

# Criminalizing Marital Rape in India: A Step towards Sustainable Development

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**Abstract:** The United Nations in the year 2015 adopted certain Sustainable Development Goals with an aim to reduce discrimination of all forms including violence against women. Thus, Gender equality was adopted as the fifth goal for achieving Sustainable development. For any society to progress and prosper, it is imperative that it accords respect to women and provides an environment free from abuse, violence and discrimination. In an attempt to protect the rights of women various laws have been enacted from time to time to criminalize the different types of violence and abuse against women. However, from time immemorial, it has been thought that violence especially sexual assault including rape can only be perpetrated by strangers or outsiders. Within a marriage, a husband could never be thought to have committed the act of rape against his wife as her consent was presumed to be given by the fact of marriage itself. Marital rape is a part of the larger offence of sexual violence perpetrated by a husband against his wife. The term generally implies forced sexual intercourse by a husband with his wife without her consent. In the present scenario it could also include any kind of sexual abuse of the wife by the husband. Marital rape has also been classified as one where force only is used, a battering rape or a sadistic rape. The main concern of the researcher in the present paper is that the act of marital rape is not seen as a criminal offence by the Indian legal regime except in few circumstances. The reason for this is the notion that a wife gives her implied consent to marital intercourse at the time of entering the marital relation. The origin of this marital rape exemption can be traced to a statement by Lord Mathew Hale, a seventeenth century English jurist who enunciated the presumption of “matrimonial consent” which cannot be retracted. The patriarchal Indian society imposes an obligation and duty upon the wife to perform the marital obligation to her husband. Thus a dutiful wife, bound by the concept of sacramental marriage must always obey the command of her husband. Despite the repeated suggestions from international community as well as various committees in India, the government has failed to recognize marital rape as a criminal wrong. Thus reinforcing the age old notion that wife must consent to sexual intercourse in a marriage. In this paper, the researcher aims to present a brief historical perspective of the concept of marital rape, study the definition of marital rape and to critically analyze the existing legal provisions in India. A brief reference shall be made to the laws prevailing in other countries with regard to this subject. The present paper proposes the criminalization of marital rape in India and suggests that penalizing the same will help in preserving and regaining the lost dignity of a woman in marriage and would pave the way for Sustainable Development of future generations.

**Keywords:** Marital rape, implied consent, gender equality, sustainable development

## Introduction

The prevention of violence against women is the major focus of the Sustainable Development Goals 2015, adopted by the United Nations as women who are equal, free from discrimination; abuse and violence in any form are capable of contributing positively towards the growth and progress of the society and thus pave the way for development of future generations. In spite of the Millenium Development Goals which aimed at establishing eight goals including gender equality and empowerment of women by the year 2015, the nations world over were not successful in bringing about a significant change in the incidence of violence against women. Thus, The United Nations has set up an agenda of sustainable development goals to be achieved by 2030. Among these goals, gender equality (SDG 5) and promoting peaceful and inclusive societies(SDG 16) figure as prominent ones.

India too has shown its commitment to achieving Sustainable development. Thus, the thrust of the government has been to introduce various programmes like “swachh bharaat”, “make in India”, “Digital india” etc. Although the government is committed to the goal of reducing violence against women including sexual abuse and violence, more needs to be done when we talk about violence within the domestic boundaries, especially sexual violence including marital rape.

### **Problem Profile**

The problem arises because the act of so called marital rape is not seen as a criminal offence by the Indian legal regime except in few circumstances. However, the incidents of sexual assault of a woman at the hands of her partner are a manifest part of the society. Take for example the case of a woman in Mumbai who was in a violent marital relation for 24 years dreading the next assault. She was often beaten, sexually abused and humiliated publicly. She continued in the abusive relation as she could not fend for herself and was dependent on her husband. Finally she reported the case of domestic violence in 2007. In 2015 she landed in the emergency of Mumbai hospital with injuries on her private parts. The doctors made observations of sexual assault but at the police station the matter was seen as a “matter between husband and wife” and no case could be registered. [1] This is the plight of several such women whose cases are either not registered or are never reported. Since the act of marital rape is not a criminal offence especially if the wife is a major, the data specifically covering marital rape is not collected however according to the NHFS-4 report 31% of married women (nearly one in three) have been subjugated to physical, sexual and emotional violence at the hands of their spouse. The survey also cited that 83% of married women between the ages of 15 and 49 are victims of sexual abuse at the hands of their current husband, while 7% refer to a former spouse. The NFHS-4 also points out that 42% of men and 52% women justified the use of violence on women including when she refuses sexual intercourse. [2] This indicates that law alone won't be sufficient to bring about a change without changing the existing social perceptions. The data collected by the NCRB in 2016 revealed that in 557 cases, the perpetrators of rape or sexual abuse are live-in partners, husband and ex-husbands. [3]

