



Review Article

Legal standpoint on marital rape in India

Meena

Assistant Professor, Department of Economics, Government College of Education, Chandigarh, India

Date of Submission:

02 May 2023

Date of Acceptance:

11 June 2023

Keywords:

Marital rape, Indian Penal Code, Section 375

Abstract

The present paper discusses the legal standpoint on marital rape in India concerning Indian women whose stoic silence on the said controversial issue is meant only for maintaining harmony in married life. The three branches of the Indian democratic system: the Legislative, Executive, and Judiciary have never been shaken vigorously whenever the reality and agony of marital rape surfaced in reports, news, and statistics. The prevalent legal provisions available to marital rape in India are insufficient to deal with the injustices borne by the victim. The judgments by the apex court are also not supportive of the criminalization of marital rape and the matter is still hanging on the pretext of the social and cultural threads beaded to the ornament of sacredness involved in the institution of marriage.

Introduction

“Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.”^[1]

Corresponding author: Dr. Meena

Email: mininam@yahoo.com

How to cite the article: Meena. Legal standpoint on marital rape in India. *Indian Journal of Health, Sexuality and Culture*. 2023;9(1):72–78.

DOI: 10.5281/zenodo.8248560

This article is distributed under the terms of the Creative Commons Attribution-Non Commercial-Share Alike 4.0 License which allows others to remix, tweak, and build upon the work non-commercially, as long as appropriate credit is given and the new creations are licensed under the identical terms.

The latest data reported that 82 % of the sexual violence for married women (of age group 18-49) is mostly committed by their current husband who either used physical force or threats to have sexual intercourse with them even without their consent.^[2]

Statistics of marital rape in India

The true magnitude of marital rape in India is hard to find given that women are not coming forward to report the matter to the police. The agencies that are somewhat providing statistical evidence are the National Family Health Survey, the Crime Bureau of India, FIR cases filed under Domestic Violence, and Independent research organizations.

Factors involved in the prevalence of marital rape in India

♦ **Social and cultural factors**

1. A rigidly patriarchal Indian society along with the indifferent approach of women makes it hard to sensitize the general population about the seriousness of the issue.
2. Socio-cultural dimension to the marriage and family still holds utmost significance.
3. A wife's consent to have sex with her husband is considered to be permanent after her marriage.
4. No one wants to open a Pandora's Box revolving around marital rape in India due to a lack of education, social customs and values, and religious beliefs.
5. The misconception that men are assumed to be a species that has no control over their sexuality and women are submissive species to look after their sexual needs, is still prevalent. The safe and secure institution of marriage provides the husband an expectation of intercourse and where the wife implicitly consents to sex.
6. Marital rape is still associated with guilt and shame in Indian society. A woman is silenced because her sexuality and sexual drives are not to be discussed openly.
7. Marital rape cannot be criminalized since the majority of the people believe that those who are raising the marital rape's legality are against India's traditions, and social values and are blindly following Western Countries' ideology in this regard.

♦ **Legal factors**

1. The Indian Penal Code has not reviewed the defining part of marital rape which can make this a criminal offense.

2. The future legal perspective on the Universal Code of Conduct in matters of marital rape is a distant dream to be achieved in the Indian Judiciary.
3. No law has codified the rights and duties of husband and wife in a marital relationship which makes the defining part of marital rape as a crime more difficult and controversial.
4. It is very difficult for the victim (woman) to prove the absence of consent in marital rape cases.
5. It is ironic that rape has been viewed only as a crime against a woman's husband or guardian.

Consequences of marital rape on the victim and her family

1. Psychological issues like self-esteem, self-confidence, trust, faith, emotional attachment, emotional security, privacy etc are affected.
2. Physical and emotional traumatic influence on the victim jeopardized the victim's personality growth and life.
3. It creates long-term consequences for the victim and her children, especially the girl child.
4. No healthy family life grows in such a traumatic experience.

Marital rape and laws in India

I. Marital rape as per Indian Penal Code (IPC), 1860:

- ♦ Section 375 of IPC, 1860: The Section defines the elements and constituents' of rape but has not defined marital rape after the age of 15 years. This Section refers to marital rape as undesirable sexual intercourse by a man with his own wife without obtaining her consent (the wife being under 15 years of age).^[3]

- ◆ Section 376 of the IPC deals with the punishment for rape.^[3]
- ◆ According to the Indian Penal Code, under the following conditions the spouse can be criminally charged for an offence of marital rape:
 - ◆ When the wife’s age is between 12-15 years.
 - ◆ When the spouse is underneath 12 years old.
 - ◆ Rape of a judicially isolated spouse.

Rape of a wife whose age is above 15 years is not punishable.

