

## **Marital Rape – A Fight against Justice**

Nilay Joshi<sup>1</sup> & Rakshita Choudhary<sup>2</sup>

### **Abstract**

यत्रनार्यस्तुपूज्यन्तेरमन्तेतत्रदेवताः।

यत्रैतास्तुनपूज्यन्तेसर्वास्तत्राफलाःक्रियाः॥<sup>3</sup>

This means, where a woman is respected, the place becomes God's abode, where not, then all the actions turn out to be fruitless.<sup>4</sup>

Manusmriti is one of the most influential and a practical social text which provides that a marriage is a remark of respect, where husband and wife are content to have divine blessings, and is not just for lecherousness. We need to remember that, if the husband is called *pati-parameshvara* i.e. "husband is ultimate god", then the wife is also called *griha-lakshmi* i.e. "prosperity of home." Now imagine that in a country where the women were once treated as a goddess, she is now being reduced to just an object. Wife's consent for sexual contentment is not necessary for a husband. Shocked? Well rightly so. Marital rape has been the biggest unaddressed concern for the women in India and non-criminalization of this heinous crime has affected the interest of many. Apparently, in a survey done on married women, majority of them has reported sexual violence against their husband.<sup>5</sup> Various Feminists workers and activists have raised their voice against this sin which has forced the Judicial Pundits to rethink on this issue. The Human Rights Commission has become active on this issue, and is pressurizing governments to provide a legal cushion to women to fight against Marital Rape. Most of the countries have amended the provisions for Marital Rape in their respective criminal laws and it is just a matter of

---

<sup>1</sup> 3<sup>RD</sup> YEAR STUDENT, ICFAI LAW SCHOOL, DEHRADUN.

<sup>2</sup> 3<sup>RD</sup> YEAR STUDENT, ICFAI LAW SCHOOL, DEHRADUN.

<sup>3</sup> Adhyay: 3 Mantra: 56, Manusmriti.

<sup>4</sup> Bhawana Pandey, *Women Power*, SPEAKINGTREE, <https://www.speakingtree.in/blog/women-power-656179>.

<sup>5</sup> Sonakshi Awasthi, *Centre would do well to check NFHS data on marital rape to understand how serious it is*, INDIANEXPRESS, <http://indianexpress.com/article/india/centre-would-do-well-to-check-nfhs-data-on-marital-rape-to-understand-how-serious-it-is-4822511/>.

time when we will witness the protection for Indian women too under the Criminal law justice of our country. We just have to keep the faith and continue the fight and stand together till we hit success.

## **Introduction**

“She's not a toy with whom you can play, then throw her, ruin her and leave her in strain!”

Imagine someone having access on your body, forcefully grabbing you and you are grappling like an object or forcing you to have sexual intercourse even when you do not wish to, and on denying thrashing you, making you discern that once you are married you lose all your bodily rights, and now someone to whom you are married possess all sort of authority on your physical and emotional attributes. Now if the same thing is done by a male to a woman not being his wife it will be considered as rape as per the provisions of Indian Penal Code but on becoming someone's wife the same rights are taken away from you. Terrifying though!

The Marital rape refers to any unwanted sexual act/s committed by a husband upon his wife without her consent. Such sexual activity is done using force, a threat of force, intimidation, or when a person is unable to consent. The sexual acts include intercourse, anal or oral sex, forced sexual behavior with other individuals, and other sexual activities that are considered by the victim as degrading, humiliating, painful, and unwanted.

## **Historical background**

There have been number of protests, number of marches to show the anger towards rape and phenomenally towards the male attitude for women. Rapes have been witnessed at several places and it is being a very obvious assumption that rape is committed by the evil personality or by a person who is desperate to fulfill the sexual needs. There are many such types of rape and there's one aspect of rape that is rape behind the wedlock. A Rape by the person who vowed to take care of a woman, the person who promised to be her lover, companion, and a great friend for the rest of the life and to pamper her with all love and affection.

