**Title**

**Marital Rape and Divergent laws in India: A Review**

**Abstract**

In the era of introduction of GST, Indian legislators also need to look at some laws which are still popular for their orthodoxy nature as well as contradictory content. As per Indian laws, a girl who is below 18 years, is neither permitted to get married legally nor considered to be mature enough to give consent for sexual intercourse. However, a “wife” even below 18 years is not at all sheltered from being raped by her own husband. Although, The POCSO act protects every child less than 18 years from being sexually abused irrespective of marital status, but the act is under rated in terms of its recognition. Voidable status of child marriage indirectly favour the term “wife” (even if she is below 18 years) under IPC 375 but, as per the POCSO act consummation of child marriage (though indirectly) may be considered punishable for the husband. Newer version of S.375 IPC under the criminal law amendment act includes unnatural sex in its definition and also immunize husband from punishment under its exception while, S.377 IPC criminalize husband even if the unnatural sex is consensual. So, there are discrepancies in between Marriage acts and The POCSO act along with S.375 and S.377 of IPC. Now, it is high time for India to criminalize marital rape instead of considering it just a form of domestic violence under the Protection of Women from Domestic Violence Act.

**Key words:**

S.375 IPC, S.377 IPC, child marriage, marital rape, The POCSO act

**Running title**

**Marital Rape and Divergent laws in India**

**Introduction**

“Marital rape” the term itself is considered controversial by some scholars. But, the fact remains unchanged that marital rape is just underreported crime provided law of the land consider it to be the one. Existence of marital rape is an obvious veracity of civilization. Different countries have different laws across the globe in regard to marital rape. Unexpectedly very little consideration has been given to the issue of marital rape by researchers, counsellors and doctors.1 If one compares the number of articles on marital rape to the number of articles on various other forms of violence against women, the ratio remains unjustified.2 Few literature on marital rape as compared to a hefty amount of literature on stranger rape may advocate that former is viewed as a less serious crime.3 However, awareness regarding the necessity of criminalization of this concept is gradually rising. Statistics around the globe elaborates that women in particular relationship are usually the victims of the worst kind of physical abuse.4In India, where masculinity dominates over femininity, especially in the context of marital relationship, the issue of marital rape always remains under highlighted as compared to other forms of domestic violence which may be because of laws in India do not justify criminalization of marital rape. According to National family health survey-3, 10% of married women reported to be forced physically for sexual intercourse and 5% reported to be suffering from other undesirable sexual acts. This review basically focuses on divergent laws in India with special reference to age of a girl, legal status of marriage, related acts, Sections of IPC and their connections as well as conflicts with the criminalization of marital rape.

**Age, Marriage and Section 375 IPC**

Way back to 1891, Indian penal code was amended to revise the age of consent for sexual intercourse from 10 years to 12 years and the code defined rape as sexual intercourse with a married or unmarried girl even with her consent if the girl was below 12 years.5 The Age of consent act was applicable not only on unmarried girls but also on married girls without discrimination on grounds of marriage. The law did not interfere directly with institution of child marriage in India, but only with premature consummation of it.6 Since then there remains a great controversy with respect to age of consent for sexual intercourse. Later on the age limit for consensual sex was increased to 16 years under the second last version of section 375 IPC in its 6th clause.7 The same clause later amended again and under the criminal law amendment act the age increased for two more years and become 18 years.8 In the context of the change in same clauses under IPC 375, legislators might have in their mind that 16 years of age for a girl should be still regarded as immature to give consent for sexual intercourse which needed to be increased further.