- ◆ Under Section 376B of IPC sexual intercourse with one’s wife without her consent during a decree of judicial separation is punishable.^[3]
- ◆ Section 498-A of the IPC deals with managing remorselessness, to ensure themselves against “unreasonable sexual direct by the spouse”.^[3]

II. Justice J. S. Verma Committee (2013), recommended rape being a criminal offense, law should specify that “marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation”.^[4]

III. Protection of women from Domestic Violence Act, 2005

As per the Act woman can seek justice from Court on account of marital rape.^[5]

III. Indian constitution and marital rape

- ◆ Marital rape is in contradiction of Articles 14 & 21 of the Indian Constitution since it denies women protection from rape and sexual violence by their own husbands.^[6]
- ◆ The exception to Section 375 differentiates and discriminates against married

women and protects only an unmarried woman from rape.^[3]

- ◆ Exception 2 of Section 375 denies a married woman her personal liberty as per Article 21.^[3,6]
- ◆ Article 21 of the Indian Constitution has a wider perspective that goes beyond the literal guarantee of the Right to life and liberty and also includes other dimensions like rights to health, privacy, dignity, safe living conditions, and safe environment.^[6]
- ◆ Marital rape is a grave violation of Article 21.
- ◆ Women’s sexual freedom and their decision-making in this regard is a big question mark in Indian society.
- ◆ Right to safety and dignity: Fundamental Rights and Human Rights are violated.
- ◆ Men cannot be given immunity from a punishable offense of rape when committed in a contract of marriage since it violates the Constitutional Provisions of the Right to Life.

Judicial stand

- ◆ RIT Foundation vs Union of India, SCC 2022^[7]

The case dealt with the legal challenge to Exception 2 of Section 375 of IPC in the Delhi High Court via Public Interest Litigations. However, the verdict caused a split judgement where on the one hand, consensual sex is considered fundamental to a healthy marriage and the on the other side opined that forced sex with a husband does not provoke the same sense of violation as forced sex with a stranger.^[8] The Central Government submitted that Criminalizing Marital Rape:-

- ◆ May destabilize the institution of marriage
- ◆ The definition of a ‘rape’ as defined

under section 375 of IPC cannot be the same in the case of marital rape.

- ◆ Questions the authenticity of evidence of sexual offenses between a man and his own wife on those grounds the Courts will rely upon to give justice to the aggrieved parties?
- ◆ Must be discussed by the legislature since the matter has consequential reference to the social, cultural, and legal aspects of the country.

In September 2022, the Supreme Court held that without any discrimination to marital status of the women they are entitled to have safe and legal abortions until 24 weeks of pregnancy under the Medical Termination of Pregnancy Act.

The apex court is still not applying the same rule in defining rape as an offense within the preview of marriage. While the wait to get justice in criminalizing marital rape has still been lingering. The matter is still under consideration in the form of a series of petitions seeking to criminalize marital rape since the last hearing of the Court which was held on March 22, 2023, and also heard on May 09, 2023.

- ◆ Hrishikesh Sahoo and State of Karnataka & Ors, 2022^[9]

The Karnataka High Court had clearly held that rape is a rape, be it performed by a ‘husband’ on the ‘wife’, and no immunity in the penal code should be provided to a married man.

- ◆ Justice K.S. Puttuswamy (Retd.) vs UOI, 2017^[10]

The Supreme Court recognized a woman's right to say “no” where her consent is required as her fundamental Right to Privacy.

- ◆ Suchita Srivastava vs. Chandigarh Administration, 2009^[11]

The Supreme Court said the right to make

choices about sexual activity is very much within the scope of Article 21 of the Constitution which considers rights to personal liberty, privacy, dignity, and bodily integrity.

- ◆ The Chairman, Railway Board vs. Chandrima Das & Ors., 2000^[12]

In this, the Supreme Court has observed that rape is not merely an offense under the Indian Penal Code but is a crime against society as a whole.

- ◆ Bodhisattwa Gautam vs. Subhra Chakraborty, 1996^[13]

In this case, the court held that rape is a sexual offense for corrupting and mortifying the ladies.

- ◆ State of Maharashtra vs. Madhkar Naraya, 1991^[14]

The Supreme Court defined that all women have the right to refuse sexual intercourse. When a prostitute can refuse sexual activity, why has an exception been made for married women.