Prior to 1970's the idea of marital rape was considered to be preposterous if not totally impossible but this notion gradually began to change due to the second wave of feminism which laid emphasis on the right of a woman to self- determination (control) of all matters relating to her body. Most countries have criminalized marital rape from the late 20th century onwards; very few legal systems allowed for the prosecution of rape within marriage before the 1970s<sup>6</sup>.Criminalization has occurred through various ways, including removal of statutory exemptions from the definitions of rape, judicial decisions, explicit legislative reference in statutory law preventing the use of marriage as a defense, or creating of a specific offense of marital rape<sup>7</sup>. With the development of the concept of human rights, in December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence Against Women which recognizes marital rape as a human rights violation<sup>8</sup>. But not all members of the UN member States recognize this declaration.

### **Facts about marital rape in India**<sup>9</sup>

- India is among 49 nations that haven't criminalized marital rape
- In their first year after government set up an emergency hotline for women, it received more than 6,00,000 calls from women, some describing assault and rape within their marriage
- When it comes to changing the law, however, the buck is still being passed. But soon it will change if we raise our voice.

### **Marital rape: a feminist approach**

Over the past many years' women activists are working day-in and day-out, to fight for the rights of women and have succeeded in bringing into notice the issue of marital rape in front of the government through mass protests, conducting rallies, writing articles and books, and by fighting it out in the courts.

---

<sup>6</sup>Marital Rape, WIKIPEDIA (May 14, 2018),[https://en.wikipedia.org/wiki/Marital\\_rape](https://en.wikipedia.org/wiki/Marital_rape).

<sup>7</sup>*Ibid.*

<sup>8</sup>Talk: Marital Rape/ Country Lists, WIKIPEDIA (May 14, 2018),  
[https://en.wikipedia.org/wiki/Talk%3AMarital\\_rape%2FCountry\\_lists](https://en.wikipedia.org/wiki/Talk%3AMarital_rape%2FCountry_lists)

<sup>9</sup>Night after night, the torture grew': A Survivor of marital rape speaks up, DAILYO,  
<https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html>.

Justice Leila Seth elucidates in her book, talking of Justice, People's Rights in Modern India, saying "a women's autonomy and bodily integrity are concepts that have developed over the years, thus making rape is an offence unless there is true consent".<sup>10</sup>

Thus consent is the biggest element, sexual intercourse with wife without her consent should be considered as rape.

Akila RS, a lawyer based in Chennai, points out the relevance of medical evidence in cases of marital rape too. A history of physical violence, results of a rape-kit and medical examination of the wife, witness testimony and possible admission of the husband in electronic communications could be ample evidence to prove his guilt, "she says a timely medical examination can differentiate between consensual and forced sex".<sup>11</sup>

Further she said, "There is some difficulty in the criminal jurisprudence here, but we have to develop it and at least, in cases where there is enough proof for proving marital rape, the law will help punish the husband".

There cannot be good rape or bad rape, sexual intercourse without consent or with forceful consent should be considered as rape, and the husband should be penalized for the same. There's no as such difference between the two, as in both situation women are subjected to as a property and are used as a material for satisfying the sexual need.

Sexual intercourse after marriage is the essence of perfectly solemnized marriage but undue calls from husband leads to distress and mental torture to the wife. Many of the thinkers have ignored this concept by stating that criminalizing of marital rape will destroy the basic structure of marriage but the question arises that what such marriage will fulfill? It will only provide stress to the women and will give more power to the men to treat her like a toy, a medium of joyful comfort, and a slave for lifetime.

**Does denying for forceful sex amounts to disintegration of marriage sacrament, or**

**Does forceful sex is acceptable part of marital relationship?**

---

<sup>10</sup>Tanya Manglik, *The Lady of Law and love: A Tribute to Justice Leila Seth*, FEMINISMININDIA, [www.feminisminindia.com/2017/07/18/justice-leila-seth-tribute/](http://www.feminisminindia.com/2017/07/18/justice-leila-seth-tribute/).

<sup>11</sup>Ramanathan S., *Justice, misuse and proof: Why the legal debate on marital rape is wrongly set up*, THENEWSMINUTE, <https://www.google.co.in/amp/s/www.thenewsminute.com/article/justice-misuse-and-proof-why-legal-debate-marital-rape-wrongly-set-40468%3famp>.

Sex after marriage is just so obvious, but people neglect the very desideratum that is "consent". What exactly consent requisites? In common speech, consent occurs when one person voluntarily agrees to the proposal or desires of another.<sup>12</sup> Everyone possesses their bodily rights and the same law applies here. Rape itself is just so disheartening; it leaves the person shattered and amounts to mental agony. Being raped by husband does amounts to same mental agony. You live with therapist, you stay with the rapist and you are helpless, as no law can compensate your loss.

