

“Marital Rape”

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LITERATURE REVIEW

Marital rape is the act of sexual intercourse with one’s husband/ wife without that spouse’s consent. Here, the essential element is ‘no consent’ and physical violence need not be involved. It is considered a form of sexual abuse and domestic violence. This paper is a comprehensive review of marital rape, its status in India, and numerous aspects.

It is a serious societal issue that is experienced by 10%-14% of all married women and 40%-50% of battered women. It has been noted that marriages in which marital rape occurs, have significantly higher rates of marital dissatisfaction, non-sexual violence, and a lower rate of marital quality. Victims are mostly women, who resist marital rape are often seen using verbal means of resistance. Most victims are unable to or are afraid of sexual aggression by their husbands. The victims usually suffer from psychological disorders like Anxiety, PTSD, Depression, Gynecological problems, and negative physical health symptoms. Victims rarely seek help but even if they do, they are shut down by people.

Despite the increasing recognition of marital rape in the last 2 decades, the literature remains sparse.

In *1989, the UN* released a report on Violence against women in the family, which initiated a change in emphasis in international law from protection of the family to protection of individuals within the family¹. It basically showcased that the family was the locus of the harm.

In *1990, UN General Assembly* adopted General Resolution 45/114 on domestic violence which emphasized on serious lack of information and research on domestic violence globally and the need for the exchange of information on ways of dealing with this problem.²

The United Nations Declaration on Elimination Of Violence against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”

¹ Bonita Meyersfeld, *Domestic Violence & International Law* (Oregon: Oxford & Portland, 2010)

² Convention on the Elimination of All Forms of Discrimination against Women, Dec.18, 1979, 1249 U.N.T.S. 113, Reprinted in 19 I.L.M. 33 (1980), (entered into force Sept.,1981), (“CEDAW”)

The report confirmed that states should oblige international standards to hold the perpetrators to account. Violence against women is the widespread violations of human rights including sexual, psychological, physical, and economic abuse.

LIST OF CASES

1. **State of Karnataka v. Krishnappa**
2. **Suchita Srivastava v. Chandigarh Administration**
3. Justice K.S. Puttuswami v. Union of India
4. T. Sareetha v. T. Venkata
5. Harvinder Kaur v. Harmander Singh AIR 1984 Del 66
6. Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732

LIST OF STATUTES & TREATIES

1. The Code of Criminal Procedure, 1973
2. Indian Penal Code, 1860
3. The Constitution of India
4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
5. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
6. Committee on the Elimination of Discrimination against Women, General Recommendations No. 19: Violence against Women Committee on the Elimination of Discrimination against Women, General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures
7. Declaration on the Elimination of Violence against Women (DEVAW)

STATEMENT OF PROBLEM

In India, marriages are considered sacred. It is not considered rape if a husband has non-consensual sex with his wife. Marital rape should be criminalized wholly. India is one of the 36 countries where marital rape is not criminalized.

OBJECTIVE OF STUDY

- To understand the concept of Marital Rape.
- To understand the Status of Marital Rape in India.
- To understand the Legal and constitutional validity.
- To suggest Reforms for change.

HYPOTHESIS

India is one of the few countries left to criminalize marital rape. The reasons are traditional views of marriage in India. It is considered the husband's right to have sexual intercourse with his wife with or without consent. The laws in India protect the sanctity of the institution of marriage. In this paper, I mentioned various reasons as to why marital rape must be recognized as an offense. I depicted the arguments advanced to not criminalize marital rape by law commission, judicial decisions are erroneous.

RESEARCH QUESTIONS

- What is Marital Rape?
- What is the Status of Marital Rape in India?
- What is the Legal and Constitutional Validity ?
- Why there is a need for changing of laws?

RESEARCH METHODOLOGY

A Doctrinal form of research has been employed in the making of this seminar paper. Primary sources such as enactments and the Indictments have been used. Other authorities cited are secondary sources such as articles, books, websites, and news articles.

I. INTRODUCTION

Rape is the act of non-consensual sexual intercourse or sexual penetration between a man and a woman. Here, the main ingredient is 'lack of consent'. The 'burden of proof' here lies on the victim to prove that there was indeed a lack of consent. In the case of minors, consent doesn't exist as they are incapable of giving consent according to IPC.

