**Criminalizing Marital Rape**

**Maya Chandra**

Student, Indore Institute of Law

**Introduction**

In Indian society, marriage is considered as a sacred institution as a basestone for a healthy family and a civilized society but unfortunately it veils like sexual cruelty and other kinds of brutality. Marital rape can be defined as an unwanted intercourse or penetration (anal, vaginal or oral) obtained by force, threat or force or when wife is unable to consent.[[1]](#footnote-1) The definition of rape remains the same, i.e., sexual intercourse or sexual penetration, where there is a lack of consent. It is also necessary to show the absence of consent to show the crime of rape. The responsibility of demonstrating breach of consent also lies with the accused. In certain circumstances, as in the case of minors, consent is believed not to occur since it is assumed by law to be incapable of consenting to such sexual acts.[[2]](#footnote-2) In the other hand, there are also cases where consent is presumed to exist. This expectation also occurs where the victim and the perpetrator are married.[[3]](#footnote-3) Of such situations, the notion of marital rape is being antithetical.

At present, only fifty-two countries have laws that identify marital rape as a crime[[4]](#footnote-4). In several countries around the world, including India, marital rape is not accepted by law and society as a crime. And when countries accept rape as a crime and set down punishments for it, they exclude the enforcement of the law when there is a marital relationship between the victim and the perpetrator. This is also referred to as the 'marital rape exception clause.' In these jurisdictions, there are four main justifications for not criminalizing marital rape. In the present day, the original two justifications are not seen as a result of progress achieved in regard to gender equality. The first justification arose from a woman's view of her husband as a subordinate[[5]](#footnote-5). Women were referring to their husbands, which meant that women had no rights in marriage. Under such a situation, it would not have been feasible to think of a husband raping his wife because the husband was the master of the wife and had rights over her body. Along with this justification, there was also the principle of harmony. This theory was based on the assumption that, after marriage, the personality of the woman had fused with that of her husband. Accordingly, the law did not grant the married woman a personality independent of her husband. This is related to the prior rationale in terms of looking at women as the husband's chattel.

However, during the 1970s and the feminist revolution, these justifications were no longer in the forefront of the campaign of not criminalizing marital rape. This was because women were regarded as equal citizens as men. Instead, the justifications have become more complex hypotheses. The principle of 'implied consent' is one such justification. Here, an irrefutable expectation of consent is assumed to occur when a man and a woman enter the institution of marriage. Marriage is considered to be a civil contract and consent to sexual intercourse is considered to be the defining aspect of this contract. The fourth justification, which is the most current, is that criminal law does not intervene with marital relations between the husband and the wife. It is a private domain in which the rule cannot enter

**Types Of Marital Rape**

The following three forms of marital rape are defined by legal experts as commonly prevalent in society:

Battering Rape: In battering rape, women experience both physical and sexual harassment in relationships and experience violence in a number of forms. Some are beaten during sexual assault, or rape which follow a physically abusive episode in which the husband tries to make up and compel his wife to have sex against her will. The bulk of victims of marital rape fall into this group.

Force-Only Rape: In what is called force-only rape, husbands use only the amount of force required to coerce their wives; beating may not be typical of such relationships. Assaults normally occur after a woman has denied sexual intercourse.

Obsessive Rape: Some women witness what has been called sadistic or obsessive rape; these attacks include torture and/or perverse sexual actions and are often physically violent.

**Lack Of Criminalisation Of Marital Rape As A Fundamental Rights’ Violation**

Marital rape is also a violation of a woman's fundamental right, in fact in accordance with Articles 14 and 21 of the Constitution of India. In this Part, we contend that the absence of criminalization of marital rape infringes the fundamental rights of a woman. Since this crime of marital rape is committed within the private domain of marriage, it is the duty of the State to penetrate this private sphere. If the state does not enter this private domain, a woman is left without redress when she is raped by her husband.

However, the study of judicial decisions on matters historically meant to be within the private domain of marriage and the family demonstrates the inability of the judiciary to bring in fundamental rights in this private sphere. The judiciary has developed this imaginary private domain where it refuses to enforce and read fundamental rights. The consequence of this has been to dispute whether marital rape is a breach of fundamental rights.This is because there is no role for fundamental rights in the presumed marital domain.

In B. Gautam v. Subhrachakraborty[[6]](#footnote-6), the Hon. Supreme Court of India ruled that "Rape is an offence against basic human rights and a violation of the most revered victims of basic rights, including the right to life protected by Article 21 of the Indian Constitution." However, the present criminal law also negates this decision by not criminalizing marital rape. Finally, the violation of the fundamental right alluded to in Article-21, i.e. Right to life with dignity[[7]](#footnote-7). Accordingly, the law-making bodies should amend Section 375 of the Indian Penal Code, 1860, and save women victimization of marital rape.

**Reasons why Marital Rape is still legal in India**

**Lack of laws**

It is not directly stated anywhere in any law that marital rape is a legal action under Indian law, although the exception to section 375 of the IPC makes it clear that a husband engaged in sexual acts with a wife not less than 15 years of age would not be subject to the definition of rape.

**Social strain**

Lack of laws and fear of social reputation against the commission of marital rape is one of the key reasons for the evil of marital rape and is still veiled behind the sacred relationship of marriage. The woman has the right to protect the privacy of her body if the person who violates her dignity is not known to her, however when the perpetrator of her bodily harm and mental suffering is her own husband, whom she got married with all the joyful jolly then, such protection is taken away by the legislators.

