

Nuptial Rape: Rape Within Marriage

Aneesh Gupta, Aashita Mehta



Abstract: Section 375 of the Indian Penal Code, 1860 Criminalizes 'Rape' under Offences Affecting the Human Body, where prevails an oddly fitted exception to this Section, which states: Sexual intercourse by a man with his wife who is not less than 15 years of age does not amount to the offence of rape. Marital Rape, a non-criminalized crime in India is where the victim herself does not know she is a victim of Marital Rape. It is one of the most under-reported crimes with 77% of women never seeking any aid regarding the violence they ever experienced. The section clearly states that rape within marriage cannot be treated as a criminal offence unless the wife is below 15 years of age. Considering the repercussions, the adverse effect on mental health highly caused by marital rape due to its non-criminalization, especially in India is reviewed legally and psychologically in this paper. The data for the above piece of research has been taken from Secondary sources: law sites, search engines, research articles, Google Scholar etc.

Keywords: Marital Rape, Criminalization, Law, Mental Health, Domestic Violence

I. INTRODUCTION

Marriage is considered to be a religious sacrament between two people [1, 2, 3]. It is a social bonding not only between the parties to marriage but also the families related to these parties. Everything in this bond requires consent of both the spouses, but if things in this institution lack consent of either of the spouses or parties to the marriage, then this religious sacrament can turn sour. One such standing instance of nonconsensual thing is Marital Rape or non-consensual sexual intercourse. In layman's language, *Marital Rape* can be outlined as a spouse having sexual intercourse with his spouse in the absence of consent. In Roman culture, *Raptus* was a general term which depicted violent theft of property and person. The term '*Raptus*' can be considered as a synonym to abduction, particularly of a woman or a sexual assault. Women were regarded as the property of her father or husband so any offence against her was treated as a wrong against them and not the woman herself. In India, women are viewed as sex symbols which are presumed to be available to men all the time.

After marriage, a man is believed to have an everlasting approval for sex with his wife whenever he wants amidst asking for actual consent of the wife for same [4]. The legal definition as per present Indian context for Marital Rape is, *an unwanted coitus by a husband on his wife incurred by force or threat of force or violence, mostly physical, when the wife negates or is unable to establish her consent* [5]. In a report put forward by the *Indiana University Press* in 1990 stated that 1 in every 7 married women have been raped in her marriage. In India, married women aged in between 15-50 years, more than two-third have been smitten, tortured with demand for dowry and subjected to forced sex. It is to be noted that non-consensual intercourse between a 50 year old husband and a 16 year old girl can be legal whereas consensual intercourse between a 17 year old boy and a 17 year old girl is illegal. In India, the existence of *Marital Rape is de facto and not de jure*.

In countries like India, Sri Lanka and Bangladesh, women are considered as the property of husband so the laws regarding Marital Rape are not prevalent as the State exempts its interference in the institution of marriage. Around 150 countries have criminalized Marital Rape where all the states in the United States, the United Kingdom having a maximum of life imprisonment as a penalty for Marital Rape, countries like Fiji the offence is viewed explicitly illegal, are included and India is not one of them.

The only remedy available to married women who are the victims of domestic violence, cruelty or perverse sexual conduct is envisaged in the following:

- *The Protection of Women from Domestic Violence Act, 2005- Section 3(a)* of the act provides for certain acts that constitute domestic violence against women which include, harms or injuries which endangers the health, body, life or well being of the woman whether mental or physical or such acts that include physical, sexual, verbal, emotional and economic abuse.

- *The Indian Penal Code, 1860- Section 376(2)* enshrines Marital Rape of wife who is below 15 years of age, but fails to cover major wives and in its Section 498A which deals with cruelty and perverse sexual conduct by husband, but fails to define or interpret or laid suitable measures as to what constitutes perverse or unnatural or obstinate within intimate partner relations. Though the Protection of Women from Domestic Violence Act, 2005 and Indian Penal Code, 1860, provides for sound remedies for victims yet it fails to criminalize the Marital Rape. The Law did not take into its consideration the violation of fundamental right of freedom for a married woman as an individual, her right to protect her body or right to protect herself against any abuse.

