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Analytical Approach to Marital Rape law

Naman Yadav^a

^aDr. Ram Manohar Lohiya National Law University, Lucknow, India

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Rape is one of the most heinous and brutal crimes against women. Marital rape is one of India's most controversial and divisive problems, despite the fact that it is not classified as a crime. This problem has been exacerbated by the patriarchal nature of Indian society. Husbands treat their wives like objects, and as a result, rape and other forms of social and sexual harassment have become a widespread occurrence in Indian households. Although, India is focusing on strengthening women's rights yet no effective regulations have been enacted in India till now to deal with the crime of marital rape. There is an urgent need to criminalise the issue of marital rape in India. This article focuses on the rape law of the country and how despite various amendments in rape laws over the years, there still exists a lack of recognition of marital rape as a crime in the country.

Keywords: *rape, marital rape, bodily autonomy, privacy, consent, equality, crime.*

INTRODUCTION

“Rape is Rape and it should not be justified!”

Rape is often defined as a criminal act of outraging the modesty of a woman by sexual penetration without her consent. Physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent such as someone who is asleep, intoxicated, has an intellectual disability, or is under the age of consent, are all possible methods of

carrying out the act. The category of a sexual offence is dealt with under section 375-377 of the Indian Penal Code of 1860, where section 375 deals with the offence of Rape. There are certain exceptions to Rape:

Exception 1 – A medical procedure or intervention shall not constitute rape.¹

Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.²

Also, *Section 376 of IPC*, which defines punishment for rape, clearly states that whoever raped a woman is liable for imprisonment and fine, "unless woman raped is his own wife." Due to such immunity provided to the *husband* by the Criminal law system of our country, the offence of **Marital Rape** is still prevalent in India. **Marital Rape** is defined as a forceful sexual act by a man with a woman, who is legally recognized as husband and wife. Despite several amendments made in our criminal law system, India is still among those 36 countries where the offence of *marital rape* is not criminalized³ and a rapist is set free just because he was the husband of the woman he raped.

EVOLUTION OF RAPE LAWS IN INDIA

In 1860, the Indian Penal Code made rape an offence for the first time. Prior to this, India's laws were frequently inconsistent and contradictory. The first Law Commission was established under the chairmanship of Lord Macaulay after the British Parliament passed the Charter Act of 1833, which led to the foundation of the first Law Commission. Thereafter, IPC came into effect in 1862. For over a century, the same rape laws remain effected in the country from 1860 until a watershed incident of **Mathura custodial rape case⁴**, which shook the whole country. On March 26, 1972, a tribal girl of 16 years was raped by 2 or 3 drunk policemen in custody inside the *Desai Gunj Police Station* in Maharashtra but the trial court held her as of

¹ Indian Penal Code, 1860, s. 375

² *Ibid*

³ 'Do you think Marital Rape isn't a Crime?' (*DailyO*, 7 February 2019)

<<https://www.dailyo.in/variety/marital-rape-shashi-tharoor-countries-where-marital-rape-is-legal-consent-sexual-assault/story/1/29347.html>> accessed 21 January 2022

⁴ *Tukaram v State of Maharashtra* (1979), AIR 185, SCR (1) 210

'loose character' and set the policemen free but the Bombay High Court set aside the session court order of their acquittal. On appeal, Supreme Court held that as there was no injury on the body of the victim, rape cannot be proved and set the policemen free. This controversy sparked a nationwide protest to make amendments to the existing rape laws of the country.⁵ Therefore, in view of this, the government introduced the **Criminal Law (Second Amendment) Act of 1983**, which added **Section 114A in the Indian Evidence Act of 1872**⁶. It presumed that there is an absence of consent in certain prosecutions of rape if the victim says so and this is applied to custodial rape cases. Also, it added **Section 228A**⁷ in IPC which makes it punishable to disclose the identity of the victim in certain offences including rape. Again, the need to improvise the rape laws of India was required after the 2012 **Nirbhaya Rape Case**, which shook the whole country and seeing the brutality of the case and never such type of case happen again, the government constituted **Justice Verma Committee**⁸ to recommend amendments for the criminal law system of the country that can be made to protect women against such type of sexual assaults. Thus after the recommendation of the committee, **The Criminal Law (Amendment) Act, 2013** was introduced. It thus increased jail terms and even harsher punishment in most sexual-related assault cases. Also, provided for the death penalty of the rapists in the cases where there was a death of the victim or was left in a vegetative state⁹.