### **Research objectives**

- To analyze the legal scenario regarding Marital Rape in India and to study the legal provisions under the existing statutes.
- To analyze and study the recommendations of various Committees and Commissions in India regarding criminalizing marital rape.
- To study the international position regarding the marital rape
- To suggest classification of marital rape as a criminal offence, punishable under the Indian legal system.

### **Research questions**

- Whether the act of marital rape or sexual assault of a wife by her husband amounts to an offence under the Indian legal regime?
- Whether the provisions under the Indian legal regime are sufficient to address the problem of marital rape?
- Whether the criminalization of marital rape will be a step towards sustainable development?

### **Research Methodology**

The research methodology adopted for present paper is doctrinal. For the same, the author has collected relevant material from primary and secondary sources consulting various statutes, books, articles in journals and newspapers, case law. The web sources like e-journals, articles etc have also been consulted.

### **Concept of Marital Rape**

Rape is one of the most heinous acts of aggression usually committed by male upon a female which violates her right to bodily integrity and amounts to denial of the right to self determination. Rape has been traditionally defined as forced sexual intercourse by a man with a woman not being his wife. Recent trends have led many legal regimes including India to include various forms of sexual assault whether by way of penetration or other unlawful sexual acts. Thus, rape can be said to be a kind of sexual assault in one of its gravest forms. Marital rape has been classified by researchers as rape where only force is used for the purpose of sexual intercourse, it can also be a battering rape when beating and rape are combined or it may be a sadistic rape or obsessive rape where the abuser is obsessed with the act of rape. [4] However, the legal regimes have not defined marital rape in these terms. The victims of marital rape suffer from various physical, emotional and psychological effects. Researchers have pointed out that a victim may suffer physical injuries and bruises to her private parts, broken bones, gynaecological complications and

sexually transmitted diseases, anxiety, depression, suicidal tendencies, negative self image, sexual dysfunction, sleeping and eating disorders etc. [5]

Sir Mathew Hale in 1678 stated “*the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*”. [6] Thus, historically marital rape was not considered to be any crime as wife was considered as the property of her husband upon whom he could exercise his rights. It has also been defined to mean “any unwanted sexual acts by a spouse or ex-spouse that is committed without other persons consent.” The lack of consent could be attributed to use of force, threat, blackmail, fear of withholding financial support etc. Sexual acts also imply any kind of forced sexual behaviour unacceptable to the victim. However, there is no uniform definition of marital rape. Each country defines it as per their prevailing societal norms. This is the reason that till date, India has failed to recognize it as a crime without any exceptions. Time and again the law makers have echoed their narrow and patriarchal sentiments at various platforms. In 2015, Haribhai Parthibhai Chaudhary, a Union Minister stated “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament.” [7] Similar sentiment was expressed by Smt. Maneka Gandhi by stating that the concept of marital rape “cannot be suitably applied in the Indian context.” [8] There has been a constant argument that marital rape cannot be criminalized for marriage is a sacred bond and that the provision may be misused by revengeful women. [9] Presently the matter is pending before the Delhi High Court.