II. OBJECTIVES

- In the interest of brevity, this piece of research examines the Marital Rape within India.

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- To explore legal perspective on Marital Rape in India.
- To list the psychological implications of Spousal Rape in India.

III. HYPOTHESES

- Marital Rape is a partially criminalized crime in India.
- Marital Rape would lead to negative impact on the psychological health of the victim and the family.

IV. RESEARCH METHODOLOGY AND DESIGN

- The data and the information is collected from the *Secondary Sources* which include reports, newspaper, journals, essays, articles, websites, books of eminent authors, research studies, case studies, interviews. Henceforth were referred while conducting the research.
- *Doctrinal Research* design has been implied in the instant research.

V. HISTORY OF MARITAL RAPE

• International History of Marital Rape:

The term or act of Marital Rape found its origin back in 1736, when *Sir Matthew Hale*, the then Chief Justice in England published in one of his influential deemed works titled '*History of the Pleas of the Crown*' that, the husband is excluded/exempted from guilt of a rape committed by himself upon his legally wedded wife as the wedding inflicted mutual matrimonial consent and contract on the part of the wife that she has given herself up in a kind to her husband which she cannot retract. In furtherance to this theory put forward by *Lord Hale*, *Sir William Blackstone* in the middle of the 18th century introduced his '*Unities Theory*' under '*Commentary on the Laws of England*' in which he stated that husband and wife are considered as one legal person where the legal existence of the wife abrogates, integrating into that of her husband. A wife cannot take any legal action in case of an injury or infringement of a legal right or duty towards her by a certain act or omission on the part of the other, without the concurrence of her husband. The lack of legislation and penalization failed to restrain the husbands from abusing their wives as the wives were already considered to be a property of their husbands. The then current scenario of Marital Rape, where wives were treated as husbands' properties and their legal personal being incorporated into that of their husbands' changed with the introduction of the '*Married Women's Property Act, 1889*' which provided women certain rights and freedoms exempting them to be considered as their husbands' properties. Rights such as management of their own property, carry out work outside home or household without the consent of husband, keep self earned wages with them and so on were given to women. The introduction of the *Act of 1889* which spoke in favor of women made Marital Rape free from being a legal impossibility. Further in 1974, *Laura X*, a women's right Advocate, after learning that Marital Rape was not a crime in the United States began her agitation to criminalize forced sex in marriage. In the year 1976, She drew public attention towards the *Michigan murder trial of Judy Hartwell* where the Presiding Judge affirmed *Hartwell* that she had a right to defend herself despite the prevalent Marital Rape exemption. As a result of which in 1977, a resolution

aiming annulment of all Marital Rape exemptions was passed by the *National Council on Jewish Women* and in March, 1977, *American Civil Liberties Union* publically stated that protection of law to the victim is denied where the sexual assault laws fail to express provisions and clauses regarding lodging of complaints by one spouse against the other. The Union also stated that such language which forbids charging sexual assault against one spouse by the other should be terminated from the laws. The subject gained most publicity in 1978 when the first ever husband named '*John Rideout*' was prosecuted for Marital Rape. *Laura X* aided in widely publicizing this landmark trial which proved to be successful in raising consciousness about Marital Rape. By this year, 1978, Marital Rape was a recognized crime in five states only, but with the influential efforts of *Laura X* other states including New York, Florida, Virginia, Georgia, Nebraska and Ireland altered their laws regarding Marital Rape. By the end of 1986, the '*Federal Sexual Abuse Act*' was enacted which criminalized Marital Rape on all federal lands. Finally on July 5th, 1993, Marital Rape gained its recognition as an offence or a crime in all 50 states. It was due to the substantial help and efforts of *Laura X* that the laws of the states underwent such a remarkable change and declared Marital Rape as a grave offence. On the other hand, Poland was the first country to declare Marital Rape illegal in 1932. The Second wave of feminism in 1970s led to invalidation of decriminalization of Marital Rape in Australia. Over the past decades, several Scandinavian and Communist bloc countries such as Sweden, Norway, Denmark, Czechoslovakia, also declared Marital Rape opposed to public policy and law of land. In 1986, the *European Parliament Resolution on Violence against Women* recommended for criminalization of Marital Rape, which was implemented immediately in Germany, France, Luxembourg and Belgium. In 2002, Nepal declared the exceptions of Marital Rape void, thus making it an illegal act or an offence. Recently in report put forward by the *United Nations on women in 2011*, 52 countries altered their law on Marital Rape thereby declaring it a crime.

