

# Criminalization of Marital Rapes: A Need of the Hour

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## ABSTRACT:

Marital rape is socially accepted crime in India. Marriage is a legal license to husband for having sexual intercourse with his wife even without her consent. In this article author is focusing on the incompetency of law rather than the social approval. In constitution of India Article 21 provides citizens to live a life with dignity. But in cases of marital rapes, dignity of a woman is always harmed. When we are considering consent as a key element in cases of rapes, then why are we ignoring it in case of a married woman. Under this contention author questions the constitutional status of our legal system. Marital rape is expressly denied in Indian Penal Code. As the exception 2 of Section 375 expressly says wives are exception to rape. Does that mean we are providing a husband privilege of raping his wife or providing him safeguard against such an inhumane conduct? Under this section author is questioning the ability of law and the hypocrisy is when it is accepting the marital rape in case of separated husband and wife but not in the case of husband and wife living together. Above position of law is prima facie vague and in dire need of changes. Also the law commission have given reckless explanations and vague grounds for not criminalizing marital rape. The article is discussing these law commission reports extensively. Also the safeguard present in the current legal system for marital rapes are not adequate and need a reform. Lastly the article provides the recommendations for betterment of law and current situation.

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**“No' kamatlab 'No' hota hai. Use bolne wali ladki koi parichit ho, friend ho, girlfriend ho, koi sex worker ho ya apki apni biwi hi kyuna ho. 'No' means 'No'. And when someone says so you STOP!”**

**- A monologue from movie “PINK”.**

## I. INTRODUCTION

The word rape in itself frames a picture of a man forcing a woman for sexual intercourse and everyone is so disturbed by instances of rape. But when it comes to marital rape our patriarchal society turns their face, they pretend like they do not have any responsibility towards the married woman who is being raped by her own husband. This is one of the major flaws in laws regarding sexual assault. In the present Indian society, a woman is considered as a property of a man after marriage and the conception is that whatever he can do whatever he wants to do no matter his wife consents for it or not.

## II. CONSTITUTIONAL SAFEGUARDS AGAINST MARITAL RAPE

In India, the marital rape can be seen de facto but not de jure. But the fine drafted constitution of India provides safeguards to women. First and foremost safeguard against the marital rape is enshrined in Article 21 of the Constitution. Where the right to live with dignity is interpreted in certain cases. Marital rapes are prima facie violative of Article 21. Interpreting the case of **Soka v Emperor** which says that:-

*“Modesty is considered to be an attribute of every female since her birth and an outrage against a wife will be punishable irrespective of the fact that she is of a tender age or developed enough understanding so as to appreciate the nature of the act. Modesty is an inherent characteristic of womanhood independent of any individual’s personality.”*

From the above, it is clear that a wife has dignity which is protected by the Article 21. The act of marital rape not only a form of physical and sexual abuse but also abuses the dignity and modesty of a woman irrespective of her marital status, no one is entitled to infringe into that not even her husband. A woman is the owner of herself, thus her consent always matters. A marriage can never be the justification of outraging the modesty and diminishing dignity of a woman.

Secondly, as per new interpretation of Article 21 in case of **Justice K S Puttaswamy (Retd) v Union of India**, the bench gave its unanimous decision declaring Right to privacy as an intrinsic part of the Article 21. Privacy is a serious concern for everyone, even a married woman have her own privacy. And categorically this privacy includes the right to sexual privacy. No one can interfere in the sexual privacy of a woman against her consent. Such sexual rights are abstractly covered under the case of **Vishakha v State of Rajasthan** where the Court said sexual intercourse is a woman’s personal right. Also in case of **State of Maharashtra v Madhakar Narayan** the court acknowledged that sexual privacy of a woman cannot be infringed and her own personal rights and decision should be respected.