Multiple acts are enforced to condemn and criminalize child marriages in India. Basically, all acts define certain boundaries in terms of age of bridegroom and bride, conditions for solemnization of marriages and other legal aspects in regards to marriage. “The Hindu Marriage Act, 1955” and “The Special Marriage Act, 1954” describe the age 21 years for male and 18 years for female to get married.9,10 Moreover, **“**The Child Marriage Restraint Act, 1929” which is an act to restrain the solemnisation of child marriages defines child is a person who, if a male, has not completed twenty one years of age, and if a female, has not completed eighteen years of age.11 But, as per “The Prohibition Of Child Marriage Act, 2006”, every child marriage, whether solemnised before or after the commencement of this Act, shall be “voidable” at the option of the contracting party who was a child at the time of the marriage.12 However, Voidable marriage, which is a marriage that can be annulled or avoided at the option of one or both the parties, is different from Void marriage, which is a marriage that is void *ab initio* or invalid from its very beginning. Nevertheless, void marriage is considered as unlawful and requires no formality to terminate.13,14

Now, Section 375 IPC narrates that a man is said to commit rape if he did multiple sexual acts as prescribed in the section with a girl who is under 18 years of age even with her consent. So, according to new Section 375 IPC a girl under 18 years of age cannot give valid consent for sexual intercourse. A girl under 18 years, even cannot marry a person legally under aforesaid acts. But, the same section 375 cannot be applied to a girl if she is a wife and a victim of rape by her own husband even if under 18 years of age. Furthermore, there is no any change in the criminal law amendment act in regards to age mentioned under the exception to IPC 375 which reads as follows:

*“Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape”*

Though the lower age of 15 years is defined, but usage of the word “wife” for a girl in between 15 to 18 years of age, is itself contrary to the aforesaid acts and that may be because of the fact that child marriage in India is voidable and not void ab initio.

**Section 377 IPC and Marital rape**

S.375 IPC in its amended version describes penetration by penis into mouth, urethra, vagina or anus of a woman to constitute the offence termed as “rape”. Under exception-2 of S.375 which reads as “sexual intercourse or **sexual acts** by a man with his own wife……..” nowhere defines “Sexual Acts” separately. Different interpretations can be derived from the words “Sexual acts”. However, S.377 IPC, which deals with unnatural sexual offences, reads as follows:

*“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. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”*

Now, this is also applicable on husband performing unnatural sexual acts irrespective of consent of his wife and can be prosecuted under the same. Apex court had pointed out following lines in regards to S.377 IPC.15

*"It is relevant to mention here that Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts, which if committed, would constitute an offence. Such prohibition regulates sexual conduct regardless of gender identity and orientation,"*

Although it can be said that the husband is immunized under S.375 IPC against charges of rape on his wife, but he is not immunized under S.377 IPC if found guilty of unnatural sex. There is conflict in between S.375 and S.377 IPC in regards to whether “sexual acts” under exception include natural as well as unnatural sex or not, because definition of “rape” includes both. So, under S.375 IPC the Husband is not guilty of any type of sexual acts even against the consent of wife while, under S.377 IPC he is guilty of unnatural sex even with the consent of his wife. Therefore, misuse of S.377 IPC cannot be ruled out as consensual acts are also punishable under it.

**Justice Verma committee on marital rape**

Justice Verma committee, a committee appointed to reform anti-rape laws after the incident of Delhi gang rape, had cited multiple examples in relation to the legal status of marital rape globally and clearly mentioned that the immunity given to husband in regards to marital rape had already been withdrawn in major jurisdictions. Moreover, the committee had also stated that the changes in attitudes of public, police and prosecutors towards the perception of marital rape should accompany with the legal prohibition. The committee had recommended that the exception of marital rape given under IPC S.375 should be removed and further suggested that the law should specify that not only marital status but also any other type of relationship between the perpetrator and the complainant should no longer remain a valid defence or a justifying factor for lower punishment.16

