

## **Marital Rape: A Quest for Justice**

**Mr. Amit Ghosh**

Assistant Professor of Law  
The Neotia University  
Kolkata, West Bengal  
&

**Mr. Soumyadip Kundu**

Assistant Professor of Law  
JIS University  
Kolkata, West Bengal

### **Abstract**

Marital rape is a term that never been looked into by Indian legislatures even it has been by-passed for so many occasions. Recently the Supreme Court of India criminalized unwilling sexual contact within a wife between fifteen and eighteen years of age. This is a steeping forward judgment on the issue of marital rape. But it only classifies the fifteen to eighteen year's wives that might be created difference between an adult wife and under aged wife. Not only that, exception 2 of Section 375 of Indian Penal Code provides an implied right to the husband to make sexual intercourse with his wife without her consent. The question emerges regarding necessity to Lord Macaulay law's applicability after passing of long one fifty years on this very issue. The India Judiciary has taken a significant role defining right to equality and right to life post Maneka Gandhi era. Indian matrimonial laws, in this context, say marriage is a sacrament between two spouses. There is a logical debate that yet to be continuing whether criminalization of marital rape would destroy the marital institutional philosophy? This present research intends to introspect taking the laws and issues about marital rape and would find the remedy if any.

**Keywords:** Marital Rape, Marriage, Sexual Contact, Women's Rights.

### **Introduction**

Marital rape is one of the contemporary issues in the recent years. Today, in so many countries like India the marital rape is yet to be allowed. It is to be noted that women being forced to have sex within marriage is not a criminal offence in 58 percent of countries said Marwa Sharafeld an Egyptian Woman's rights Activist, at a launch of report in U.N Headquarter. More than 50 countries, including the United States, Nepal, Britain, South Africa, it is a crime for a husband to rape his wife, but

that is not the case in most of Asia. According to Hindu Law, Marriage is a sacrament between two spouses. It is a body for the performance of religious duties. It is deemed as a holy union in Hindu Law. It is also considered to be a union of flesh and blood. It is a religious sacrament and not a civil contract. This is a convention that is being followed from emerging the marriage laws since Vedic age. Perhaps, India is in dilemma relating to declare exception 2 of Section 375 unconstitutional. Lord Macaulay introduced India Penal Code in 1834 that came into force at 1860. The exception 2 of Section 375 says sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape. To prove rape, consent is one of the valid points before court of law. Explanation 2 of Section 375 of IPC says consent is an equivocal voluntary agreement when the woman by words, gestures, or any form of the verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. Marital sex comes from consent that already been given by both spouses obliging the rituals at the time of marriage. So, there is a doubt validly emerges that criminalizing of marital rape can destroy the building of society. This paper would follow the doctrinal research methodology to understand the result of marital rape status in India.

## **Review of Literature**

The research conducted by Melanie, Koshan and Nyaundi in 2017 analyzed the judicial treatment of marital rape in Canada from 1983 until 2013. It is the first comprehensive review of marital rape decisions in Canada since Criminalization allows an assessment. This marital rape is focusing on issues related to consent, mistake, belief in consent, evidence and sentencing. This paper concludes by highlighting overall trends in the case law and identifying potential responses. Jermittiparsert and Kasemsukpha explored Bangkok men's understanding of Section 276 of the Criminal Code. The study also examined the attitude of marital rape as perceived by men using various demographic assessment factors and investigating correlations between level of understanding of law (Jermittiparsert & Kasemsukphaisit, 2016). Interestingly, on 22<sup>nd</sup> February 2007 the Ghanaian Parliament passed the long awaited domestic violence act. The marital rape constitutes a violation of Women's Human Rights. The consent to marriage is the equivalent of consent to sex in Ghanaian custom and law. The marital rape expression is a throwback from British common Law. In the 1980's Judges held or opined in dicta what must be incontrovertible to the feminist community. The marital rape exemption denies the married women protection against the violent crime. The endurance of marital rape exemptions results from the dominant understanding of meaning of equality. It also re-examines contrasting understanding of the meaning of equal protection (Torres & Yllo, 2016). Dube in 2006 analyzed the offence of rape as one of the most gruesome and barbarous crimes perpetrated against women. The marital rape demolishes the entire physical and psychological composure of women and reduces her as a living corpse. The legislators have turned