### III. MARITAL RAPE WITHIN THE AMBIT OF INDIAN PENAL CODE

The Indian Penal Code under section 375 criminalizes the offence of rape. It is an expansive definition which includes both sexual intercourse and other sexual penetration within the definition of ‘rape’.<sup>1</sup> However, this section excludes forced sexual intercourse between husband and wife under exception 2 of the section. Thus creates husband-wife relationship an exception. But this does not mean that marital rape is not a rape. Flaw in section 375 is ostensible as exception 2, which excludes wives from the definition of the rape but it does not provide any reason for such exclusion. The main focus of the section is on the concept of consent. Legislative intent to provide exception 2 is clear as it assumes the consent between the perpetrator and the victim. However certain relief is given to the victims of marital rapes under section 376B which renders sexual intercourse between husband and wife as rape, (1) where the consent of wife is absent and (2) Sexual intercourse occurred during the separation. The first report to deal with this issue was **the 42nd Law Commission Report**. This report formally assumed the consent between a husband and wife living together. First time in law marital rape was recognized and it was said that “it is not right to criminalize marital rape”. Why? This was not answered.

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<sup>1</sup> David Finkelhor and Kersti Yllo, “Rape in Marriage – A Sociological View” in *The Dark Side of Families*, ed. by David Finkelhor, (1983) at 119.

The Law Commission specifically dealt with the validity of the exception clause in the 172nd Law Commission Report.<sup>2</sup> The report validated the exception clause since it feared that criminalization of marital rape would lead to “*excessive interference with the institution of marriage*”.<sup>3</sup> Later in 2012 a nationwide agitation was there seeking the criminalization of marital rapes. In result of that, a committee was formed which was headed by Justice J.S. Verma (Retd.). The committee suggested criminalization of marital rape. This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.<sup>4</sup>

Recently in 2015 the where ministry of Home Affairs reiterated the idea of criminalizing the marital rape. One of the reasons given for this was the “mindset of the society to treat the marriage as sacrament”. After the rejection of parliamentary standing committee till now no step has been taken to criminalize the marital rapes. Criminalizing marital rape is not only the duty of legislature but also of the judiciary.

#### IV. STATUS OF SAFEGUARDS FOR WOMEN IN INDIA

Safeguards for women are provided in the laws of India; Criminal law and Civil law. There is no specific safeguard for the marital rapes in India but the end can be achieved by the other way round. Through alternatives are provided in law. We can use such laws as a safeguard for women against marital rape. Also, we will discuss the status of such safeguards.

##### **Criminal Law:-**

Section 498 of the IPC is the most relevant provision in this regard. Section 498 was inserted to provide a safeguard from the act of cruelty against women. But this section lacks its capacity when it comes to marital rape, because (1) there is a considerable difference between rape and cruelty and (2) the section only deals with cruelty and not with the rapes.

Dealing with the first reason to begin with, there is no straightjacket definition of cruelty. However, what would amount to cruelty is purely a question of fact and would vary from case to case. There is no specific definition of cruelty given by the courts to keep it broad, it is still very difficult and tricky to bring in cases of rape within this section. We cannot deal with the cases of marital rape with section 498 for the reason being; (1) under cruelty intensity of the act is looked into and the threshold for such is very high but in cases of rape threshold is too kept very low. (2) Section 498 demands the repetition of conduct but in case of rape only one instance is enough. (3) Punishment under section 498 is maximum of 3 years with or without a fine but in rape it is 7 years or life imprisonment.

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<sup>2</sup> Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000),

<sup>3</sup>Id., 3.1.2.1.

<sup>4</sup> JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013).

**Civil Law:–**

For civil law, we have already recognized the '***right to sexual intercourse***'. This right should also be used as in its negative connotation providing the right to say no to the sexual intercourse. If this is done then we can use it as a ground for divorce in The Hindu Marriage Act as well. Moreover the PWDVA, 2005 includes sexual violence in its definition of domestic violence. This definition can be used for the interpretation of word cruelty. In this way, the safeguards under civil law can be used.

**V. CONCLUSION AND RECOMMENDATIONS**

In light of the above firstly it is necessary to understand that marital rape is equally horrible as rape. By not providing sufficient protection we are violating the right to equality of married women. It is not only the result of our patriarchal society but also of our flawed legal system which does not recognize marital rape as an offence. Although we have alternatives to such cases but rather focusing on alternatives we should criminalize the marital rapes. For this following steps should be taken:

- (1) Exception clause under section 375(2) of IPC must be deleted.**
- (2) Complexities must be simplified in proving rape in such cases.**
- (3) Relation of husband-wife should not be considered as a defense in such cases.**
- (4) 'Right to sexual intercourse' should also be taken in its negative connotation.**