

Criminalization of Marital Rape in India

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Abstract

The term marital rape or spousal rape means an act of sexual intercourse with one's spouse without the spouse's consent. The essential element of the marital rape is lack of consent of the spouse and need not involve violence. In other word marital rape is considered a form of domestic violence and sexual abuse. At present, only 52 countries have laws recognizing that marital rape is a crime. In many jurisdictions across the world, including India, marital rape is not recognized as a crime by law and society. Even when countries recognize rape as a crime and prescribe penalties for the same, they exempt the application of that law when a marital relationship exists between victim and perpetrator. This is often called the 'marital rape exception clause'. India should also make a marital rape as a crime and provide a justice to the married woman who is the victim of the marital rape.

Keywords: Marital rape, consent, recognize, sexual abuse, spouse

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INTRODUCTION

Marital rape refers to rape committed when the perpetrator is the victim's spouse. The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent of the spouse. The concept of the marital rape in India is to punish the person who is doing the heinous crime and under the Indian penal code they are punished with the death penalty. The problem of my research is that the marital rape violates the fundamental right article 21 that is right to life and also human rights of the woman. The Marital rape should be criminalized in India because in current time in the world there are 52 countries in the world which they criminalized the marital rape and many other countries on the process to criminalize the marital rape then in India also criminalized the marital rape. Research on Marital rape is a social legal research; it is fully based on doctrinal research. This research is based on secondary data. It has a limited scope within in India only.

TYPES OF MARITAL RAPE

These are the following three kinds of marital rape:

- **Battering rape:** In battering rapes when women experience both physical and sexual violence in the relationship and

they experience this violence in various ways. The majority of marital rape case victims fall under this category.

- **Force-only rape:** It is called force-only rape, when husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically occurring after the woman has refused sexual intercourse.
- **Obsessive rape:** Other women experience what has been labelled "sadistic" or "obsessive" rape; these assaults involve torture and "perverse" sexual acts and are often physically violent also [1].

SECTION 375 OF THE IPC DEFINES "RAPE" [2]

S.375. Rape means:

- Penetration of his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or compel her to do so with him
- inserts, to any extent, any object or any part of the body, not being the penis, into the vagina, the urethra or anus of a woman or compel her to do so with him
- manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus, mouth or any of body of such woman or compel her to do so with him

- applies his mouth to the vagina, anus or into urethra of a woman or makes her to do so with him or any other person,

Under these circumstances falling under any of the following seven descriptions:

1. In the against her will.
2. Without the consent of woman.
3. With her consent, when her consent has been obtained by coerce her or any person in whom she is interested, in fear of death or of hurt.
4. Obtain 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 believes her to be lawfully married.
5. When woman given a valid consent, 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 condition and consequences of that to which she gives consent.
6. with or without her consent, when she is minor (18 year)
7. When she is unable to communicate her consent.

Explanation I—In the purposes of this section, "vagina" shall also include labia majora [3].

Explanation 2—Consent includes 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 as a rape.

Exception 2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under the age of 15 year of, is not rape.

MARITAL RAPE AND LAWS IN INDIA

Marital rape is not an offense in India. Section 375, the provision of rape is given in the

Indian Penal Code, as its exception clause: Sexual intercourse by man with his own wife. And the age of the wife is not less than 15 years of age, is not rape.” As per section 376 of Indian Penal Code 1860, which provides punishment for rape, the rapist punished for a term which is not less than under 7 years but rather which may stretch out to life or for a term reaching out up to 10 years and should likewise be at risk to fine unless the Woman raped is his own particular spouse, and is not under the age of 12 years old, in which case, he might be rebuffed for a term which may reach out to 2 years with fine or with both.