a deaf ear to all pleas of Justice by married women and impact of victim in the Indian stand point. A study by Anderson discussed about the marital Immunity for sexual offences persists in over half of the states. All country must abolish this immunity to make the law formally neutral on the marital status of parties. This kind of marital rape immunity has mostly infected the way this legal system treats all kinds of sexual offences among all the intimates who are not yet married (Anderson, 2003). Furthermore, the marital rape is considered to be a heinous crime, but not considered to be a criminal offence in India. The only remedy is that of compensation and not a ground for seeking a decree of divorce. There has been a widespread protest in India to include it under marital rape (Garg & Singla, 2013; Pandey, 2013). Both the pillars of humanity i.e men and women have equal importance and role in creation of humanity. Women are bound to face several humiliations in the society. The offences against women are endless as sexual harassment. Marital rape is very crucial as it is not recognised till date as a crime (Pandey, 2013).The immediate need is to criminalize the marital rape under the Indian Penal code. The real objective of marital rape criminalization can only be achieved if society challenges the prevailing myth. Marital rape has to be regarded as sexual harassment and Indian society cannot continue to trend women in the verge of promoting social cohesion (Dhingra, 2015). Goodwin talks about sexual violence against women and girls, exposed women's credibility to such intense hostility. This paper highlighted the factors that are irrelevant to sexual violence, which serve as points of searching enquiry. This essay looks into more probing report about sexual violence and legal perspective (Goodwin, 2015). Hence, in accordance with the aforementioned literature review it can be understood that the struggles surrounding the criminalization of marital rape.

## **Objective**

- To introspect taking the laws and issues about marital rape
- To find the remedial measures with regard to legal aspects towards marital rape

## **Principle of Constitutionality**

Article 14 of the Indian Constitution ensures that, “[t]he State shall not deny to any persons equality before the law or the equal protection of the laws within the territory of India”. Although the Constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husbands. The time when IPC was drafted in 1860s, a married woman was considered to be the chattel of her husband. As a result, she did not possess many of the rights now guaranteed to her as an independent legal entity, including the right to file a complaint against another under her own identity. India was a British colonial during the 19th century. All Indian laws enacted at this time were deeply influenced by English Laws and Victorian Patriarchal laws that did not recognize

men and women are equals, did not allow married women to own property, and merged the identities of husband and wife under the “Doctrine of Coverture”.

The Exception 2 of Section 375 of IPC might violate the right to equality enshrined in Article 14 as it discriminates against married women by denying them equal protection from rape and sexual harassment. The exception creates two classes of women on their marital status. In *Budhan Chowdhury Vs State of Bihar and State of West Bengal Vs Anwar Ali Sarkar*, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to reasonableness test that can be passed only if the classification has some rational nexus to the objective that act seeks to achieve. Exception 2 may encourage husbands to forcefully enter into sexual intercourse with their wives, as they know that their acts are not discouraged or penalized by law. Because no rational nexus can be deciphered between the classification created by exception and the underlying objective of the Act, it does not satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.