Marital Rape is also a form of rape. Here, in this scenario, the husband rapes his wife. Consent is not present here. For ages, sexual intercourse is regarded as a right of the spouse in the marriage even without the consent of the said spouse. But now, it is widely classified as rape by many societies around the world. At present, only fifty-two countries have laws recognizing that marital rape is a crime.³ Many international conventions have been made and are increasingly criminalized in many countries. Unfortunately, in India, Marriages are considered sacred in law and society and it's still non-criminalized which is leading to the exploitation of the spouses. Reasons for non-criminalizing of Marital rape in our country can be found in various reports of the Law Commission, judicial decisions, and Parliamentary debates.

Marital rape is experienced widely by women as compared to men, though this is not exclusive. Marital rape is a chronic form of violence that takes place within abusive marriage

³UN Women, 2011-2012 Progress of the World's Women, 17, (2011)

relations. It exists in complex webs of cultural practices and societal ideologies which combine to influence each distinct instance and situation in varying ways.

There are 4 justifications as to why Marital Rape is not criminalized. The first justification stemmed from the understanding of the wife as subservient to her husband.⁴ Women were chattel to their husbands, and this meant that women did not have any rights in the marriage.⁵ In such a scenario, it would not be possible to fathom a husband raping his wife since the husband was the master to the wife, and enjoyed privileges over her body.⁶ Along with this justification, the unities theory also existed.⁷ This theory rested on the idea that after marriage, the identity of the woman merged with that of her husband.⁸

The law didn't give married women an independent personality. Their personalities were merged after marriage. Women lived in shadows. This is linked to previous justification when women were looked at as chattel of their husbands. However, post the 1970s and the feminist revolution,⁹ the two above-mentioned justifications were no longer the reason to not criminalize marital rape because women were recognized as equal citizens as men in many parts of the world. Instead, more theories have become justifications. The 'implied consent' theory is one such justification.¹⁰ An irrefutable presumption of consent existed when a man and a woman enter the institution of marriage. Marriage is considered to be a civil contract and consent to sexual activities is thought to be the defining element of this contract.¹¹ The fourth justification, which is the most recent, is that criminal law must not interfere in the marital relationships between the husband and wife.¹²

Types OF Marital Rape :

1. Obsessive Rape:

This is the most sadistic form of rape. The abuser seems obsessed with sex, and then the act itself is violent. The abuser in this case uses violence to become aroused.

2. Force Only Rape:

This means a husband who uses violence and threats only to the degree which is necessary to coerce sex. This type of rape usually occurs in relationships where violence is verbal or primarily in sexual interactions.

⁴ Rebecca M. Ryan, The Sex Right: A Legal History of Marital Rape Exemption, 20 LAW AND SOCIAL ENQUIRY, 944(1995)

⁵ To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) HARVARD LAW REVIEW, 1256 (1986)

⁶ *Id.*, 1261.

⁷ *Id.*, 1256.

⁸ *Id.*

⁹ Ryan, *supra* note 6, 964.

¹⁰ *Id.*

¹¹ *Id.*, 944.

¹² *Id.*, 941.

3. Battering rape:

Where beatings and rape are combined it is called 'battering rape'. Sexual abuse is part of the general pattern of verbal, emotional, psychological, economic, and physical abuse. It is a continuation of physical assault. In certain cases, physical violence continues during sex and as a result sexual act is also violent.

II. HISTORY

The issues related to sexual and domestic violence within marriage and family and of violence against women have come to growing international attention since 2nd half of the 20th century. But still in almost 36 countries, including India marital rape either remains outside the criminal law or illegal and widely tolerated. Laws are rarely being enforced due to factors ranging from lack of public knowledge that sexual intercourse in marriage without consent is illegal to the reluctance of authorities to pursue the crime.

The sheer reluctance to criminalize and prosecute marital rape is the result of traditional views of marriage, interpretations of religious doctrines, and the cultural expectations of subordination of a wife to a husband, which is still common in many parts of the world. These kinds of views of marriage and sexuality were first challenged in most Western countries from the 1960s and 1970s by second-wave feminism, which led to the acknowledgment of the woman's right to self determine and control all the matters related to her own body, the withdrawal of the exemption or defense of marital rape from her husband.