Hence marital rape is seeming as a rape just if the spouse is under the fifteen years old, and the seriousness of punishment is milder. There is no lawful security agreed to the spouse after the age of fifteen, which is against human rights directions. Similar laws that accommodate the lawful period of agree for marriage to be 18, shields from sexual mishandle just those up to the age of 15. According to the Indian Penal Code, the cases wherein the spouse can be criminally arraigned for an offense of marital rape are as under: In the year of 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which considers marital rape as a type of local violence. Under this Act, a Woman can go to the court and get legal partition from her husband for marital rape. Marital rape is unreasonable: is a lady's body raped, as well as her affection and trust are damaged in this way throwing her it might be said of instability and dread. Her human rights are relinquished at the holy place of the marriage [4].

MARITAL RAPE OF WOMEN OVER THE AGE OF 18 YEARS

Even as the laws protecting the rights of girls under the age of 18 years stand harmonized by the judgment, the question of rights of adult married women against sexual abuse remains open.

The Law Commission of India in its 172nd Report includes the issue of marital rape, but chose to ignore the voices that demanded the deletion of Exception 2 to s. 375 of the Indian penal code on the ground that “it may lead to excessive interference with the marital

relationship between the couple” and may destroy the institution of marriage.

One of the foremost issues is that of the right to bodily integrity and reproductive rights. While referring to various precedents, the Court found that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as under Article 21 of the Constitution.

In fact, in the recent order, the High Court of Gujarat observed, Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. It is a non-consent act of violent perversion by a husband against the wife where she is abused physically and sexually [5].

HISTORY OF MARITAL RAPE

The origins of the concept of a marital rape exemption from rape laws (a rule that a husband cannot be charged with the rape of his wife) is the idea that after the marriage a woman gives irrevocable consent for her husband to have sex with her anytime, anywhere when he demands it. This view was described by Sir Matthew Hale (1609–1676) in *History of the Pleas of the Crown*, published after his death in the year of 1736, where he wrote that The husband can’t be prosecutor for committing a rape upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract. Also, American and English law not implement until the 20th century to the system of covertures, that is, a legal doctrine under which, upon marriage, a woman’s legal rights were subsumed by those of her husband.

The Marriage was traditionally understood as an institution where a husband had totally control over his wife’s life; control over her sexuality was only a part of the greater control that he had in all other areas related to her. A husband’s has totally control over his wife’s body could also be seen in the way adultery between a wife and another man was constructed; for example in 1707, English Lord Chief Justice John Holt defines the act of a man having physical relations with another man’s wife as “the highest invasion of property”.

In some cultures, marriage is arranged for the purpose for producing a child. Following this logic, if consent is not part of marriage, then it is not necessary for intercourse. The independency of the wife is also always compromised in cultures where bride price is paid [6].

RIGHT TO LIVE WITH HUMAN DIGNITY

In the *Francis Corallie Muin v. Union Territory of Delhi*, the idea of right to life under Article 21 of the Indian Constitution was highlighted. According to this case Article 21 incorporates the right to live with human dignity and all that accompanies it, to be specific, the minimum essentials of life, for example, sufficient food, medicine, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. The right to live with human dignity is a standout amongst the most fundamental component of the right to life which perceives the independence of a person [7].

RIGHT TO SEXUAL PRIVACY

Right to privacy is not defining in the Indian Constitution. Nevertheless, in a series of cases like *Kharak Singh v. State of U.P.* [8]; *Govind v. State of Madhya Pradesh*, *Neera Mathur v. LIC*, etc.; the Supreme Court has perceived that a right to privacy is intrinsically ensured under extent of Article 21. The Right to Privacy under Article 21 of the India constitution incorporates a right to be allowed to sit unbothered and not aggravated. Any type of grievous sex damages the right of protection, sexual security. It is presented that the teaching of marital exclusion to rape damages a wedded lady’s entitlement to protection by driving her to go into a sexual relationship without wanting to.

In the case of *State of Maharashtra v. Madhkar Narayan* [9] the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished. In the landmark case of *Vishakha v. State of Rajasthan* [10] the Supreme Court of India extended this right to privacy in working

place also. Further, along with a similar line we can translate that there exists a right of privacy to go into a sexual relationship even inside a marriage. Subsequently by illegalize rape inside a marriage, the marital exception teaching damages this right of privacy of a married woman and is consequently is illegal.

