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# TRAVERSING THE LEGALITY OF MARITAL RAPE: AN ANALYSIS IN LIGHT OF MODERN INDIAN CRIMINAL LAW

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## I. ABSTRACT

This paper research about whether the marital rape is an offense or not. Rape is a cruel form of violation of the right to privacy for women and a violation of human rights against women. It is not only the physical effect but also the psychological effect. Rape is considered an offense under Section 375 of the Indian Penal Code, 1860 which will be replaced by Bharatiya Nyaya Sanhita, 2023 defined the same as under Section 63 of said sanhita but have some modifications. No specific laws were criminalized and penalized the marital rape. Since marital rape is not considered an offense of rape and not the offense is criminalized. This paper gives us efficient matter about the marital rape. There are so many judicial decisions is pronounced the validity of marital rape. Both sides of marital rape are offenses and not offenses are equal value. But one thing will strongly be concluded: we all have equal rights and no right to be infringed in any way.

## II. KEYWORDS

Rape, marital rape, spousal rape, consent, sex, Indian penal code, Bharatiya nyaya sanhita, criminal law, fundamental rights violation.

## III. INTRODUCTION

The society has changed by its trend. In India, more than seventy percent of women are victims of domestic violence. Rape is an offense but, sometimes it is not an offense. Because marital rape has exceptions from rape. It's nothing but, the raped by his spouse without his consent. Marital rape is sexual intercourse with a wife by her

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husband. This research paper discusses whether marital rape is an offense or not under the enacted statute. Let's dive it on.

#### **IV. RESEARCH OBJECTIVES**

- To study whether marital rape is an offense or not under the modern criminal laws.
- To analyze the constitutional validity of marital rape.
- To suggest and measure about to reduce the marital rape.

#### **V. RESEARCH QUESTIONS**

- Whether the sexual intercourse with his spouse is an offense?
- Whether the rape by her husband, without the consent of his wife amounts to marital rape?
- Whether marital rape is violating the fundamental rights of the wife?

#### **VI. RESEARCH HYPOTHESES**

- The Marital Rape is not an offense under any Indian Modern Criminal Laws. There is no matter whether the consent is given or not by the spouse.
- If the spouse is raped who have under fifteen years of her age by his husband, this act considers an offense under the Indian Penal Code, 1860.
- In Bharatiya Nyaya Sanhita, 2023 says, when rape is committed by his spouse against his wife, it is considered an offense only if she is under eighteen years of her age.
- Literally and legally, Marital Rape is not an offense in Modern Criminal Law but, sometimes it is an offense, if there is judicial separation between them.

#### **VII. RESEARCH METHODOLOGY**

The research methodology adopted in this paper is purely doctrinal. Doctrinal research, also known as library-based research, is a distinctive method of conducting legal research that involves the study and analysis of existing legal provisions, case

laws, and scholarly works. This methodology is well-suited for examining the theoretical and conceptual aspects of law and for providing a systematic exposition of legal doctrines and principles.

The primary sources relied upon in doctrinal research include statutory materials, judicial precedents, and authoritative texts, while secondary sources such as commentaries, articles, and legal digests are also consulted.

The research process involves the identification, collection, and critical analysis of these sources to draw logical conclusions and offer insights into the legal issues under investigation. Through doctrinal research, this paper seeks to provide a comprehensive and coherent understanding of the legal framework governing the subject.

## VIII. LITERATURE REVIEW

Researching Marital rape is a controversial subject and it is difficult to prove whether it is the offense of rape or not an offense of rape.

To analyze this paper, the provisions of the Indian Penal Code, 1860, Bharatiya Nyaya Sanhita, 2023, and the Constitution of India, 1950 are essential to keep in mind. Further, the books referred to, Criminal Law – by P.S.A. Pillai, Commentary on Indian Penal Code – by K. D. Gaur, The Indian Penal Code, 1860 – Ratanlal & Dhirajlal, and other books and commentaries help analyze marital rape.

The paper analyses in depth several landmark Supreme Court judgments that are related to this paper quoted *State of Maharashtra v. Madhukar Narayan Mardikar*,<sup>2</sup>, *Sree Kumar v. Pearly Karun*,<sup>3</sup>, *Suchita Srivastava v. Chandigarh Administration*,<sup>4</sup>, *Maneka Gandhi v. Union of India*<sup>5</sup> Among other landmark case laws.

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<sup>2</sup> State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207.

<sup>3</sup> Sree Kumar v. Pearly Karun, 1999 (2) ALT (CRI) 77.

<sup>4</sup> Suchita Srivastava v. Chandigarh Administration, (2009) 14 SCR 989.

<sup>5</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597.

