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FROM INTIMACY TO INJUSTICE: CONSENT AND MARITAL RAPE THROUGH INDIAN LEGISLATIVE LENS

- Sakshi Verma ¹

ABSTRACT

This article seeks to investigate the practice of Marital Rape in India. It starts with the basic definition of rape, how it is different from martial rape, how the latter exists as an exception to the former's punishment. It states the legislative position of rape and the loophole, with respect to application of Mischief Rule from interpretation of statutes point of view, to marital rape. It is affirmed by various judicial pronouncements. Moreover, the origin of marital rape from a global perspective, thereby international comparison is also stated. This is followed by how criminalization of marital rape poses various challenges for adaptation of laws on the same. Lastly, after a thorough analysis, recommendations, and suggestions to have a balanced legal approach are also sought, to solve the challenges or problems, in this context.

Keywords- Marital rape, rape, consent, challenges, criminalization

INTRODUCTION ON RAPE AND MARITAL RAPE

'It would be tragic if a married woman's call for justice is not heard even after 162 years (now 164 years), since the enactment of IPC².'

- Justice Rajiv Shakdher

The word rape, in its simplest, plain, and literal meaning means the crime of forcing or compelling someone to have sex with them without their consent. This is not only an offence from a legal or societal point of view, but also one of the most heinous crimes from humanity point of view. The Legislature and Judiciary have collectively made and interpreted laws and judicial pronouncements respectively, to create a space where such an offence should not occur. But it is almost disheartening to notice the existence of marital rape, in the 21st century. To understand the gravity of this article,

¹ 4th-year Student, B.A. LL.B. (Hons.), Christ University.

² Abhinav Garg, 'Delhi HC delivers split verdict on marital rape' The Times of India < <https://timesofindia.indiatimes.com/city/delhi/split-wide-open-on-colonial-era-provision/articleshow/91501545.cms> > accessed on 28th April 2024

it is important to have an established meaning of marital rape, as it is not even defined in The Indian Penal Code, 1860. Its existence is also clearly denied! Marriage in India is considered to be a sacred bond between two individuals. It symbolizes trust, companionship, and mutual respect. However, within this institution, instances of sexual violence, particularly marital rape challenge the notion of consent and autonomy. Marital rape refers to sexual intercourse or any sexual acts perpetrated by one spouse against the other, without consent. Marriage cannot be used as a reason or ground of defence to rape the wife. Despite being recognized as an act of violence against women globally, this concept largely remains unaddressed in many legal systems, including India.

HISTORICAL CONTEXT AND INTERNATIONAL COMPARISON

The English judge and lawyer, Sir Matthew Hale stated, in 1736, in his leading treatise: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”³ So, it can be derived that the British had brought this concept to India. It was believed that when a woman gets married to a man, she becomes his lawful wife, thereby giving him implied consent to every kind of sexual violence subjected to her. Marriage becomes a ground for binding her to give implied consent for sexual intercourse every and any time, till she is his wife. With this view, it can be said that a wife becomes the property of her husband⁴. Soon in 1860, The Indian Penal Code was introduced, which continued the same thought. In fact, it did not even criminalize sexual intercourse by a man of her wife below the age of 15 years⁵. This continued for many years until the amendments brought in the rape laws by many judicial pronouncements.

On an International platform, Article 1 of CEDAW defines ‘Discrimination on women’ as ‘any distinction made based on sex which has the effect of impairing the exercise by women, irrespective of their marital status of human rights and fundamental freedoms in the social, cultural, civil or any other field’⁶. Poland established the earliest explicit criminalization of marital rape in 1932. Following the second wave of feminism, Australia became the first common law nation to

³ Sir Matthew Hale, *The History of The Pleas of The Crown* (1st ed, E and R Nutt and R Gosling 1736) 629; The Justice Verma Committee Report (n 25) 113 [72]; P K Chaturvedi, ‘A Legal History of Marital Rape: The Erosion of Anachronism’ [2010] *Indian Journal of Law and Justice* 122, 122–23; Kim (n 5) 92; Patel (n 17) 1530.

