

JOURNAL FOR LAW STUDENTS AND RESEARCHERS**MARITAL RAPE: AN ILLEGAL PRIVILEGE**

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ABSTRACT

Sexual violence in the form of a marital rape is a very common and offensive practice of masochism⁴ in every society which is completely blinded by the so called notion of marriage. Societal practices and legal codes in India jointly enforce the repudiation of women's sexual activity and bodily autonomy, which lie at the core of women's natural rights. Marital rape is not considered as a crime in the eyes of law. Even if it is considered as a crime, the issue of penalty remains lost due to the vagueness and legal uncertainty. In this article we will try to represent a different opinion towards the issue of marital rape and also dealing with the concept and provide remedial to overcome limitations and delusions of the criminal judicial system in India towards the issue of marital rape. We would also be discussing the common arguments and reasons that are brought forward in debating as to how crucial and essential it is to criminalise marital rape. Lastly, we would like to emphasise certain legal reforms essential to achieve the desired objectives.

Keywords: Marital Rape, Marriage, Illegal, Privilege, Right to sexual intercourse, Sexual coercion, Consensual, Right to privacy, Assault.

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² Supra 1

³ Supra 1

⁴ Unusual or unacceptable sexual behavior.

INTRODUCTION

Marital rape is an act of sexual intercourse with one's spouse without the spouse's consent⁵. There are various descending attitudes towards the idea of marital law, it is believed that the husband wife have a right to privacy and no person should interfere with that including the judicial system and criminalisation of marital law could blemish the institution of marriage.⁶

Before the present era, many cultures believed in the concept that provided the spouses to have sexual intercourse with each other as it was their conjugal rights. According to the then English common law, the very concept of marital rape was treated as an impossibility in the North America and the British Commonwealth. Sir Matthew Hale, mentioned in his work that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, as the wife has given herself to her husband because of their mutual consent and contract which she cannot retract."

During the mid of 20th century, issues of sexual violence gained attention due to increase in the literacy rate and awareness regarding domestic violence against women within the family unit and marriages. Even today, the issue of marital rape is either considered as illegal but tolerated by women in various countries or is not considered as an offense as per the Criminal Law. This is because of the authoritative reluctance or lack of awareness among people.

Marital rape as the term suggest is a very chronic form of violence within an abusive marriage, mostly experienced by women. It persists in a network of cultural practices, state government and patriarchal ideologies which jointly influences the issue in different instances and circumstances. The only reason of authoritative reluctance is a traditional aspects of marriages, religious practices and gender discrimination. In 1960s, western societies with the advancement of the Second wave of feminism⁷, which lead women to realize their rights in the society started to challenge the issues of sexual violence. By the end of 20th century, marital rape was criminalized by many countries and allowed prosecution of domestic violence and rape within marriages. The process of criminalization followed various methods such as exclusion of constitutional exemptions from the definition of rape, jurisdictional decisions, and explicit judicial references in constitutional law avoiding the use of marriage as a justification or fabricating offense of marital rape. Still in various countries, it is not clear whether the issue

⁵ https://en.wikipedia.org/wiki/Marital_rape

⁶ <http://www.legalserviceindia.com/legal/article-515-marital-rape-safeguarded-by-the-constitution-of-india.html>

⁷ https://en.wikipedia.org/wiki/Second-wave_feminism

of marital rape falls under the common law of rape while in certain countries it falls under the act of battery⁸ and assaults.

Even after the second wave of feminism in the early 90s, India still stands on the 36th positioning the category of countries who not criminalised marital rape. If a stranger commits an offence of rape according to IPC he is being punished with imprisonment for rest of his life or death penalty but in case of marital rape the punishment is not even comparable i.e. very less. Siting the facts of the survey conducted by international centre for women(ICRW) and united nations population fund's(UNFPA) asserts that majority of the times the husbands have committed the offence of marital rape and which most of the times leads to domestic violence.

When marital rape is faced by a wife the horrific event leads to such traumatic effects such as depression, stress, anxiety, etc. Many cases have been reported not only in India but also in other parts of the world, such examples are Indonesia and Malaysia which depict brutal nature of such incidents where the women has suffered physically as well mentally.

Not only the women has to suffer mentally and physically due to the heinous acts of the husband but during this course her constitutional right to life and equality before law are being infringed at the same time. In India the society is exclusively male dominant due to which the legislature or the government is helpless and cannot be blamed for laying down legal provisions for such heinous or gruesome act against women. Marital rape is an illegal privilege exercised by men over the women that provides them to control another individual's ideas, views, body and mind.

