A Study on Constitutional Validity of Marital Rape in India with Special Reference to Sec 375

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Abstract

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. Marital rape could be by the use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused. This research paper seeks to bring out the laws regarding rape in India while concentrating on the position of marital rape and its recognition as an offence by the system and the attitude of the society and the judiciary towards marital rape and to check the constitutional validity of Section 375 of IPC and to compare the legal scenario regarding Marital rape with other countries like USA and UK. Marital sexual violence including marital rape where permissible by law, amount to legal sanctioning to violence against women in one of the most intimate spaces of their lives.

Key Words: Sexual violence, criminalisation, chronic social problem, validity, force only rape and sadistic rape.
1. Introduction

Rape is the most heinous offence committed on a woman. It is worse than a murder. The victim dies thousand deaths, even when she is alive. Although it is not her fault, in every case of rape we have seen, without exception, the violated woman is discriminated against and made to feel as if it is she who were the criminal. Society looks upon the offenders with a kinder and more lenient eye. Every woman dies within when she is raped. Marital rape is a taboo subject rarely discussed. Yet it affects millions of women. Marital rape occurs irrespective of age, social standing, education, race or ethnic origin. Research shows that rape by husbands is as terrifying and degrading as rape by strangers (Das). Marital rape is seldom given the legitimacy or validity of other forms of sexual violence but it can be just as devastating (“The Dark Consequences of Marital Rape on JSTOR”). Marital rape occurs when one spouse has non consensual sexual intercourse with other or when the consent is extorted by threats or fear of bodily harm. The offence of marital is one of the most gruesome and barbarous crime perpetrated against women. Marital violence has been recognised globally as a grave public health concern with devastating consequences affecting the physical, reproductive, sexual and psychological health of women (Painter and Farrington).

India is one of the few countries in the world continues to exempt husbands from being charged with rape committed against their wives (Mandal). Even though many countries still permits husbands to rape their wives with little or no consequence, but there is a growing trend that the marital exemption is unjust and has no place in a civilised society. In India patriarchy family value is reflected in parliamentary Act and culturally create the space for sensitising men to current marital sexual crimes. Women still have a difficult time protecting their bodily integrity whether against marital is not a crime and police rarely enforce laws or against rape outside the home (Nussbaum). Violence against women including sexual violence has been a persistent and chronic social problem with India and such evil social practices should eradicated to improve the status of women (Kim).

The criminalisation of marital rape constitutes an historic opportunity to enact laws which effectively combat violence against women. Legal impunity for marital rape constitute state endorsed violence against women (Osborn et al.). During the 1980’s a handful of state judges in UK either held opined what must be incontrovertible to the feminist community. Spousal exemptions from rape prosecution persist in many US states criminal codes thereby compromising women’s right. The marital rape exemptions denies married women protection against violent crime solely on the basis of gender and marital status (Singleton). The basic aim of having any statute on marital rape is to strengthen the criminal justice system. There is an implicit requirement that the marital rape should be treated as rape (Osborn et al.). The main aim of the
study is to analyse the sexual violence against married women and to identity the constitutional validity of marital rape under sec 375 and to compare the status of marital rape in India with other countries

2. Hypothesis

Alternative Hypothesis

Marital rape in India should be punishable offence

Null Hypothesis

Marital rape in India should not be punishable offence.

3. Materials and Methods

This paper follows doctrinal type of research. The present study demands a analytical and descriptive type of research and secondary sources such as books, journals and articles.

4. Review of Literature

Rape is the most heinous offence committed on a woman. It is worse than a murder. The victim dies thousand deaths, even when she is alive (Debdatta Das, 2010). Marital rape is seldom given the legitimacy or validity of other forms of sexual violence but it can be just as devastating (B. Kiffe, 2016). Marital rape occurs when one spouse has non-consensual sexual intercourse with another or when the consent is extorted by threats or fear of bodily harm (Upasana Mahanta, 2016). The offence of marital is one of the most gruesome and barbarous crime perpetrated against women (Dipa Dube, 2016). Marital violence has been recognised globally as a grave public health concern with devastating consequences affecting the physical, reproductive, sexual and psychological health of women (Meghana Bhat, Sarah Ullman, 2013). India is one of the few countries in the world continues to exempt husbands from Even though many countries still permits husbands to rape their wives with little or no consequence, but there is a growing trend that the marital exemption is unjust and has no place in a civilised society (Vand J. Transnat, 2006) being charged with rape committed against their wives (Saptarshi Mandal, 2014).