## IX. MEANING, DEFINITION & EXPLANATION

The word 'rape' is derived from the Latin term 'rapio' which means 'to sieze'. In the literal sense, the Rape is a forcible seizure.<sup>6</sup> Rape signifies "the ravishment of a woman against her will or without her consent or with her consent obtained by force, fear or fraud or the carnal knowledge of a woman by force against her will"<sup>7</sup>

In a legislative sense, the Indian Penal Code, of 1860 defines rape in Section 375

"[S. 375] Rape. –

*A man is said to commit "rape" if he; -*

*(a) 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*

*(b) 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 do so with him or any other person; or*

*(c) manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus, or any part of the body of such woman or makes her do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, or urethra of a woman or makes her 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, because of unsoundness of mind or intoxication or the administration by him personally or through another of any*

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<sup>6</sup> Criminal Law, P S A Pillai, 14<sup>th</sup> edition

<sup>7</sup> State of Madhya Pradesh v. Santosh Kumar, (2006) 6 SCC 1.

*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 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 a willingness to participate in the specific sexual act: Provided that a woman who does not physically resist 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 wife, the wife not being under fifteen years of age, is not rape”.<sup>8</sup>*

Sexual intercourse between a male and female without her consent or against her will under any seven circumstances mentioned is rape in said section of IPC. The punishment for rape is given under Section 376 of the Indian Penal Code, 1860.

India's Supreme Court is currently considering whether marital rape, an exception within Section 376 of the Indian Penal Code, is unconstitutional.<sup>9</sup>

In the case of *Shri. Bodhisattwa Gautam v. Miss Subhra Chakraborty*<sup>10</sup> Supreme Court held that despite rape being a recognized violation of fundamental human rights and Article 21 of the Indian Constitution, the exemption for marital rape creates a contradiction.

172<sup>nd</sup> Law Commission report argued that criminalizing marital rape, where the husband is over 18, would be going too far in regulating married couples' lives.

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<sup>8</sup> Indian Penal Code, 1860, Section 37.

<sup>9</sup> Hrishikesh Sahoo v. State of Karnataka, SLP(Cr.) 4063-4064 of 2022

<sup>10</sup> Shri. Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR 922.

## A. Interpretation of Section 375 of IPC.

The elements of the definition of rape are,

- Sexual intercourse with a woman by a man under the said provision,
- Sexual intercourse must be under any seven-circumstance said in Section 375 of IPC,
- It must be without her consent,
- It must be against her will,
- With or without consent obtained under any fear,
- With or without consent by the unsoundness of mind, intoxication, or under the influence,
- Sexual intercourse with a woman who is under eighteen years of age, with or without consent of her.

## B. Form of Marital rape

The different forms of marital rape include,

- Physical and sexual violence to his wife by her husband is called *Battering Rape*,
- Husband has sexual intercourse with his wife by mean force, when she refuses to have sexual intercourse with her husband is called *Force-only rape* and
- *Obsessive rape* is brutal torture and perverse sexual acts.<sup>11</sup>

## C. Theory of Irrevocable Consent

The statutory provisions are that incorporated marital rape exemptions are based on the ground of implied consent that is irrevocable until the existence of marriage. In the 17<sup>th</sup> century, Jurist Matthew Hale laid down in his cryptic pronouncement where he stated, "*For the husband cannot be guilty of a rape committed by himself upon his lawful*

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<sup>11</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017.

wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract".<sup>12</sup>

#### D. Comparison with other Countries

- **England:** According to Sir Hale's theory, the husband cannot be convicted of rape with his wife is a general rule in England's Judiciary and gives exemption from prosecution for rape with wife because marital rape is implied consent to sexual intercourse with both spouses. However, in the case of *R. v. R.*<sup>13</sup> Five Law Lords declared that a husband's immunity from a charge of his wife's rape formed no part of English Law and held the exception clause to be void.
- **USA:** Before the 20<sup>th</sup> century, the marital rape exemption was followed. In the 18<sup>th</sup> century common law was articulated by English jurist Matthew Hale in the New York case of *People V. Liberta*.<sup>14</sup> Finally decided that there was no reason to distinguish between marital rape and non-marital rape. The court denoted that "A marriage should not be viewed as a license to force rape with his wife by impunity" and further, it struck the marital exemption from the law in question for violation federal Constitution.

