrong to its core. First of all, it needs to be understood that in every religion, marriage is not considered to be a contract. Infact some religion consider marriage to be a sacred and sacrosanct ritual. Even if marriage is considered to be a contract under Muslims law, it is a well

²² Indian Penal Code, 1860, Section 498-A.

²³ INDIA CONST. art. 14.

²⁴ INDIA CONST. art.21.

²⁵State of Maharashtra and Anr. V. Madhukar Narayan Mardikar, A.I.R. 1991 S.C. 207 (India).

understood fact that consent plays an important role for the formation of a contract. According to Section 14 of the Indian Contract Act 1860, “ Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.”²⁶ Hence taking this concept in account for marital rape it can be assumed that during marital rape, there exists coercion and undue influence which makes the contract instantly void. And hence the argument of consent fails then and there itself.

- Interestingly India has also signed the United Nations Conventions on the Elimination of all Forms of Discrimination against Women (CEDAW). CEDAW says that all the discriminatory laws against women violates their rights to live with respect and dignity. In addition to this convention, a resolution was passed by the CEDAW which recommended that Marital Rape needs to be criminalized.²⁷ But till now, India has not criminalized it yet.
- An argument cited again and again by the critics is that how can we provide for evidence to prove that marital rape has happened. First thing that needs to be understood here that marital rape is not just a one-time act. It is something that happens over a long period of time. Unlike rape, marital rape may happen for a long period of time. And to tackle the argument part, the SC in *Om Prakash vs. DilBahar*²⁸ has provided that a person who has been accused of a rape can be arrested solely on the basis of evidence of the victim even if the medical evidence does not proves it.

VII. JUSTICE VERMAS COMMITTEE

In 2013, a committee was formed which was headed by Justice JS Verma, Former Chief Justice of Supreme Court. This committee included Former Chief Justice of Himachal Pradesh High Court, Justice Leila Seth and Gopal Subramaniam, Former Solicitor General of India.

This committee was formed with the intention of giving recommendations regarding various amendments needed in the criminal law for speedy trials and to make stricter laws against criminals who have been accused of committing sexual assaults against women.²⁹

The committee on marital rape took the stand of eliminating this century long out dated notion. It gave reference of the *C.R. vs. UK*³⁰, a judgement of European Commission of Human Rights, where in the court held that rape is a rape irrespective of the fact whether the accused has any kind of relationship with the victim. This judgement was further strengthened when it was given statutory recognition through Criminal Justice and

²⁶ Indian Contracts Act, 1860, Section 14.

²⁷ Ms. Dubravka Simonovic, Convention on the Elimination Of All Forms Of Discrimination Against Women – Main Page (December 18, 1979), <http://legal.un.org/avl/ha/cedaw.html>.

²⁸ *Om Prakash vs. DilBahar*, (2006) 9 S.C.C. 695 (India).

²⁹ Justice Verma Committee Report, PRS (2017), <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summay-2628/>.

³⁰ *CR vs. UK*, 1997 ECHR at 1.

Public Order Act 1994. The committee also further dealt with the issue of seriousness of the crime of marital rape. It was considered herein that the judges or lawmakers might consider the issue of marital rape as that of a less serious crime as compared to other kinds of rape, same was happened in a case in South Africa.³¹

After going through various laws from other parts of the world, the committee recommended the following changes with respect to marital rape-

1. The exception of marital rape be removed from the law and the offence be criminalized.
2. The law criminalizing marital rape needs to specify that-
 - a. A previous relationship between the accused and the victim will not be a valid defense.
 - b. The fact that whether the accused and the victim are married or not will not be considered as a factor that justifies for lower sentences for rape.³²

Suggestions for the new law

1. The first and foremost step that needs to be taken is to remove the Exception 2 of the Section 375 of the Indian Penal Code which states that sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. This very Clause creates confusion and segregates between married and unmarried women.
2. The punishment for rape and marital rape has to be same. This would avoid confusion and would treat both the offenses as same and would offer speedy and efficient justice to the victims.
3. The lawmakers need to formulate a proper mechanism for determining whether a married woman accusing her husband has been raped or not. This can be determined by taking a few small steps-
 - a. When the spouse is incapable of having an intercourse
 - b. When there is an irretrievable breakdown of marriage
 - c. When the court has ordered the couple to be judicially separated
 - d. When the spouse has already filed complaints against the other
4. The option of divorce should be readily available to the victim after the crime has been proved. The victim does not need to go to the family court to get a divorce. Instead the court dealing with the case of marital rape should be allowed to grant the victim to have divorce from their partners.

³¹ S vs. Moipolai, [2004] ZANWHC at 19.

³² Supra note 30.

5. The victims of the marital rape should be allowed to file cases both in civil and criminal courts. This would allow them to punish the perpetrator and as well recover compensation from the accused for the damage caused by the act.

6. If evidence proves that marital rape has been committed and the victim opts for divorce, then the custody of minor children has to be given to the victim on whom the crime has been committed. The accused in such case needs to give monthly maintenance to the victims and the children for their upbringing.

VIII. CONCLUSION

As we reach the end of paper, it can be easily inferred that marital rape is still not treated seriously in our society as it should be and is being treated in other countries. People still look towards it as an age long practice confined to the bedroom of the couples and not as a problem of the society. What's more saddening is the current government's outlook towards Marital Rape. In the case filed in Delhi High Court, the government tried to defend this inhumane practice. The government tried to justify this practice by using the excuse of the law being misused by Indian women to extort money from husband.

This current outlook of the government only shows how severely we need stringent laws so as to curb this inhuman practice which violates the very dignity of a woman. This could only happen if the present patriarchal society changes its outlook towards women and stops objectifying them. The population needs to be educated and made aware about how both men and women are equal. People need to understand that a rape is a rape irrespective of whether the victim had a relationship with the accused or not.

We are living in a time where India is striving to become a superpower in almost every domain that is possible. But how can we expect our country to make strides in this field if the masses don't respect and treat women as equals. Hence it is important for the lawmakers to realize that its time now that they took steps towards achieving this goal. And to criminalize this inhumane practice of marital rape would be a good start.

In *Independent Thought vs. Union of India*³³, Supreme Court of India declared that any man who has had sex with a girl below the age of 18 years without her consent is said to have committed rape, whether she is married or not. This judgement has given all of us some hope that a change in the outlook of people in the near future is quite near.

³³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).