In January 2018 a minor girl of 8 years of Jammu and Kashmir was abducted and raped by a group of men. This news led to the **Criminal Law (Amendment) Act, 2018**, which introduced the death penalty for the first time if there was a rape of a girl under 12 years of age and also increased the punishment from 10 years to 20 years imprisonment.¹⁰ Despite these amendments over this long period in our country, and voices raised by several civil rights

⁵ Soibam Rocky Singh, 'Explained: The laws on rape and sexual crimes' (*The Hindu*, 8 December 2019) <<https://www.thehindu.com/news/national/what-are-the-laws-on-rape-and-sexual-crimes/article30233033.ece>> accessed 21 January 2022

⁶ Indian Evidence Act, 1872, s 114A

⁷ Indian Penal Code, 1860, s 228A

⁸ Justice J.S. Verma (Retd.), *Report of the Committee on Amendments to Criminal Law* (23 January 2013) <https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf> accessed 21 January 2022

⁹ Soibam Rocky Singh (n 5)

¹⁰ *Ibid*

groups, women, NGOs to criminalise **Marital Rape** but still no government has taken any efforts in criminalising it. Although, the **Justice Verma Committee** had recommended the removal of **Exception 2 of Section 375 of IPC** as there was no rationale in giving immunity to a husband for raping his wife¹¹. The Committee also said that having such type of exception for such a heinous crime gives a notion that a woman is the property of the husband and thus the exception 2 should be removed from IPC but **The Parliament Standing Committee on Home Affairs** in its **167th** report refused to remove exception 2 (Marital Rape) on the ground that the entire family system will collapse and can result even in more injustice to the public.¹²

MARITAL RAPE: VIOLATIVE OF RIGHTS OF WOMEN

In India, the concept of marital rape exemplifies what we call "implied consent." Marriage between a man and a woman in this context implies that both parties have agreed to engage in sexual activity, and it cannot be otherwise. The *United Nations Declaration on the Elimination of Violence against Women*, on the other hand, defines violence against women as "any act of gender-based violence that causes or is likely to cause physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether in public or private life." The Indian Penal Code's Section 375 (Exception 2) is incompatible with and in violation of these principles. In 2013, *the UN Committee on the elimination of discrimination against women*, to which India is a party, recommended India to criminalize *marital rape* but still, no government has taken an effective step against criminalising the crime.¹³

Against the spirit of Section 375 of IPC – The sole purpose of section 375¹⁴ is to protect women and their rights against sexual abuse and to punish the culprits who try to demean the women dignity but exception 2 of section 375 is contradictory to this purpose and it gives right

¹¹ Ankita Yadav, 'Understanding Marital Rape in India: A Discourse on Textual and Constitutional Perspective' (2019) 11 RMLNLUJ 81

¹² Criminal Law (Amendment) Bill, 2012

¹³ Anirudh Pratap Singh, 'The impunity of marital rape' (*The Indian Express*, 20 December 2020)

<<https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>> accessed 21 January 2022

¹⁴ Indian Penal Code, 1860, s 375

to husbands to rape his wife without her consent and just because the woman is married, section 375 doesn't protect her from criminal acts of her husband.

Against Right to Equality –As our criminal legal system doesn't criminalises marital rape just because the woman is married and treats her differently from the other non-married women, it's a clear violation of **Article 14 of the Indian Constitution**¹⁵ which guarantees the right to equality before the law to all the citizens of the country but just because a woman is married, the exception 2 of section 375 of IPC takes away her basic Fundamental right. Also, **Article 15(1) of the Indian Constitution**¹⁶ prohibits discrimination on the ground of sex and **Art 15(3)** empowers the state to take action in favour of women and children, but still marital rape is legal in India. **Violates Right to Life** – According to the interpretations made by Supreme Court in various cases, **Article 21 of the Indian Constitution**¹⁷ guarantees the Right to life, health, bodily autonomy, safe living, and a healthy environment. It was held by the Supreme Court in the case of *Suchita Srivastava v Chandigarh Administration*¹⁸ that the right to make choices about sexual activity is within the scope of rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.¹⁹