### **Legal Provisions in India**

The act of forced sexual intercourse or marital rape is not recognized as an offence under the Indian legal regime as such. However, there are certain legal provisions which do touch upon the concept to some extent but fall short of criminalizing the Act without any exemptions. The statutory provision regarding rape is contained in section 375 of The Indian Penal Code 1860. Originally, the offence of rape only included sexual intercourse committed upon a woman without her consent and will under various circumstances. [10] In a major amendment made by the *Criminal Law Amendment Act 2013*, different forms of sexual assault apart from non consensual sexual intercourse were included as a criminal act amounting to rape. [11] However, Indian legal regime did not recognize husband as the perpetrator of rape upon his wife except if the wife was under the age of 15 years or if the wife was living separately or divorced. This marital rape exemption is the remnant of the patriarchal thought and mindset that a wife’s consent is presumed to be given at the time of marriage and can only be revoked in the event of divorce. [12] Originally the age of wife under the exception was fixed at 10 by the law makers which was later raised to 12 and finally to 15. Till date it remains 15 in the Act. This fact also reflects the social reality of child marriages being rampant in the past and even prevailing in the present in India. Thus, a wife above 15 years cannot report the offence of rape against her husband under section 375 of Indian Penal Code. The *Criminal Law Amendment Act 2013* also criminalized sexual intercourse with or without consent with a woman below the age of 18, thus raising the age of consent from 16 to 18. [13] Thereafter, the exception 2 of section 375 was challenged before the Supreme Court of India as violative of right to equality as it allowed sexual intercourse with a wife between 15 to 18 years and on the other hand criminalized even consensual sex with a woman below 18. The Supreme Court of India finally gave a landmark verdict in *Independent Thought v. Union of India and Anr* [14] in which the court held that the marital rape exemption should not be available if the wife was under 18 years of age, thus protecting the rights and equating the status of child wives between the age group of 15 to 18 years. The basis for the Court’s decision was the fact that the exemption under section 375 conflicted with other laws like the Prevention of Children from Sexual Offences Act 2012. The act recognized various kinds of sexual assaults and aggravated sexual assault as a crime against children and a person could be penalized for committing any of the acts defined under the Act with a child below 18 years of age. The POCSO Act also provided punishment in case a person related to a child by marriage commits sexual assault with the child and it was categorized as an aggravated sexual assault. [15] Thus, the exception 2 to section 375 was a direct contravention to this as well as the *Prohibition of Child marriage Act 2006* which prohibits the marriage of a person under 18 years and declares the same in some cases to be void and in other situations as voidable. [16] The court also held the provision as against the fundamental right to equality as it created a discriminatory classification based on marital status i.e a class of child brides below 15 years and another category between 15 to 18 years. However, the issue before the court was only pertaining to criminalize sexual abuse of a child wife between the age of 15 to 18 years and thus the larger issue of marital rape concerning all wives was not dealt with by the Court. In July 2019, a Public Interest Litigation was filed seeking criminalization of marital rape

however, the Supreme Court refused to entertain the matter as the matter is already pending before the High Court of Delhi. [17]

In 2018, *Criminal Law Amendment Act 2018*, was enacted which aggravated the punishments for rape especially in case the victim was below 16 and 12 years of age. The punishment for rape in case victim is less than 16 years and above 12 years of age was enhanced to minimum 20 years and extending upto life imprisonment and in case of child below 12 years, it was enhanced to minimum 20 years and maximum upto life imprisonment or death. [18] Although the rape law was made more stringent in 2013 as well as 2018 the provisions regarding marital rape did not change much. Thus, in spite of the Supreme Court's mandate in 2017, the exception 2 regarding marital rape exemption has been kept intact. This is completely violative of a woman's right to privacy and her bodily integrity. Law in order to foster sustainability must evolve and change with time.

The constitution of India, guarantees the fundamental right to equality by stating, "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" [19] However, the retaining of exception 2 to section 375 is a blatant violation of this right to equality of married women. This provision does not fulfill the criteria of reasonable classification as enumerated by the Hon'ble Supreme Court of India in various cases. Thus, married women cannot prosecute the perpetrator of rape just because he happens to be her husband. [20] Apart from this, the constitution also protects the right to life and liberty in the following terms "no person shall be denied of his life and personal liberty except according to the procedure established by law." [21] In the case of *Suchita Srivastava v. Chandigarh Administration* [22] the supreme court held that right to make choices with regard to sexual activities could be treated as part of right to personal liberty, privacy and bodily integrity. In the recent case of *Justice K.S. Puttuswamy (Retd.) v. Union of India* [23] the Hon'ble Supreme Court further elaborated on the concept of right to privacy under the Article 21. It held that right to privacy is the fundamental right and 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." [24] Thus, in view of these constitutional mandates and the interpretation of the courts it seems that the retention of exception 2 to section 375 is completely unconstitutional.