Exception 2 of Section 375 of IPC also might violate Article 21 of the Indian Constitution. Article 21 states that “[n]o person shall be denied of his life and personal liberty except according to the procedure established by law.” The Supreme Court has extended this right by including rights to health, privacy, dignity, safe living conditions, and safe environment, among others. In *Kharak Singh and Francis Coralie case*, the Supreme Court stated life does not mean like animal existence. A human life should be included with human dignity. In *State of Karnataka Vs Krishnappa*, the Supreme Court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence. Later, in *Suchitra Srivastava Vs Chandigarh Administration*, the Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution. In *Justice K.S. Puttuswamy (Retd.) Vs Union of India*, the Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. Thus, the Supreme Court had recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the constitution. Moreover, contending these arguments, the male activists have been against the criminalization of marital rape. They are raising the judgment given by Supreme Court in *Aradesh Kumar Vs State of Bihar and Rajesh Sharma Vs State of Uttar Pradesh* Court stated that “no arrest is made without reasonable satisfaction” in 498A cases. The Court seriously shows its doubt relating to using of 498A section of Indian Penal Code. Not only that, the Court shows

dissatisfaction relating to using of 498A section which exclusively provides rights to married women against cruelty. One National Health and Family Survey (NHFS-4) for 2015-16, 5.4 percent women have experienced marital rape. They are showing the number of marital rape against women is very much low in respect of suicide committed by married men. As per the National Crime Bureau Statistics 65,000 married men commit suicide every year, which is more double the suicide by women.

As there are so many laws provided for ensuring the rights of married women, the contender is against the view of criminalizing marital rape in Indian context. The laws are:

A) Section 376B criminalizes sexual intercourse done by husband during judicial separation under order by court against the will of wife shall be punishable not less than two years may extend to seven years, and shall also be liable to fine.

B) Section 377 criminalizes unnatural sexual intercourse with women and it shall be punishable imprisonment for life or imprisonment which may extend to ten years and shall also be liable to fine. This section can be applied by married women if any unnatural sex commits by her husband.

C) Section 493 invokes those offenders who deceitfully makes intercourse with a woman by showing himself as legal husband shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

D) Section 498A, Explanation (a) defines ‘cruelty’ as any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the women. It means any physical violence against women shall also come under 498A and it shall be punishable for three years and fine.

E) The Protection of Women from Domestic Violence Act 2005, Section 3(a) includes “harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse comes under domestic violence”. Not only that clause ii of Section 3(d) states any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a women.

The Government of India stated that criminalizing marital rape would “destabilize the institution of marriage” and could become an easy tool to “harass husbands’ in RIT Foundation Vs Union of India.

## **Suggestions**

The law in the IPC must be amended to as suggested by the Justice Verma Committee Report, it is to be understood by the policy maker that the relationship of marriage cannot be a ground of defense for the perpetrators. Secondly, we also agree with Verma Committee Report that the existence of a marriage does not lead to a presumption of consent. However, in practicality, the judiciary will undeniably look at some threshold of force to answer questions of consent. There are three ways to treat consent while criminalising marital rape. The first would be to presume consent, and put the burden on the victim to rebut that consent. The second is to presume absence of consent, and the accused will have to establish consent. The third would be to draw out a system especially for cases of marital rape, and this will require a review of existing principles of evidence law. In the current scenario, there is lesser punishment associated for husband committing sexual intercourse living separately with his wife and it varies from two years to maximum seven years as stated in section 375B. The sentencing policy must be unified on the ground of equality enshrined in Article 14 of the Indian Constitution. Apart from it to deal with cases related to marital rape consolidated amendment is required in IPC and Evidence Act also.

## **Conclusion**

In December 1993, the United Nations High Commissioner for Human Rights published the declaration on the elimination of violence against women. This establishes marital rape as a human rights violation. India Government is still against the opinion about relating to criminalizing marital rape. The Judiciary has identified it and taken necessary step to address this crime in India. On a report proposed by Justice Verma Committee, stated marriage is not a valid defense against sexual crimes like rape. Justice Verma Committee was established after Nirbhaya Gang Rape. Moreover, having ratified the report of Justice Verma committee the legislatures of India added so many clauses in molestation and rape laws in India but in the matter of marital rape proposal the Government of India does not take any necessary measures which should be looked into. Moreover, having said that the issues raised by the male activists have to be kept into mind but not criminalizing marital rape might be violating the woman's right across India.

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