But still, the Indian legislature did not evolve on its own as it derived its elements from the English common law which did not consider marital rape to be an offence. Many petitions were filed challenging such aspect. The government in India always evades from the discussion over this topic by giving silly defence as the culture, tradition, society in India is quite different from the other parts of the world.

In 2016, Hari Bhai Paratibhai Chaudhary, a minister of state for home affairs supported the government's views in the Indian parliament stating that difference in culture, literacy rate, poverty, religious beliefs of the Indian society from other countries do not have the same concept of marital rape as marriage is treated as a sacrament. In 2017, the government claimed

⁸ <https://www.justia.com/criminal/offenses/violent-crimes/assault-battery/>

that criminalising marital rape would disrupt the institution of marriage. Other people may not consider an act as marital rape which an individual wife would.

In this paper, we will begin by discussing the definition of marital rape and its types. In the second and third section, position of marital rape in India and other countries will be discussed. In the fourth and fifth section, need of criminalization of this issue and arguments against it. In the sixth, suggestion to reform would be discussed. Lastly, concluding remarks regarding the issue of marital rape.

1. Definition of Marital Rape

- According to the definition provided by the Wikipedia, Marital rape also known as spousal rape is “the act of sexual intercourse with one's spouse without the spouse's consent. The essential element of such act is consent and it need not involve physical violence⁹”.
- As per the section 375 of Indian Penal Code (IPC), in its exception clause states that “sexual intercourse by man with his own wife not being under the age of 15 years is not rape¹⁰”.
- In other countries like California, marital rape falls under the Cal Pen Code 262 as Spousal Rape which states that “marital rape is an unwanted sexual act by spouse or ex-spouse committed without the consent of other person. Such illegal sexual acts done with coercion, threat, intimidation or when the person is not in a condition to consent. The sexual acts include unnatural intercourse or forced sexual behaviour with other individual that are considered by victim as humiliating, painful and unwanted. It is known as spousal rape¹¹”

1. Types of marital rape

According to legal scholars, there are three kinds of marital rape¹²:

⁹ Supra 5

¹⁰ <http://www.legalservicesindia.com/article/2369/Marital-Rape.html>

¹¹ <https://definitions.uslegal.com/m/marital-rape/>

¹² *Heavy hands: An introduction to the crimes of domestic violence*. Upper Saddle River, NJ: Prentice Hall by Gosselin, D. K. (2000).

- **Battering rape:** Women experiencing both physical and sexual violence within a relationship and in various ways is known as Battering Rape. For instance, a woman is beaten during the sexual violence, or the rape followed by the incident of physical violence where the husband tries to make out and force his wife to have sex against her will. In mostly cases, victim of marital rapes falls under this category.
- **Force-only rape:** In this category of rape, only that amount of force is used by the husbands required to coerce their wives; beating may not be characteristic of these relationships. These type of assaults happens when the woman refuses to have sexual intercourse.
- **Obsessive rape:** in this category of rape, women faces assaults that involves perverse sexual acts or torture and other common forms of violence. This type of rape is labelled as “*sadistic*” or “*obsessive*” rape.

POSITION OF MARITAL RAPE IN INDIA

In India, the issue of marital rape has been debated widely but is not criminalized yet. This is to say that marital rape in India exists *de facto* but not *de jure* (facts are true but cannot be sanctioned officially). One of the most common reason given by legislation is that marriage is regarded as sacred in Hinduism, where wife is considered as under the possession of her husband. Whereas the legislature of other countries have criminalized marital rape, an active role has been played by their Judicial System in making it an offense but Indian judicial system is operating at cross-purposes. For instance, in the case of **Shri Bodhisattwa Gautama v. Subhra Chakraborty**¹³ in 1995, the Supreme Court of India held that “rape is a crime against basic human rights and a violation of the victim’s fundamental rights to life enshrined in Article 21 of the Constitution”. But in the same case, court contradicted this very pronouncement by not recognizing marital rape as a crime¹⁴. After the bill of Domestic Violence Act (2005) was passed, many advancements were made in the Indian Legislation in regard to Domestic violence, but failed to criminalized the assaults in the form of sexual abuse rather have focused on the violence in physical form. Women who faces sexual violence within a marriage are

¹³ <https://www.escr-net.org/caselaw/2013/shri-bodhisattwa-gautam-v-miss-subhra-chakraborty>

¹⁴ <http://ijllis.in/wp-content/uploads/2015/06/MARITAL-RAPE-final-draft.pdf>

denied state protection as per exemption made for the marital rape in the Section 375 of the Indian Penal Code (1860).

