



Marital Rape Criminalization : A Critical Study

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ABSTRACT

Marriage is a sacred covenant that brings together two individuals and their respective families. However, a marriage might go bad if there is no consent or if the parties involved are dissatisfied. We have inherited a patriarchal social structure from our ancestors who lived off the land. As a result, men express feelings of dominance as a matter of course. Law and order play a significant role in setting and enforcing standards for human behaviour around the world. According to the Indian Penal Code, 1860, adequate punishment has been imposed for violations of the law. But what most of the people fail to comprehend is that these laws were made by the British a long time ago. At that time Marital Rape was not considered a crime which can be one of the reasons why it was exempted under the penal laws. Women's rights have evolved over time, and this study focuses only on the impact of marital rape and why it is a violation of Indian law.

Keywords: - Marital rape, Women's rights, violation of Indian law.

INTRODUCTION

A woman's role in a marriage has traditionally been to provide for her husband's physical, emotional, and sexual needs, as well as to take care of the household and children. This kind of stigma has been created by the society itself and men assume the role of dominance, sometimes taking it too far. The women were not given the status similar to that of their male counterparts and, before marriage, were considered the property of their fathers, and after their marriage, were considered the chattel of their husbands. The father could wed off his daughter to whomsoever he deemed fit. The woman had to provide her husband sexually with or without her consent to ensure progenies and continuation of the family line. This made the woman believe that being sexually available to her husband at all times was a necessity and her duty; she could never decline her husband's wishes. But these laws were written a long time ago when all of it was socially acceptable.

Ladies were viewed as the captive of man and the evil practices like Sati and youngster relationships were predominant in the nation yet the circumstance in the nation changed after the development of Raja Ram Mohan Roy. Indeed, even Mahatma Gandhi took an extraordinary drive to work on the social states of the ladies since it was the initial time in the Indian Independence Struggle that ladies partook in the equivalent and were at

standard with their male partners. The outcome of these very movements was a Constitution which gave equality to the women and almost all the rights that are given to the men; be it Right to Vote or Right to contest elections. Post-Independence, there were enhancements and progressions in practically every one of the fields and spotlight on the life being given to lady could be improved. They were fairly separated based on their orientation. The ladies have battled all of the time for their privileges and this was one of the principle justifications for why the situation with ladies and men was compared in the Indian Constitution. There were many legislative reforms taken after the independence of the country to strengthen women and improve their status in the country so that no discrimination takes place with them. With the introduction of a Constitution, women have been granted equal social as well as political rights to that of men.

Women have been given the freedom and all the support from the constitution so that they can help in shaping the future of the country. Despite the fact that ladies have accomplished incredible statures and are endeavoring in practically every one of the fields whether it is training, regulation authorization organizations or science and innovation, there are numerous regions where our nation falls behind.

MARITAL RAPE

Conjugal assault in layman's terms can be clarified as a companion having sex with their life partner without their assent.

As indicated by Section 375 of the I.P.C.—

“Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim.”¹

Non-consensual sexual relations between married partners are not considered rape², however there is an exception to this rule. This type of domestic violence is defined as the violent or aggressive behaviour in the home, which includes the violent abuse of one's spouse or partner³ in the home, as most men understand that marriage gives them the right to have sexual intercourse with their wives at any time, whether or not they are willing. This is the face of a patriarchal society, and it's bad for marriage. IPC, 1860 provides for rape and punishment for rape under section 375 and 376, respectively.

Almost all countries have made marital rape a criminal offence, either by amending existing legislation or by enacting new legislation. Marital rape is now illegal in more than 150 nations throughout the world, several of which passed new legislation to that effect.

Unlike in the U.K., where the highest penalty for marital rape is life imprisonment, marital rape is illegal in all 50 states in the United States. Due to a ruling by the courts in

¹ The Indian Penal Code, 1860 (45 of 1860), s. 375

² The Indian Penal Code, 1860 (45 of 1860), Exception to s. 375

³ The Protection of Women from Domestic Violence Act, 2005. (No 43 of 2005)., s.3

countries such as the U.K.⁴, Fiji, and Brunei⁵, the offence has been criminalised in these countries. Marital rape is illegal in Bangladesh, India⁶, and other nations where women are considered property of their husbands and marriage is not regulated by the state.

