



Silent Victims- The Impact of Marital Rape

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Abstract

Rape is a heinous crime that is considered graver than murder. It is a crime of violence that not only damages the body but which also leaves a permanent scar in the mind of the victim, and when it occurs within the four-walls of a matrimonial home, it reduces the woman to the status of an object used merely for sexual gratification. Marital rape is sex by a husband with his wife without her assent by compulsion or threat. In India, rape is a penal offence under S.375 and S.376 of IPC. Surprisingly, it unequivocally avoids marital rape from the ambit of conviction. The woman has and still continues to be victimized by man and society. The patriarchal power structures have deemed marriage to be a license to legal unwilling sex. There is a total negation of the self worth of a woman. Even as we celebrate 70 years of independence, the women in our country are still not truly free and independent and continue to live under the realm of darkness and fear.

This paper significantly focuses on the violation of the fundamental rights of women guaranteed by the Constitution of India and the status of marital rape in India and different countries of the world.

Keywords: Marital Rape, Law, Violation of Rights, Violence against Women, Crimes against Women

“While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female.”

- Justice Arijit Pasayat, *Tulsidas Kanolkar v. State of Goa* (2003)

Marital Rape: An Understanding

At 42, Asha (name changed) has spent 24 years of her life dreading the next assault. Sitting at a counseling center in a Mumbai suburb, she vividly recalls each episode of violence: of being slapped, beaten with a stick, sexually abused in private and verbally abused in public, being abandoned, and later, treated like a slave. But she says she has clung to her 'married' status for it ensures a roof over her head, a one-room-kitchen flat that is in her husband's name. Having studied up to Class X, she has taken up odd jobs, but says she can't fend for herself with her poor earnings. She first lodged a domestic violence case against her husband in 2007. Nine years later, in August 2015, Asha landed in the emergency room of a public hospital with injuries on her private parts that doctors noted as those inflicted in a sexual assault. At the police station, the assault was seen as "a matter between a husband and wife" and no case was registered.ⁱ This is the unfortunate reality for countless Indian women living among the culture of arranged marriages and remaining legally unprotected from the realities of marital rape. It is indeed a somber reality of India.

Marital rape refers to any unwanted sexual act/s committed by a husband upon his wife without her consent. Such sexual activity is done using force, a threat of force, intimidation, or when a person is unable to consent. The sexual acts include intercourse, anal or oral sex, forced sexual behaviour with other individuals, and other sexual activities that are considered by the victim as degrading, humiliating, painful, and unwanted.

Marital rape is particularly complicated because the complex, personal nature of marital relationships makes it hard for the victim to even see herself as a victim, let alone reporting the offending act to the authorities, which is why Marital Rape is one of the highly under-reported violent crimes. Even the women who do consider themselves victims are disinclined to approach the authorities because they are financially dependent upon their husbands, and reporting the matter could very well result in withdrawal of financial support leaving them and their children without food and shelter.

During National Family Health Survey (NFHS) 4, Indian men were asked specific questions to assess their gender egalitarian attitudes. In particular, men were asked, if a woman refuses to have sex with her husband when he wants her to, does he have the right to display the following four different behaviours: use force and have sex with her even if she doesn't want to; get angry and reprimand her or refuse to give her money or other means of financial support. At an all India level, 9 out of every 100 men agree to the fact that a husband has the right to use force and have sex with his wife even if she doesn't want to. The survey further noted that, at an all India level, 11 out of every 100 men agree to the fact that a husband has the right to refuse financial support to his wife if she refuses to have sex with them. Similarly, 18 out of every 100 men across India believe that a husband has the right to get angry and reprimand his wife if she refuses to have sexual intercourse with her husband.ⁱⁱ

Legal Position In India

It's 2020 and India remains one of 36 countries where it is not a crime for a man to rape a woman "as long as they are married." Despite the revolutionary legal reforms undertaken over the last century and half which have led to several rights being granted to women and wives specifically, the law and the lawmakers have surprisingly remained silent over the issue of overturning the marital rape exemption for husbands.