Supreme Court in the case of *State of Karnataka v Krishnappa*²⁰ held that Sexual violence apart from being a dehumanizing act is also a breach of the Right to privacy and sanctity of a woman. Also, it was held that non-consensual sexual act amounts to physical and sexual violence²¹. In the case of *K.S. Puttuswamy (Retd.) v Union of India*²² it was observed that the right to privacy is a basic fundamental right guaranteed under Article 21 of the Indian Constitution which also includes the right to intimate privacy and takes own decisions related to sexual activity. Thus by these judgments of the Supreme Court, we can conclude that a woman also

¹⁵ Constitution of India, 1950, art. 14

¹⁶ Constitution of India, 1950, art. 15

¹⁷ Constitution of India, 1950, art. 21

¹⁸ *Suchita Srivastava v Chandigarh Administration* (2009) 14 SCR 989

¹⁹ Pallavi Prasad, 'Why It's Still Legal For Indian Men to Rape Their Wives' (*The Swaddle*, 20 January 2020)

<<https://theswaddle.com/marital-rape-inda-decriminalized-crime/>> accessed 24 January 2022

²⁰ *State of Karnataka v Krishnappa* (2000) CriLJ 1793

²¹ 'Marital Rape in India' (*Drishti IAS*, 22 December 2020) <<https://www.drishtias.com/daily-updates/daily-news-editorials/marital-rape-in-india>> accessed 24 January 2022

²² *K.S. Puttuswamy (Retd.) v Union of India* (2017) 1 SCC 809

has a Right to life including sexual activity irrespective of whether she is married or not. Therefore, a woman has a basic right to deny intercourse which is against her will, and whether she is married or not, no one has the right to violate her basic fundamental right guaranteed by the Constitution itself. Thus, **Exception 2 of section 375 of IPC** is arbitrary and clearly violates all these basic rights of a woman which are guaranteed by the Indian Constitution.

INTERNATIONAL PERSPECTIVE

Marital rape is a common problem for women that have persisted for ages all across the world. Despite this, marital rape has received relatively little attention from social scientists, legal practitioners, the criminal justice system, and society as a whole. However, after analysing the need for legal reforms regarding the penalization of various crimes against women, particularly married women, various countries have recognised this as a crime with severe consequences. According to a report by *Progress of the World's Women 2011-12*, only 52 countries strictly recognized marital rape as a crime.²³

Poland was the first country to criminalize Marital Rape in 1932.²⁴ Some other countries where Marital Rape is strictly criminalised are the USA, UK, Australia, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, etc.

United States

Rape has always been unlawful in the USA and is defined as any non-consensual sexual contact between non-spouses. However, every state had a "marital exemption" clause until 1975, which permitted a husband to rape his wife without fear of legal consequences. By 1993, every state and the District of Columbia had approved laws prohibiting marital rape, largely in response to the women's rights and equality movement. Since 1993, all 50 states and the

²³ UN Women, *Progress of the World's Women in Pursuit of Justice* (2011) <<https://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2011/%20progressoftheworldswomen-2011-en.pdf?v=1&d=20160810T092106>> accessed 24 January 2022

²⁴ Shalini Nair, 'Marital Rape is crime in many countries, an exception in many more' (*The Indian Express*, 7 September 2019) <<https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>> accessed 24 January 2022

District of Columbia have passed legislation prohibiting marital rape. In some places, the only marital exemption is for statutory rape. All states now regard rape within marriage as a crime, and most prosecute it similarly to rape between strangers²⁵.

United Kingdom

The oldest trace of Marital Rape law in England can be seen in *History of the Pleas of the Crown*²⁶ by Sir Matthew Hale, where he argued that “the 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”. Thus the principles regarding the marital rape exemptions were laid down in *R v Clarence*²⁷ in 1888.²⁸ In the Landmark judgement of *R. v R in 1991*,²⁹ where the accused named ‘R’ raped his wife and cited the exemptions stated by *Sir Matthew Hale*. **The House of Lords** ruled against this exemption and stated “Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances.”³⁰ Since then, the UK has strictly criminalized Marital Rape.

WHY MARITAL RAPE IS STILL NOT CRIMINALISED IN INDIA?

Marriage in Indian reflects the Patriarchal nature of society and the rights given to women are limited. Due to Male oriented society, the husbands think that they have all physical and emotional rights over their wife and thus the issue of domestic violence such as marital rape is prevalent in Indian households.