Marital rape has not yet been criminalised in the country despite numerous laws being implemented to protect women from domestic violence, dowry, and other forms of abuse. When a guy commits marital rape, the victim knows that she will have to spend the rest of her life with him, which has a detrimental effect on her mental and physical health as well. Because there are no laws against marital rape, most of these women are afraid to come forward and report the crime for fear of being shunned by society if they do.

Laws must be updated in the twenty-first century to reflect society's growing awareness of its rights and requirements. 1860's Indian Penal Code makes it illegal to have sex with a woman under the age of 15. This situation, however, has a flaw. Under the Prohibition of Child Marriage Act of 2006, child marriage is merely voidable and not void in India, meaning that it is not immediately prohibited.⁷ Divorce may be granted to minors after they reach the age of majority, but only if they do so within one year of their legal age. It is, however, possible for husbands to have sexual intercourse with their wives between the ages of 15 and 18 because there is no provision for males to ask for their wives' agreement while they are between the ages of 15 and 18 years. Consensual intercourse between a 17-year-old boy and a 17-year-old girl is illegal but non-consensual intercourse between a 50-year-old man and a 16-year-old girl can be legal.

Under the Protection of Women from Domestic Violence Act, 2005, the meaning of abusive behavior at home is given under Section 3(a) which says that "harms or harms or jeopardizes the wellbeing, security, life, appendage or prosperity, regardless of whether mental or physical, of the oppressed individual or will in general do as such and incorporates causing actual maltreatment, sexual maltreatment, verbal and psychological mistreatment and monetary maltreatment".⁸ The drawback of this act is that it is more civil in nature than criminal. It does not provide for a period of imprisonment. Rather it provides for compensation, monetary gain, restraining and protective orders.

EFFECTS OF MARITAL RAPE

Women who have been victims of marital rape have experienced despair, PTSD, fear, low self-esteem, rape trauma syndrome, and sexual instability, inability, or dysfunction.⁹ When a woman marries, she is expected to satisfy her husband's sexual desires right away. As soon as a woman is married, she is expected to fulfil her husband's sexual desire.

⁴ R. v. R, [1992] 1 AC 599 (UK)

⁵ Brunei's Penal Code, s.375

⁶ *Supra* note 3

⁷ The Prohibition of Child Marriage Act, 2006, s. 3(a)

⁸ The Protection of Women from Domestic Violence Act, 2005. (No 43 of 2005)., s3(a)

⁹ Campbell, R., Dworkin, E. and Cabral, G., *An ecological model of the impact of sexual assault on women's mental health. Trauma, Violence, & Abuse*, 2009

The first time any female must have experienced this, it must come as a shock to her that such a thing might be required without her consent.

Medically, rape survivors are diagnosed with Rape Trauma Syndrome, which is the term used to describe the natural response of a healthy individual to the trauma of rape¹⁰. An instant or long-term effect is possible. Victims may experience feelings of shame or degradation. Victims may be perplexed as to what transpired and how they were unable to prevent it. Others may blame themselves for being too weak or unwilling to have sex with their husband because they don't want it.¹¹

Because this isn't even recognised as a problem, people who have been affected by it may be embarrassed to talk about it. As a result, they avoid talking about it with others for fear of drawing attention and eliciting further questioning. Due to the failure of the couple to marry, a criminal complaint was brought against the couple in the case of *Bodhisattva Gautam vs. Subhra Chakraborty*¹². Moreover, the Delhi High Court in 2018 stated that "force is not a pre-condition for rape," and that "rape is a crime." To put his wife in a financial pinch, a man can threaten to withhold funds from her unless she engages in sexual activity with him."¹³ Each and every one of these scenarios puts mental strain on the victim and their children, if any. This can lead to a mental breakdown or clinical depression in the children.

Even while the Protection of Women from Domestic Violence Act, 2005¹⁴ contains a provision for civil liability for sexual assault, this is not a comprehensive law. For some people, violence is a way to show power and instil fear that they would resort to violence if they don't get their way in life.

Most women suffer from perpetual soreness due to frequent rapes. This leads to fractured ribs, knife wounds, marks on their body, and black eyes as a result of their assault. Among the many things women go through, these are just a handful of the more common. Vaginal bleeding and soreness are common complaints among patients. Due to the vagina's extreme rupture, bleeding occurs. Anal sex sufferers often complain of bleeding, pain, and irritation as side effects¹⁵. If the memory of the abuse event is triggered, they may experience nausea. Unwanted pregnancies are also possible, which places further strain on the victim's¹⁶ mental and emotional well-being. In particular, if he or she is between the ages of 15 and 18. This may necessitate early motherhood, which can have a long-term influence on the child. Vaginal rupture can also result in infertility, resulting in the inability of the victim to bear children. When it comes to starting a family,

¹⁰ *Surjibhai Badaji Kalasva v. State of Gujarat*, (2018) 59 (3) GLR 2498

¹¹ Ann Burgess and Lynda Holmstrom, *Rape Trauma Syndrome*, *American Journal of Psychiatry* 981-986 (1974).