Even though many countries still permits husbands to rape their wives with little or no consequence, but there is a growing trend that the marital exemption is unjust and has no place in a civilised society (Vand J. Transnat, 2006). In India patriarchy family value is reflected in parliamentary Act and culturally create the space for sensitising men to current marital sexual crimes (Huma Ahmed Ghosh, 2004). Was Women still have a difficult time protecting their bodily integrity whether against marital is not a crime and police rarely enforce laws or against rape outside the home (Martha C. Nussbaum, 2001) Violence against women including sexual violence has been a persistent and chronic social problem with India and such evil social practices should
eradicated to improve the status of women (Ashutosh Mishra, Simm Bronitt, 2014).

The criminalisation of marital rape constitutes an historic opportunity to enact laws which effectively combat violence against women. Legal impunity for marital rape constitutes state endorsed violence against women (Fiona Sampson, 2010). During the 1980’s a handful of state judges in UK either held opined what must be incontrovertible to the feminist community. Spousal exemptions from rape prosecution persist in many US states criminal codes thereby compromising women’s right (Aubrey L. Jackson, 2015). The marital rape exemptions denies married women protection against violent crime solely on the basis of gender and marital status (Robin west, 1990). The basic aim of having any statue on marital rape is to strengthen the criminal justice system, There is an implicit requirement that the marital rape should be treated as rape (Gunjan chowksy, Shantanu Srivastava, 2010). Another important factor for raping an unwilling pair-bonded mate may be a 'male tactic of sperm competition' which is a result of sexual jealousy of a man as a woman's sexual unreceptivity may suggest to him that she is having consensual intercourse with another man (Randy Thornhill and Craig T. Palmer, 2000). Most of the women are unemployed and dependent upon their husbands for their living and thus are unable to resist such a dreadful act. It is imperative to mention at this point that the long term effects of marital rape includes negative feelings toward men; low self-esteem; feeling of fear, anxiety, guilt, embarrassment and outrage; changes in behaviors, including an increase in drinking and a refusal to consider remarriage; and depression. (Vernon R. Wiehe, 1999).

5. Kinds of Marital Rape

Marital rape is generally sub-divided into three categories: those rapes which involve a degree of violence, those that use enough force to control the victim, known as 'force-only' rapes, and sadistic rapes.

**Violent rape** occurs, as the name suggests, when the abuser uses enough physical violence to cause injury to the victim, apart from any injuries due to the rape itself, i.e. injuries to the genital area or breasts. Examples would include the husband punching his wife or injuring her with a knife - the rape being part of a violent assault, or the violence being a part of the rape. Many abusers will also force their wives to submit to sexual acts after a physical assault, either to prove her forgiveness or to further intimidate and humiliate her - and if the wife should refuse such an act, even the threat of further violence (or a previous experience!) will soon ensure her compliance. Battering rapes in which the husband rapes and simultaneously batters his wife also comes within this ambit.

*'Force-only' rape' is usually understood to include only enough force used on the part of the abuser to control or hold his wife in position, e.g. holding down
the victim by her arms or wrists to prevent her defending herself or escaping. This form of rape is common where there is a larger contrast between the physical size and strength of abuser and victim, or in abusive relationships where physical violence is infrequent or non-existent (so far as one does not categories sexual assault itself as a violent act). In most cases of 'force-only' rape, coercion plays a large part. The victim may also be so confused and numbed by constant emotional abuse, that she simply does not know how to act or react when sex is forced on her.

