

Marital rape: An Unrecognized Crime in India

-Arzoo Khan*

Abstract

Half of the planet population represents women however we tend to see that women are often subjected to various forms of atrocities in the society. Discrimination, oppression, prejudice, and violence are often seen against women in this male-dominated society, since the beginning of human civilization. Violence against women is prevalent in all the communities, cultures, societies and regions. Despite various conventions, legislations and penal provisions violence against women is at the same front. Women are always subjugated for the sake of violence. In every era, whether it is the old Vedic period or the times of Muslim rule or the modern times before and after independence, despite the various movement's violence against women always prevailed in the larger extent. It seems the society is governing through the old saying prevailed in India: *Dhol Ganwar, Shudra, Pashu, Nari Sakal tarana ke adhikari*. Violence against women in India has assumed a ruffling and alarming proportion. According to a recent survey, there are forty specific forms of violence committed against women. They include child marriage, rape, domestic violence, female foeticide, sexual harassment. One of such violence committed against women is marital rape. In India marriage is always considered as a sacramental pious union. The object of marriage was to enable a man and a woman to perform religious duties and to beget progeny. Although marriage gives the sanction of sexual intercourse but only if both the husband and wife agree and willingly consents to it. While in India, the role of women and men is socially enlightened and constructed. Women are bestowed with a social obligation called 'stridharma' which means women entails a devotion to her husband. Marital Rape is a type of crime and violence against the women both physically and mentally in a form of assault which has been ignored by the Indian laws to be considered as a crime. Due to this ignorance, under the veil of the sacramental union of marriage, Marital Rape has failed to be identified as a crime, and it is a bitter truth that it, is even being justified. *Keywords-Marital, Rape, Marriage, Crime, India, Violence.*

* Student,LLM,University of Rajasthan,Jaipur

Definition:

Marital Rape, in the common laymen language, is understood as sexual intercourse by a man with his wife obtained by force or threat of force or physical violence or without her consent or when she is unable to give consent.

Marital rape exists in the society, in all the religions, cultures, communities and within all the boundaries of the country, some of them get enlightened while some of them still get hidden in the veil of marriage and social boundation. Rape is rape regardless of the relationship between the rapist and the victim.

No law or the dictionary defines the marital rape specifically but it can be defined as- *Marital rape is an unwanted sexual act or intercourse committed without consent or against a person's will or when the consent is obtained by force, threat of force, by coercion, or when the person is unable to give the consent. It is also known as spousal rape.* India is one of the thirty-six countries that still have not criminalized marital rape.¹

Exception 2 to sec 375 of Indian Penal Code², states that sexual intercourse by a man with his wife is not rape which says that "*sexual intercourse or sexual acts by a man with his wife not being under 15 years of age, is not rape*". This exempts unwilling and non-consensual sexual intercourse between a husband and a wife over fifteen years of age from Section 375's definition of 'Rape'.

Consequences of Marital Rape:

The consequences of marital rape can be classified as follows:

- 1) Somatic effects-Somatic and physical consequences of marital rape comprises injuries to private organs, bruises, lacerations, torn muscles, fatigue etc. The somatic effects also include gynecological consequences which can be life-threatening for the victim of marital rape.
- 2) Mental and emotional effects-Women who are subjected to rape in their own house by their husband often suffer dreadful and serious psychological effects. Those

1. Marital Rape in India: 36 countries where marital rape is not a crime, *India Today*, Mar. 12, 2016.

2. Exception 2 to Section 375 of Indian Penal Code, 1860 in material part, lays down:-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

psychological effects can be of short term or can be long-lasting which can again be life-threatening or can badly affect the normal life of the women.

As rape is exceptionally a heinous crime, but still this crime of rape generally enlightens when it is complained about. But for the sake of society and because of liberal law and unrecognized penal provisions the crime of marital rape still prevails in the four walls of the household and the victim is subjugated to it and bear its tremendous effects with no complaint.