Most countries in the world criminalized marital rape from the late 20th century. Few legal systems were allowed for the prosecution of marital rape before the 1970s. Criminalization, though has occurred through various ways, including the removal of statutory exemptions from definitions of rape, explicit legislative reference in statutory law preventing the use of marriage as defense, judicial decisions, creation of the specific offenses of marital rape.

IN INDIA:

The non-criminalized nature of Marital rape emanated from the British era. It was largely influenced by and derived from the doctrine of merging the wife's identity with that of her husband. This doctrine is known as 'Doctrine of Coverture'. This doctrine has been followed since then.

When IPC was drafted, a married woman was not considered a separate independent legal person. She had to live under the shadows of her husband.

The marital exception to Section 375 IPC's definition of rape was drafted on the basis of Victorian patriarchal norms. The Victorian patriarchal norms didn't recognize men and women as equal, but women were considered subordinate/ slave to the women. Women were not allowed to own property and merged their identities with that of their husband and wife under the 'Doctrine of Coverture'.

The reason behind the exception clause can be understood by the trajectory and reports of the Law Commission. The first report to deal with this issue was the *42nd Law Commission Report*.¹³ Subsequently after this report, the law has been amended at various intervals. The importance of this report has been thereby restricted only to the views of the Law Commission on marital rape.

The report by the Law Commission made 2 important suggestions:

1. In cases where husband and wife are judicially separated, the exception clause won't apply.¹⁴ It also stated that “in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right”.¹⁵
2. It was regarding non-consensual sexual intercourse between women aged between twelve and fifteen.¹⁶ It stated that the punishment for such offences must be put into a separate section and preferably not be termed rape.¹⁷

The Report was unclear on so many levels. First, the reason for suggestion 1 is still unclear and then it doesn't discuss why non-consensual sexual intercourse is right and why is implied consent presumed when husband and wife are living together. It stated that it would be considered rape when the wife and husband are not living together. Secondly, the Second suggestion was prior to recent amendments made in IPC, where there was a different punishment when the wife was between 12 and 15. It was the sheer reluctance to classify marital rape as rape but more like sexual misdemeanour at its lower form. This report merely highlighted that the presumption of consent operates when a husband and wife live together. It didn't comment whether the exception clause must be retained or deleted.

The Law Commission was directly faced with the validity of the exception clause in the *172nd Law Commission Report*.¹⁸ Here, during the consultation rounds, arguments were advanced regarding the validity of the exception clause itself.¹⁹ It was argued that when other instances of violence by a husband toward wife were criminalized, there was no reason for rape alone to be shielded from the operation of law.²⁰ The Law Commission rejected this argument since it feared that criminalization of marital rape would lead to “excessive interference with the institution of marriage”.²¹

¹³ Law Commission of India, Indian Penal Code, Report No. 42 (June 1971)

¹⁴ Id., 16.115

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000)

¹⁹ Id., 3.3.

²⁰ Id.

²¹ Id., 3.1.2.1

In **2012**, a **Committee** was constituted under **Justice J.S. Verma (Retd.)** who advocated for the criminalization of marital rape. This committee was formed in light of the nationwide agitation seeking to make criminal law more efficient to deal with cases of heinous sexual assault against women.²² The committee published the ‘Report of the Committee on Amendments to Criminal Law’ (‘J.S. Verma Report’) in 2012.²³ One of the suggestions given in this report was that marital rape ought to be criminalized.²⁴ Two suggestions were made. The preliminary recommendation was simply that the exception clause must be deleted.²⁵

The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defense for the accused, or relevant while determining whether consent existed or not and that it was not be considered a mitigating factor for the purpose of sentencing.²⁶ This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.²⁷ This Committee remarked how this immunity has been withdrawn in a number of jurisdictions and in the modern concept of marriages between equals, such an exception clause cannot stand.²⁸

The Criminal Law Amendment Bill, 2012 (‘Amendment Bill, 2012’) was drafted.²⁹ The word ‘rape’ was replaced with ‘sexual assault’ in an attempt to widen its scope but the Bill did not contain any provision to criminalize marital rape.³⁰ The Amendment Bill, 2012 rejected the suggestions in the report laid by the committee constituted under Justice J.S. Verma. In 167th Report (‘Standing Committee Report’) the Parliament Standing Committee on Home Affairs reviewed this Amendment Bill, 2012, and also organized public consultations.³¹ It was suggested that Section 375 must be suitably amended to delete the exception clause.³² The Standing Committee, however, rejected this recommendation.