In 1983, Section 376-A was added in the Indian Penal Code, which criminalized the rape of divorced or separated wives. This amendment was made on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India¹⁵. The committee prohibited the notion that marriage is a licence to rape. As per the new amendments, husband would face the imprisonment of up to 2 years if found guilty on the basis of non-consensual sexual intercourse with his wife and who got separated from him. This law is only a disjointed legislation and more is to be done by the government or the Parliament regarding marital rape. A new ray of hope was seen, when in its 42nd report the Law Commission advocated that sexual intercourse by a man with his minor wife is an illegal offense. But the proposal was rejected by the Joint Committee, as they argued that husband could not be found guilty of having sexual intercourse with his lawful wife of any age. When a man and woman marries, they both agree to sex.

The Indian Legislation for Rape only covers two categories of married women under such law— firstly wives below the age of 15 years and secondly who are separated from their husbands. By the 42nd Report of the Law Commission of India and Indian Penal Code (Amendment) Bill, 1972, the Indian Legislation noticed some progression where domestic violence against women was added in Sec. 376-A of IPC which criminalised rape of judicially separated wife.¹⁶

i. Defects in Indian legal provisions

The laws related to Rape are totally shambled up. There are many defects in these provisions which must be addressed as soon as possible which refrain from empowering women against marital rape:

- Article 21 of the Indian Constitution provides for “*right to live with human dignity*” (in this regard of a woman) but such right is violated due to the exception provided under Section 375 of Indian Penal Code, 1860.

¹⁵42nd Report of the Law Commission of India and Indian Penal Code (Amendment) Bill, 1972

¹⁶42nd Report of the Law Commission of India and Indian Penal Code (Amendment) Bill, 1972

- Article 14 of the Constitution guarantees provides for equality before law and equal protection of law i.e. protection from discrimination but it is violated because of the exception under Sec. 375 of Indian Penal Code,1860 the wife is discriminated in protection from rape.
- The Constitution of India¹⁷ provides for fundamental rights to every citizen and it also provides for fundamental duties and one of the duty is to protect the dignity of women; but domestic violence and marital rape don't seem to fall under the definition of dignity.
- The “United Nations Convention on the Elimination of All Forms of Discrimination against Women” (CEDAW), aims at eliminating any kind of discrimination against women but such act of marital rape and domestic violence is also a sort of discrimination against women violates the principles of equality of rights and respect for human dignity.
- With the mainstream idea of marriage as a contract presupposes consent to sexual intercourse with the wife and she is bound to fulfil the desire of the husband to have sexual intercourse with her in terms of the contract and he shall not be prosecuted for raping her.
- The Indian legal system prevents child marriage i.e. below 18 years but does not aim to criminalise non-consensual sexual intercourse with a wife below 15 years.
- The IPC states if the girl is below 16 and is not the wife of the man involved, even if she consents it is considered as rape.¹⁸ But it is not rape if she is not below 15 and is a wife of the man involved, also does not consent.

STATUS OF MARITAL RAPE IN OTHER COUNTRIES

United Nations of America

Every state in the Unites States has criminalised marital rape and according to the existing laws such act is termed as illegal. Although it is criminalised all over the U.S. there are some states that do not treat marital rape and rape alike. States such Ohio, Michigan, Nevada treat them differently.

¹⁷ Article 51-A(e) of Constitution of India Bare Act, Universal Publication

¹⁸ Section 375(6) of Indian Penal Code, T. Bhattacharya 3rd Edition

For instance, in Maryland, a judicially separated or divorced couple become total strangers. And if any coerced sexual act takes place between the two will be considered as rape. Such US law is similar to that of India. The only change is that if two spouses are residing together and if such act occurs then the victim can initiate a law suit.

A similar situation exists in the state of Mississippi, when the rapist and the victim are married and reside together at the time of the incident and the person commits the offence of rape against the victim's will only in this case a law suit can be filed but if the victim was under the influence of drug or narcotics and was incapable of controlling their behaviour then no such suit could be initiated.

However, the state of Oklahoma, if any spouse was compelled to submit under the influence of drug or narcotics the other cannot charge their spouse for rape.

Different states in the US have different laws. Marital rape could be considered as null and void by law in some places whereas in other states the laws miss out the concept on basis of influence of drugs and narcotics or any other reason.