⁴ The Justice Verma Committee Report (n 25) 113 [72]

⁵ Penal Code 1860 (IPC 1860), s 375 exception 2

⁶ Convention on the Elimination of all forms of Discrimination against Women, Art.1

enact reforms against marital rape in 1976. Subsequently, various common law countries, such as South Africa, Ireland, Israel, and Ghana, have followed suit since the 1980s. New York's Court of Appeal invalidated marital immunity from the Code in 1984, leading to all 50 states of the United States criminalizing marital rape. Nepal joined in 2002, with its Supreme Court ruling that the marital rape exception violated constitutional rights to equal protection and privacy⁷.

LEGISLATIVE LOOPHOLES AND JUDICIAL PRONOUNCEMENTS

To recognize the Legislative loopholes, it is important to first understand the legal framework in and around rape, in India. Section 375 of the Indian Penal Code from 1860 deals with the offense of rape. This section includes a provision exempting married men from prosecution for raping their wives, provided the wife is above eighteen years old. While this exemption has undergone some amendments in the past, the changes primarily aimed to align the mentioned age with the legal age of consent in the country. However, none of these amendments have abolished this exemption. Nevertheless, it is important to note that marital rape still holds legal consequences in India. Within matrimonial law, forced sexual intercourse can be regarded as cruelty, serving as grounds for separation or divorce. Despite this, the punishment for marital rape differs significantly from that of rape under Section 376⁸, which carries a sentence of seven to ten years of imprisonment. In contrast, husbands who rape their wives are not penalized under Section 376⁹. Moreover, if a husband rapes his wife while living separately from her, the punishment is two to seven years of imprisonment.

This situation raises concerns regarding Article 14 of the Indian Constitution, which guarantees equality before the law and equal protection of the laws within the country's territory. However, Section 375 effectively discriminates against women who experience rape at the hands of their spouses. This issue has been highlighted by the Supreme Court in cases such as Budhan

⁷ Ayantika Bhattacharya, 'Marital Rape Laws: An International Overview'

⁸ Indian Penal Code, 1860 sec. 376

⁹ Ibid

Choudhary v. State of Bihar¹⁰ and State of West Bengal v. Anwar Ali Sarkar¹¹. Under Article 14¹², any categorizations must undergo a test of reasonableness, ensuring that the classification is reasonably connected to the objective the law intends to achieve. Exempting husbands from prosecution under Section 375 constitutes an unreasonable categorization, as the consequences of rape for a woman remain unchanged regardless of marital status. The experience of forced sexual intercourse is profoundly traumatic, whether perpetrated by a spouse or a stranger. Studies by RAINN reveal that marital rape can inflict even more severe physical and psychological harm than rape by a non-spouse¹³. Furthermore, marital rape often occurs within abusive relationships, exacerbating existing trauma. The repetitive nature of marital rape compounds the distress¹⁴.

This exception could also be interpreted as infringing upon Article 21 of the Constitution, which guarantees the right to life and personal liberty, subject only to lawful procedures. In State of Karnataka v. Krishnappa¹⁵, the Supreme Court emphasized that sexual violence violates a woman's privacy and sanctity. Suchita Srivastava v. Chandigarh Administration¹⁶ expanded Article 21 to encompass the right to make choices regarding sexual activity. Justice

K.S. Puttuswamy v. Union of India¹⁷ affirmed the right to intimate decisions, including those related to procreation and sexual activity.

Additionally, limiting marital rape to a ground for divorce overlooks the societal stigma surrounding divorce in India. Marital rape is widespread across the nation, particularly in rural areas, where 36% of women experience spousal rape compared to 28% in urban areas¹⁸. Relying solely on divorce as a solution to marital rape forces many victims to endure abusive relationships due to societal

¹⁰ Budhan Choudhary v. State of Bihar, AIR 1955 SC 191

¹¹ State of West Bengal v. Anwar Ali, AIR 1952 SC 75

¹² Constitution of India 1950 art.14

¹³ Intimate Partner Sexual Violence, Rainn.org, 2013

¹⁴ Marital Rape, Hidden Hurt, Jun. 2007

¹⁵ State of Karnataka v. Krishnappa, (2000) 4 SCC 75

¹⁶ Suchita Srivastava v. Chandigarh Administration, (2008) 14 SCR 989

¹⁷ K.S. Puttuswamy v. Union of India, AIR 2017 SC 4161

¹⁸ National Health and Family Survey 4

pressures.