The Standing Committee Report argued that:

²² As per GOI Notification No. SO (3003), December 12, 2012, this committee was constituted to give out a report in merely thirty days.

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

²⁴ Id. 113-117.

²⁵ Id. 79 (i).

²⁶ Id., 79 (ii).

²⁷ Id., 72.

²⁸ Id., 73-77.

²⁹ The Criminal Law Amendment Bill, 130 of 2012.

³⁰ Id.

³¹ STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, (December 2015).

³² Id., 47

if the recommendation is accepted then, the “entire family system will be under greater stress and the committee may perhaps be doing more injustice”.³³

Second, there are sufficient remedies already in existence, the family can itself deal with such issues and a separate legal remedy is available in criminal law, through the concept of cruelty I.e. Section 498A of IPC.

In 2015, arguments were presented by the Ministry of Home Affairs in reply to a bill proposed by a Member of Parliament which aimed to criminalize marital rape.³⁴ The press release stated that it “was considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context”.³⁵

One of the many reasons were given was the “mindset of the society to treat the marriage as sacrament”.³⁶

Further in December, a private bill was introduced on the same topic.³⁷ During this discussion, the Home Minister stated that this was under consideration by the Law Commission, and the decision would be taken after the report came out.³⁸ In his speech a striking aspect was his continuous reference to the existing remedy of ‘cruelty’ that already existed in the Section 498A IPC.³⁹ Again in 2016, the then Home Minister was questioned about the status of marital rape exception in the law commission and if the government decided to scrape out the exception and criminalize the marital rape. The reply from him remained the same about the matter being studied by the law commission and no decision was taken since the Parliamentary Standing Committee had decided against it.⁴⁰

The same attitude is of the judiciary as well. Although there are no specific cases in which the constitutionality of the exception clause in section 375 has been upheld, there have been some instances where the courts have simply avoided this question,⁴¹ dismissed petitions to

³³ *Id.*

³⁴ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014. The status of the Bill is currently pending as of 1st December, 2017)

³⁵ Press Release, PRESS INFORMATION BUREAU, April 29, 2015

³⁶ *Id.*

³⁷ *Supra* note 44.

³⁸ RAJYA SABHA DEBATES, *Discussion on the Indian Penal Code (Amendment) Bill, 2015*, 53, Session Number 237, December 4, 2015.

³⁹ *Id.*

⁴⁰ LOK SABHA DEBATES, *Question on Marital Rape, 2016*, Question No. 2872, March 15, 2016.

⁴¹ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC Online Guj 1386. The Gujarat High Court notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same. See also Deya Bhattacharya, 'Marital Rape a Disgraceful Offence': Gujarat HC's Ruling Progressive, But Mere Condemnation of Practice Rings Hollow, Child Marriage, FIRSTPOST (India) November 9, 2017.

strike down the exception clause or have used this clause in some cases to avoid answering whether the husband raped his wife or not.⁴²

Till today, 'Marital Rape' in our country is non-criminalized. Further, the existing alternatives or lack of alternatives for a woman to seek redressal even if marital rape occurs.

III. STATUS OF MARITAL RAPE IN INDIA

India has long been a patriarchal society. Marriages are considered sacred in India that forms the bedrock of our society. It is viewed as deeply personal and private. The state is hesitant to interfere in that delicate personal sphere of people's life. State intrusion in people's marital life would mean disrupting the privacy of citizens. State can't coerce people to marry to divorce. However, the state's refusal to interfere has been a problem too. It is important for the state to interfere in certain areas.