Another legislation which needs pertinent mention is *The Protection of Women from Domestic Violence Act 2005*. India being a signatory to the *Convention on Elimination of All forms of Violence against Women*, enacted this law to recognize domestic violence as a separate wrong for the first time in India. It covered various types of abuse meted out to a woman within the walls of her home at the hands of the husband or his relatives. It also recognized women in live-in relations and not in formal marriage as victims of domestic violence. The Act defined domestic violence comprehensively and also includes sexual abuse within its ambit. Thus, a woman aggrieved of marital rape though could not prosecute her husband, she was given the option to report domestic violence to protection officers under the act or go to the court to get the relief in the nature of a protection order. Thus, the major loophole of this enactment was that it considered domestic violence as a civil wrong and remedies provided under the Act are more civil in nature. The sexual abuse amounting to domestic violence under the act is not a punishable wrong as such except in case of breach of a prohibition order. For this very reason The Domestic Violence Act 2005 has earned the nomenclature of being a toothless law.

Thus a wife who is a victim of rape and sexual abuse at the hands of her husband has to look for indirect ways to prosecute her husband such as under section 498A of Indian Penal Code which provides for punishment to husband or his relatives for committing cruelty against her.

Apart from the above stated legal provisions there also exist the different personal laws for each community governing the matters regarding marriage and divorce etc. The personal laws also do not recognize marital rape as a ground for divorce. However, in case she is a victim of the same she can apply for divorce or separation on the ground of cruelty by proving physical and mental cruelty. [25] There is a need to treat sexual violence in marriage as separate from any other form of violence because sexual violence by a partner destroys the very basis of marriage and companionship. In India, where divorce for a woman is still considered as a taboo among certain sections of society, divorce on the grounds of cruelty simply doesn't create any hardship for a man to remarry. Thus, he may freely remarry and subject other women to such a mistreatment.

### **Recommendations of Law Commission of India**

The Law commission of India has on different occasions discussed the changes required to be made in rape laws in India. On both the occasions it did touch upon the marital rape exemption too. In its 42<sup>nd</sup> report made in 1971, it suggested that the offence of sexual intercourse with a child wife should be removed from the definition of

rape and treated as a separate offence as it could not be technically held to be rape. Thus, the view seemed to reinforce the perception that a husband cannot commit rape upon his wife. However, they did suggest the removal of exemption in cases where the wife was judicially separated or divorced. [26] Later, in its 172<sup>nd</sup> report made in the year 2000, the Law Commission suggested the criminalization of marital rape with a wife below the age of 16 as it was the age of consent as per section 375, clause 6. At the same time, they did not suggest the removal of the exception providing for the marital rape exemption on the reasoning that “it may amount to excessive interference with the marital relationship” [27] Thus, time and again the Law Commission failed to see marital rape as a serious crime equivalent to rape.

### **Recommendations by Justice J.S. Verma Committee**

In the year 2012, the Justice J.S. Verma Committee was appointed to take up a review of the rape law in India, following a nationwide protest against the brutal Nirbhaya gang rape case in Delhi. The law as it existed then was not seen sufficient to check the instances of rape. While deliberating on the provisions dealing with rape under the Indian Penal Code 1860, the Committee made elaborate analysis of the offence of marital rape and suggested that the marital rape exception should be removed from section 375 and that the relation between the perpetrator and the victim should not be a ground for defence or even as a mitigating factor for deciding the quantum of punishment. Thus, the committee had in clear terms recommended the criminalization of marital rape in all cases. The recommendations have not been incorporated by the legislature till date.