According to the data of the **National Crime Records Bureau’s (NCRB)** ‘Crime in India’ 2019 report, a woman is raped every 16 minutes, and every 4 minutes she experiences some type of cruelty by her in-laws. Also, an analysis of the *National Family Health Survey (NFHS) 2015-16*

²⁵ Ayush Choudhary, ‘Marital Rape: A Crime Undefined’ (*Academike*, 13 November 2015) <<https://www.lawctopus.com/academike/marital-rape-a-crime-undefined/>> accessed 24 January 2022

²⁶ ‘When did marital rape become a crime?’ (*The Week*, 6 December 2018) <<https://www.theweek.co.uk/98330/when-did-marital-rape-become-a-crime>> accessed 24 January 2022

²⁷ *R v Clarence* (1888) 22 [QBD] 23

²⁸ Constitution of India, 1950, art. 14

²⁹ *R v R* (1991) [UKHL] 12

³⁰ Anusha Agarwal, ‘Only 36 Countries Have Not Criminalised Marital Rape, India Is One of Them’ (*The Leaflet*, 2 November 2020) <<https://www.theleaflet.in/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them/>> accessed 24 January 2022

indicates that around 99.1 % of cases in India of sexual violence go unreported and on average an Indian woman is 17 times more likely to face violence by her husband. Most of the time the assault by the husband is marital rape but the social pressure and lack of effective laws result in the non-reporting of such crimes.³¹ Despite so many cases and demands of criminalising marital rape in India, no government is taking steps to criminalise it. Whenever this issue is raised, there were similar answers by all the governments that due to illiteracy, poverty, and the conservative nature of Indian people, criminalising marital rape will degrade the cultural value of marriage. In 2019, Lok Sabha MP, **Shashi Tharoor** did bring a private member bill '*The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018*'³² in Lok Sabha, but the government did not entertain the bill by citing "criminalising the marital rape will destabilise the institution of marriage and thus the entire family system will collapse" and finally the bill was withdrawn. Thus due to the lack of proper efforts by the governments and the male-oriented nature of the society, the issue of **marital rape is still not criminalized** in India.

JUDICIAL VIEW

Various times we have observed that the Indian Judiciary has taken effective steps against the laws which are no more required in Indian society and had abolished them, like in the landmark judgement of *Navtej Singh Johar & Ors v Union of India*³³, the Supreme Court abolished **Section 377 of Indian Penal Code, 1860**, which criminalised Homosexual relationships. Also, in the case of *Joseph Shine v Union of India*³⁴, Supreme Court abolished adultery and declared **Section 497 of IPC** unconstitutional. Though we have seen this much improvement in our legal system and how various courts of India have set good examples in deciding prevalent issues but in the scenario of **Marital Rape**, even the judiciary is not seeming too active. Instead of criminalising such a big issue, the judiciary is silent about it. Suppose if a woman is physically abused by the husband in their bedroom, then it will be considered as a crime under **Section 498A**³⁵ of IPC. Similarly, if a husband tortures his wife

³¹ Ankita Yadav (n 11)

³² Women Sexual, Reproductive and Menstrual Rights Bill, 2018

³³ *Navtej Singh Johar & Ors v Union of India* AIR 2018, SC 4321

³⁴ *Joseph Shine v Union of India* 2018 SCC OnLine SC 1676

³⁵ Indian Penal Code, 1860, s 498A

mentally in their bedroom, it is a dowry offence under the **Domestic Violence Act**. It will not be a crime under Section 375 of the IPC if a husband rapes his wife in the same bedroom. There is a lack of proper laws as well as judicial interpretation in crimes against women, especially in the case of marital rape.

CASE STUDIES

The case of *Arnesh Kumar v State of Bihar & Anr*³⁶ was a blow for those calling for the criminalisation of marital rapes. In this instance, the court ruled that criminalising marital rape would disrupt the social and family system³⁷. Following that, a court petition filed in 2015 was similarly dismissed, citing the fact that the law cannot be changed for just one woman. Although things were not good with respect to interpretation of marital rape law in past we have seen some improvements in recent years, For example, a Delhi High Court decision in 2018 questioned marital rape as: “Why is it ‘not rape’ when you’re married and ‘rape’ when you’re not? Force is not a pre-condition to rape.”³⁸

The court thus rejected the PIL by an NGO, Men Welfare Trust. In the landmark case of *Independent Thought v Union of India*³⁹, Supreme Court partially interpreted the offence of marital rape as a crime and stated a husband cannot rape his minor wife (below 18 years) and if he does so, he will not be exempted from the Exception 2 of Section 375 of IPC. This case was marked as a victory for child rights activists but a partial victory for those who were fighting for the criminalisation of marital rape.