United Kingdom

In the UK, Sexual Offences Act, 2003 deals with all kinds of sexual offences. Section 1 discusses about Marital Rape as it is expressly considered as a crime. The offence of rape is said to be committed when the person accused without the consent of the other person penetrates his penis into the vagina, anus or mouth of the person on purpose. It is irrelevant as to whether the victim resides with the accused or not, knows him or not, is or was married to the said accused or not. The basic element is consent. If the consent was absent such act is considered to be rape.¹⁹

There is a landmark case in regard to above context. In the case of **R v R**²⁰, the House of Lords was of the opinion that it is possible under the English Criminal Law a man commit the offence of rape on his own wife. In this case the husband was the defendant, he claimed that by the contract of marriage his wife gave him irrevocable consent to have sexual intercourse and that

¹⁹ <http://www.legalserviceindia.com/legal/article-515-marital-rape-safeguarded-by-the-constitution-of-india.html>

²⁰ (1992) 1 AC 599

he could commit rape on his wife. As a result of this the House of Lords and the Court of Appeal held that the English Law does not permit any exception to marital rape.

After knowing the status of marital rape in countries other than India, it is applaudable that the country of England has made progress in accepting marital rape as a flaw and thus formulating a legal provisions for the same. The US does not lack much further as majority of the states do consider marital rape as a crime.

NEED FOR CRIMINALIZATION

1. Physical and psychological effects of marital rape

Marital rape is not like other forms of rape, the victim has no choice but to continue living with their spouse as divorce is very difficult to obtain and is highly stigmatized whereas in other forms of rape the victim can remove themselves from the company of the rapist.

Finkelhor and Yllö were two researcher who correctly pointed out in their work that:²¹

“When a stranger rapes a woman, she only has to live with the frightening memory but when she is raped by her husband, she has to live with the rapist.”

Nowadays, in some countries husbands are immune from prosecution in case of certain forms of physical abuse against their wives. For example: in Iraq the husbands are provided with a legal right to punish their wives and supporting this view the criminal code states that while exercising such right no crime is committed. A recent example of exercising a legal right is UAE. In 2010, their Supreme Court ruled that a man has a legal right to physically discipline his wife and children as long as there exists no physical marks²².

2. Violation of Article 14 of the Indian Constitution

The Constitution of India provides many fundamental rights one of which is Article 14 which ensures equality before law and equal protection of law that means no discrimination on any

²¹ License to Rape. New York: p. 138 by Finkelhor, David; Yllö, Kersti (1985).

²² Court in United Arab Emirates held that if no physical marks are visible, beating the wife and children is OK.

basis²³. But the Indian criminal law discriminates against female victims who face sexual abuse by their own husbands.

When the IPC was drafted, married women were not considered independent legal entity and they did not possess many rights. Their status was defined by their husbands²⁴. Now the times have changed. Indian law now considers husbands and wives separate and independent legal identities and much of the laws of the modern era are concerned with the protection of women. Legislation regarding safeguard of women from domestic violence and physical abuse are covered by “The Protection of Women from Domestic Violence Act (2005)” and the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act²⁵.”

3. Violation of Article 21

Article 21 is violated by the exception 2 of Section 375 of IPC which revokes the right of the person to live with dignity. It also includes the rights to health, privacy, dignity, safe living conditions, and safe environment, among others.

In the recent case of Justice **K.S. Puttuswamy (Retd.) v. Union of India**²⁶ the Supreme Court recognised the right to privacy as a fundamental right of all citizens and was of the view that right privacy includes decisional privacy and ability to make decision in respect of intimate relations. And forced sexual cohabitation violates such fundamental right. The above ruling did not distinguish between the rights of married women and unmarried women. And there is no ruling that states that such right is lost by marital association. Thus, the Supreme Court has recognised right to abstain from sexual activity as a fundamental right conferred by Article 21 to all women irrespective of marital status. Act, 2005; Act, 2013.

²³ Article 14 of Constitution of India Bare Act, Universal Publication

²⁴ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harvard Law Review 1255, 1256 (1986).

²⁵ Act, 2005; Act, 2013.

²⁶ <https://indiankanoon.org/doc/91938676/>

The above mentioned points clearly reflect that Exception 2 of Section 375 of IPC violates both Article 14 as well as Article 21 of the Constitution. Now is time to strike down such provision which requires immediate attention.

DESCENDING OPINIONS AGAINST CRIMINALIZATION OF MARITAL RAPE

Every debate has its for and against sides. Under are some arguments that are against the criminalisation of marital rape:

- i. Marital rape is very rare and uncommon phenomena in the world and there is no urgent need to draw the legislature's attention towards it.
- ii. As claimed earlier by the English scholars the concept of marital rape is an impossibility, the Indian legal system is already overburdened and proposing it to criminalise marital rape would only lead to additional burden.
- iii. When the husband does any act which might be contrary to the wishes of the wife or does not fulfil her demands, the frustrated, angry, vengeful wife could charge their innocent husband with offence of marital rape.
- iv. When a woman marries a man there seems to exist an implied consent to have sexual intercourse.
- v. When marital rape laws exist and any situation arises where the husband is accused of such crime, the possibility of reconciliation dies and could destroy the marriage right away.