### **Global Scenario**

The United Nations Convention on Elimination of All forms of Discrimination Against Women provided a comprehensive bill of rights for women and also required the member states to try to create an environment free from any discrimination and eradicate all forms of violence against women. Article 1 of the Convention defines discrimination against women as “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*” [28] Further, the CEDAW Committee’s Recommendation No. 19 elaborated the meaning of discrimination and considered gender based violence as a form of discrimination. Accordingly it was stated that “*The definition of discrimination includes gender based violence, i.e., violence that is directed against woman because she is a woman or that affects woman disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence.*” [29] In its specific recommendations the CEDAW Committee categorically mandated the state parties to provide civil remedies for domestic violence and where ever necessary even criminal penalties In 2015, The UN adopted gender equality as one of the Sustainable Development Goals to be achieved by 2030. It was viewed as a basis for creating a peaceful, progressive and sustainable world. It stressed upon the fact that by achieving gender equality and providing equal access to women to education, healthcare etc. will be beneficial for societies at large and help in achieving the aim of sustainable economies. In 2016, the UN Program Chief, Helen Clark too stated that India would not be able to achieve the Sustainable Development Goals it has adopted if it fails to criminalize marital rape. Thus, India being a member state signatory to the CEDAW must fulfill the international standards as far as the criminalization of marital rape is concerned.

As far as the countries world over are concerned, marital rape is considered as a criminal wrong in many countries. In England and Wales, although the marital rape exemption did exist but in the famous case of R v.R [30] it was held that wife cannot be regarded as a chattel and that marriage must be considered to be a partnership between the equals. Thus, in U.K, a man can be prosecuted for raping his own wife. In the U.S.A, marital rape was criminalized by all the states by the year 1993. However, some states still give exemptions to the husband where the wife is unable to consent due to certain situations like unconsciousness, sleep, mental or physical impairment etc. The exemptions are based on factors like no use of force or failure to report the incident within a certain time period, agreement by the husband to take counseling and therapy. [31] The penalties and prison terms also vary from one state to another. [32] Lately in February 2019, the state of Minnesota also abolished the marital rape exemption after a tough struggle by one of the marital rape victims. [33] The marital rape was also made a punishable wrong in Canada in 1983. Australia abolished the marital rape exemption in 1976. South Africa also recognized it as an offence in 1993. In 2007, South Africa further by an amendment in the criminal law provided that the relation between the perpetrator and the victim should not be a valid defence to sexual offences. [34] Recently Nepal too joined the league of nations criminalizing marital rape. The Criminal Code Bill provides punishment for marital rape

as imprisonment upto 5 years. [35] Marital rape has also been criminalized by other countries like New Zealand, Poland, Russia, Sweden, Israel [36]

### **Conclusion and Suggestions**

There can be no doubt that sexual assault is one of the most heinous crimes committed against women. It becomes even more serious when it occurs within a marriage which is supposed to be the union of two souls. However, when the protector himself becomes the violator, the legal regime has to protect the victim. Therefore, marital rape has to be recognized as a criminal offence which violates the dignity of a woman just as a rape outside marriage. Keeping in mind the Global Scenario where large number of countries are increasingly recognizing the offence by doing away with the marital rape exemption, India must also follow the same. The International obligations of India too demand that it takes the step towards sustainable development by creating an environment in which women are treated as equals and not as chattels. The age old notion that a husband cannot commit rape on his wife which is nothing but the manifestation of a patriarchal order which has no place in the future world based on the principle of sustainability. The Supreme Court of India has stepped in to uphold that a husband could be prosecuted for marital rape in case the wife is eighteen years old. In order to achieve the goal of sustainable development India needs to take the following steps :

- The exception 2 to section 375 regarding marital rape exemption should be completely removed. Thus, it should be an offence not only against wives under the age of 18 years but against all wives including divorced and judicially separated wives.
- The relation of the perpetrator should not be a mitigating circumstance
- The degree of punishment could vary according to the degree of assault like in the case of rape.
- There is a need to take up extensive awareness programmes by the government from the grass root level to break the age-old notion that wife must give in to all demands of the husband and that there is a presumed consent of the wife. Stress should be laid in awareness programmes regarding role of consensual sex in a marriage.
- There should be provisions and regulations for mandatory counseling sessions of persons accused and convicted of marital rape
- Marital rape should also be specifically recognized as a ground for divorce.

There can be no legal, moral, social or cultural justification for an act which denies the basic human right to live with dignity to women. A woman, who is the victim of marital rape and sexual violence, constantly lives in fear and is not able to express herself freely nor can she be a contributor towards larger social and economic development of the nation. Thus, in order to achieve the goal of sustainable development we must remember the pledge “leave no one behind”. Only then can we achieve the goal of a truly inclusive society where violence against women and girls can be eliminated completely.

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