As per the Constitution of India, every law that is passed in the country has to be in conformation with the principles and ideas enshrined in the Constitution of India. Any law that fails to meet this standard is considered *ultra vires* and is liable to be struck down by the Courts and declared unconstitutional. When we look towards the constitution of India, we find Article 14 that provides equality before law for women or we can say that all are equal before law. Article 15(1) mandates the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.ⁱⁱⁱ But regarding marital rape women in India are not being treated equal. Equal treatment of law is not being provided to the victims of marital rape. Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape.^{iv} Article 21 of the Constitution of India provides right to live with dignity. But marital rape clearly breaches the right of a married woman to live with dignity. Or in other words we can say that section 375 of IPC violates Article 21 of the constitution regarding marital rape.

Article 21 of the Indian Constitution enshrines in it the right to life and personal liberty.^v Article 21 although couched in negative language confers on all persons the fundamental right of life and personal liberty. In light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression 'right to life and personal liberty' under Article 21. There cannot be a more obvious and blatant violation of Article 21. The marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time. The right to live with human dignity is one of the most inherent qualities of the right to life that recognizes the autonomy of an individual. The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape.^{vi} The Supreme Court has held that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society. Rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the women.^{vii} Thus the marital exemption doctrine is also vocative of a woman's right to live with human dignity. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes the against the very essence of right to life under Article 21 and is hence unconstitutional.

The Indian Penal Code ('IPC') in Section 375 criminalises the offence of rape. It is an expansive definition that includes both sexual intercourse and other sexual penetration such as oral sex within the definition of 'rape'^{viii}.

However, in Exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and wife. Thus, a wife under Indian law does not have recourse under criminal law if a husband rapes her. The wording of S.375 of the IPC on account of the Criminal Law (Amendment) Act, 2013 are:

*"375. A man is said to commit "rape" if he-
penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or applies his mouth to the vagina, anus, urethra of a*

woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven 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, 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.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

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”.

Section 376^{ix} of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both. This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 15 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 15, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation, as per Section 376A^x *Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under 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.*

This section indicates that in S.375 of the IPC consent is presumed, which is not so here since the husband and wife are not living together. Living together raises a presumption that the wife has consented to sexual intercourse by the husband.

- **42nd Law Commission Report**

The first report to deal with this issue was the 42nd Law Commission Report.^{xi} Since the law has been amended at various intervals subsequent to this report, the importance of this report is restricted to understanding the prism through which the Law Commission views marital rape. This report made two important suggestions. First, it noted that in instances where the husband and wife were judicially separated, the exception clause must not apply.^{xii} Although this was a laudable suggestion, the reasoning given for this was unclear. It stated that “in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right”.^{xiii}

It does not discuss the reason why this is not right. It implies that consent is presumed in situations where the husband and wife live together and cannot be implied when they do not live together. The second suggestion made in this report was regarding non-consensual sexual intercourse between women aged between twelve and fifteen.^{xiv} It stated that the punishment for such offences must be put into a separate section and preferably not be termed rape.^{xv} This was because prior to the recent amendments in the IPC, there was a different punishment for rape committed by the husband when the wife was between twelve and fifteen. The defining feature of the second suggestion is the reluctance to classify marital rape as rape, but at best as a lower form of sexual misdemeanour.^{xvi} In summary, this report highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape, where the former is viewed as less serious. It did not however comment on the exception clause itself, i.e. whether the exception clause must be retained or deleted.

- **172nd Law Commission Report**

Even the 172nd Law Commission report^{xvii} that was 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’.
- ‘Sexual intercourse as contained in section 375 of IPC should include all Forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- In the light of *Sakshi v. Union of India and Others*^{xviii} sexual assault on any part of the body should be construed as rape.
- Rape laws should be made gender neutral as law has neglected custodial rape of young boys.
- A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
- Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- Marital rape: explanation (2) of section 375 of IPC 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. On the same reasoning, section 376 A was to be deleted.
- Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

Notwithstanding the 172nd Report of the Law Commission of India submitted over nine years ago to the Government of India urging that Parliament should replace the present definition of rape under Section 376 IPC with a broader definition of sexual assault, which is both age and gender neutral, nothing has been done till date.

- **The Protection of Women from Domestic Violence Act 2005**

This legislation has only created a civil remedy for marital rape, without criminalizing the same. It did not consider marital rape as a crime, did consider it as a form of domestic violence.^{xix} Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. This is only a piecemeal legislation and much more needs to be done by the Parliament in regard to marital rape.