**Sadistic rape** is sometimes also present. This tends to indicate that in addition to the rape itself, the victim is either forced to comply with or undergo deeds designed to further humiliate her. Examples of this would be the abuser/rapist urinating on the victim, acting out a fantasy of torturer, or using other object during a rape. Sadistic rape may or may not involve further violence. Some people consider buggery as a sadistic form of rape, since its effect on victim is often particularly humiliating. Pornography is frequently involved in this kind of rape. It is also known as Obsessive rape.

Finkelhor and Yllo Talk in their book 'Men Who Rape' have added apart from the aforesaid kinds of rape, two more types of the same. These are:

**Anger rapes**, which are committed primarily to express hostility to women, to retaliate against them and to hurt them. In this type of rape, the husband will degrade the victim/wife as much as possible. He may force her to commit other sexual acts which are particularly degrading, such as sodomy or fellatio, meaning bestiality.

**Power rapes** are committed to assert dominance and control over women. It is not really the intention of the husband to harm; he just wants to assert his control over her. The rape reflects a kind of sexual conquest, which in a normal healthy relationship is not necessary. But in this case, the husband needs it due to his own feelings of inadequacy. That is why, when a wife with passage of time become more assertive, indignant or rebellious, this kind of rape is more likely to happen.

### 6. Causes and Effects of Marital Rape

One of the basic causes of marital rape is that in a male dominant relationship many husbands use sexual violence as a way to maintain power. *(SAGE Books - Family Violence: Prevention and Treatment)*. Another important factor for raping an unwilling pair-bonded mate may be a 'male tactic of sperm competition' which is a result of sexual jealousy of a man as a woman's sexual unreceptivity may suggest to him that she is having consensual intercourse with another ("A Natural History of Rape"). Also abusive men with the history of alcohol or drug problems are apt to abuse their spouses sexually when drunk or sober. Further, Russell argues that economic factors are extremely important in
understanding why women keep living with men who rape them. Most of the women are unemployed and dependent upon their husbands for their living and thus are unable to resist such a dreadful act. It is imperative to mention at this point that the long term effects of marital rape includes negative feelings toward men; low self-esteem; feeling of fear, anxiety, guilt, embarrassment and outrage; changes in behaviors, including an increase in drinking and a refusal to consider remarriage; and depressions (“Understanding Family Violence”)

Women are at particularly high risk for being raped by their partners under the following circumstances:

Women married to domineering men who view them as "property"

Women who are in physically violent relationships

Women who are pregnant

Women who are ill or recovering from surgery

Women who are separated or divorced

Many factors contribute to the difficulty that many women have in recovering from marital rape. The issues are complicated. First is the fact that the rapist is a close acquaintance, and as in other forms of acquaintance rape, healing can be a very long and difficult process. The survivor may not recognize that she was sexually violated, and so may think that her feelings of fear, revulsion, depression or anger mean that she is crazy or somehow flawed. Because the perpetrator was at one time trusted and loved, the survivor is likely to deal with bitter feelings of betrayal and broken trust, and may feel she cannot trust herself to decide which people are safe and which are not. Feelings of grief and loss are common for victim/survivors of marital rape because the rape is a break in an important relationship. The survivor may still love her assailant, and may feel terribly torn and confused because of this. She may experience a great loss of self-esteem, and feel worthless because someone who "loved" her did something so horrible to her.

Lack of support from family and friends is also often a problem. Some other difficulties may arise for a woman if the assailant/husband is also the economic provider for the family, or the father of her children. For women in this situation, a decision to confront the perpetrator, report the crime or even try to escape would mean risking loss of income, loss of home and loss of children, not to mention the loss of a spouse. For some women, the ability to "keep a man" is important to feelings of self worth, and they may feel it necessary to put up with the violence. All these entanglements and more, along with the religious and social beliefs mentioned above, may function to keep women in marriages where they are raped. This sense of entanglement may cause a survivor to feel that she is, therefore, responsible for the abuse. In addition, survivors who see
no way of escape may deny or minimize the violence they live with in order to survive it.