• Indian History

17th century India, before the arrival of European Traders, the applicability of law was detrimental directly on the basis of status and caste. Since the period of *Ancient Indian Law* i.e. between 200 BC and 200 AD, when *Laws of Manu* were compiled, women were treated and considered to be as eviternal minors. The primary duties of women were to raise children and family, obey blindly the commands of her husband whether they were evil or destructive to oneself in nature and treat and consider her husband as 'God'. Later on in the 19th century, *Thomas Babington Macaulay* proposed a unified set of codes, replacing and putting an end to the application of laws which were determined by the status and cast to govern the people of India. The proposal of unified codes led the foundation of the '*Indian Penal Code, 1860*' which is in force and is applicable till date.

Lord Macaulay sought to secure that IPC will ensure clarity and approachability of provisions along with retention of applicability and expression. The code provided for security of women as it expressed protection against evils such as rape, where the burden of proof rests with the defendants to prove that the victim consented for sex. Despite being a codified law having clarity and approachability of provisions along with retention of applicability and expression, IPC failed to keep pace with changing cultural and social norms in lieu of women's rights in general and marital rape in particular. The IPC, in its exception stated under sections 375, which protects marital rape of minor brides who are less than 15 years of age, neglected to provide protection to major brides against marital rape. Further in 2013, *Justice Verma Committee*, which was constituted to recommend amendments in Criminal Law after the *Nirbhaya Case of 2012* (a.k.a. Delhi Gang Rape Case) gave its recommendations to remove the exception to marital rape. The recommendation was rejected by the Indian Government. Hence there is no protection available to a major married woman or a major wife against marital rape as the area remains untouched and unaltered since the foundation and implementation of the IPC.

VI. LEGAL FACET OF MARITAL RAPE

Marital Rape is not a crime in India. Its criminalization has been in question since a long time. Where the reports mention that 150 countries have declared Marital Rape as an offence, India is not one of them. The status of Marital Rape in India is that of de facto and not de jure. Thereby meaning that Marital Rape exists in the society but it is not legally accepted. Henceforth is the legal status of Marital Rape in India:

Section 375 of IPC defines 'Rape' as sexual intercourse with a woman against her will, without her consent, with consent when such consent is obtained under the influence of fear of death or hurt, with her consent when such consent is attained under the influence of unsoundness of mind or intoxication or administration of any substance that boosts her inability to understand the nature and consequences of such consent and when she is less than 16 years of age. The Section implies an exception which states that sexual intercourse with a woman by her own husband, the wife being more than 15 years of age does not constitute rape. A married girl aged about less than 15 years has the right to accuse her husband of rape where as this very right ceases as soon as the wife reaches 15 years of age and above. The Section does not provide a strong ground or a valid reason for the exception mentioned in Section 375. Furthermore the laws in India are in conflict with one another where the exception clause under Section 375 of IPC is contradictory to *Section 5(c)(iii) of the Hindu Marriage Act, 1955* where in it is stated that the legal age for a girl to marry is not less than 18 years where as the exception clause under Section 375 of the IPC preserve accusation rights of a wife who is not more than 15 years of age against her husband if he forces to share his wife's gender with him.

Though the law does not permit Marital Rape yet it criminalizes a certain type of Marital Rape which is the sexual intercourse without consent, with a wife by her husband, both residing separately on account of an order

passed by the Court or otherwise. *Section 376 A of the IPC* states that non consensual sexual intercourse i.e. any of the acts mentioned in Section 375(a) to (d) with his wife by a husband who reside separately on account of a decree of separation or otherwise, shall be punished with imprisonment of either description for a term extendible to two years and shall also be liable to be fine.