The above made arguments clearly show that the male-dominant Indian society that lacks any sort of legal substance or moral face would present mere fanciful, lame excuses to not criminalise marital rape. And a rebuttal to the above stated arguments are not very difficult.

Marital rape is quite common but an under-reported crime. The women frequently do not report such events because the law does not support them. According to the study conducted by the Joint Women Programme, an NGO, it was found that out of seven married women one had been raped by their husband at least once.²⁷

²⁷ Subsequent research has found that each year more women are raped by the husbands than by strangers, or other persons. And 1/3rd of women face battering by their husbands.

In regard to the second argument, the act of marital rapes are difficult to prove and the mere fact that they would be very difficult to prove is no reason for not recognising it as a crime. It may be showed that criminalisation of marital rape serves to recognise rape in marriage as a criminal offence and would have a deterrent effect on prospective rapist husbands.

In the regard to the third argument, as claimed above that proving a claim of rape in marriage is difficult and if a woman foists a malicious charge against her husband proving that fabricated charge would be even more difficult.

As far as the fourth argument is concerned, when a woman marries a man it is true that she has impliedly given consent to sexual intercourse but the consent to sexual intercourse denotes to expression of love through sexual intimacy and not to forced sex. As to the other aspect, it strikes at the very foundation of matrimony irrespective of whether the marriage is a sacrament or a contract. It is not even imaginable that by marriage a person consents to har or violence and neither does the law permits any person to give such consent.

Finally, with regard to the final argument, Constitutional law is first law that should be considered when there exists a clash. Fundamental rights provided by the Constitution of India always come before than any other right. When in any marriage a husband commits rape of his wife their marriage is already destroyed. And an attempt to hold together their marriage may be one of the objectives of matrimonial laws but in cannot override the fundamental objective of law which is to protect dignity and bodily integrity of a human being. And thus the law should not protect the rapist husband but to safeguard the principles of constitution to provide equality before law.²⁸

SUGGESTIONS FOR REFORM

After dealing with the various aspects of law regarding the criminalisation of marital rape here are some suggestions as under:²⁹

- Parliament should recognize the concept of marital rape and should insert a provision under India Penal Code.

²⁸ <https://www.ebc-india.com/lawyer/articles/645.html>

²⁹ <https://www.ebc-india.com/lawyer/articles/645.html>

- Rape is rape be it marital or in other form and the punishment for the same should be as it is prescribed under Section 376 of Indian Penal Code.
- The marital status or the relationship between the parties should not affect the punishment for the crime committed.
- The fact that the wife submitted easily or did not fight back or resisted forcefully or screamed or shouted cannot be used as a defence by the husband.
- If the charge for marital rape is proved against the husband the wife should have an option of getting a decree of divorce. Though marital rape may fall under cruelty or rape as a ground of divorce, it is advisable that the legal provision should be clarified.
- The wife should be given the option of either getting a divorce or to continue the marriage and if she wishes to seek a divorce she should be allowed to demand for divorce.
- If the marital rape is criminalised the corresponding changes should be made in the matrimonial laws.

CONCLUSION

Unlike other foreign countries India has a vast diversity of cultures, traditions, religions, views and with the changing times India has adopted many new notions and have discarded all those which were not compatible with the current Indian Society. Earlier women were deprived of most rights but with the increase in literacy rate, awareness and public knowledge amendments have been made. But marital rape is a topic which requires change in laws relating to sexual offences and it is a sensitive task as in India there is a contemporaneous presence of a various and different system of personal and religious laws which might come in conflict with the new amendments in the statutory criminal law. Constitution claims to provide equality and thus there is a need for substantial changes in the legal provision on sexual offences such as making them neutral for all genders and eliminating the inequalities. The urgent need is criminalisation of marital rape as it is an advantage which allows the male breed to exploit and torture the women. Mere declaration of conduct as an offence is not sufficient. There is a need for proper awareness and need to educate the masses about this crime, this crime was said to be uncommon but was under-reported because the law did not support the women but once the society acknowledges such act as an offences and break the myth that rape by one's spouse is inconsequential. Marital rape is the advantage that men had/have been exercising over the

women, in our opinion it is an illegal privilege exercised by the husband against the wife that has to stop.

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