7. Marital Rape Exemption in India

The redraft of Sections 375 and 376 E as recommended in the 42nd report provided for Explanation II which explicitly stated that, "a woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section." This becomes relevant because the redraft of the section provided by the commission stated that, "a man is said to commit rape who has sexual intercourse with a woman other than his wife..." Another very important recommendation made in this report was that sexual intercourse with a child wife should be made. However before we proceed to the other reports of the Law Commission, it is imperative to highlight some serious flaws in the reasoning of the 42nd Law Commission. The reasoning of the commission in making forced sex with judicially separated wife punishable seems to be based on the presumption that she is no longer the "wife" (de facto) and hence the husband has no right to forcibly enforce his conjugal rights. Such an approach shuts all doors for making rape within marriage punishable.

Coming to the 84th Law Commission's Report on Rape, (The Law Commission of India: 84th Report on Rape (New Delhi: the Union of India Press, 1980) they claim to be adopting a different and wider scheme as compared to the 42nd report. However, the researchers would beg to differ from this since there does not seem to be any wider scheme that has been proposed in this report. As regards marital rape they too suggest the same changes i.e. rape of child wife and rape of a judicially separated wife. The only substantially different thing they had proposed to make punishable any rape committed by a man on his wife, if she is below 18 years of age, although sadly this age condition of 18 years has not been incorporated in the IPC. It needs to be appreciated that the changes proposed in these reports were incorporated in the form of exception to S. 375 and S. 376A of the IPC.

Finally coming to the 172nd Law Commission's Report on Rape, The Law Commission of India: 172nd Report on the Review of Rape Laws (New Delhi: the Union of India Press, 2000) Report was prepared in response to the directions of the Supreme Court in 1998, where by they required to address issues that were raised in the case of Sakshi v. Union of India. In this case reference was also made to the famous English case of R v. R25 with respect to marital rape, to substantiate the argument that "criminals go unscathed due to mere technicalities of law."

Coming to the report, the Law Commission has recommended that the Exception to S. 375 should be retained in its form. As regards modification of S. 376A, the punishment, it was proposed, should be enhanced to being not less
than two years and may also extend to seven years with fine. This was done in accordance with the reasoning put forth in the case of Sakshi that(Miller). "When a man who causes hurt or any other physical injury to his own wife is liable to be punished for such offence like any other person causing such hurt or physical injury, why should a husband who sexually assaults his wife...be not punished like any other person." The Commission, while appreciating the force of these arguments, refused to delete S. 376-A on the pretext of "not ignoring" the fact that even in such a case the bond of marriage was unsevered. Therefore, they chose to enhance the punishment while retaining the section. Thus, this report just upholds the recommendations of the previous Commissions and fails to keep pace with the changing laws on rape. Furthermore, if we look at the Indian cases though there has been no reporting of cases of marital rape, it has been observed by a few courts that under various treaties and conventions, they are expected to criminalize marital rape. However, mentions of such declarations are mere "rhetoric" of the judiciary and are nothing but surplusage in a judgment which has no real value.(Yllo)

Having considered the inadequacies of the IPC and the half-hearted efforts of Law Commissions, the conclusion is inescapable that 'male' legislators are still not willing to shed their notion of marriage being the legitimation of all sexual intercourse with women(Anderson), for reasons of upholding patriarchy and denying sexual agency to women. Such backwardness of rape laws in India gets further enhanced, when seen in stark contrast to the rape laws in most other jurisdictions where marital rape has already been criminalised.

8. Validity of Marital Rape in Other Countries

USA

It should be noted, that cultural norms and the perceived social stigma attached to rape often discourage the reporting of marital rape, and prosecution is very rare in many countries. Until 1976, marital rape was legal in every state in the United States. Although marital rape is now-a crime in all 50 states in the U.S., some states still do not consider it as serious as other forms of rape(Brownmiller). The only states that have laws that make no distinction between marital rape and stranger rape are Colorado, Delaware, Florida, Georgia, Indiana, Massachusetts, Montana Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Texas, Utah, Vermont, Wisconsin and the District of Columbia. These states have no marital rape exemptions.