Causes of the such unrecognized crime:

As every crime has an element of intention in it same as the marital rape has intention as one of its elements and with that various jurists, psychological researchers and scholars during their investigation found some reasons and causes behind commission the marital rape:

1) Since the primitive period woman is considered dependent on man and that man has its sole control over woman. Manu laid down in the Hindu code that a woman must consider his husband as a God. She should be kept in dependency by her husband. In all the eras of the world, women are always considered as subordinate to men. Men consider their physical and non-physical control over women. We can say that one of the causes of marital rape is such patriarchal ideas and the nature of society.

The state of women in the ancient period is very much comprehensible from the ancient scriptures. In Manusmriti-verse 9.3³

*pitā rakṣati kaumāre bhartā rakṣati yauvane|
rakṣanti sthavire putrā na strī svātantryamarhati|⁴*

The father guards her during virginity, the husband guards her in youth, the son guard her in old age; the woman is never fit for independence.

The women were always kept in the private sphere. Such antiquated views of the prevalent society crystalline the position of women in those times which are still prevalent in our present society where even husband violet her privacy and invade her dignity.

3. <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc201361.html>

4. Supra, note 3

2) Rape, in the union of marriage, is not only for sexual needs but it is also a way to show power and supremacy over the victim. It usually happens in the household where the woman earns more than the man. Hence, to diminish her status and debase her dignity man uses such a crime of marital rape as his weapon.

3) In India, other social evils like dowry system and female infanticide also affect the commission of marital rape at some sort of extent. Husband subjects their wife to rape as a punishment for not fulfilling their dowry requirements or for not having a male child.

4) Child marriages prevalent in India is also a major reason for the commission of marital rape. As girls get married at a very young age and remain unaware of sex education and unknowingly consider it as a part of their duty in the union of marriage and never understand it as a crime of infringement of their rights. Hence never question the same.

Why marital rapes are not reported often or why the prosecution is difficult in the crime of marital rape?

Marital rape is an intimate crime that is committed in a sacramental union of marriage. There is no awareness and strict penal provision in its regard hence it becomes very hard to prosecute the abuser for marital rape.

Firstly, it is hard to believe in such a patriarchal society where marriage is considered sacred that a husband can rape his wife.

Secondly, Women hesitant to report marital crime because they fear the complications in their union.

Thirdly, Women feels uncomfortable in discussing sexual violence caused in their personal life as it resultant humiliation to her in public.

Fourthly, Many women because of a lack of awareness and proper education consider marital rape as their duty and not a crime. Due to these women never seek outside help to get rid of it.

Fifthly, the major fault is in the law, which does not consider it as a crime and still does not recognize a penal provision for it.

Sixthly, Due to rape is committed in marriage, the evidential burden of proof to prove

becomes very difficult.

And lastly, It is seen that when women gather the courage to report about the crime of marital rape, often it is seen that police officers does not show proper response towards it and various religious advisors pressurize the complainant woman to drop the idea to report the offence and consider it as her duty towards her husband.

Legal Position of Marital Rape in Indian laws:

Societies all over the world consider that, while consenting to marriage a woman is considered as she has given her irrevocable consent to sexual intercourse with her husband. Hence the usual conception of society is that husband is cannot be held liable for guilty of committing rape upon his wife. Sir Mathew Hale, CJ wrote in his History of the Pleas of the Crown⁵ :

"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract"....

This statement makes it clear that the husband has a right to sexual intercourse with his wife whether she consents the same or not which is completely against the human rights.

India is governed by Indian Penal Code 1860⁶ as substantive criminal for India, It is drafted by Sir Macaulay and it comprises provisions which defines rape under Section 375⁷ and also penalize the offence of Rape⁸

Under Section 375 of Indian Penal Code rape⁹ is defined as a coercive non-consensual

5. 1 Hale PC (1736) 629(6)

6. ACT NO. 45 OF 1860

7. In material part, lays down A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:- 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, because 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 sixteen years of age. Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

8. Indian Penal Code,Section 376,1860-Punishment for rape.

9. Supra, point 7

intercourse with a woman “*without her consent*” or “*against her will*”.

It states that man is said to commit rape under following circumstances¹⁰ –

i) Against her will.

ii) Without her consent.

iii) 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.

iv) 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.

v) 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.

vi) With or without her consent, when she is under sixteen years of age.