In the case of *Tukaram and Ors. v. State of Maharashtra*¹⁹ (the custodial rape case), an Adivasi girl named Mathura, was raped by 2 policemen, while in their custody. The court held that there was a "world of difference between sexual intercourse and rape". It further stated that she was "habituated of sexual intercourse" and thus her consent was voluntary. When the appeal went to High court, it convicted and sentenced the two accused and held that it was a case of "passive submission". It stated that "the girl felt helpless in the presence of persons in authority and inferred that her submission was a result of fear and therefore no consent in the eyes of law." However, the supreme court in its final verdict reversed the judgment and acquitted the policemen on the grounds that "there were no marks of injury on the girl" and the "girl had raised no alarm" which indicated that the alleged intercourse was a "peaceful affair"¹⁹. This brought in The Criminal Law (second amendment) Act, 1983. The act brought about significant changes, and sections 376-B, 376-C and 376-D were inserted to deal with custodial rape²⁰. This was followed by many landmark cases, which brought in amendments, like, *The State of Punjab v. Gurmit Singh & Ors*²¹ and the Delhi gang rape case, or *Mukesh Singh v. The State (NCT of Delhi)*²².

WHY MARITAL RAPE SHOULD BE CRIMINALIZED AND CHALLENGES

Whenever a woman is raped, being a wife, she is told that the exception in rape law presumes her consent and grants her husband the immunity against rape prosecution. The lawyers and intellectuals who are against the criminalization of marital rape often argue that criminalising it would lead to the decaying of the institution of marriage, which is apparently sacred. But the fact is that this particular thought or argument itself acts as a degradation of the institution of marriage, by making women tolerate violence in a matrimonial alliance²⁰.

This exception in rape law discriminates between women who are wives and non-wives. It is against the intelligible differentia, guaranteed under the Constitution. It also somewhat sends a message to the society that the demands of a husband are always to be met with, even if it is against the consent of the wife and that the husband has legal backing for it. The marital exception

¹⁹ *Tukaram and Ors. v. State of Maharashtra*, MANU/SC/0190/1978

²⁰ Hindustan times, 'Marital Rape a crime of cruelty in India, Delhi govt tells high court < Marital rape a crime of cruelty in India, Delhi govt. tells high court' (Hindustan Times, 10 January, 2022) [marital-rape-a-crime- of-cruelty-in-india-delhi-govt-tells-high-court-101641579049116.html](https://www.hindustantimes.com/india-news/marital-rape-a-crime-of-cruelty-in-india-delhi-govt-tells-high-court-101641579049116.html)> accessed 09 April, 2022 >

infringes on a victim's right to good health while also causing physical and mental trauma.²¹ Offspring born to abusive spouses and victimised wives hurt their children and subject them to lifetime trauma. It can also be inferred that in an average Indian household, the authority of a husband is so overwhelming that a woman cannot resist her husband's sexual advances and must meekly agree to whatever is being told. In fact, in some cases, women often do not resist because they have been a victim of domestic abuse by their husbands and know what their husbands can do. As a result, to protect themselves from further physical violence, they do not resist being raped by their husbands, which is why their bodies are bereft of injury marks²⁵.

