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MARITAL RAPE: SOCIAL AND LEGAL ISSUES

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ABSTRACT

Marital rape has been a controversial and burning issues since years. It comes under sec 375 of IPC (Now under sec 63 of BNS). In Vedic era females were respected like goddess. As we developed, change of society happened, demographic change with change in women's lifestyle as well. We talk about women empowerment; women should have right to job and should move freely, but what is happening, question arises are they empowered? No, they are being raped by their husband. They have to face their husband dominating nature. They have to give unwavering consent to the sex the minute they get married. Unfortunately, India is one of 36 countries that do not criminalise marital rape yet. There are so many cases pending in supreme court but still there is no law which gives women autonomy over her body. Marriages does not imply permanent consent according to Puttaswamy judgement (right to privacy) and Joseph Shine Judgement. Countries like U.K and Nepal criminalized marital rape, setting an international human rights precedent. Hence, India should criminalize marital rape, recommending progressive legal reform.

This paper critically examines historical perspective, global legal framework, challenges in criminalising it and recommendations.

Key words: Marriages, Vedic era, Rape, Consent, sec375 (IPC), sec 63(BNS)

INTRODUCTION

Marital rape also known as spousal rape is a social and legal issues refers to unwanted forced sexual intercourse by a man on his wife first against her will, Secondly, without her consent. Thirdly, when at the time of giving such consent, by reason of unsoundness of mind or intoxication. It was introduced with the implementation of IPC in 1860, but that time there was law which states marital rape exception was over 10 years of age which was raised to 15 years in 1940, and later it was raised to 18 years in independent thought Judgement in 2017. BNS does not considered marital rape a criminal offence. However, it comes under Domestic Violence Act 2005 to address marital sexual violence as a form of domestic abuse and offers a civil remedy only. India as an orthodox and patriarchal society has always given more importance to men than women. Consent

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is important in every aspect even during signing contract consent is needed, but marriages in India means an agreement between husband and wife which gives a licence to husband to do anything over her wife without any consent which gives rise to the case of marital rape.

According to NHFS survey study revealed that the percentage of Intimate Partner Violence (IPV) against women ranges between 3% to 43% in different states of the country. NFHS survey (2015-16) had revealed that close to 33% of women had suffered from some form of sexual abuse.

A 2017 report by the International Centre for Research on Women and the United Population Fund reported that 17% of wives have suffered sexual violence from their spouses, and 31% of men admitted that they have committed sexual violence against their wives.

The latest NFHS Survey (2019-2021) was conducted in two phases-Phase 1 from June 2019 to January 2020 which covered 17 states and 5 union territories and phase 2 from January 2020 to April 2021 which covered 11 states and 3 union territories.

This data highlighted NFHS-5 findings about sexual violence against married women in India.

According to this data about 18% of married women said they cannot say no to their husband even if they did not want to get physical.

About 20% of husband said they would get angry if their wife refused to have sexual intercourse.

The survey highlighted that about one fifth of India's married women, their consent in sexual relation with their husband compromised.

Overall, 82% of married men were sexually violent with their wives.

HISTORY OF MARITAL RAPE

The concept of marital immunity came from English common law where it was notioned that wife by entering into marriage has consented to sexual relation with her husband and denial to have sex with her husband will be considered as cruelty and will be one reason of divorce.

Historically, it was considered that a woman is entity of her father and after marriage the entity of her husband.

Hence, it was perceived that a man cannot rape his own entity. (Hale Law)

TIMELINE

17TH CENTURY

First time English Chief Justice in 1736, mentioned that husband could not be punished with the charge of rape attempted on his wife because she had devoted herself to him through their marriage contract.

1970's: Many countries started criminalising marital rape.

1993: USA amended their laws and criminalised marital rape.

2019: Almost as of 2019, 150 countries had criminalised marital rape

GLOBAL LEGAL FRAMEWORK

Data of WHO region on criminalize marital rape, 75 countries said yes to criminalize marital rape while 109 said no and 10 were unknown.

COUNTRIES THAT HAVE CRIMINALISED MARITAL RAPE

US: In 1993, US changed their laws and criminalised marital rape in all 50 states.

UK: In 1991, UK criminalised marital rape and made it punishable offence.

SOUTH AFRICA: Since 1993, marital rape is an illegal offence.

CANADA: Not exactly but after 1983, marital rape is an illegal punishable offence.

COUNTRIES THAT HAVE NOT MADE MARITAL RAPE AN CRIMINAL OFFENCE

Ghana, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka & Tanzania.

India is amongst the 36 countries who have not criminalised marital rape yet.

INDIAN LAWS ON MARITAL RAPE

As Indian law does not consider marital rape as a criminal offence which means husband cannot be punished with rape even without consent with his wife.

Sec 375 of IPC addresses 'Rape'. Rape is a heinous crime which defines as that a person has committed a rape if they apply or make another person apply their mouth to genital areas.

There is an exception clause in sec 375 of the IPC and sec 63 of the BNS which replaces the IPC, the colonial code this year.

Exception 2 of sec 375 states that non-consensual sexual intercourse by a man with his wife is not considered rape when wife is above 18 years of age.

A similar exception in sec 63 (rape) of BNS rules out forced sexual intercourse by a man with his wife, aged over 18 years.