Marital rape is also a violation of the fundamental rights of a woman. The lack of criminalization of this offense infringes the rights. Even though this occurs in the private sphere of marriage, interference of the state is the responsibility of the state. However, if the state doesn't interfere the fundamental rights of women are infringed. A woman is left without a proper remedy trapped in marriage while being raped by her own husband.

Marital rape has been impeached in almost all countries but, unfortunately, India is one of the few countries where marital rape is still not criminalized. Marital rape is a part of domestic violence. Domestic violence is an entrenched problem in India. According to National Crime Records Bureau (NCRB) Crime in India, 2019 report, about 70% of Indian women are victims of domestic violence, and each year the number increases.

A wife is presumed to deliver consent to have intercourse with her husband after getting married. The wife's consent is considered implied. Marriage between a man and woman implies that both have consented to marital relations and it can't be considered otherwise. Women aren't even considered equal in marital relations and are forced to comply with their husbands in their every decision. Marital rape is an unjust and common way to degrade and disempower the women of our country.

Many legal amendments are done in the criminal law of India for the protection of women, but marital rape is still non-criminalized, undermining the human right and dignity of women. The definition of rape is in Section 375 of the Indian Penal Code (IPC). It includes all forms of sexual assault, involving non-consensual sex with a woman.

⁴² In a judgment delivered by Justice Virender Bhat, an Additional Sessions Judge of the Special Fast Track Court, he noted that forced sex cannot be considered rape in a marriage and hence, an analysis of the fact situation was not required. See Apoorva Mandhani, Marital Sex Even if Forcible is Not Rape; Delhi Court, he noted that forced sex cannot be considered rape in a marriage and hence, an analysis of the fact situation was not required. See Apoorva Mandhani, Marital Sex Even if Forcible is Not Rape; Delhi Court

Exception (2) of Section 375 of IPC, Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. The unwilling sexual intercourse between a husband and wife over 15 years of age is not rape according to the exception (2) of section 375 and thus, immunizes this act from prosecution.

There are several cases where women admitted they dreaded the next assault and feared when will it happen and where. Often they happened in private places but publicly they were verbally abused. The victims had fear of being abandoned and are generally treated like a slave. Many women clung to their 'married' status for it ensures a roof over their head. At police stations, assault is generally seen as a 'matter between husband and wife'.

In Mumbai, of the 664 cases of women who reported domestic violence in 2016 at NGO, 159 women also reported marital rape along with it. While marital rape gets documented in hospitals, it is rarely registered since it is excluded in IPC.

In *Harvinder Kaur v. Harmander Singh*⁴³

Delhi HC was confronted with a petition challenging the constitutionality of Restitution of Conjugal Rights. The court upheld the constitutionality of section 9 of the Hindu Marriage Act. Court further stated that the purpose of Restitution of Conjugal rights is not to coerce someone to stay with their partner but rather to "protect the institution of marriage".⁴⁴ The court refused to accept that a decree of RCR would result in women would be forced to resume conjugal relationships with their husbands. In one part of the judgment, Court took a progressive stance by mentioning that a sexual relationship is not the only kind of relationship that encompasses a marriage. Again, the Court uses this understanding to ignore the fact that when a woman is forced to live with her husband, there is a very high probability that these women would be forced into sexual relationships as well.

The Court asserted that: "*The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in relationships which should be obviously as far as possible protected from possibilities of that kind. The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces 'two-in-one-ship' "*".⁴⁵

⁴³ Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

⁴⁴ Id.

⁴⁵ Id.,36.

IV. Legal and Constitutional Validity

1. Article 14 of the Indian Constitution reads as:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

This article of the Indian Constitution is clearly divided into 2 parts :

1. It commands the state not to deny any person ‘equality before the law’.
2. It commands the state not to deny ‘equal protection of laws.’

This article prohibits discrimination. It provides for equality before the law.

Marital Rape is violative of Article 14 of the Indian Constitution. The exception of Marital rape immunizes husband's action against their wives. Exception (2) of Section 375 protects unmarried women from those acts while victimization of married women continues.

2. Section 375 of IPC, 1860 reads as:

375. A man is said to commit "rape" if he—

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

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 to do so with him or any other person; or

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

applies his mouth to the vagina, anus, urethra of a woman or makes her to 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, by reason of unsoundness of mind or intoxication or the administration by him personally

or through another of any 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 I.—For the purposes of 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 willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”.