**Government approach on marital rape**

Originally, the central government had expressed urgency and brought down the new anti-rape law as an ordinance which was later replaced by a bill. During discussion on anti-rape bill in Lok sabha, one of the female Member of Parliament stated in favour of exclusion of marital rape from the ambit of rape-law with an argument that joint family system in India can sort out such incidences within family itself.17 Despite of the clear recommendations of Justice Verma committee, criminalization of marital rape was not able to find its place and exception to marital rape remains as such in amended S.375 IPC. Many noticeable movements in opposition to this ordinance were reported, but the central government was successful in passing the bill as if the bill was just an exercise to cool down the sentiments of public. Unexpectedly, strong opposition party also maintained strange silence at that time. Since then, The Criminal Law (Amendment) act, 2013 had been strongly criticized by multiple human rights and women's rights organizations as well as academic scholars for its inadequate reflection of the Justice Verma committee’s report. When asked by a member of parliament in regards to planning of government to criminalize marital rape, Minister of State for Home answered in the Rajya Sabha that the concept of marital rape, though considered and understood internationally, could not be suitably applied to India due to the factors related to education, poverty, religious beliefs and present mindset of society to treat marriage as sacred.18 Furthermore, Minister also cited the 172nd report on review of rape laws submitted by Law commission in 2000 which was against the deletion of exception under IPC 375 with an argument that “*deletion of the same may amount to excessive interference in marital relationship.”*19

United Nation’s Committee on the Rights of the Child under concluding observations on the combined third and fourth periodic reports of India, 2014 also had recommended to India that all forms of sexual abuse of girls under 18 years of age with inclusion of marital rape should be fully criminalized.20

**POCSO act and child marriage**

Many articles and blogs raises their voices to condemn the law of the land and ask for justification in regards to exception of marital rape under S.375 IPC with special reference to the age mentioned for the wife, if only below 15 years, to make the offence punishable by law. The Indian penal code has failed to justify the discrimination of a girl on the basis of her marital status and her age in regards to marital rape. But, how criticizers can ignore the provisions prescribed under The Protection of Children from Sexual Offences Act, 2012 under “aggravated penetrative sexual assault and punishment,” 21 which reads as follows:

*“(n) Whoever being a relative of the child through blood or adoption* ***or marriage*** *or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child”*

With the punishment that reads as follows:

*“Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”*

Moreover, chapter V, section 29 of The Criminal Law Amendment Act, 2013 under, “Amendments to The Protection Of Children From Sexual Offences Act, 2012” mentioned following inclusion and substitution of section 42 of the POCSO act which reads as follows:

*42.Alternate punishment: Where an act or omission constitutes an offence punishable under this Act and also undersection166A,354A,354B,354C,354D,370,370A,375,376,376A,376C,376D,376E or section 509 of the Indian Penal Code, then ,not withstanding anything contained in any law for the time being in force, the offender found quality of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment* ***which is greater in degree.***

*42A. Act not in derogation of any other law: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of* ***this Act shall have overriding effect*** *on the provisions of any such law to the extent of the inconsistency.*

Though the POCSO act does not cover child marriage specifically, but it automatically corrects the controversy of child marriage and marital rape as mentioned in aforesaid clauses. The girl, if married and if aged in between 15 to 18 years, who may not be protected under Indian Penal Code S.375, is very well protected under this act with justifiable punishment for the accused. The amendments in the act have further clarified the overriding status of this act in case there are discrepancies in the laws. An organization named “Bachpan Bachao Andolan”, had filed a writ petition before Apex court to clear the conflict between the IPC and the POCSO Act.22

**Case laws related to the POCSO act**

Nevertheless, an instance should be highlighted at this point which contradicts the provisions of the POCSO act. In a case of [State v. Suman Dass,](https://indiankanoon.org/doc/614296/)  The court acquitted a 22-year-old accused of charges of kidnapping and raping a 15 year old girl whom he later married.23 Additional sessions judge added,

*"I am afraid I am not impressed. The words "penetrative sexual assault" used in Section 3 of the POCSO Act goes to suggest that where physical relationship or sexual intercourse had taken place with consent of a girl child which is not derived by coercion or not in the nature of an assault or use of criminal force, or which is not resulting in exploitation, or where the consent is not obtained for unlawful purpose, no offence within the ambit of Section 3 of POCSO Act can be said to have been committed.."* He further added, *“I am afraid, if that interpretation is allowed, it would mean that the human body of every individual under 18 years of age is the property of State and no individual below 18 years of age can be allowed to have the pleasures associated with once body”*