Indian Penal Code provides that "Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape".¹¹

The Hon'ble Supreme Court in its recent and landmark judgment on 11th October 2017, held that Exception 2 to Section 375, that the Age shall read as 18 years instead of 15 years in exception 2 of section 375 Indian Penal Code.¹² Thus, marital rape is considered as a crime just if the woman is under 18 years old, and the seriousness of punishment is much lenient. There is no specific provision provided to the woman after the age of 18, which is again against human rights directions.

However, the legislature added a provision under section 376A¹³ of Indian Penal Code stating Intercourse by a man with his wife during separation. This provision was added in IPC in 1983 and the said amendment was made on the recommendation of joint committee On IPC Amendment bill 1972. Hence, despite of this attempt of legislature, it can be clearly seen that, this section is completely silent on the rape

10. Indian Penal Code, Section 375,1860

11. Supra ,point 10

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

13. Sec 376a-Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

committed by the husband while living together in the same house.

Secondly, It is also silent about the scenario where a husband commits the rape during the wife is living separately for the prior period before the presentation of a petition of divorce by mutual consent. Thirdly, it has also a complete silence on the commission of rape when the husband and wife is living separately on the mutual agreement under section 125(4)¹⁴ Code of Criminal Procedure,1973.¹⁵

Fourthly, it is also quite on the point when husband commits rape upon wife while living separately under circumstances of sec 18(2)Hindu Adoption and Maintenance Act,1956.¹⁶

Punishment of rape¹⁷ is embodied under Indian Penal Code provides that when a husband is found guilty of marital rape when his wife is below 12 years of age, he shall be punished with a mandatory imprisonment of minimum 7 years just as the other offence of rape. Legislature has not specifically propounded any punishment nor given importance if the rape is committed by husband on wife who is between twelve years to fifteen years nor provided specific punishment for rape committed upon wife above 15 years.

Even 172nd Indian Law Commission report¹⁸ passed in March 2000 had made the following recommendations for substantial change in the law with regard to rape.

- ‘Rape’ should be replaced by the term ‘sexual assault’.
- Marital rape: explanation (2) of Section 375 of Indian Penal Code should be deleted.
- Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence.

14. Sec 125(4) in material part, lays down- No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

15. Act No. 2 of 1974

16. Sec.18(2) in material part, lays down-A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying her living separately.

17. Indian Penal Code, Section 376,1860

18. 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

- On the same reasoning, Section 376 A was to be deleted.

Even after 20 years of the above-mentioned report, we can see no changes according to the report in the present criminal law of the land.

In the Parliament, it was once said that¹⁹ *"It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament."* In such state how can we expect from the legislature to make a reform?

Constitution of India and Marital Rape:

The Constitution of India is the guardian of the nation. It reflects as the soul of the country. Constitution is the supreme document which provides rights, powers, duties and reflects the balance between society and nation while having numerous of cultures and social and individual interest.

It works as the powerhouse for the whole nation as it operates for national unity and development. Each law passed in India should conform and consistent with the constitution.

- Right to life and marital rape

Constitution of India provides the right to equality which states equality before law and equal protection of the law²⁰ to every citizen of India. Article 14 has a very wide Scope provides that equals should not be treated unequally and unequal should not be treated equally. Article 14 supports the principle of reasonable classification and intelligible differentia. Hon'ble Supreme Court of India in State of West Bengal vs. Anwar Ali Sarkar²¹ held two essentials principles for valid classification that is:

(1) That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and

(2) That differentia must have a rational relation to the object sought to be achieved by the statute Thus, it can be concluded that if any law makes classification irrelevant to the object of the act shall be external to the framework of the Constitution. With

19. <https://www.hindustantimes.com/india/marriage-sacred-concept-of-marital-rape-cannot-be-applied-in-india-govt/story-Yb5UkpmPYuF9Bf2uc0ZZXJ.html>