Sec 376 of IPC states punishment for rape, 1. Imprisonment for 7 yrs 2. extended life imprisonment for 10 yrs including fine.

If the victim is the husband then imprisonment is as follows:

1. Rape of wife between age 12 to 15 will get imprisonment up to 2 years or fine or both.
2. Rape of wife below 12 years of age will get imprisonment for 7 years not less than that.

EXCEPTION 2 OF SEC 375 OF IPC VIOLATES ARTICLE 14 AND 21 OF CONSTITUTION OF INDIA

Art 14 states that everyone is equal before law, no one is denied of equal protection of laws. Thus, exception 2 of sec 375 violates art 14 by denying women equal protection. It differentiates between married and unmarried women as 375 reads sexual intercourse with his wife not above 15 is not considered as rape. But if women are unmarried then it will be considered as rape.

Art 21 tells us about our right to life and personal liberty. It is the heart of our constitution. In the case of *Suchita Srivastava V.S Chandigarh Administration* the Supreme Court gave a judgement that right to make choices related to sexual activities is personal liberty.

In *Joseph Shine V.S Union of India* 2018 judgement D.Y. Chandrachud held that man is not the owner of the wife.

LAW GOVERNING MARITAL RAPE IN INDIA

1. IPC and BNS: Sec 375 IPC and Sec 63 BNS exempt marital rape from being classified as an offence.
2. Protection of Women from Domestic Violence Act, 2005 provides civil remedies but does not criminalize marital rape.

3. Criminal Law Amendment Act 2013, expand rape definition but exempt marital rape from being classified as an offence despite Justice Verma Committee's recommendation to remove it.

CASES ON MARITAL RAPE

- **Harvinder Kaur vs. Harmander Singh:** Delhi HC held that Constitution of India couldn't intervene in household matters and also stated that privacy of home and married life neither comes under art 21 or art 14 of Indian constitution.
- **State of Maharashtra and Anr vs. Madhukar Narayan Mardikar:** The SC stated that every woman has the right to privacy, and it must not be infringed.
- **Shri Bodhisattwa Gautam vs. Ms. Subra Chakraborty:** The SC held that marital rape violated art 21 of Indian constitution as it breached the victim's right to life and liberty.
- **State vs. Vikas (2014):** Special fast track court in Delhi asserted that if husband and wife are legally married and sexual intercourse between them cannot be considered as rape.
- **In 2015 RTI Foundation** filed Public Interest Litigation in Delhi High Court to declare marital rape as an offence on the ground of violation of Fundamental Rights i.e Art 14,15,19,21 of Indian Constitution.
- **Independent Thought vs. Union of India:** The SC held that sexual intercourse between husband and wife aged between 15 and 18 years is considered rape.

THE LEGAL DEBATE

ARGUMENTS FOR MAKING MARITAL RAPE AN OFFENCE

1. Marital rape infringes fundamental rights of women including the right to dignity. (Human Rights)
2. It contributes to physical and mental trauma, unwanted pregnancies.
3. Marital rape sometimes led to thought of suicide.
4. Marriages does not mean consent; bodily autonomy must be upheld.
5. Karnataka High Court in 2022 recognized marital rape as offence, recommending progressive reforms.

Example: A girl who was 10 years old name Phulmoni married to 2 decades older than her. The young bride died when her husband tried to having sex with her. The case went to litigation in

Calcutta session court in July 1890 and registered as one of the most horrifying cases of marital rape. Fact said that the young girl died due to trauma and excessive bleeding to her private parts as her ovaries and uterus had not developed fully. The victim's husband was convicted under the IPC for causing grievous hurt but not for marital rape.

LEGAL CHALLENGES IN CRIMINALISING MARITAL RAPE

1. Evidentiary Issues: a) To prove marital rape an offence is quite difficult due to private nature of the act.
b) Difficult in establishing lack of consent.
2. Cultural Barriers: Conservative societies believe in their orthodoxies referring sanctity of marriages.
3. Judicial review/interpretations: In 2022, In RIT FOUNDATIONS V.S UOI, a bench of Delhi HC has given a split verdict regarding the criminalisation of marital rape. Justice Rajiv Shakdher declared the marital rape unconstitutional, whereas Justice C Hari Shankar disagreed and stated that marital rape exception did not infringe any fundamental rights. Further he mentioned supporting his arguments that what is going on inside the close room, we don't know, and he also added that exception to marital rape aims to preserve marital institution.
4. Burden of proof: It is one of problematic issue that has prevented marital rape to be criminalised.

RECOMMENDATIONS

1. Law should be amended to criminalise marital rape with no exceptions.
2. There should be public awareness campaign to educate communities on the importance of consent before doing intercourse.
3. To provide shelters, counselling for the survivors of marital rape.

CONCLUSION

Marital rape is one of heinous crime which should be criminalised as it undermines right and dignity of women (Art 14, 21). IPC now BNS should be amended and should made marital rape a ground for divorce. Rape is rape whether it is committed on married or unmarried women. If women say no, it means no. Marriage does not imply consent to have sex. Women should have autonomy over her body. It is now high time for government to take steps for women rights as cases of marital rape is rising as shown in NFHS survey. They should bring some policy or laws

to motivate suffered women to raise their voice and come front to file the case against their husband.

Thus, criminalisation of marital rape helps in achieving gender equality and upholding human rights.

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