Section 375 of the IPC infringes the privilege guaranteed under *Article 21 of the Indian Constitution*, which calls for *Protection of Life and Individual Liberty*. The right guaranteed by this Article comes into question when a wife is deprived of such a right when she is made to indulge forcefully for sexual intercourse by her own husband, which harms her dignity and validity of her right to exercise personal liberty. The exception in Section 375 further puts into question *Article 51A(e) of the Indian Constitution*. The Article states about the Fundamental Duties of every citizen of India to abdicate such practices which deteriorate the dignity of women. A girl under 15 years of age has the right to protect her dignity and is also the duty of the husband to renounce any act that can deteriorate the dignity of his less than 15 year old wife where as the duty ceases its effect as soon as the wife crosses the age of 15 years. A marriage which is in existence since a long period of time does not license the husband the power to dominate the wife and indulge in sexual intercourse to satisfy his need and demand with his wife without her consent. There is no reasonable ground in law in India as to such prejudice.

The only remedy available to a victim against Marital Rape in India is under the *Protection of Women from Domestic Violence Act, 2005*. The remedy is civil in nature and not criminal. The main objective of the Act is to protect women from all sorts of physical and mental harassment and cruelty including sexual harassment. Protection Officers can be appointed for the purpose to protect wives or live-in partners from domestic violence, the power to appoint such Officers is vested in the Magistrate. Under this Act, a wife can seek judicial separation from husband on the grounds of physical or mental or sexual abuse. Though the Act does not criminalizes Marital Rape yet it provided for protection of women in a domestic environment. *Section 3* of the Act defines and explains all types of abuses, physical or mental or economic, verbal or emotional abuse, etc. and domestic violence including sexual abuse.

VII. INTERVIEWS

- A woman on a TV program confronted that her husband raped her daily even on the days when she bled. She stated that her husband never spared her despite her pregnancy including the last day of the delivery of her child. She motivated other women in her confrontation saying to stand up and speak up against such barbarity so that they do not have to suffer the way she did. She ended her confrontation stating that then she used to fear her husband, but now she developed the strength to turn down such a man.

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- A service record of a 21-year-old girl being in marriage for one year stated that during her pregnancy, her husband injected a syringe of blood which she suspected to be that of HIV Positive. As a result of which she had to undergo a medical examination and later on abortion. Her husband penetrated pens and bottles in her vagina, threw chilli powder on her and made her watch pornographic content forcefully on his mobile.

- A service record of a 32-year-old survivor said that her husband whom she divorced on the grounds of domestic violence, dropped by her house to ask for forgiveness but raped her.

VIII. LEGAL UPDATES AND CASE STUDY

- A two Judge bench, consisting of *Justice Madan Lokur and Justice Deepak Gupta* on October 12th, 2017 delivered two concurring opinions regarding the *Exception Clause in Section 375 of IPC*. The bench rose the age of consent from 15 years to 18 years for the purpose of this section. The bench also delivered judgment regarding Exception 2 of Section 375 stating that the very Section relates to a girl child who is below 18 years of age so, it is liable to be struck down as it is a violation of the rights of a girl child along with a violation of *Articles 14, 15 and 21 of the Constitution of India*. Furthermore it is discrepant with the provisions laid down under *POCSO (Protection of Children from Sexual Offences)*

Justice Madan Lokur stated that penetrative sexual assault by the husband with girl child is punishable under the *POCSO Act*. *Justice Lokur* further stated that the Exception Clause under section 375 is contrary and in conflict with *POCSO Act*, where rape of a married child, aged about 15-18 year by her husband is not an offence under Section 375, but it is an offence under *Section 5(n) of the POCSO Act* and the offence is punishable under *Section 6 of the POCSO Act*. So, the conflict in this regard will be solved keeping in view the best interest of a girl child. *Justice Deepak Gupta* in addition to this stated that it is in the hands of the *Parliament* to decide the legal age of marriage along with the age of consent to be given under *Section 375 (vi)*. *Justice Gupta* also stated that when a girl who is 15 years of age is subjected to forceful coitus by the husband, it affects her body and mind, rendering her to trauma. (Independent Thought V. Union of India, 11th October, 2017)