On July 5, 1993, marital rape became a crime in all 50 states, under at least one section of the sexual offence codes. In 20 states, the District of Columbia, and on federal lands there are no exemptions from rape prosecution granted to husbands. However, in 30 states, there are still some exemptions given to husbands from rape prosecution. In most of these 30 states, a husband is exempt
when he does not have to use force because his wife is most vulnerable (e.g., she is mentally or physically impaired, unconscious, asleep, etc.) and is unable to consent. Women who are raped by their husbands are likely to be raped many times—often 20 or more times. They experience not only vaginal rape, but also oral and anal rape. (Bergen)

UK

For the purposes of the Sexual Offences Act of 1956, the phrase "unlawful sexual intercourse" had been held to mean 'illicit intercourse' i.e. intercourse outside the bonds of marriage. With a history of the famous statement by Lord Mathew Hale, the Common Law rule was that a husband could not be convicted of raping his wife ("Recent Book: Smith and Hogan: Criminal Law: Cases and Materials. Butterworth. Hardback £12.00 Soft Cover £7.60").

This view of the law was so generally accepted that there was no prosecution of a husband for marital rape until 1949, when law took its first turn with the case of R v. Clarke. In this case, the husband was convicted for raping his wife as a result of forced intercourse with her while they were staying apart under a decree of judicial separation. This separation order was given on the grounds of persistent cruelty towards the wife and cohabitation had not been resumed when the alleged act took place. Justice Byrne reasoned that in such circumstances, the wife's consent to have sexual intercourse can be understood to be revoked. This case is extremely important by virtue of the fact that it changed the course of law and gave some agency to the wife. This case also left it open for interpretation as to whether consent can be said to have been revoked only when there is a decree of separation or also when the husband and wife are separated de facto. A similar situation, in fact, also surfaced in the later case of R v. Miller.

Though it has been noted that the symbolic importance of these developments is immense, there are still doubts about its practical significance due to the general factors weighing against the reporting and successful prosecution of rape cases. Besides, it is feared that courts would take a more lenient view of marital rapes. Changes in societal morality and behaviour cannot be achieved overnight but legal recognition of the offence of marital rape has definitely paved the way for this change.

9. For and Against Criminalization of Marital Rape

When such are the notions of men in the society it really is no wonder that people get startled by the idea of criminalising marital rape. Thus, the general arguments against the criminalisation of marital rape in different societies are as follows:
Criminalisation would destroy the sacrosanct institution of marriage and disturb the balance of conjugal rights and obligations in a marriage. Penalisation of rape within marriage would make the state "interventionist" and would be violative of the "right to privacy" understood to be granted under the Constitution. It would deny the husband the right to have sex with his wife and would lead to encouragement of the offence of adultery as the husband would need to satisfy his sexual needs outside the marriage. It would give an opportunity to the women to avenge their husbands by threatening to file a compliant of marital rape against them. The law would also have to rely upon the word of the wife, which complicates matters further since the wife could misuse the laws i.e. similar to the misuse of dowry laws and other rape laws.

Since the husband is no stranger to the wife, it will not have any devastating effect on her.

Now, the researchers would like to differ from this perception of the society as most of the above arguments for not criminalising marital rape seem ridiculous, and suffer from serious drawbacks. An analysis of the flaws is as follows:

Firstly, a marriage in which the wife has no say and the husband inflicts injuries on her is not worth being preserved and as a matter of fact recognising marital rape would only correct the imbalance that has been created by "men" in conjugal relations and thus, improve the wife's otherwise powerless situation. The second argument is very obviously an excuse for the simple reason that the state does not shy away from intervening in the bedrooms of homosexuals and in any case arguments like these should not be used to let the criminals go scot-free. Therefore, there is no reason why an exception should be made with respect to marital rape.

The next argument relating to the misuse of laws is definitely a genuine concern as there needs to be a mechanism to make the justice delivery system effective. But again the state should not be allowed to hide behind the excuse that marital laws will be misused. As a matter of fact any law can be misused and by the above logic we should have no laws at all.

Finally, we would like to submit that the last argument is also frivolous because it has been revealed in researches and studies that acquaintance rape is as devastating as stranger rape, if not more. Therefore, it is evident that all arguments against criminalisation are mere excuses and the underlying objective is basically to protect the hegemony of men. Furthermore, such an attitude also reflects on how our understanding of marriage is still rooted in archaic and patriarchal notions of subjugation of women.
10. Prevention of Marital Rape

Prevention of partner’s abuse must occur at each of these levels: Personal, Community and Society.