#### E. Violation of Fundamental Rights

- **Article 14:** Equality before the law and equal protection of the law to all persons is guaranteed under Article 14 of the Constitution of India, 1950 but, in certainly reasonable classifications. The married woman is an exception to rape by his husband from other ordinary women. It discriminates based on married women and unmarried women about the rape. Article 14 permits classification but prohibits class legislation. In the case of *D.S Nakara v. Union of India*<sup>15</sup> and *Garg v. Union of India*<sup>16</sup> The Apex Court held that the

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<sup>12</sup> Maria Pracher, The Marital Rape Exemption: A Violation Of A Woman's Right Of Privacy, Golden Gate University Law Review, Women's Law Forum, Volume 11, Issue 3 (January 1981)

<sup>13</sup> *R. v. R.*, 991 U.K.H.L. 12.

<sup>14</sup> *People v. Liberta*, 64 N.Y.2d 152 (1984).

<sup>15</sup> *D.S Nakara v. Union of India*, AIR 19983 SC 130.

<sup>16</sup> *Garg v. Union of India*, AIR 1981 SC 2138.



classification must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. The classification must not be arbitrary or evasive. Irrational classification between married and unmarried women has no nexus to the object to be attained.

- Article 14 can be passed only if the classification has some rational nexus to the objective that the Act seeks to achieve.<sup>17</sup> When the definition of rape is wide is unjust, illogical, and irrational in the matter of classification. It is discriminatory and arbitrary and has no logical or convincing reasons provided for the exception of a husband for the non-consensual sexual act with the wife.
- **Article 21:** Article 21 of the Constitution of India denotes the matter of the right to life and personal liberty. When the marital rape occurs, the fundamental rights are violated. In the reference case, *Maneka Gandhi v. Union of India*<sup>18</sup> Explained the 'right to life and personal liberty'. It includes the right to choose personal sexuality. This case is important to how the judiciary interprets the constitution matters.

## F. Violation of Human Rights

Human Rights are born rights and inalienable rights. It is right in rem and applicable to the whole world. Because it is the fundamental right of all human beings who are surviving as human beings in all nations. The right to marry and the family right are human rights to all people. Human dignity is a state worthy of honor, respect, and equal status. It is irrespective of class, caste, gender, color, and status.<sup>19</sup>

*State of Maharashtra v. Madhukar Narayan Mardikar*<sup>20</sup> Held that no person has no right to violate another person's right, including an 'unchaste' woman and further held that recognized in this case 'right to bodily integrity'.

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<sup>17</sup> State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75.

<sup>18</sup> Maneka Gandhi v. Union of India, 1978 AIR 597.

<sup>19</sup> Right to Life with Human Dignity: Constitutional Jurisprudence.

<sup>20</sup> State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207.

*Bodhisattwa Gautam v. Subhra Chakraborty*<sup>21</sup>, the Apex Court observed that the commission of rape is against basic human rights and it also violates the fundamental rights of the Constitution of India.

## X. JUDICIAL DECISION ON MARITAL RAPE

No enacted statute is to penalize marital rape in India as well as the judicial pronouncement of marital rape is also inaudible.

In the case of, the *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>22</sup> The court acknowledged women's fundamental right to self-determination and the importance of ensuring their bodily autonomy. However, it is disheartening to discover that the court overlooked the issue of spousal sexual violence against married women.

*Sree Kumar v. Pearly Karun*<sup>23</sup>, A man and his wife were in a period of separation. They decided to live together as a chance for a second marriage. The wife is coming back to his husband's house. In that period, Husband has sexual intercourse with his wife. His wife was approached by the court to be liable for the rape of his husband. His wife was coming back to his matrimonial house because of this reason husband was not guilty of the offense of rape. It is implied that her consent about the matrimonial aspect gives the consent. In that period there was no separation and it was presumed that the wife gave consent to sexual intercourse impliedly.

*Empress v. Hari Mohan Maiti*<sup>24</sup> The court determined that a husband's entitlement to engage in sexual relations with his wife is not unconditional and must take into consideration her safety. Consequently, the only situation in which this unrestricted right to sexual intercourse can be infringed upon is when it poses an extreme danger or poses a threat to the woman's life as a result of a physical ailment.

In *Suchita Srivastava v. Chandigarh Administration*<sup>25</sup> Article 21 talks about the right to life and personal liberty; the choice of reproduction is upon both consents. It is not to any one of those consent and not only the choice of the husband. It is the choice of

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<sup>21</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

<sup>22</sup> *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207.

<sup>23</sup> *Sree Kumar v. Pearly Karun*, 1999 (2) ALT Cri 77.

<sup>24</sup> *Empress v. Hari Mohan Maiti*, (1890) 18 Cal 49

<sup>25</sup> *Suchita Srivastava v. Chandigarh Administration*, A.I.R. 2010 S.C. 235.

both equated with personal liberty. The entitlement to refrain from reproducing is encompassed within it. Whether the woman is married or not, human rights are the same for all humans.

