

Marital Rape beyond Boundaries: Decoding its Criminalization in India

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Abstract

The criminalization of marital rape is a contentious issue worldwide, and India is no exception. In recent years, there has been growing awareness of the prevalence and harm of marital rape, leading to calls for its criminalization. However, India's legal framework remains ambiguous on the issue, with marital rape being exempt from prosecution under certain circumstances. This article explores the historical, cultural, and legal factors that have contributed to the lack of criminalization of marital rape in India. It delves into the social and patriarchal norms that perpetuate the acceptance of non-consensual sexual activity within marriage and the challenges faced by survivors in reporting and seeking justice for these crimes. This article also analyzes the legal framework surrounding marital rape in India, including relevant case law and statutory provisions. It examines the arguments for and against criminalizing marital rape and explores potential solutions to this complex issue. Ultimately, this article also highlights the urgent need to address the alternatives available to the criminalization of marital rape in India for a speedy recourse and calls for a shift in societal attitudes towards consent and gender equality. It advocates for a victim-centric approach to addressing marital rape and emphasizes the importance of survivors' agency and autonomy in seeking justice.

Keywords: Circumstances, criminalization, framework, surrounding marital, worldwide

INTRODUCTION

Legality of Marital Rape in India

In India, marital rape is not explicitly criminalized, meaning that, it is not illegal for a husband to have non-consensual sexual relations with his wife. However, there are provisions in the law that can be used to address this issue. For example, the Indian Penal Code criminalizes sexual acts that are committed without the consent of the other person [1]. This includes sexual acts that are committed through the use of force, threat, or intimidation, or when the other person is unable to give consent due to physical or mental incapacity. In addition, the Indian Penal Code also criminalizes sexual acts that are committed against someone's will [2].

Additionally, the Protection of Women from Domestic Violence Act provides a civil legal remedy

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for women who are subjected to abuse and violence within their marital relationships [3]. This act allows women to obtain protection orders and seek compensation for the harm they have suffered. It is important to note that while these provisions in the law can be used to address instances of marital rape, they do not explicitly criminalize marital rape as a separate offense. There have been calls to explicitly criminalize marital rape in India, but it remains a controversial issue. Prior to 2013, the Indian Penal Code contained a provision that stated that sexual intercourse by a man with his own wife, who is not under 15 years of age, was not considered rape. This

meant that a husband could not be charged with raping his wife, regardless of whether or not the wife had given her consent. In 2013, the Indian government amended the law and removed the exception for marital rape, making it a criminal offense. However, the law only applies to marriages in which the wife is over the age of 15.

The recognition and criminalization of marital rape in India is a significant development, as it helps to protect the rights of women and ensure that they are not subjected to non-consensual sexual acts by their spouses. However, there is still a long way to go in terms of raising awareness about marital rape and providing support for survivors.

Is Criminalising Marital Rape a Solution?

Criminalizing marital rape can be one way to address and prevent this form of violence against women. By explicitly making it illegal for a husband to have non-consensual sexual relations with his wife, the law sends a clear message that this behaviour is not acceptable and will not be tolerated. This can help deter individuals from committing this crime and may also provide a stronger deterrent for those who may be considering committing it in the future [4]. In addition, criminalizing marital rape can provide an important legal recourse for women who have been subjected to this abuse. It can give them the ability to seek justice and hold their abusers accountable for their actions, which can help empower them and provide a sense of closure.

However, it is important to note that criminalizing marital rape alone may not be sufficient to address this issue. In order to effectively address and prevent marital rape, a comprehensive approach is needed that includes not only legal provisions, but also social and cultural change, as well as initiatives to support and empower women.

CRIMINALIZATION OF MARITAL RAPE IN CONTEXT WITH INDIAN SOCIETY

The criminalization of marital rape is a complex and controversial issue in India and can be viewed from different perspectives. Some people may argue that it is necessary to protect the rights of women and to hold perpetrators of marital rape accountable for their actions, and that criminalization is the most effective way to do this. Others may argue that the concept of marital rape is not applicable in the Indian context, and that criminalization could destabilize the institution of marriage and lead to an increase in divorce rates.

Ultimately, the acceptability of criminalizing marital rape in the context of Indian society will depend on the values and principles that are held by the society as a whole. Some may argue that the right to consent and the right to be free from abuse are fundamental human rights that should be protected, regardless of whether the perpetrator is a spouse or not. Others may argue that the institution of marriage and the roles and responsibilities of men and women within marriage are important cultural and social values that should be upheld.