Highlighting the same, a woman (wife) has to have sex with her husband regardless of her will, consent, health, etc. any time her partner demands it. i.e. the "consent" of a woman was not considered anywhere in the whole concept of marriage, initially from the selection of her spouse until the end of such a one-sided relationship.

**Family pressure**

Under Hindu law, marriage is a sacrament that is once bonded and can never be broken down by anyone for any reason. The objective behind such a relationship is to perform religious duties and beget offspring. Marriage is therefore compulsory, and more so in the case of a woman, whereas under Muslim law marriage is a social concept and the object behind such a relationship is the production of a child.

It is therefore clear from Muslim law that marriage is a way of fulfilling the sexual desires of men, whether women want it or not. There is no emphasis on women's human rights as if they have not been identified as human.

**Economic dependence**

Another point that should be addressed under this heading is the economic dependence of a woman on her husband and her in-laws, because the former women are not supposed to move out of the house, although this attitude is slowly and steadily changing in many families, so married women are unable to protect themselves from such wrongdoing and are bound to face such brutality in their husbands.

**Marital rape and law**

Though Indian laws have progressed in every possible area even marital rape is not yet regarded as an offence. After amendments, law commissions review and new legislation, one of the most embarrassing things is that such a hideous and cripple acts is not an offence in India. The point that is based here is that the consideration of a woman for the security of her marital relationship regardless of the lack of personal safety of her health, which shows us that the statute has either been non-existent or vague, and that everything depends on the will and sexual demands of males in a marital relationship.

Interpretation by the Judiciary has a significant role to play in deciding such cases, as no provision has been made for such an offence. Section 375 of the IPC describes rape and specifies activities that are to be treated as rape under the rule, said section reinforces somewhat ancient concepts, referred to as the exemption clause, i.e. any male engaged in any sexual interaction with his or her own wife, and not less than 15 years of age shall not be considered rape.

In compliance with the provisions of section 376, any person convicted of committing rape shall be punished with imprisonment of not less than 7 years, which may extend to life or to a term of up to 10 years, and shall also be liable to a fine unless the victim is his or her own wife and is not less than 15 years of age, in which case he or she shall be punished with imprisonment for a term of any length. Under this clause, marital rape is deemed to be a crime only under one condition, i.e. when a woman afflicted by such a criminal act is under 12 years of age.

If a woman's age varies from 12 to 15 years and her husband commits such a forceful act or sexual act against her, it may, however, be less severe, incur milder punishment. Once she is over 15 years of age, she has not been given legal immunity and is a gross breach of human rights regulations.

Loophole to be explored here is that since the minimum age of consent for marriage is 18, then why immunity against sexual assault since married before 18 is granted only up to 15 years of age, there is no solution for 15 years of age. The Indian Penal Code was revised in 1983 for the criminalization of spousal abuse during the time of judicial separation.

**Available remedies**

**Under Domestic Violence Act, 2005**

The Protection of Women against Domestic Violence Act was passed in 2005 to give legal protection to a woman facing any violation of domestic violence, even if she does not deem marital rape to be an offence, but also under that act if a woman is abused by marital rape, she will sue the court demanding judicial separation, which ensures that marital rape could be the focus of that act.

**Section 376(B) of IPC**

Section 376B provides for punishment for a husband who lives apart, whether under a divorce order or otherwise, who has sexual intercourse with his wife forcibly, for a period of incarceration of not less than two years, which can stretch to seven years.

**Conclusion**

After going through the entire material, the response to the title is "No." In India, marital rape has not yet been accepted as an offence. There is a need to realize that marital rape is a crime to be recorded by the government, and that any person should report for it.

There is a demand for a change to the concept of rape. Indian law must be equal to men and women regardless of whether they are married or single. Marital rape is not only an occurrence under an iron curtain, although the issue of women's right to privacy is a crime. Marrying a man does not mean giving permission to physical and mental torture towards one's own self by satisfying the sexual appetite of the person to whom you are married.

There must be awareness among women of marital rape. Women's empowerment and education for women would help them rise up against such a heinous crime. The right to live with dignity is the right of our foundation, and marriage should not be a justification for such an unethical act against women. There is a need for an hour to raise the voice against this discrimination against women.

1. The Indian Penal Code, 1860, Sec. 375 [↑](#footnote-ref-1)
2. See The Protection of Children from Sexual Offences Act, 2012, Sec. 3. Consent is immaterial when the assault is against a child. [↑](#footnote-ref-2)
3. The Indian Penal Code, 1860, Sec. 375, Exception 2 [↑](#footnote-ref-3)
4. UN Women, 2011-2012 Progress of the World’s Women, 17, (2011) available at http://www2.unwomen.org/-

   /media/field%20office%20eseasia/docs/publications/2011/progressoftheworldswomen-2011-

   en.pdf?v=1&d=20160810T092106 [↑](#footnote-ref-4)
5. Rebecca M. Ryan, The Sex Right: A Legal History of Marital Rape Exemption, 20 LAW AND SOCIAL ENQUIRY, 944 (1995). [↑](#footnote-ref-5)
6. 1996 SCC (1) 490 [↑](#footnote-ref-6)
7. The Constitution of India,1950 [↑](#footnote-ref-7)