¹² *Bodhisattva Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

¹³ <https://www.financialexpress.com/india-news/delhi-hc-on-marital-rape-marriage-doesnt-mean-wife-always-ready-for-physical-relations-with-her-husband/1248987/>

¹⁴ *Supra* note 4

¹⁵ *Supra* note 12

¹⁶ Sarkar J. Mental health assessment of rape offenders, 55(3) *Indian J Psychiatry* 235-243 (2013).

this can have a long-term negative impact on the victim. They may have permanent scarring. In some cases, the victims may become suicidal as a result. The victim may consider suicide as a last resort because of the stigma attached to marital rape and the fact that the victim is unable to inform anyone about the abuse.

MARITAL RAPE LAWS IN INDIA

There have been numerous changes and new legislations made in our country, yet the crime of marital rape is still not regarded to be an offence here. There are no laws in place to safeguard women in the institution of marriage, and the court has the final say on any issues relating to the same.

Section 375 of the Indian Penal Code states that "Sexual intercourse by a man on his own wife, the wife not being under the age of 15 years, is not rape."¹⁷

Under the I.P.C., the instances where punishment is awarded to husband under marital rape is as follows:

- i. When the age of wife is between 12-15 years, there can be imprisonment up to 2 years or fine or both;¹⁸
- ii. When the age of wife is below 12 years, there must be imprisonment for term which shall not be less than 7 years but can also extend to life and shall also be liable to fine.¹⁹
- iii. When the wife is judicially separated, there can be prison up to 2 years and fine²⁰
- iv. Rape is not punishable when committed against a wife who is older than 15 years.²¹

Because of this, we can conclude that women who are married beyond the age of 15 are without legal protection in the event that they are subjected to unwanted sexual advances by their husbands, a violation of their human rights. It's alarming because the Constitution sets the legal marriage age at 18 years, but the law only protects females under the age of 15 from sexual abuse, and women over this age have no recourse.

The 42nd Law Commission²² report discusses the evacuation of exemption of Section 375 from the IPC on the grounds that it is prejudicial towards ladies and isn't in understanding to the law. Indeed, even the 172nd Law Commission²³ report was supportive of eliminating the special case for Section 375 consequently making conjugal assault a criminal offense however over 20 years have passed and no move has been made on a similar issue.

CONSTITUTION OF INDIA ON MARITAL RAPE

¹⁷ *Supra* Note 1

¹⁸ The Indian Penal Code (45 of 1860), s. 376(1).

¹⁹ *Ibid*

²⁰ The Indian Penal Code (45 of 1860), s. 376A.

²¹ *Supra* Note 3

²² Law Commission of India, "42nd Report on Indian Penal Code, 1860" (June, 1971).

²³ Law Commission of India, "172nd Report on Review of Rape Laws" (January, 1998).

There are various ways to contest this statute, which appears to allow for rape in marriage, including those listed above. The Indian Constitution mandates that all laws passed by the legislature must adhere to the Constitution's essential structure philosophy. As long as any statute is in conflict with this, the courts can declare it unconstitutional. For any law or provision in favour of rape to be passed, it must be in accordance with Constitutional principles.

ARTICLE 14

Article 14 of the Indian Constitution²⁴ guarantees the Fundamental right of equality before the law and equal protection of the laws within the territory of India. However, criminal law is still silent on the discrimination that is faced by the victims of marital rape. If you're married and you're being harassed by your husband for reasons that aren't comprehensible, artificial, or evasive, you won't be protected by the law under the Exception to Section 375 of the IPC, which is a discriminatory statute against married women.