Ironically many of us will not even consider it as crime but, according to the latest National Health and Family Survey (NHFS-4) for 2015-16, 5.4% women have experienced marital rape, under this category. Sadly! Even after notably occurrence of such brutal crime we cannot find any remedy under our code of justice. Body is body, rape is rape, does a definition of rape gets change for a married woman? Does her consent for such act where her hole body will be engaged should not be taken? Marriage is not just a gateway of fulfilling sexual needs; it is an alliance of two people who vow to stay together, for the rest of the life. In Country like India women are treated as object, the patriarchal society makes the male genders superior and thus after marriage he claims her like his property where he can do anything with her.

**Night after night, the torture grew': A survivor of marital rape reiterates her story.**<sup>13</sup>

Anita, assaulted by her husband every day, waits for marital rape to become a punishable crime in India.

I still remember the day I got married. While taking the vows, I glanced at the tall frame of my husband and felt a tug at my heartstrings. I felt tears of joy washing me over, knowing I had a protector now. Alas, even before I could wipe them dry, I was in for a rude shock. On the "suhaag raat (the first night of our marriage)" instead of care, kind words and companionship, I was met with verbal abuse, force and assault. Says 18-year-old marital rape victim.

Of the 664 cases of women who reported domestic violence in 2015 at NGO Sneha's crisis counseling center in Dharavi, 159 women also reported, among other issues, marital rape.

---

<sup>12</sup>www.oed.com.

<sup>13</sup>Supra Note 9.

At Sneha's counseling centers at KEM and Sion hospitals, of 218 cases of domestic violence received in 2015, 64 women said they had faced marital rape.<sup>14</sup> If she denies for sex, she's considered as a home breaker. Sex is permissible after marriage and in country like India there's no concept for forceful sex under marital institutions, if you are married your body belongs to him and your emotions, your consent, and your pain is just baseless.

## **Different views on marital rape in India**

### **i. Justice Verma Report committee**

The Justice Verma committee Report on marital rape was worth awakening and it elucidated the dark side of marriage. The side that is been ignored since ages. The side that is been witnessed by number of helpless women behind the goody of the marital establishments. The three-member panel suggested that marriage should not be used or most probably misused as a valid defense against rape.

The view was supported by the judgment of the European Commission of Human Rights in C.R. versus UK, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Quoting various court judgments in different countries, the panel said "the exemption for marital rape stems from a long outdated notion of marriage, which regarded wives as no more than the property of their husbands."<sup>15</sup>

The Indian Penal Code differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.

The committee thoroughly questioned the Indian Penal Code's provision for rape and therefore suggested to amend the code with effective laws that can provide relief to the number of helpless women. They argued that the inept attitude of the law makers is

---

<sup>14</sup>Roli Srivastava, *Marital Rape: the statistics show how real it is*, THEHINDU, <http://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece>.

<sup>15</sup>*Marriage is not a valid defence against rape, says committee*, THEHINDU, <https://www.google.co.in/amp/www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-says-committee/article4351148.ece/amp/>.

making women impuissant, despite of the fact that women are Making names in every field but when it comes to provide them with the legal support, the law becomes incompetent. The law codes serve as the lifeblood of the country, and if the code becomes deficient, that to for the women, will lead to lot of tension.

**ii. Views of Mr. Venkaiah Naidu**

In the Lok sabha debates of 1983, marital rape was thoroughly discussed but most of the parliamentarians resisted criminalizing the offence. It is just like other sort of violence, now the question is why it is not regarded as crime in the eyes of law makers? Where Justice Verma committee came up with the recommendation of criminalizing of marital rape, Parliamentary Standing committee on HomeAffairs, led by Venkaiah Naidu had said that an aggrieved women has “other means of approaching the court” and that “if marital rape is brought under the law the family system will be under stress”<sup>16</sup>Congress refused to legislate by stating the ground that it had “Potential of destroying the institution of marriage.”