By stating the laws, it becomes easier to identify the loopholes that exist. Following are the factors which pose to be a firm challenge for criminalizing marital rape-

- (a) Deep-rooted societal attitudes as social and cultural norms, often view marriage as implying permanent consent to sexual activity, regardless of the wife's wishes. Challenging these norms requires extensive education and cultural shifts.
- (b) Religious and patriarchal influences play a vital role here. Some interpretations of religious texts and patriarchal ideologies reinforce the belief that women are subordinate to men within marriage, further complicating efforts to criminalize marital rape.
- (c) Due to lack of reporting and legal awareness many victims of marital rape do not report the crime due to fear of retaliation, societal stigma, economic dependence, and lack of awareness about their legal rights.
- (d) Proving marital rape in court can be challenging due to the intimate nature of the crime and the absence of physical evidence. Often, it boils down to the victim's word against the perpetrator's, leading to difficulties in securing convictions.
- (e) It creates an impact on family dynamics. Criminalizing marital rape may disrupt traditional family structures and relationships, leading to concerns about marital stability, child custody, and economic support for the family.
- (f) Lastly, political will and opposition always pose a threat to any new legislative reform. Despite advocacy efforts, there may be political resistance to changing laws related to marriage and sexual rights. Conservative factions may oppose reforms, viewing them as threats to traditional values.

²¹ Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161

ANALYSIS AND RECOMMENDATIONS FOR REFORM

The analysis of the existing rape laws brings out two main thoughts -

(a) marriage is a sacrament binding the wife to be her husband's property, thereby impliedly giving consent to sexual violence.

(b) It does not have an equal status as rape, in terms of punishment. Law is not actively silent on the existence of marital rape. Sexual violence in marriage is a valid ground of divorce under personal laws. This passive acknowledgment is even more shameful as the quantum of punishment, for the same offence is highly distinguished, just because of the reason of nature of relationship.

The rape laws in India do a miscarriage of justice as the unreasonable exception for married women violates their right to life and liberty²². Moreover in Indian society, a woman is taught right from her childhood that her duty is to obey her husband to maintain peace in the family. Thus, they also feel that it is their responsibility to have sex with their husbands even if they do not want to. Even if the courts continue to rule that marital rape is not a crime, it is a crime that women have experienced, and the legislation cannot repress it. Notwithstanding the fact that the view of courts in India is still the same and they believe that marital rape is not a crime, if we look at marital rape from the societal viewpoint or from the experience of women who had undergone so much pain and agony it is a crime and there is no law which can repress these experiences, marital rape will remain as a disguised crime that is protected under the ambit of section 375²⁷. Lastly, there is an exemption in Section 375 of the Indian Penal Code, 1860 that excludes husbands from being prosecuted for raping their wives, provided the wife is above eighteen years of age. Amending this law to criminalize marital rape requires legislative action, which can be slow but possible.

Addressing the various challenges in criminalizing marital rape requires a comprehensive approach involving legal reforms, education campaigns, community engagement, and support services for survivors. It demands a shift in societal attitudes towards gender equality, bodily autonomy, and the recognition of marital rape as a grave violation of human rights. The way

²² Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746

forward, in its most practical sense could be as follows-

Consolidated reforms are required in the Indian Penal Code and The Indian Evidence Act. The Bharatiya Nyaya Sanhita also does not acknowledge the same. Amending would include- First, removing the exception clause in §375 and adding another explanation clause mentioning that marriage is not a defence. Example- *Explanation — The relationship of marriage does not constitute a valid defence.* Moreover, Section 376B of The Indian Penal Code can be repealed. This can be added in Section 54 of The Indian Evidence Act- *Exception: In cases under §375 of the IPC, the previous bad conduct will be relevant if the accused is the husband of the woman.* Section 114 – *No presumption of consent in prosecutions of rape: There shall be no presumption of consent in prosecutions of rape, even if the accused is the husband of the woman.* Lastly, a sentencing policy should be expressly given in a statute and no intelligible differentia should be created, in providing relief to a rape victim, irrespective of the relationship between the victim and the wrong-doer.

CONCLUSION

With the surge in reported instances of marital rape in India, there is a newfound awareness surrounding the issue. It's crucial to seize this moment to educate society about the moral and social implications of marital rape, as it's the collective responsibility of individuals to shape a just society. Dispelling the misconception that a husband has an inherent right to sexual relations with his wife regardless of her consent is imperative, as it perpetuates the occurrence of marital rape. Therefore, it is imperative for the legislative body to criminalize marital rape in India to uphold women's rights and shield them from any form of sexual or physical violence from their spouses. The absence of formal legislation on marital rape highlights the legislative system's failure to address this issue.