Sexual assault by a spouse on his wife is not covered under Sections 375 and 376. Strictly speaking, Section 375 of the Indian Penal Code (IPC) is discriminatory and breaches Indian Constitution's Article 14, if a person's marital status is protected from its jurisdiction. In both cases, the victim is raped in the same way. The only difference is that in the latter scenario they are already married, but other than that, they are both rapes. To make matters worse, a married woman must spend the rest of her life with the perpetrator and is completely reliant on him for her very survival. Realistically speaking, this provision makes it easier for husbands to engage in coercive sexual acts since they know that they will not be held accountable. Since equal protection is not provided to the female victims of marital rape, Article 14 of the Indian Constitution clearly prohibits it since it fails the twin tests put out in Article 14 in terms of understandable difference and reasonable linkage.

ARTICLE 21

Article 21 of the Indian Constitution says that:

“[N]o person shall be deprived of his life or personal liberty except according to a procedure established by law.”²⁵

In the case of *Kharak Singh v. State of Uttar Pradesh*²⁶, the Hon'ble Supreme Court (S.C.) held that “[b]y the term “life” as here used something more is meant than mere animal existence” There have been many cases where the S.C. has interpreted this article and given a whole new shape to it. Under Article 21, there are many rights which are given to the citizens which include the right to health, dignity, safe environment, sexual privacy,

²⁴ The Constitution of India, art. 14.

²⁵ The Constitution of India, art. 21.

²⁶ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

human dignity, among others. In the case of *State of Karnataka v. Krishnappa*²⁷, the Hon'ble Supreme Court held that "[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.", it further held that rape in itself is a serious blow to the self-esteem and dignity of the victim and it degrades her, leaving behind a traumatic experience.

In the case of *C.E.S.C. Ltd. v. Subhash Chandra*²⁸, the Hon'ble Supreme Court held that Right to Life also includes the Right to live a healthy and dignified life which is one of the most important things to maintain the individuality of a citizen in the country²⁹. Exempting women from Section 375 violates their right to well health because marital rape can cause emotional, mental and physical harm to a woman and can lead to depression; in addition, there is always a risk of STD transmission in the case of forcible sexual intercourse. Rape is a crime against society and a violation of Article 21 of the Indian Constitution in several cases brought before the Hon'ble Supreme Court.³⁰

There are numerous cases in the Apex Court where it has been held that Right to Privacy is to be protected constitutionally under Article 21.³¹ Therefore, any type of forceful sexual act to a woman is a violation of her privacy as it is her body and she has full right to consent to it and protect it. If we talk about sexual privacy the same has been discussed by the Hon'ble Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*³² where it was held that "[e]very woman is entitled to her sexual privacy and the same is not open to for any and every person to violate her privacy". Notwithstanding, the exclusion of conjugal assault in the IPC is violative to one side to sexual protection of a wedded lady since no one should compel her to have sex without wanting to. Consequently, this exception is in infringement with the Right to Privacy and thusly ought to be held illegal.

IPC defines rape when a woman refuses to engage in sexual activity and is forced into it, but it does not define rape when a married woman is forced into sexual activity; in the eyes of IPC, the former is defined as sexual intercourse, while the latter as rape when it occurs between a married woman and an unmarried person. A married woman's right to control her own body is violated by Section 375 because marriage does not indicate that consent for sexual intercourse is not required.

That Section 375 of India's penal code gives a pass to a crime such as marital rape is an obvious violation of Articles 14 and 21 of India's constitution, which forbid it. Due to the fact that it is unfair to married women and makes a distinction between them, this exemption fails the "just, fair, and reasonable law" and the "reasonable categorization" standards. This exemption is now obsolete and needs not to be present in the IPC, rather

²⁷ *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

²⁸ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).

²⁹ *See also* *Bandhua Mukti Morcha v. Union of India* (1997) 10 SCC 549, *Francis Coralie v. Union Territory of Delhi* 1981 AIR 746, 1981 SCR (2) 516

³⁰ *The Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.

³¹ *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

³² *State of Maharashtra v. Madhkar Narayan*, AIR 1991 SC 207.

India should also take strict measures to guard the rights of the married woman because there is a large portion of women who are victims of marital rape but they do not have a law which can support them; the only remedy available to them is the Section 498A of the IPC and the Domestic Violence Act.

HUMAN PERSPECTIVE

There is a strong public consensus that rape in the marriage relationship should not be criminalised. Public opinion is formed by this, and the nation is cast in a negative light. Since most Indians are engaged in their culture, these views have acquired traction. Many people believe that the laws that defined India a thousand years ago are still in effect today. Because this exemption is discriminatory, these arguments have no place in today's society. Here are a few counterarguments.

a. ARGUMENTS AGAINST CRIMINALISING MARITAL RAPE

There is a strong case to be made against criminalising marital rape since doing so would undermine the sacredness of marriage and, in turn, the family unit itself. In the absence of marriage, the holy link between husband and wife would be shattered. If marital rape is made a criminal offence, the state is crossing a border between home and law, which poses a stumbling block for the courts. Legislating for this purpose would signify that the state had crossed its borders and gone outside of its legal jurisdiction. If a decision crosses a line that separates two people, it is likely to face opposition and strong criticism.