LEGAL POSITION IN OTHER COUNTRIES

In the United States of America researchers estimate that 10% to 14% of married women experience rape in marriage. When researchers of the marital rape examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes. Despite the prevalence of marital rape, this problem has received relatively more attention from social scientists, practitioners, the criminal justice system, and larger society as a whole and from different group of people.

In England, earlier as a general rule, a man could not have been prosecuted for the rape upon his wife, for the wife in general it is unable to retract the consent to physical relation, which is a part of the contract of marriage. However, the marital rape criminalize entirety in the year of 1991. The House of Lords held in the case of *R. v. R.* that the rule that a husband could not be prosecuted for raping his wife if he forced her to have sexual intercourse against her will and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied.. This judgment was also promoted by the European Court of Human Rights after the decision in the case of *SW v. UK* [11-15].

In New Zealand, the marital rape exemption was abolished in the year of 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be punished for sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.

POSITION IN INDIA

In India marital rape exists in fact but not de jure. While in other countries either the

legislature has illegalized marital rape or the judiciary has played an active role in recognizing marital rape as an offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty* [12]. In this case the Supreme Court of India said that rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life defines in the Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape illegal. Though there have been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse. Women who feel and wish to challenge sexual violence from their respective husbands are currently denied State protection as the Indian law in Section 375 of the Indian Penal Code, 1860 has a general marital rape exemption. The root of this exemption can be traced back to statements made by Sir Matthew Hale, C.J., in 17th century England. Hale wrote:

The husband got license to commit rape by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract.

This established the condition that once married, a woman does have the right to refuse sex with her husband. This allows husbands rights of sexual control over their wives in direct contravention of the principles of human rights and provides husbands with a "licence to rape" their wives [16-22].

LACUNAE IN INDIAN LAW

- The judiciary interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and "right to live with human dignity" 21 is within the ambit of this article. Marital rape no doubt clearly violates the right to live with dignity of a woman and to that effect, it is submitted, that the exception provided under Section 375 of the Indian Penal Code, 1860 is violate of Article 21 of the Constitution.
- Article 14 of the Indian Constitution guarantees the fundamental right that "the

State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 14 of the Indian constitution therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. It's submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution.

- A husband can't be punished for raping his wife because consent to matrimony presupposes consent to sexual intercourse. This implies that having sex anytime, anywhere or in any condition and of any sort is an implied term of the contract of marriage, and the wife could not breach that term of the contract.

SUGGESTIONS FOR REFORM

- Marital rape should be considered by Indian Parliament as an offence under the Indian Penal Code 1860.
- The punishment for marital rape should be the same as a similar to the rape under Section 376 of the Indian Penal Code.
- It should not be a defence to the charge that the wife did not fight back and protest forcefully or screamed and shouted or beat.
- It is depending on the wife should have an option of getting a decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under "cruelty" or "rape" as a ground of divorce, it is advisable to have the legal position clarified.
- In last the demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue [23-27].

CONCLUSION AND SUGGESTIONS

In India the Marital Rape should be criminalized. There is need of Criminalization of the marital rape in India also. Legalizing of the Marital Rape will not help to removing the inequality between genders. There is need to provide equal right to woman also in term of the sexual autonomy. And protect the human

right of the woman in term of the sexual right also. Let them decide to whether they want to make a physical relation or not it is not husband autonomy to control their wife life and violate their human right.