At the Personal level, eradication of sexual violence requires that men involve women as equal partners in relationship. Changes in the behavior of men can be brought only when Courts, State and other National Legislative bodies hold men responsible for their behavior and work towards empowerment of all individuals regardless of gender.

Preventive measures at the Community level could be achieved through education, which would highlight equality between the sexes and problem solving skills in resolving interpersonal disagreements which further requires financial support through private and public funds at the National, State and Community levels.

At the Societal level, prevention calls for an improvement of societal institutions and the mechanisms for carrying out basic societal functions that fail to provide equal treatment to all members of society regardless of gender. Further, it requires the development and implementation of strategies for creating socio-political change, which is a responsibility and task of all societal members.

11. Suggestion

Based on realizations and experiences while working on this issue, author would like to make the following suggestions:

Make the young generation conscious of such gruesome act so that they themselves develop hatred towards it. Women need to come out of the social taboos and develop a very pragmatic temper. It is high time that India should realise the need of criminalisation of marital rape. The present laws should be done away with, amended and required laws should be adopted. The machinery functioning to counter such acts should make it easy for a women to address her grievance and make available suitable relief. The judiciary should be trained and sensitised to treat women specially on such delicate issues with empathy rather than sympathy. The Women's Commissions and NGO's should be engaged in more acidic activities in making the Legislature realise the need of passing specific laws to combat marital rape.

Recommendations already made on this issue need to be implemented and the opinion of the international forum on this should be respected.

The society should provide a supportive shoulder to the victim of marital rape and act as a encouraging organ for the victim to build confidence and strength to face the world and fight for her right and dignity. Lastly, though this might
apparently sound to be vague, but in my opinion this too requires a mention. The term marital rape often conveys the idea that it is only the woman who is at the suffering end. In today's changing world which breathes of equality of sexes concepts should not be given a restricted meaning but should be assigned the widest possible explanation. Keeping this in view marital rape should also be so defined that the victim of rape involved in marital relationship can be of either sex. It may sound Utopia in rural set up but is not irrelevant in the changing urban scenario. However, it is beyond any doubt that in more than majority of the voters cases it is the woman who suffers, just as she is the "weaker sex" in the relationship.

12. Conclusion

Marital rape is indeed a serious crime and that women who have experienced this type of rape need better sources of help. Victims undergo a variety of emotional and behavioural reactions, some of them quite severe. It was also clear that rape by ones husband leads to even worse consequences than "only" being battered. In every comparison done, the raped and battered women demonstrated more extreme reactions than another battered women who had not been raped. However, it was also true that the raped women tended to have experienced the most extreme levels of violence (Shrivastava et al.). Marital rape meets the legal criteria for criminal sexual conduct but with two crucial differences. Previous studies have examined women’s responses to rape within an intimate relationship as well as physiological effects of rape ("The Dark Consequences of Marital Rape on JSTOR") In USA, Dr. Diana Russell found that a minimum of 14 percent of American women who have ever been married have been raped by a husband or ex-husband—one out of every seven married women. In this eye-opening work, Russell explores many disturbing questions raised by her findings. For example: Why is rape in marriage so often downplayed, even by the wife-victims themselves? Why is wife rape so prevalent, and to what extent is it caused by the traditional American family structure (Torres and Gabriela Torres). This lead to eye opener for many countries regarding marital laws.

Both pillars of humanity, men and women have equal importance and development. Among other problems marital rape is very crucial as it is not recognised, till date in our Indian legal system didn’t give appropriate attention to this issue (Pandey). The need of the hour is to salvage Section 498A of the Indian Penal Code from the shackles of adverse propaganda and “misuse” by the media, goaded on by men’s rights groups from the urban and privileged classes, and restore it as a viable law to protect victims of all types of domestic violence. The provisions of the civil law of Domestic Violence Act should be linked to the criminal provision which will help all affected women much more than the introduction of the charge of marital rape.
References