Marital rape is a serious violation of the basic rights of married women. Rape is a crime that goes against the dignity and self-respect of all women, regardless of whether it is committed by a spouse or someone else.

### **A. Amendments / Repealing**

The Code of Indian Penal, 1860 which will be repealing statute defines rape as a married woman is considered as a rape victim when the woman is above 15 years of her age. In other words, if the person committed rape with his wife who has the age below 15 years, that person committed the offense in the definition of rape.

The new penal statute which will replace the Indian Penal Code, 1860 known as Bharatiya Nyaya Sanhita, 2023 defines rape as the same as what is said in the Indian Penal Code, 1860. Still, there is replaced the word eighteen from fifteen years in an exceptional clause of Bharatiya Nyaya Sanhita, 2023.

### **B. Marital Rape is an Offence**

In India, there is no offense in the meaning of rape by her husband. But sometimes there is an offense in the meaning of rape by her husband when the time is judicial separation. It has a separate clause in the Indian Penal Code, of 1860 for marital rape while occurring at the time of judicial separation.

- “S. 376B Sexual intercourse by husband upon his wife during separation: *Whoever has sexual intercourse with his wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine? Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of S.375”.*

According to Section 375 of the Indian Penal Code (IPC), the consent of the wife is presumed through marriage. However, in this particular scenario, the wife has not given her consent as they are living in a state of judicial separation.

### **C. Committee on marital rape**

The formation of the committee, led by Retd. Justice J.S. Verma in 2012, aimed to address the issue of marital rape. This committee was established in response to the widespread outcry for a more effective criminal justice system in handling cases of severe sexual assault targeting women. The committee published the 'Report of the Committee on Amendments to Criminal Law' ('J.S. Verma Report') in 2012.<sup>26</sup>

The report examined the origins of the immunity provided to husbands who commit crimes against their wives, tracing it back to the antiquated belief that women were considered the possessions of men and automatically agreed to fulfill their husbands' sexual desires.

The committee proposed the criminalization of marital rape, urging the elimination of the exemption clause, the explicit declaration that it is not a defense, the rejection of any presumption of consent, and the maintenance of consistent punishment. Conversely, the 42nd Law Commission Report recommended the inclusion of marital rape in a distinct section, avoidance of the term 'marital rape', and the implementation of a unique penalty.<sup>27</sup>

### **D. Consequence Of Marital Rape**

- Severe physical harm to the vaginal and anal regions, including cuts, bruises, and other injuries that may never fully heal due to the absence of immediate medical attention.
- Feelings of anxiety, shock, depression, and suicidal ideation can result in a decrease in a woman's ability to perform at her best. Without assistance, she

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<sup>26</sup> JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013).

<sup>27</sup> JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013).

may resort to suicide, impacting her ability to fulfill her maternal responsibilities if she has children.

- Gynaecological consequences such as miscarriages (resulting from unwanted or forced pregnancies), stillbirths, urinary tract infections, sexually transmitted diseases, etc. are often the result of non-consensual sexual activities within a marriage where legal protections are lacking. Women frequently endure physical and emotional harm, leading to a diminished quality of life. This represents a form of modern-day exploitation and highlights the failure of feminist movements, particularly in countries like India.
- Prolonged symptoms like insomnia, eating disorders, sexual dysfunction, and negative self-perception are among the enduring effects for which there is a lack of legal, societal, or governmental support. If this trend continues, a significant portion of the population will continue to suffer, and no government policies or empowerment initiatives will be effective. The root of the issue, as we have observed, often lies hidden behind closed doors.

### **E. Suggestions**

- When the spouse is not given the consent to his spouse, it would be considered as rape.
- There should be equality between men and women when rape occurs. If the woman spouse compels his man spouse for sexual intercourse, it will be considered rape and there is no gender inequality in upcoming modern laws.
- In enacted new criminal law as Bharatiya Nyaya Sanhita, 2023, should amend marital rape is also rape under the definition of rape in upcoming amendments.
- There should be a mention of one of the grounds for divorce marital rape in all personal laws.

## **XI. CONCLUSION, SUGGESTIONS & RECOMMENDATIONS**

Marital rape is a violation of Articles 14 and 21 of the Constitution of India, 1950, and a violation of human rights. Here, in this modern society need to criminalize the marital rape.

In my opinion, no difference between marital rape and rape. Rape is rape which is not given consent by a woman even if she may be the spouse.

In light of this paper, proposed the model of criminalizing marital rape. Firstly, the exceptional clause be deleted. Secondly, insert the clause to criminalize the marital rape. Thirdly, the sentencing policy is to denote the same for rape.

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