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REFERENCES

1. Saurabh Mishra, Sarvesh Singh. Marital Rape—Myth, Reality and Need for Criminalization, Available from <https://www.ebc-india.com/lawyer/articles/645.htm>, Accessed on 18-02-2019
2. Indian Penal Code. 1860, Available from www.advocatekhaj.com/library/bareacts/indianpenalcode/375.php?Title=Indian%20Penal%20Code,%201860&STitle=Rape, Accessed on 17-02-2019
3. Supra
4. Sangamithra Loganathan. Marital Rape, Available from <http://www.legalservicesindia.com/article/2369/Marital-Rape.html>, Accessed on 17-02-2019
5. Bar & Bench. The Viewpoint: The law on Criminalization of Marital Rape, Available from <https://barandbench.com/viewpoint-criminalisation-marital-rape/>, Accessed on 17-02-2019
6. Sangamithra Loganathan, Marital Rape, Available from <http://www.legalservicesindia.com/article/2369/Marital-Rape.html>, Accessed on 17-02-2019
7. Supra

8. 1963 AIR 1295, 1964 SCR (1) 332
9. AIR 1991 SC 207
10. (Air 1997 Sc 3011)
11. Saurabh Mishra, Sarvesh Singh. Marital Rape — Myth, Reality and Need for Criminalization, Available from <https://www.ebc-india.com/lawyer/articles/645.htm>, Accessed on 18-02-2019
12. 1996 AIR 922, 1996 SCC (1) 490
13. Saurabh Mishra, Sarvesh Singh. Marital Rape — Myth, Reality and Need for Criminalization, Available from <https://www.ebc-india.com/lawyer/articles/645.htm>, Accessed on 18-02-2019
14. Saurabh Mishra, Sarvesh Singh. Marital Rape — Myth, Reality and Need for Criminalization, Available from <https://www.ebc-india.com/lawyer/articles/645.htm>, Accessed on 18-02-2019.
15. Shoibam Rockey Singh, January 19, 2018, Marital rape an offence under law, Available from <https://www.thehindu.com/news/cities/Delhi/marital-rape-an-offence-under-law/article22467416.ece>, Available from 17-02-2019.
16. Priyansh Verma. It Is About Time That Marital Rape Is Criminalised In India, Available from <https://www.youthkiawaaz.com/2018/07/why-marital-rape-should-be-criminalized-in-india> Accessed on 17-02-2019.
17. Surya Rajkumar. 25th February 2018, International Law, Right to Privacy and Marital Rape in India, Available on <http://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india/>, Accessed on 17-02-2019.
18. Priyanka Rath. Marital Rape and the Indian legal scenario, Available from http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html, Accessed on 17-02-2019.
19. Sumedha Choudhari. 28/oct/2018, Why Is Outlawing Marital Rape Still a Distant Dream in India? Available from <https://thewire.in/law/india-marital-rape-criminal-law>, Accessed on 17-02-2019.
20. Saurabh Mishra, Sarvesh Singh. Marital Rape — Myth, Reality and Need for Criminalization, Available from <https://www.ebc-india.com/lawyer/articles/645.htm>, Accessed on 17-02-2019.
21. Sutirtha Sahariah, December 1, 2017, Indian Courts Finally Consider Making Marital Rape Illegal, Available from <https://www.globalcitizen.org/en/content/marital-rape-india-criminal-offense/>, Accessed on 17-02-2019.
22. Aishwarya Mishra. 13 April 2018, India: Law on Marital Rape – A Much Needed Reform in Our Legal System, Available from <http://www.mondaq.com/india/x/691482/Crime/Law+On+Marital+Rape+A+Much+Needed+Reform+In+Our+Legal+System>, Accessed on 17-02-2017.
23. Bar & Bench. The Viewpoint: The law on Criminalisation of Marital Rape, Available from <https://barandbench.com/viewpoint-criminalisation-marital-rape/>, Accessed on 17-02-2019
24. Shikha chhibbar, Torkel Opsahl Academic EPublisher, 2016, sexual Violence in Private Space: Marital Rape in India.
25. Srimati Basu. 03-Jan-2015, Univ of California Press, The Trouble with Marriage: Feminists Confront Law and Violence in India.
26. Geetanjali Gangoli. 23-May-2016, Routledge, Indian Feminisms: Law, Patriarchies and Violence in India.
27. Malavika Rajkotia. 15-Feb-2017, Speaking Tiger Publishing, Intimacy Undone: Marriage, Divorce and Family Law in India.

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