Constitutional parameters

- ◆ Right to Live with Human Dignity (Article 21)
- ◆ Francis Coralie Muin vs. Union Territory of Delhi, 1981: In this case, the right to life with human dignity under Article 21 of the Constitution was highlighted.^[15]
- ◆ Right to Sexual Privacy (Article 21)
- ◆ Kharak Singh vs. State of U.P. (1962); Govind vs. State of Madhya Pradesh (1975); Neera Mathur vs LIC (1991) etc.; The Supreme Court has perceived that a right to privacy is inherently enshrined under Article 21.^[16,17,18]
- ◆ State of Maharashtra vs. Madhkar Narayan (1991): The Supreme Court has held that every woman is entitled to her sexual privacy and her consent in this matter, matters.^[14]

- ◆ Fundamental Rights
- ◆ Justice K.S. Puttuswamy (Retd.) vs. UOI, 2017: The Supreme Court held that the ability to make an intimate decision on sexual matters within intimate relationships is under the ‘right to privacy’.^[11]

In each of these cases, the Supreme Court recognized that regardless of a woman’s marital status she has the right to refrain from any sexual activity. The women’s autonomy to take decisions in such matters derives from a fundamental right guaranteed by Article 21 of the Indian Constitution. Anything done contrary to obtaining forceful consent in sexual activities is a violation of the Constitution’s Article 21.

- ◆ Article 14 And Exception 2 of Section 375 of IPC.
- ◆ Smt. Saroj Rani vs. Sudarshan Kumar Chadha (1984): In the said case, it was stated that Article 14 would not apply in marital relationships.^[19]
- ◆ Justice K.S. Puttuswamy (Retd.) vs. UOI, 2017: Then subsequently, in this particular case this was cited whether Article 14, privacy will apply to personal association or not.^[10]
- ◆ RIT Foundation vs. Union of India, SCC 2022: The Chief Justice of India, D Y Chandrachud stated- “You are challenging the validity of a central law on the ground that reading the marital rape exception would amount to a breach of 14. That does not raise the issue of whether Article 14 will apply to personal relations or not. The question is that Article 14 does apply to the statute”. The bench clubbed the case with the other petitions concerning the validity of the marital rape exception.^[7]
- ◆ Article 21 and Exception 2 of Section 375 of IPC

- ◆ RIT Foundation vs Union of India, SCC 2022: The exception 2 of Section 375 of IPC goes against the woman’s rights over their body, her autonomy in making decisions, and matters which concern her dignity. Though all these matters have been guaranteed under Article 21 of the Constitution to each Citizen. The case’s judgment however acknowledged that including rape within marriage is not “rape”.^[7]

Legal provisions in conflict with other provisions and contexts

- ◆ Section 375 of the IPC

It is an irony that there is no lawful provision for the wife after the age of 15, if she suffers from marital rape which is against human rights. Here the law is accommodating and shielding the sexual violence for those who are lawfully 18 years or above which is clearly violative of Article 14 (Equality before Law) since it discriminates against married women.^[6]

- ◆ Section 498A of the IPC

Section 498 -A of the IPC protects the woman from the cruelty of her husband. Though marital rape has not been defined here, but any willful conduct which is likely to hurt or endanger the woman’s body and life is a punishable offense.^[3]

It’s odd that, in marital relationships, there is no legal definition of a spouse’s rights and duties towards others. Though the ingredients of Section 375 are separate yet Section 498A can be used as a substitute for Section 375.

- ◆ Restitution of Conjugal Rights (Section 9 of the Hindu Marriage Act, 1955)

Spouses have the conjugal rights to maintain the harmony of their married life, and the law also ensures that the withholding or denial of conjugal rights can be a reasonable ground for divorce. The denial of sex by one partner in a marriage can become a source of contention

by one spouse against the other. This context is very much complex and needs serious handling of the matter.^[20]

◆ False implications in marital rape cases

There is the fear that false cases of marital rape will be implicated to settle scores with husband and in-laws.

◆ Marital rape and divorce

The social thinkers are of the view that the number of divorces will rise, if proven, marital rape recognized as a cruelty and as a crime.

◆ Live-in-relationships and marital rape

The dichotomy also exists in live-in-relationships where if forceful non-consensual intercourse occurs, cases are filed for ‘rape’, not as ‘marital rape’.

◆ Interference in marital relationship

“Review of Rape Laws” 2000 mentioned that removal of Exemption Clause 2 from Section 375 will lead to unnecessary interference within the marital relationship.^[21]

Contentious issues alongside with marital rape are:

- ◆ Will exempting the married man of marital rape is not equivalent to shielding and creating more new crimes in the society?
- ◆ Does men’s consent also matter in sexual matters?
- ◆ In the four walls of the home, can law interfere in private and intimate moments of the spouses?
- ◆ What is the role of the State in the private affairs of spouses?
- ◆ Are Indian women ready to fight this battle alone in criminalizing marital rape?
- ◆ Are Indian men ready to take the allegation of “rapist” as a challenge to their masculinity or authority in the institution of marriage?