20. Constitution of India, Article 14, 1950

21. 1952 AIR 75

regard to the finding held by Hon'ble Supreme Court in the above-mentioned case, It is crystal clear that exemption of marital rape from considering as crime does not qualify the test of equality and fails to fulfil the requirement of valid classification. The failure to qualify the test of valid classification can be seen as Section 375 Indian Penal Code²² safeguards women against forceful sexual intercourse against her will and without her consent. It thus penalize the offence of rape. It constitutes as rape because it violates the individuals choice and dignity. While on the other hand, Exception 2 of Section 375²³ does not regard forceful sexual intercourse as rape because unfortunately it is in marriage. This exception to section 375²⁴ automatically terminates the protection provided under section 375²⁵ from a married woman. She is not entitled to this protection of law because her status is married in the law. This is a differential treatment with a woman only on the condition of her marriageable such supposition is not at all right and the difference created is not based on intelligible differentia nor has rational nexus as provided in the aforesaid landmark judgment. Like an unmarried woman, a married woman shall also have equal right of protection in law and choice of bodily autonomy. Such classification completely violates Article 14 of the Constitution of India.²⁶The classification between married and unmarried woman under section 375 IPC has no rational nexus with the object of section which is to protect women from sexual and criminal assault. Withdrawing the right of protection from married women is completely irrelevant. As the Constitution of India confers right to life and personal liberty²⁷ to all the persons whether citizens or non-citizens of India. Resultant of the landmark judgment of Maneka Gandhi v. Union of India²⁸ The scope of article 21 is much widened and now it becomes a source for all the protection of human rights in India. In this case, it was held that the right to life does not confine only to the right to life it also includes the right to live life with human dignity. Hon'ble Supreme Court of India explained the same identical view in the case of Francis Corallie v. Union Territory of Delhi²⁹, wherein it was held that

22. Supra,point 10

23. Supra,point 2

24. Supra, point 2

25.Supra,point7

26. Constitution of India, in the material part lays down,Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

27. Constitution of India,Article 21,1950

28. 1978 AIR 597

29. 1981 AIR 746

30. 1984 SCR (2) 67

right to life is not confined merely to animal existence nor physical survival but it is more than that. It was further affirmed in *Bandhua Mukti Morcha v. Union of India*³⁰ by the apex court. Exemption of marital rape from considering as crime violates article 21 with its expanding approach. As discussed above right to life with human dignity is one of the important inherent requirement of individual and recognizes its autarchy.

The Hon'ble Supreme Court of India in a landmark judgment in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*³¹ held that *women also have right to life and liberty; they also have right to be respected and to be considered as equal citizens. their rights, honour and dignity cannot be violated. They also have the right to lead an honourable and peaceful lifetime, and was further held that rape is a crime against the entire society. Rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women.*

In the case of *The Chairman, Railway Board v. Chandrima Das*³² it was held by the Hon'ble Apex Court that rape is violative of Article 21 on the Constitution of India. Thus, the exemption provided to the marital rape is violative of Article 21 as it is violative of right to life with human dignity. The exemption to marital rape provided under sec 375 makes a distinction between victims based on their marital status which concomitantly depicts that married women do not have the right to live life with human dignity.

- Right to privacy and marital rape-Right to privacy is not specifically enshrined in the Indian constitution while it is recognized by Hon'ble supreme court of India in many celebrated cases *Govind v. State of Madhya Pradesh*³³, *Kharak Singh v. State of U.P.*³⁴, *R.Rajgopal vs state of Tamil nadu*³⁵ it was held that right to privacy is under the purview of article 21 of the Constitution of India. In a recent landmark judgment³⁶ Apex Court held that, right to privacy is a

31. 1996 SCC (1) 490

32. (2000) 2 SCC 465

33. 1975 AIR 1378

34. 1963 AIR 1295

35. 1995 AIR 264

36. Justice K.S.Puttaswamy(Retd) vs Union Of India,2017 10 SCC 1

fundamental right and within the ambit of article 21. Hence, the marital rape violates the right to privacy of the women.

In the case of *State of Maharashtra v. Madhukar Narayan*³⁷ Hon'ble Supreme Court, held that every woman is entitled to sexual privacy and it is not open to any person to infringe her privacy. Concerning the right to privacy within the ambit of article 21 marital rape exemption as a crime is unconstitutional.