- On May 11, 2022, a split verdict was delivered by the Delhi High court with a bench consisting of *Justice Rajiv Shakdher and Justice C. Hari Shankar* regarding the *Exception Clause in Section 375 of IPC*. *Justice Rajiv Shakdher* held that the *Exception Clause in Section 375* where a husband is exempted of non- consensual sexual intercourse with his wife, the wife not being less than 15 years of age is unconstitutional. So, *Exception 2 of Section 375 and Section 376B of IPC* was struck down by *Justice Rajiv Shakdher* as it violated *Article 14 of the Indian Constitution*.

On the contrary to this Judgment made by *Justice Rajiv Shakdher, Justice C. Hari Shankar* held that the *Exception 2 in Section 375* is not in conflict with *Article 14* or the *Constitution* thereby not violating it and the Exception is based on intelligible differentia.

As a result of the split verdict, both the Hon'ble Judges agreed to grant the certificate of leave to appeal to the Apex Court as it concerned substantial question of law. The matter is sub judice and is listed for further hearing in February, 2023. (HRISHIKESH SAHOO And STATE OF KARNATAKA & Ors | SLP(CrI) 4063/2022) (Live Law)

- On September 29, 2022, a bench of Judges in The Supreme Court consisting of *Justice DY Chandrachud, Justice JB Pardiwala and Justice AS Bopana* held that all women regardless of their marital status i.e married or unmarried are entitled to legal and safe abortion till 24 weeks of pregnancy. The Court held that marital status of a woman is no ground to deprive her of right to abortion of an unwanted pregnancy. The Court in its Judgment further laid down that rape can consist of sexual assault by a husband against his wife. So, the meaning of Marital Rape under the *Medical Termination of Pregnancy Act* must be included in the meaning of Rape including the rules for purpose of abortion. The Court stated that non- consensual sexual intercourse with a wife by husband may lead to pregnancy, so they must also be treated as a part of the class of survivors of sexual assault or rape. (X V. Principal Secretary, Health and Family Welfare Department and Anr. 21 July, 2022)

- According to a survey, 83% of the married women aged between 18-49 years reported their current husband and 13% report their former husband as perpetrators for sexual assault. The observation that in most of the sexual assault cases, the perpetrator was mostly the one with whom the victim have had an intimate relationship was laid down by the survey. (National Family Health Survey 5 (2019-2021))

IX. PSYCHOLOGICAL FACET OF MARITAL RAPE

Surviving experiences of coitus assault may have a humongous impact on introspection of the victim and its response towards others and the world. The victims of Marital rape and sexual violence, begin to hold pessimistic and an erroneous perspective about love, sex and relationships as a result of trauma. Untreated trauma of the victim leads to deterioration of mental and physical conditions. Physically, tiredness, nausea, strain, discomfort are experienced by the victim. Other serious physical repercussions include injuries to vaginal and anal areas, nose bleeding, black eyes, broken bones, lacerations, etc. Mentally, hypervigilance, intrusive thoughts and rumination are developed by the victim. The said mental and physical conditions are not only the outcome of brutality of the physically endured but also helplessness and shame. Being defiled by one's intimate partner, the victim may experience confusion and range of emotions. Many psychological symptoms occur viz. headache, panic attacks, insomnia, digestive issues, poor self-esteem, anxiety and so on. To escape the humiliation and despair temporarily, the abuse of substances and/or alcoholic beverages can be relied upon by the victim. The process of personal degradation rises to an extent that it becomes a stumbling block or an impediment that the victim becomes prone to not undertaking the needful to escape the abusive relationship [6].