- ◆ Is sex with spouse a privilege or a right that cannot be challenged by any authority or by the person whose consent in this matter is assumed to be non-significant?
- ◆ Is marriage a permit or license to rape without being caught by the law?
- ◆ Does marital rape questions the safety, dignity, equality, and equity of women in the institution of Marriage?

Challenges alongside with coining of “Marital Rape” in legal provisions are:

- ◆ Defining Marital Rape in contrast to “Rape”.
- ◆ What constituents will be considered to define marital rape?
- ◆ What are the domains and parameters of the evidence that will eliminate the proximity of false implications of the man in marital rape cases?
- ◆ What must be the nature of the punishment to be decided by the Judiciary and executives?

Conclusion

The judiciary is silent, legislature is quiet, executive is unaware and Indian women are bearing the brunt? Isn’t this form the organized crime against the women? Who will provide justice to the women confined in the four walls of the house, conditioned by the society to behave and act in a certain manner as expected from them a centuries ago? It is high time that the Exception 2 for Marital Rape be removed from IPC to make the offence as a crime. The institution of marriage or any other relationship between the offender and victim is not a valid defense against rape or sexual violence. The question is why marriages in India are assumed as the citadel of security and harmony when the real data speaks contrary to the facade?

Acknowledgement: None

Conflict of interest: None

References

1. Batacan F.H. (2002). Smaller and Smaller Circles. Available from: <https://www.goodreads.com/work/quotes/1422088-smaller-and-smaller-circles>
2. National Family Health Survey, India [Internet]. [cited 2023 March 20]. Available from: <http://rchiips.org/nfhs/>
3. The Indian Penal Code (IPC), 1860. Bare Act. 2017 ed. Universal (Lexis Nexis)
4. Committee reports [Internet]. 2013. Available from: <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>
5. Domestic Violence Act (2005) [Internet]. [Cited 2023 March 20]. Available from: <http://ncw.nic.in/sites/default/files/Chapter04.pdf>
6. The Constitution of India. Bare Act. 2017 ed. Universal (Lexis Nexis)
7. RTI Foundation vs the Union of India on 14 January, 2022 - Indian kanoon [Internet]. 2022. Available from: <https://indiankanoon.org/doc/102185307/>
8. Menon R. Women have a right to say no! [Internet]. DH News Service; 2022 [cited 2023 March 21]. Available from: <https://www.deccanherald.com/sunday-herald/sh-top-stories/women-have-a-right-to-say-no-1110674.html>
9. Hrishikesh Sahoo and State of Karnataka & Ors, 2022 [Internet]. Available from: <https://www.the-laws.com/Encyclopedia/browse/Case?caseId=012202054000&title=hrishikesh-sahoo-vs-state-of-karnataka>
10. Justice K.S.Puttaswamy (Retd) vs Union of India and Ors. 2017 [Internet]. 2017. Available from: <https://indiankanoon.org/docfragment/91938676/?forMInput=1961%20air%201315>
11. Suchita Srivastava & ANR vs Chandigarh Administration, 2009 [Internet]. [cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/1500783/>
12. The chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors, 2000 [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/113663/>
13. Bodhisattwa Gautam vs Subhra Chakraborty, 1995 [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/642436/>
14. State of Maharashtra vs MadhkarNaraya (1991) [Internet]. [Cited 2023 March 12]. Available from: <https://indiankanoon.org/doc/524900/>
15. Francis Coralie Muin vs Union Territory of Delhi, 1981 [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/78536/>
16. Kharak Singh vs the state of U. P. & others on 18 December, 1962 [Internet]. [Cited 2023 March 22]. Available from: <https://indiankanoon.org/doc/619152/>
17. Govind vs state of Madhya Pradesh & ANR on 18 March, 1975 [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/436241/>
18. Mrs. Neera Mathur vs Life Insurance Corporation of India, 1991 [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/832598/>
19. Smt. Saroj Rani vs Sudarshan Kumar Chadha (1984) [Internet]. [Cited 2023 March 20]. Available from: <https://indiankanoon.org/doc/1382895/>
20. The Hindu Marriage Act (1955). [Internet]. [cited 23 March 2023]. Available from: chrome-extension://efaidnbnmnncbjpcjglefindmkaj/https://highcour.tchd.gov.in/hclsc/subpages/pdf_files/4.pdf
21. Review of Rape Laws (Report No. 172) [Internet]. [Cited 2023 March 02]. Available from: <http://www.commonlii.org/in/other/lawreform/INLC/2000/2.html>