The court observed that consensual sex with minor girl does not make an offence punishable under the POCSO act.24

However, in another case, the Allahabad high court had convicted the accused who was acquitted by an additional session judge on the ground of consent given by a minor girl for alleged kidnapping and sexual intercourse thereafter. The court added that her consent or willingness was meaningless as she was a minor at the time of the incident.25 Same way, the Punjab and Haryana high court had dismissed the plea filed by a man from Gurgaon district in opposition to his conviction for raping a minor girl and added that when the girl is below 16 years, the partner must be treated as a criminal and he couldn't plead that the act was consensual.26

**Civil remedy for marital rape**

Failure of government to give justice on marital rape cases, Indian courts have occasionally attempted to give some justice to the victims of marital rape by applying domestic violence laws or IPC s.498A whenever applicable. “The Protection of Women from Domestic Violence Act (PWDVA), 2005” is an act came into force to protect the rights of women guaranteed under the Constitution.27 According to this act under CHAPTER II, definition of domestic violence reads as follows:

*“harms or injures or endangers the health, safety, life, limb or wellbeing, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse,* ***sexual abuse,*** *verbal and emotional abuse and economic abuse”*

With following explanation to define sexual abuse

*“’Sexual abuse’ includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman”*

Under the purview of this act, magistrate, if find the case fit under PWDVA, can pass orders like protection orders, residence orders, monetary relief, custody orders, compensation orders for the applicant along with penalties prescribed for accused on breaching the orders .The punishment for breaching the orders can be imprisonment up to one year or fine up to 20,000/- or both. It is also to be noted here that Maintenance provisions prescribed under various personal laws may stand contrary to the provisions prescribed under PWDVA 2005.28

Fundamentally, the act can serve civil purpose only and cannot criminalise the accused of marital rape with justifiable punishment.. Though the act includes and defines sexual abuse separately, but fails to rationalize punishment for the same as it basically focuses on relief for the victims and not on the criminalization of the accused. Virtually the act serves equal punishment for economic or verbal abuse of wife similar to that of her sexual abuse. Moreover, overlapping reports of different authorities may create bias and confusion for the magistrate to pass various orders under PWDVA as the complaint and investigation may go parallel under S.498A IPC. No doubt, procedures under PWDVA may hasten the process to give “Civil” justice and relief to the victims of marital rape, permanent solution except divorce is still to be searched for.

As far as implementation of this act is concerned, it is the responsibility of the state to appoint protection officers to carry out duties as prescribed under PWDVA. Extreme disparity can be observed in numbers of Protection officers appointed, eg. Maharashtra has appointed 3730 Protection officers in comparison to Gujrat , Bihar, Tamilnadu and west Bengal where numbers of Protection officers appointed ranges between 20 to 40 only.29 This may hamper proper implementation of the act. Special attention must be given on proper implementation of already established law.

**Conclusion**

So, it is high time to make a separate act or to include marital rape within purview of existing laws with grave punishments. Marital rape must be considered as a heinous crime irrespective of the age of a girl and laws must be amended further with justifiable punishments. However, it is to be noted that in western countries where marital rape is already criminalized many of the cases are ended with divorce only even after successful prosecution of husbands by their wives.30 If the government is not in a hurry to expunge the exception under section 375, steps must be taken to raise the “age of wife” under the same at least to end the discrepancies in present laws. Moreover, utmost emphasis should be given to increase awareness about amended laws, especially among the care takers of the laws themselves, as recently in Ahmedabad, a deputy superintendent of police (DSP) who had investigated the case of rape of a minor girl was asked during cross examination in a local court about the POCSO act, he said that he did not know what was POCSO act and when this act was introduced...!31

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