Some of the short-term psychological impacts are sadness, shock, acute terror, suicide idealization, Contemplate harming. Long term impacts are depression, posttraumatic stress disorder, anxiety,[7]. eating disorders, poor self-esteem, dissociative, and anxiety disorders; general psychological distress and disorders such as somatization, neurosis, chronic pain, [8]. sexualised behavior, [9]. school/learning problems; and behavior problems including substance abuse,[1,2]. destructive behavior, criminality, and suicide. [12,13,14,16,].

Although qualitative work has been done in the treatment for traumatized and victimized women from the domestic violence and marital rape, but there has been none of the studies involving controlled clinical trials for the same treatments in this population.

Hanneke and Shields (1985) suggest many interventions such as heart-rate biofeedback, systematic desensitization, cognitive-behavioral therapies, and stress inoculation for the treatment of marital rape.

- *Stress Inoculation Therapy (SIT)*: Stress Inoculation Therapy deals on these levels say, physiological, cognitive, and behavioral coping for fear by striking out the anxiety from client.

- *Cognitive Processing Therapy*: The Cognitive Process Therapy addresses the victims conflict between their present schemas and newly acquired information that contradicts their existing cognitive organization. The maladaptive beliefs such as issues of safety, trust, power, esteem, and intimacy are challenged which are clenched by victims. This was that very therapy tailored to treat PTSD in rape victims (Resick & Schnicke, 1992), is eventually now suggested for use with marital rape victims (Westwell, 1998).

- *Cognitive behavioral therapy (CBT)*: This therapy helps the individual to rethink and reassess his/her own thoughts. It also provides better coping strategies when someone feels troubled, unhappy and uneasy. Hence, in the case of Spousal rape, CBT can address the negative thoughts and reframe them by projecting into positive side.

- *Somatic Experiencing therapy*: Somatic therapy can be chiefly beneficial for the victims who have gone through intimate partner violence. This therapy is also recognized as a form of “Somatic Experiencing” by helping individual’s body freeing the trauma and by restoring balance to the nervous system

X. CONCLUSION

The institution of marriage is believed to be a religious sacrament and of a relationship of non-interference of an outsider. Therefore, the Government and the Judiciary beholds themselves from the marital affairs between a husband and a wife. Marital Rape which is a crime in almost 150 countries and India not being one of them is our biggest concern as citizens of India. Marital Rape ‘not a recognized crime’ leads to domination of a husband over his wife and ruin her physical and mental state as discussed in this research paper. The above research highlights the ways of coping and detailed therapies to overcome the distress produced by Marital Rape on the victim. This piece of research has unveiled all the legalities and psychological repercussions

faced by a married woman in form of rape, violence and harassment both mental and physical by her intimate partner. There fore in this light, the policy-makers and law shall come forward to criminalize the Nuptial Rape at the earliest as there is a dire need to modify society’s patriarchal norms to achieve the gender equality by ticketing those men who rape their own wife. We as a part of the society curse men who are guilty of rape but fail to identify the demon in the name and style of husbands who are engaged in non consensual intercourse sexual activity with his own spouse. Till date sexual violence in a marriage stays neglected and undetected and here the question arises: Will there ever be a set of laws or rules to define the non- consensual sex of a husband with his wife? Will the Indian Law ever consider the importance of consent of a married woman?

XI. SUGGESTIONS

- Law in India recognizes the right of a married girl child to accuse her husband of Marital Rape whereas fails to recognize such rights of the major married wives. So, laws should be made to provide justice to major wives who are the victims of Marital Rape.

- A vast research is required on the rates, correlates and impacts of wife to husband Marital Rape and Marital Rape in bisexual and gay marriages.

- According to a study put forward by Saltzman, Holden and Holahan, whereby it is stated that prevalence of long term psychological and physical effects on children who are exposed to marital violence in the family of origin can be witnessed clearly. A greater research and longitudinal effects of marital violence on children and family members should be conducted.

- Victims of Marital Rape are clinically neglected and are not addressed as special populations. Therefore, they must be provided with hassle free counseling, trauma treatment, pain management, mental assessment and by psychologists, clinicians, nurses, police and women cells.

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