- Right to physically self-determination-Like the right to privacy, right to bodily or physically self-determination is not specifically construed in the Constitution of India and which we can consider within the scope of Article 21. Right of self-determination means the individual person is the sole decision-maker for his/her wellbeing or body. Like that consent for the sexual intercourse is the sole choice of an individual. Any legal framework which abridges and takes away the right to self-choice, consent and expression violated the right of self-determination under Article 21 of the constitution of India. Consent to the sexual intercourse is solely the personal and intimate choice of a woman guaranteed under right of bodily self-determination. Hence, again by the purview of Art. 21 of Constitution of India, section 375 exception 2 is unconstitutional.
- Right to have good health -Again as aforesaid, the ambit of article 21 is very much wide, right to good health is also recognized under article 21 of the constitution. In a celebrated judgment in the case of *Consumer Education and Research Centre v. Union of India*³⁸, it was held by the apex court that the right to health is a fundamental right and is within the scope of article 21. Right to health is essential because it makes the life and dignity of a person meaningful and purposeful. Still, marital rape exemption from the ambit of rape violates the right of good health of victim as stated above that marital rape as various somatic and psychological harm and effects. In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*³⁹, the Supreme Court held that

37. AIR 1991 SC 207

38. 1995 AIR 922

39. Supra, point 31

rape completely destroys the psychology of a woman and pushes her into a deep emotional crisis.

Along with all the above-mentioned arguments the marital rape is not a rape in the eyes of law does not pass a common test of just, fair and reasonable law.

Judiciary and Marital Rape

With regard to the law relating to marital rape, there is a huge discussion around the globe comprising judicial decisions, various obiter dicta of the courts, legislative actions and legislative comments. In United States, the highest court of the New York state abolished marital rape exemption stating that there is no rational basis on the discrimination based on marital rape and non-marital rape. Peoples v. libereta⁴⁰ it further considered rape as violent dignity degrading act. Similarly, The House of Lords in R.vs.R.⁴¹ Held that husband's impunity as propounded by Hale, CJ can no longer exist.

The Indian judiciary has been always very strict in the cases of rape. Even the Indian legislature is too active for enacting various acts to protect women from the sexual assault and crimes like rape and also in establishing special courts for the offences of rape. Specific procedural amendments have been done by the Indian legislature and Indian courts for the trial of rape and sexual assault cases which is surely a good effort and perfect act as being a responsible government and judiciary of the nation. But in the case of marital rape both the Indian judiciary and legislature has turned a blind eye. Indian legislature and law commission already denied recognizing marital rape as a crime by stating that it will cause interference with their family life and Indian judiciary is highly focused to the strict interpretation of laws.

Recently, in Sakshi vs Union of India⁴², an Organization filed Public Interest Litigation under Article 32 of the Constitution to the Hon'ble Supreme Court of India, asking for directions concerning the definition of rape under IPC. It is also requested

40. People v. Liberta, 90 A.D.2d 681,

41. [1991] 3 WLR 767

42. (1999) 6 SCC 591

to include all kinds of penetration in the ambit of definition was held in its case that the ambit of definition cannot be enlarged. It can be clearly said that law is the clear reflection of patriarchal mindset of Indian society where women have no right over its physical integrity.

It is sad in such a modern era where in terms of any field women is equal to men or even one step forward to men in some spheres. In such a society where people gather and talk about the rights of women, various agitations have been done for the upliftment of women. Where around the globe various developed, undeveloped or under developing countries recognizes marital rape as a crime and criminalize it. The Indian judiciary and legislature is still believing the old ancient thought that husband cannot rape his own wife. Exemption to marital rape from criminalization can truly be said as a bad law and there is a dire requirement for criminalization of the offence of marital rape. Even there are many defaults in Protection of Women from Domestic Violence Act, 2005⁴³ as the Act does not specifically state against marital rape.

Conclusion and Suggestions

Concerning the above discussion of marital rape and its criminalization. It is suggested to the legislature of India to recognize marital rape as a crime/offence within the ambit of Indian penal code like the other provisions of rape marital rape shall also be recognized in the definition of rape. There shall be no distinction between victims based on their marital status. Exception to Section 375 shall be deleted and marital rape against her will and without her consent should be criminalised. The punishment to the marital rape should be increased or should be provided the same as provided under Section 376. Rape is rape whether it is committed by a stranger or the husband in both the cases the privacy of women is infringed and dignity of women is discarded.

43. Act No. 43 of 2006