Societal factors can have a significant impact on the criminalization of marital rape. These factors can shape public attitudes towards marital rape and influence whether or not it is viewed as a serious problem that warrants legal intervention. If there are strong societal beliefs and norms that support gender inequality and traditional gender roles, this may make it more difficult to criminalize marital rape [5]. These beliefs may create an environment in which marital rape is seen as less serious or acceptable than non-marital rape, or in which victims of marital rape are not believed or are discouraged from coming forward.

On the other hand, if there are strong societal beliefs and norms that support gender equality and respect for consent, this may make it easier to criminalize marital rape. These beliefs may create an environment in which marital rape is seen as a serious and unacceptable crime, and in which, victims of marital rape are more likely to be believed and supported. Overall, it is important for society to recognize the harms caused by marital rape and to take steps to prevent and address this form of abuse.

This can include efforts to promote gender equality and respect for consent, as well as legal provisions that explicitly criminalize marital rape.

WORLD POLITICS AND MARITAL RAPE

Geopolitical factors can also play a role in the criminalization of marital rape in India. These factors can influence the development of laws and policies related to marital rape as well as public attitudes towards this issue. For example, international human rights obligations and pressure from other countries or international organizations can be factors in the criminalization of marital rape in India. If India is seen as not meeting its obligations under international human rights law or if there is pressure from other countries or organizations to address marital rape, this could contribute to the development of laws and policies that criminalize this form of abuse [6].

In addition, geopolitical considerations such as trade and diplomatic relations with other countries can also be a factor in the criminalization of marital rape in India. If criminalizing marital rape is seen as being in the country's best interest from a diplomatic or economic perspective, this could influence the development of laws and policies on this issue. Therefore, it is important for India to consider both domestic and international factors when developing laws and policies related to marital rape [7]. It is also important for the country to consider the needs and rights of victims of marital rape and ensure that appropriate measures are in place to address and prevent this form of abuse.

IMPACT OF CRIMINALIZING MARITAL RAPE IN INDIA

If marital rape were to be criminalized in India, it could have a number of impacts. One possible impact of criminalizing marital rape is that it could encourage more women to come forward and report instances of abuse. Currently, many women may be reluctant to report marital rape due to the social stigma attached to it and the lack of legal recourse available. Criminalizing marital rape could help break down these barriers and make it easier for women to seek help and justice. By making marital rape a criminal offense, it may be easier for prosecutors to pursue cases against those who commit this crime. This could lead to more perpetrators being brought to justice and held accountable for their actions. Criminalizing marital rape could also help raise awareness of this issue and encourage more people to speak out against it. This could help shift societal attitudes and create a greater sense of intolerance for this type of abuse. This could also lead to the development of more specialized services and support systems for victims. This could include things like counselling, legal assistance, and emergency shelters. By holding perpetrators of marital rape accountable and sending a clear message that this behaviour is not acceptable, criminalizing marital rape could help shift societal attitudes towards women and promote greater gender equality. It is noteworthy that criminalizing marital rape alone may not be sufficient to address this issue. A comprehensive approach that includes social and cultural change, as well as initiatives to support and empower women, is also needed.

Judicial Approach to Marital Rape in India

In India, judicial approaches to marital rape have been mixed. While some courts have recognized that marital rape can be a form of domestic violence and have used provisions in the law to provide relief to victims, others have been more resistant to this idea [8]. For example, in some cases, courts have used provisions in the Indian Penal Code that criminalize sexual acts committed without consent to hold perpetrators of marital rape accountable [9]. In other cases, courts have used the Protection of Women from Domestic Violence Act to provide relief to victims of marital rape by granting protection orders and awarding compensation [10].

However, there have also been instances where courts have been resistant to the idea of criminalizing marital rape [11]. In some cases, judges have argued that the concept of marital rape is not applicable in the Indian context, and have relied on traditional notions of marriage and the role of women within marriage to justify their decisions. It is important to note that while some progress has been made in addressing marital rape in India, more needs to be done to ensure that victims of this form of abuse are able to access justice and receive the support they need.