So does this means that just for the sake of protecting the basic structure of marriage, a woman will sacrifice all her bodily rights and will obey her husbands’ command even when she do not wish to? Is this what the women of 21st century is for? Where the slavery system is abolished worldwide, this offence is no less than being a slave.

**iii. Maneka Gandhi’s views**

Maneka Gandhi said that a law cannot be passed keeping in “mindset of the society to treat the marriage as a sacrament.”<sup>17</sup>

She missed the real picture, there are number of surveys that have been conducted and there are number of NGO's that are reportedly working for the betterment of the helpless women under this category. The data shows that it is the need for the authoritative panels to support the women and work for the criminalization of the offense.

Ironically, Times of India conducted poll in respect of this statement and 52% majority agreed to her statement.

---

<sup>16</sup>*Government Justify exclusion of marital rape*, TIMESOFINDIA,  
[www.google.co.in/amp/s/m.timesofindia.com/india/government-justify-exclusion-of-marital-rape.cms](http://www.google.co.in/amp/s/m.timesofindia.com/india/government-justify-exclusion-of-marital-rape.cms).  
<sup>17</sup>*Ibid.*

Why the proficient authorities see the concept of marital rape as alien to India. They are the ones who have the power to bring the change and their efforts can better the society. People against to this argue that it will bring change in considerations of family values and women will get easy advantage of it. But does just for sake of some advantageous people crime will not be considered as crime? These are exceptions and law is made for public welfare.

So far, a married woman has only a remedy under law for marital violence where she can file a complaint against any spousal abuse or abuse by her in laws under section 498A of the Indian Penal Code which broadly covers all forms of cruelty and domestic violence. But if a woman goes for a FIR under this offence, she's ignored with queer attitude and it is suggested to her to go home and serve her husband as no such sort of offence exists.

iv. **Haribhai Parathibhai Chaudhary, Minister of State for Home on Marital Rape**

In 2015, the debate re-surfaced in the media when a United Nations Populations Fund survey reported that around 75 percent of Indian women are victims of marital rape. The response by Haribhai Parathibhai Chaudhary, Minister of State for Home, in this respect, is still referred to as the standard excuse for dismissal of accountability for something as serious as marital rape, this casual attitude of him was very depressing and worth

disparaging.

Justice Pardiwala wrote, "The total statutory abolition of the marital rape is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized". He precisely concluded that "No one is even willing to discuss to reform the criminalization of marital rape, A law that does not give married and unmarried women an equal protection creates conditions that lead to the marital rape,"<sup>18</sup>

v. **Gujrat High Court's view**

---

<sup>18</sup>Asmita Kundu, *Marital Rape in India: When Law remains silent to Sexual violence*, INDIANCULTURALFORUM, <http://indianculturalforum.in/2017/08/17/marital-rape-in-india-asmita-kundu/>.

Justice Pardiwala said as he issued the order saying “Making marital rape illegal or an offence will remove the destructive attitudes that promote the marital rape”.<sup>19</sup> “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.” Does this mean that Indian citizens are not capable enough to understand that every being have their own physical and mental tolerance and going beyond that fine line can create only stress and torment.

### **Criminalization of marital rape**

Nearly every state recommended giving more attention to prevent violence against women, but many of the western states called upon India to specifically criminalise marital rape.

“Marital rape is not yet criminalised in India – in spite of many calls for criminalisation, including from the UN,” said the Swedish delegate. Similar views were expressed by Iceland, Ireland, Australia, Belgium, Canada and Slovenia, with most calling for the removal of the exception related to marital from the definition of rape in Section 375 of the IPC.

Last year in March, Maneka Gandhi, Union minister for women and child welfare, had said that the concept of marital rape could not be applied in the “Indian context”. A few months later, she claimed that even if there was a law on marital rape, she was sure that most women would not come forward to complain.<sup>20</sup>

Criminalizing marital rape is considered as a biggest need of the hour.

Several provisions have been suggested by legal institutions, judicial pundits, women activists and social workers in favor and against the criminalization of marital rape over time, as we have discussed earlier in the paper.

It is not that marital rape is an unacknowledged concept; it has been witnessed since ages. There have been numerous cases regarding this matter but the court and the authoritative

---

<sup>19</sup>Khushboo Sharma, *Gujarat High Court proposes to make the “Destructive Attitude” that promotes “marital rape” illegal*, INDIANWOMENBLOG, <http://www.indianwomenblog.org/gujarat-high-court-proposes-to-make-the-destructive-attitude-that-promotes-marital-rape-illegal/>.