The main purpose of this section is to protect women and punish those people engaging in this inhumane activity of rape. The Criminal Amendment, 2013 doesn't state why there is the exclusion of 'marital Rape' in this section. Since this section is based on consent. It is always considered as the implied consent between husband and wife. It is also irrefutable that because of this exception (2) many married women are victims of marital rape and don't have any legal remedy. Exempting the husbands from the punishment contradictory to the objective of this section. The consequences of the rape should be similar whether the woman is married or unmarried.

However, a specific form of marital rape is criminalized. The non-consensual sex between husband and wife while they are living apart on account of judicial separation or otherwise. Section 376 B deals with this kind of situation.

376B of the IPC states:

“S. 376B: Sexual intercourse by husband upon his wife during separation:

Whoever has sexual intercourse with his own 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 section 375”.

Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732

The applicant was accused by his wife of inflicting torture and performing a sexual activity that is often unnatural without her consent on many occasions. It was argued by the applicant's counsel that in India marital rape is not an offense. However, it was submitted that a prima facie case of cruelty under section 498A of IPC can be made against the applicant.

Appearing for the respondents, Rajesh K. Shah contended:

The present case is one of marital rape on the grounds that it was unwanted sexual intercourse by the applicant with his wife and consent was obtained by the coercion. The case is one of the non-consensual sexual acts and violent perversion by a husband towards his wife where she was abused mentally and physically.

The Court delved into provisions concerned of Section 377 and 376 of IPC.

Issues raised by the court :

1. Whether a husband can be prosecuted for the offense of section 376 of IPC.
2. Whether a wife can initiate proceedings against her husband for unnatural sex under section 377 of IPC
3. Whether there is a concept of marital rape.

Gujarat High Court:

In this case focal point was marital rape and unnatural carnal activity, the Bench of J.B. Pardiwala, J., observed that:

A wife is not a chattel to her husband and husband having intercourse with his wife is fulfilling a marital duty with a human being with equal dignity as him, it is not merely using a property. He can't coerce his wife to engage in a sexual act without her full and free consent. He can not be permitted to violate the dignity of his wife.

Further, the court urged that it is high time the legislature intervenes and goes to the root of the issue of marital rape as it is a serious matter. Unfortunately it is not attracting serious discussions which are needed at the end of the Government.

The court highlighted section 377 of IPC “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Consent is not essential in determining unnatural offences. Any offence which is described as carnal penetration would constitute an offence under section 377. Thus, making it clear that the wife can initiate proceedings for unnatural sex against her husband. But, as per the

current legal position wife cant initiate a proceeding against her husband for marital rape. Or under section 376 as the marriage gives irrevokable consent to her husband to have sex with her at any period of time and anytime he demands it.

The Bench, strongly stressed that marital rape is not merely a concept and stated that, “It is time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”

3. Article 21 of the Indian Constitution reads as :

“ 21. Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law ”

The language of article 21 is negative. However, it confers to every person the fundamental right to life and personal liberty. It is the most fundamental of human rights and recognizes the sanctity of human life.

According to interpretation by SC rights enshrined includes the right to privacy, health, dignity, safe environment, safe living conditions among others.

In the ***State of Karnataka v. Krishnappa***,

SC held :

Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. Sc also held that non-consensual sexual intercourse amounts to physical and sexual violence.

In the ***Suchita Srivastava v. Chandigarh Administration***,

SC equated the right to make choices related to sexual activity with the right to life, privacy, dignity, and personal liberty in article 21 of the constitution.

In ***Justice K.S. Puttuswamy (Retd.) v. Union of India***,

SC recognized the ‘ right to privacy’ as a fundamental right of all citizens.

The right to privacy 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”.

In ***T. Sareetha v. T. Venkata Subbaiah***⁴⁶

It was the first case to strike down the constitutionality of Restitution of Conjugal rights given in the Hindu marriage act. The argument in court was that section 9 of the Hindu marriage act violated articles 14, 19, and 21 of the Constitution.

⁴⁶ T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356.