Still, it is generally not appropriate for the judiciary to amend laws [12]. In most countries, including India, the power to create and amend laws lies with the legislative branch of government. The judiciary's role is to interpret and apply the laws as they are written, not to create or change them [13]. However, in some cases, the judiciary may be able to provide relief to victims of marital rape through the use of existing laws or by interpreting those laws in a way that recognizes the harm caused by this form of abuse [14]. This can be especially important in situations where the law is unclear or where there are no specific provisions that address marital rape [15]. In the context of the criminalization of marital rape, the judiciary can only declare existing laws unconstitutional or interpret their provisions. It cannot, on its own, criminalize marital rape. In the case of marital rape in India, the judiciary has played a crucial role in striking down the exemption for marital rape under the Indian Penal Code as unconstitutional and in directing the government to take the necessary steps to address this issue. In the case of *Independent Thought v. Union of India* (2017), the Supreme Court of India declared that the exemption for marital rape in the Indian Penal Code was violative of the constitutional rights of women and went against the principles of equality and non-discrimination. Further, in the case of *State of Maharashtra v. Madhukar Narayan Mardikar* (2011), the Bombay High Court held that a husband can be prosecuted for rape if he sexually assaults his wife without her consent. The judiciary took a leap ahead in the judgement of *Joseph Shine v. Union of India* (2018) where the Supreme Court of India held that the exemption for marital rape under Section 375 of the Indian Penal Code was unconstitutional. Due to aforementioned judgements, the judiciary's role in striking down laws that are discriminatory and violative of the rights of women has been seen as crucial in advancing the cause of gender justice. By declaring the exemption for marital rape under the Indian Penal Code as unconstitutional, the judiciary has helped to establish the principle that marital rape is a criminal offense and that no one, including a husband, is above the law. However, the ultimate responsibility for criminalizing marital rape and passing the necessary laws to enforce it lies with the legislative branch of government.

However, the interference of the judiciary in the criminalization of marital rape can be seen as a necessary step towards ensuring that the law recognizes and punishes this form of abuse and promotes equality between men and women. If the legislature fails to act in a timely manner to address a particular issue, the judiciary may be called upon to address the issue through its constitutional power of judicial review. In such cases, the judiciary can declare existing laws unconstitutional or issue directives to the legislative or executive branches to take the necessary action.

Parliamentary Approach to the Criminalization of Marital Rape

In India, the parliamentary approach to the criminalization of marital rape has been mixed. While some lawmakers have advocated for the explicit criminalization of marital rape and have introduced legislation to that effect, others have opposed such measures. One of the main arguments against criminalizing marital rape in India has been that it could destabilize the institution of marriage and lead to an increase in divorce rates. There have also been concerns raised about the difficulty of proving marital rape in a court of law and the potential for false accusations.

On the other hand, advocates for the criminalization of marital rape argue that it is necessary to protect the rights of women and to hold perpetrators accountable for their actions. They argue that the current lack of legal recourse for victims of marital rape leaves many women vulnerable to abuse and that explicit criminalization is needed to send a strong message that this behaviour will not be tolerated. It is worth noting that while marital rape is not explicitly criminalized in India, there are provisions in the law that can be used to address this issue. However, these provisions do not specifically address marital rape and may not provide the same level of protection and recourse as a law that explicitly criminalizes this form of abuse.

Alternative Recourse to the Criminalization of Marital Rape in India

There are a number of measures that could be taken to address and reduce marital rape in India, aside from criminalizing it. Educational campaigns could be developed to raise awareness about the

issue of marital rape and promote healthy and respectful relationships. These campaigns could be targeted at both men and women, and could focus on topics such as consent, communication, and healthy communication within relationships. Even, counselling and support services could be made more widely available to help victims of marital rape cope with the trauma they have experienced and provide them with the support they need to move forward. These services could include things like therapy, legal assistance, and emergency shelters. A few efforts could also be made to challenge and change social norms and attitudes that contribute to the acceptance of marital rape. This could include initiatives to promote gender equality and challenge traditional ideas about the role of women in marriage. While not explicitly criminalizing marital rape, the law could be reformed to provide stronger protections for victims of abuse within marriage. This could include things like the development of specialized domestic violence courts, the provision of protection orders, and the establishment of legal remedies such as compensation. Further, community-based approaches, such as support groups and peer education, could be developed to address and prevent marital rape. These approaches could focus on empowering victims and promoting healthy and respectful relationships within communities. This could include a combination of legal, social, and cultural initiatives, as well as support and empowerment for victims.