<sup>20</sup>Devirupa Mitra, *India comes in the line of fire at UNHRC over Rights Record, Racism*, THEWIRE, <https://thewire.in/diplomacy/india-unhrc-universal-periodic-review>.

panels ignored the same stating that sexual intercourse after marriage is very much important ingredient of perfectly solemnized marriage and it is very vague to determine whether the intercourse was done forcefully or with consent.

While for some of the thinkers Criminalization of such laws will lead to frustration of basic structure of marriage and will create lot of chaos.

The Declaration on the Elimination of Violence against Women was adopted without vote, the United Nations General Assembly in its resolution 48/104 of 20 December 1993.

"The struggle for women's rights, and the task of creating a new United Nations, able to promote peace and the values which nurture and sustain it, are one and the same. Today - more than ever - the cause of women is the cause of all humanity."<sup>21</sup>

Articles 1 and 2 of the resolution provide the most widely used definition of violence against women.

Article One: For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article Two: Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.<sup>22</sup>

---

<sup>21</sup>*Women Watch Special Features*, UN, [www.un.org/womenwatch/feature](http://www.un.org/womenwatch/feature).

<sup>22</sup>United Nations, UN, available at [www.un/document.net](http://www.un/document.net).

It is high time that we have been avoiding this issue and immediate actions are required to be taken for safeguarding rights of our mothers, sisters, daughters and most importantly the women of our country.

### **Data analysis**

According to the UN Women's 2011 report, out of 179 countries for which data was available, 52 had amended their legislation to explicitly make marital rape a criminal offence. India is one such country where marital rape is yet to be even recognized, least criminalised. Section 375 of the Indian Penal Code (IPC), which defines rape, makes an exception for marital rape by stating, "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

The Law Commission of India, in its 172nd Report on "Review of Rape Laws" in March 2000 did not recommend criminalization of marital rape. However, the Justice J.S. Verma Committee, while giving its report on "Amendments to Criminal Law" in January 2013, recommended that the rape law ought to be amended to delete the marital rape exception irrespective of the age of wife. In March 2013, a Parliamentary Standing Committee on Home Affairs in its 167<sup>th</sup> report on the Criminal Law (Amendment) Bill, 2012, observed that if the marital rape was brought under the law, the entire family system would be under great stress.

In August 2017, the Centre, in an affidavit filed in response to pleas seeking to criminalize marital rape in the Delhi High court, stated that marital rape cannot be made a criminal offence as it could become a phenomenon which may destabilize the institution of marriage and an easy tool for harassing husbands.

On October 11, 2017, the Supreme Court of India, in the case Independent Thought V. Union of India, ruled out that "sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not" stating that the exception in the rape law was arbitrary and violative of the constitution. Before passing this judgement, the IPC legally allowed a husband to rape his minor wife if she was between the ages 15-18 years old. However, during the hearing of the case, the Supreme Court despite taking a strong position and criminalizing sex with a wife who has not attained the age of 18, showed reluctance in extending this argument to adult marital rape. Now the exception 2 to Section 375 of the IPC, allows a husband to have sexual intercourse with his wife who is

above 18 years of age even if she doesn't consent for it and it will not be considered as rape. But data collected through National Family Health Survey 4 in the year 2015-16 on various aspects of women's empowerment and domestic violence shows that marital rape needs to be criminalised in India.

### **Authors suggestions**

The Indian Government should pass a specific violence against women law that contains both criminal and civil provisions.

- Care should be taken that the new law does not contain provisions that would cause further harm to victims.
- The new law should expand the definition of violence against women and ensure various types of relationships are covered by the law.
- The new law should establish civil remedies, including comprehensive Civil Protection Order provisions for women who are victims of violence.

India's Penal Code should be amended to:

- Explicitly criminalize conjugal rape;
- Abolish criminal prosecutions for illicit sexual relations;
- Eliminate laws that criminalize those who assist or harbor married women;
- Eliminate discriminatory legal provisions that place heavy burden of proof solely on the victim of violence.

### **Conclusion**

In the conclusion, we adamantly stand to the fact that, marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination.

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.