The recent **Kerala High Court's** decision is a significant break from Indian marital rape law⁴⁰. On August 7, 2021, the Kerala High Court ruled in favour of the wife who had accused her

³⁶ *Arnesh Kumar v State of Bihar & Anr* (2014) 8 SCC 273

³⁷ Mythreyee Ramesh, ‘Indian Men Can ‘Lawfully’ Rape Their Wives: When Will That Change?’ (*The Quint*, 8 March 2021) <<https://www.thequint.com/neon/gender/marital-rape-laws-in-india-criminal-acts-against-women#read-more>> accessed 25 January 2022

³⁸ Urvija Banerji, ‘Delhi HC on Marital Rape: “A Rape Is a Rape’ (*The Swaddle*, 18 July 2018) <<https://theswaddle.com/delhi-high-court-on-marital-rape-a-rape-is-a-rape/>> accessed 25 January 2022

³⁹ *Independent Thought v Union of India* (2017) 10 SCC 800

⁴⁰ Shaju Philip, ‘Marital rape a good ground to claim divorce, says Kerala HC’ (*The Indian Express*, 7 August 2021) <<https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/>> accessed 25 January 2022

husband of raping and mental torture for 12 years. In this case, the husband has appealed against the divorce but the court concluded that even though marital rape is not a crime under the Indian Penal Laws, it is a valid ground for divorce from the spouse under **Section 13⁴¹ of the Hindu Marriage Act** and **Section 27⁴² of the Special Marriage Act**, where cruelty is a pre-established reason for divorce and hence the petition of husband was dismissed and the divorce was granted.⁴³ Also, recently while the hearing of an ongoing petition⁴⁴ in Delhi High Court, justice C. Hari Shankar said “Even in a marriage, howsoever elevated we may take the expectation of a sexual relationship, you cannot claim the right to have sexual intercourse with a partner.”⁴⁵ Furthermore, the Delhi High Court raised a question behind a rationale that if a woman is forced into sexual relation, then how only the dignity of an unmarried woman is harmed but not of the married woman. However, the court is yet to take a proper decision on this issue. Although the offence of marital rape is still not recognized in our country, seeing the stand of various courts of the country regarding the offence of marital rape in the past few years in the number of their judgments, we can expect criminalisation of marital rape in the future.

CONCLUSION

The argument over marital rape is critical in creating substantive equality for married women who are otherwise limited to the boundaries of their homes in public and legal discourse. It is critical to recognise that there is currently a significant gap in criminal law that is undermining constitutional principles that provide women equality and autonomy. Since now the Indian laws treat husbands and wives as separate and independent identities. The legislature must look for the betterment of society and for the equality of women in India and should bring the following reforms regarding the offence of rape in India. Firstly, the offence of **Marital Rape**

⁴¹ Hindu Marriage Act, 1995, s 13

⁴² Special Marriage Act, 1954, s 27

⁴³ Aeshita Singh, ‘Marital Rape in India: Will the Kerala HC Judgment Usher Any Change?’ (*Academike*, 13 August 2021) <<https://www.lawctopus.com/academike/marital-rape-in-india/>> accessed 24 January 2022

⁴⁴ *RIT Foundation v Union of India* (2015)

⁴⁵ Aneesha Mathur, ‘You cannot claim right to have sex with partner, says Delhi HC during marital rape case hearing’ (*India Today*, 20 January 2022) <<https://www.indiatoday.in/india/story/cannot-claim-right-sexual-intercourse-marital-rape-delhi-court-hearing-1902422-2022-01-20>> accessed 24 January 2022

must be criminalised. Secondly, the exception clause in **Section 375 i.e., Exception 2**, which gives immunity to husbands to rape their wives, should urgently be abolished and there should not be an exception to rape because *Rape is Rape*, even if the culprit is the husband of the victim. Finally, more strict rape laws are needed in India to serve as a deterrent to criminals, as well as the proper and effective execution of rape laws to prevent misuse of the law and lower the crime rate against women.