- **Justice Verma Committee**

For strengthening anti-rape law, Indian government constituted Justice Verma Committee on December 23, 2012 after the rape of a twenty-three year old student in Delhi, comprising retired Justice J.S. Verma, retired Justice Leila Seth and Solicitor General Gopal Subramaniam to look into the possible amendments in the criminal laws related to sexual violence against women.^{xx} In view of the significance and urgency of the task, the committee undertook to perform it within 30 days, which task has been completed. The Committee is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee has recommended that the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape...”^{xxi} The Verma committee report points out a 2010 study suggesting that 18.8 percent of women are raped by their partners on one or more occasion. Rate of reporting and conviction also remain low; aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.^{xxii} The recommendation of Justice Verma Committee regarding deleting exception of marital rape is not included in Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19 March 2013 and by the Rajya Sabha on 21 March 2013. The Bill received Presidential assent on 2 April 2013 and deemed to come into force from 3 February 2013. The word rape has been replaced with sexual assault in Section 375.^{xxiii} The parliamentary panel examining the Criminal Law (Amendment) Bill, 2012, said that "In India, for ages, the family system has evolved ... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women, It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice".^{xxiv}

- **Judicial Outlook**

The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*^{xxv} has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v. State of Rajasthan*^{xxvi}, the Supreme Court extended this right of privacy to workplaces. Further, along the same line that there exists a right of privacy to enter into a sexual

relationship even within a marriage. By decriminalizing rape within a marriage, the marital exemption doctrine violates this right of privacy of a married woman and is hence, unconstitutional.

The most recent change came through the Supreme Court's decision under *Independent Thought v. Union of India* in October 2017. The case was filed as Public Interest Litigation by the nongovernmental organization, Independent Thought, to protect child brides from marital rape. Exception 2 under Section 375 of the Indian Penal Code provides an exemption to rape for men having sexual intercourse with their wives under the age of fifteen. In *Independent Thought*, Supreme Court Justices Madan B. Lokur and Deepak Gupta rationalized that Indian Penal Code, Section 375; Exception 2 should not apply to child brides between the ages of fifteen and seventeen. The Court held that Exception 2 creates an arbitrary and discriminatory distinction between a married girl child and an unmarried girl child. The Supreme Court offered well-supported and rational arguments to defend its decision to change the exception from "under fifteen years of age" to "under eighteen years of age." The Court stipulated that the distinction between the married girl child and the unmarried girl child is contrary to the spirit of the Constitution of India ("the Constitution"), specifically Article 15(3) and Article 21. The concurring judgment also pointed out equal protection clause under Article 14 of the Constitution. Similarly, the Court identifies that the Constitution and the Protection of Human Rights Act, 1993, guarantee liberty and dignity as protected rights and to allow a man to engage in forced sexual intercourse with his child bride would be a violation of these rights. The Supreme Court also recognized the importance of a woman's autonomy over her own body, her right to bodily integrity, and her right to privacy. Furthermore, the Court pointed out the inconsistencies that arise from the fact that husbands can be charged with lesser sexual crimes, while enjoying an exemption from the much more serious crime of rape. Lesser crimes for which the husband can be prosecuted include intent to outrage her modesty, sexual harassment, assault or use of criminal force against woman with the intent to disrobe, voyeurism, and stalking. There are no marital exception clauses associated with any of these crimes. Relatedly, women also enjoy protection under Section 3 of the Protection of Women from Domestic Violence Act, 2005. Lastly, the Court pointed to India's international obligations, especially under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). The decision under *Independent Thought v. Union of India* was a milestone for advocates in furthering the fight against marital rape.

Lacunae In Indian Law

- A husband can't be punished for raping his wife because consent to matrimony presupposes consent to sexual intercourse.
- The exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. It's submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution.
- Domestic Violence Act, 2005 also kept marital rape out of its purview. It disregards sexual abuse only if it threatens life or is capable of causing grievous hurt; it has nothing to do with the freedom or want of a woman.

- Provisions of divorce under Hindu marriage Act, 1955 includes rape as one of the grounds available to women for claiming divorce from husbands, but only when the husband, on some other woman and not on his wife, committed such rape.
- Marital rape no doubt clearly violates the right to live with dignity of a woman and to that effect, the Exception 2 to Section 375 is also a violation of Article 21 of the Indian Constitution.

Position In Other Countries

Today there are many countries that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand did so in 2007. The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights.