The Andhra Pradesh HC held:

Restitution of conjugal rights is unconstitutional since it transferred the right of choice to indulge in sexual intercourse from the woman to the State. This would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual.⁴⁷ Moreover, the Court accepted that women would be hurt by this provision and notes the importance of sexual autonomy for a woman.⁴⁸ Court agrees that “no positive act of sex can be forced upon the unwilling persons because nothing can conceivably be more degrading to human dignity and monstrous to the human spirit than to subject a person by the long arm of the law to a positive sex Act”.⁴⁹

Court observed that even within the realm of marriage, concept of forced sex can exist. However, the Court held that the concept of RCR is not in tandem with the concept of the ‘marital sphere’.⁵⁰

In all the above judgments SC recognized the right to abstain from any sexual activity for all the women, irrespective of her marital status as a right to privacy under fundamental rights conferred by Article 21 of the Constitution.

Forced sexual cohabitation is a violation of fundamental rights under Article 21 of the Constitution.

In 2013, the *UN Committee on Elimination of Discrimination Against Women (CEDAW)* recommended Indian government to criminalize marital rape.

The *JS Verma committee* was set up after the nationwide protests which occurred over the December 16, 2012 gang rape case also suggested:

By criminalizing marital rape women would be safer from their abusive husbands, can save themselves from sexual abuse and domestic violence, and can receive the help needed to recover from marital rape.

V. SUGGESTED REFORMS

1.They need to seek help from a variety of sources including social service agencies and law which appears to be the most effective remedy for ending marital rape.

2.Government should start certain educational drives for educating people about their rights.

⁴⁷ Id., 31-32.

⁴⁸ Id.

⁴⁹ Id., 18.

⁵⁰ Id., 38.

3. Cognitive processing therapy and Stress inoculation therapy are the other alternatives for the victims of marital rape.
4. Setting examples for children. Teaching them with actions that violent and abusive actions aren't the solution.
5. Expressing strong support for the marital rape victims.
6. Expressing the strong support for new legislation to combat sexual and domestic violence.
7. Supporting educational and prevention programs on national, state, and local levels.
8. The need for strong enforcement for the criminalization of Marital rape.
9. Hotlines and emergency numbers must be there for immediate help and support of victims.
10. Legal Aid services offer low-cost or free legal information.
11. Support groups are helpful for providing insights and they can help victims to open up with other people dealing with sexual abuse.
12. Government must recognize the dire need to criminalize the offense.

VI. CONCLUSION

It is crucial to recognize the non-Criminalization of marital rape defeats the purpose of constitutional provisions that grant women equality, liberty, and privacy. In India today, wife and husband are separate legal entities and have independent identities.

It is about time the legislature intervenes and takes cognizance and criminalizes marital rape and eliminate the exception of section 375 of IPC. This exception fails the equality test provided in Article 14.

It has been established in this paper how the arguments against marital rape are not only biased but are direct humiliation to the victims. It has been noted in this paper, how Indian society is unreceptive of this change. Suggested reforms have also been mentioned in this paper which can be followed and justice can be brought to marital rape.

VII. BIBLIOGRAPHY

1. Websites: www.scconline.com
2. Acts:
 - (i) IPC, 1860
 - (ii) Constitution of India
3. UN Women, 2011-2012 Progress of the World's Women, 17, (2011)
4. Rebecca M. Ryan, The Sex Right: A Legal History of Marital Rape Exemption, 20 LAW AND SOCIAL ENQUIRY, 944(1995)
5. To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) HARVARD LAW REVIEW, 1256 (1986)
6. The Criminal Laws (Amendment) Bill, 2013
7. Press Release, PRESS INFORMATION BUREAU, April 29, 2015
8. RAJYA SABHA DEBATES, *Discussion on the Indian Penal Code (Amendment) Bill, 2015*, 53, Session Number
9. LOK SABHA DEBATES, *Question on Marital Rape, 2016*, Question No. 2872, March 15, 2016.
10. As per GOI Notification No. SO (3003), December 12, 2012
11. JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013).
12. STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, (December 2015).
13. Law Commission of India, Indian Penal Code, Report No. 42 (June 1971)
14. Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000)