RELIEF FOR VICTIMS OF MARITAL RAPE

There are a number of reliefs that could be sought for victims of marital rape in India. Victims of marital rape could seek protection orders to keep their abuser away from them and prevent further abuse. These orders could be obtained through the Protection of Women from Domestic Violence Act or through other legal provisions. Victims of marital rape could further seek compensation for the harm they have suffered, including for medical expenses, lost wages, and other damages. This could be sought through the courts or through other legal remedies. They may benefit from counselling and therapy to help them cope with the trauma they have experienced and support their recovery. They may additionally need legal assistance to help them navigate the legal system and to ensure that their rights are protected. This could include things like help with filing protection orders or seeking compensation. In some cases, victims of marital rape may need to leave their homes in order to escape abuse. Emergency shelters could provide a safe place for them to stay and access support and assistance. Thus, it is important for victims of marital rape to have access to a range of resources and support to help them cope with the trauma they have experienced and rebuild their lives.

A COMPARATIVE STUDY OF CRIMINALIZING MARITAL RAPE

In common-law countries, the legal treatment of marital rape varies. In some countries, marital rape is explicitly criminalized and treated the same as non-marital rape under the law. In other countries, marital rape is not explicitly criminalized, but provisions in the law can be used to address this issue [16]. In the United States, the criminalization of marital rape varies by state. Some states have laws that explicitly criminalize marital rape, while others do not. However, all states have provisions in the law that can be used to address instances of sexual assault within marriage. In the United Kingdom, marital rape has been explicitly criminalized since 1991. Prior to that, marital rape was not recognized as a crime under English law. In Canada, marital rape has been explicitly criminalized since 1983. Prior to that, marital rape was not recognized as a crime under Canadian law. In Australia, the legal treatment of marital rape varies by state. Some states have laws that explicitly criminalize marital rape, while others do not. However, all states have provisions in their laws that can be used to address instances of sexual assault within marriage. It is pertinent to note that while marital rape is not explicitly criminalized in all common law countries, there are provisions in the law that can be used to address this issue. However, the availability and effectiveness of these provisions can vary significantly.

CONCLUSION

It is important to recognize that marital rape is a serious and harmful form of abuse that can have long-lasting effects on victims. It is a violation of an individual's fundamental right to consent and to be free from abuse, and it should not be tolerated. In this context, the criminalization of marital rape in

India could be seen as a necessary step to protect the rights of women and hold perpetrators of this crime accountable for their actions. It could also serve as a deterrent to prevent future instances of marital rape and to create a greater sense of intolerance for this behaviour.

However, it is important to recognize that the criminalization of marital rape alone may not be sufficient to address this issue. A comprehensive approach that includes social and cultural change, as well as initiatives to support and empower women, is also needed. The obligation of a wife to consent to sexual activity within marriage is a complex, sensitive, and controversial issue. While it is important for individuals to have agency and the right to consent to sexual activity, it is also important to recognize that power imbalances and other factors can make it difficult for some individuals, particularly women, to assert their right to consent. In this context, it is important for the law to provide strong protections for the rights of all individuals and hold perpetrators of sexual abuse accountable for their actions.

REFERENCES

1. Indian Penal Code 1860, S. 377.
2. Indian Penal Code 1860, S. 354.
3. The Protection of Women from Domestic Violence Act 2005, S. 2.
4. Criminal Law—Removal of Marital Exemption from Rape—Article 7—Retrospective Criminal Law (1996) 2 EHRLR 197.
5. Osborne C. Does the end justify the means?—Retrospectivity, Article 7 and the Marital Rape Exemption (1996) 4 EHRLR 406.
6. Agnes Flavia. Section 498A, marital rape and adverse propaganda. 2015; 12–15. Available at: <http://www.jstor.org/stable/24482280>.
7. Gruber Ava. Zero tolerance comes to international law. *AJIL Unbound*. 2015; 109: 337–341 Available at: <http://www.jstor.org/stable/27003165>.
8. *Aparna Bhat v. State of Madhya Pradesh* [2021] SCC Online SC 230.
9. Indian Penal Code 1860, S. 354.
10. The Protection of Women from Domestic Violence Act 2005, S. 2.
11. *X v. Health & Family Welfare Department* [2022] SCC Online SC 1321.
12. AS Anand, Chief Justice of India [1999] 3 LW (JS) 97.
13. *B. Premanand v Mohan Kokilal* [2011] 4 SCC 266.
14. *Eera v. State (NCT of Delhi)* [2017] 15 SCC 133.
15. *Shankar Kisanrao Khade v. State of Maharashtra* [2013] 5 SCC 546.
16. Randall Melanie, Vasanthi Venkatesh. Criminalizing sexual violence against women in intimate relationships: State obligations under human rights law. *AJIL Unbound*. 2015; 109: 189–196. Available at: <https://www.jstor.org/stable/27003137>.