Australia, under the impact of the second wave of feminism in the seventies, was the first common law country to pass reforms in 1976 that made rape in marriage a criminal offence. In the two decades before that, several Scandinavian countries and countries in the Communist bloc passed laws criminalising spousal rape including Sweden, Norway, Denmark, and the former Soviet Union and Czechoslovakia. Poland in 1932 was the first to have a law explicitly making it a criminal offence.

In the United States of America, marital rape or spousal rape is criminalized in all the fifty states in the United States of America. However, not all the states in the United States of America treat marital rape and rape the same. Some states like Ohio, Michigan, and Nevada treat them differently. But anyhow, marital rape is a crime under some section or the other. In no state is it legal in accordance with the existing laws.

In the United Kingdom, all kinds of sexual offences are dealt with under the Sexual Offences Act, 2003. In the UK too, marital rape is expressly considered a crime. Section 1 of the same talks about rape. A person is said to have committed the crime of rape if the accused penetrates his penis into the vagina, anus or mouth of the person without their consent and on purpose. It doesn't matter whether the victim resides with the accused or not, knows the accused or not, or is or was married to the accused or not. What matters is the element of consent. If the victim hasn't consented to the penetration, then it will be considered as rape.

A landmark case in this regard is *R v R*. In this case, the House of Lords held that it is possible under the English Criminal Law to commit rape on his own wife. The defendant, that is the husband, claimed that he could commit rape on his wife since the wife gave him irrevocable consent by the contract of marriage. Thus, as a reaction to this, both the House of Lords and the Court of Appeal held that there is no exception of marital rape under the English law.

In 2002, Nepal got rid of the marital rape exception after its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy. It said, "The classification of the law that an act committed against an unmarried girl to become an offence and the same act committed against a married woman not to become an offence is not a reasonable classification."

In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries and India is not one of them.

Conclusion

It is evident that marital rape is a prevalent issue facing India and there are several actions that need to be taken in order to properly combat its pervasiveness. At the very least, the marital rape exception needs to be eliminated making rape within a marriage a criminal offense and effectively removing marriage as a defense to rape. Criminalizing marital rape is only the first step that needs to be taken. In order to completely eradicate marital rape, there are still various economic, social, and legal barriers that need to be addressed in order to provide women who face sexual violence in marriage with an effective remedy. Gender-sensitivity training needs to be provided to various vocations including the police and the judiciary. Furthermore, centers and sanctuaries should be provided by the State in order to aid women in removing themselves from violent environments and providing them with necessary support services. Lastly, the State needs to adopt a national policy towards eradicating pervasive stereotypes and stigma against women generally and married women specifically.

Endnotes:

- ⁱ <https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece>
- ⁱⁱ <https://www.huffingtonpost.in/kumar-rajesh/latest-data-on-sexual-violence-in-marriages-shows-why-india-should-progress-towards-criminalising-marital-rape-a-23367102/>
- ⁱⁱⁱ http://streeshakthi.hpage.co.in/constitutional-protection_62485969.html
- ^{iv} <http://www.ebc-india.com/lawyer/articles/645.htm>
- ^v The Constitution of India, Article 21.
- ^{vi} *The Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.
- ^{vii} *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1196 SC 922.
- ^{viii} The Indian Penal Code, 1860, S.375 as amended by the Criminal Law Amendment Act, 2013.
- ^{ix} The Indian Penal Code, 1860, S.376.
- ^x The Indian Penal Code, 1860, S.376A.
- ^{xi} Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf>
- ^{xii} *Id.*, ¶16.115.
- ^{xiii} *Id.*
- ^{xiv} *Id.*
- ^{xv} *Id.*
- ^{xvi} *Id.*
- ^{xvii} 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1
- ^{xviii} 2004 (5) SCC 518.
- ^{xix} The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii)
- ^{xx} <http://www.thehindu.com/news/resources/full-text-of-justice-vermas-report-.pdf/article4339457.ece>
- ^{xxi} <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf>

^{xxii}<http://www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-says-committee/article4351148.ece>

^{xxiii}[http://en.wikipedia.org/wiki/Criminal_Law_\(Amendment\)_Act,_2013](http://en.wikipedia.org/wiki/Criminal_Law_(Amendment)_Act,_2013)

^{xxiv}http://articles.timesofindia.indiatimes.com/2013-03-02/india/37389697_1_live-in-relationships-sexual-offence-sexual-consent

^{xxv} AIR 1991 SC 207.

^{xxvi} AIR 1997 SC 3011.