When two people join into a legal marriage, they are doing it in their own capacity. It's also been said by others that if these two people have agreed to this marriage contract on their own, the woman has already given her approval. As long as the parents are responsible for matching the matrimonial relation, they are believed to have given their approval to the marriage. There is a longstanding custom of never seeking the consent of the woman being sexually harassed. When a couple agrees to marry or has their marriage fixed by their parents, the spouse is regarded to have granted his agreement for a sexual connection. There is no such thing as a "arranged" or "forced" marriage. Unlike in a forced marriage, in an arranged marriage both parties are willing to get married as soon as they meet, both parties agree to get married before meeting.

Since infancy, people have been indoctrinated with a set of traditions, conventions, and values. It is considered forbidden to do anything that deviates from or contradicts these principles, which are deeply ingrained in our psyches. In light of these societal conventions, men have been conditioned to expect their wives to fulfil their sexual desires.

More than half the population, according to polls, believes that wives will use the fear of legislation against their husbands as a means of getting out of their marriages or intimidating their spouses into doing what they want them to do. Disgruntled wives are using Section 498A as a weapon rather than a shield, according to the Supreme Court in

Arnesh Kumar v. State of Bihar.³³ As a result, the judiciary would be forced to monitor the men at all times. Judicial proceedings could be disrupted by an avalanche of bogus cases being filed, delaying justice for more important matters. There is simply no way for India to make up for all the cases that have been deferred for years.

The Protection of Women from Domestic Violence Act, 2005 is supposed to be the solution for conjugal assault. Contentions are made that assuming this regulation is now in power, there is no requirement for a different regulation for the equivalent in the state. Conjugal assault can be considered under Section 3(a) "hurts or harms or imperils the wellbeing, security, life, appendage or prosperity, regardless of whether mental or physical, of the distressed individual or will in general do as such and incorporates causing actual maltreatment, sexual maltreatment, verbal and psychological mistreatment and financial maltreatment"³⁴.

b. ARGUMENTS IN FAVOUR OF CRIMINALISATION

Without his wife's agreement, the sanctity of marriage has already been desecrated. Because marital rape crosses the borders of issues between a man and his wife, there is no way to claim that the crime may be exempted from the law because of this. In the High Court of Gujarat, in the case of Nimeshbhai Bharatbhai Desai v. the State of Gujarat³⁵, it was held that the "[n]on-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage". When the concept of sanctity has been contradicted, this argument becomes ethically flawed.

The Prohibition of Child Marriage Act, 2006, makes child marriage voidable rather than void³⁶. It is legal for parents to marry off their minor children to anyone they choose, and the children themselves cannot divorce or cancel their marriages until they reach the age of majority, which is 18 in most jurisdictions. On the other hand, Section 375 of the IPC 1860 forbids a man from having sexual relations with a wife under the age of 15 years³⁷. A loophole exists for persons between the ages of 15 and 18 years of age, however, as a result. They must share a home with someone who may or may not force them to engage in sexual acts without their permission. Consent is pledged in this way, according to an age-old custom. Being in the 21st century, these archaic laws can be changed according to the advancement of society.

Women have been dehumanised and subjugated as mere chattel since antiquity. When the father hands over the bride to the husband, it is referred to as 'kanyadaan'. To her family, she is seen as an outsider and a property of her husband. Traditional practises such as this should be debated logically, because women have rights and cannot be objectified in this period. It's important to support the shift in cultural paradigm. As a

³³ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 (India)

³⁴ *Supra* note 10

³⁵ Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2017) No. 26957

³⁶ *Supra* note 9

³⁷ *Supra* note 21

result, outdated customs that are no longer relevant could be relegated to the history books.

CONCLUSION

When a man and a woman are married, the state has already set laws governing marriage, such as dowry and cheating, as well as cruelty and divorce. Adding rape to the list would be nothing short of a monumental achievement for India's mental health. "Destabilizing the institution of marriage" and "harassing spouses" are two reasons why the state opposes criminalising marital rape. How would getting justice for an act that has already tainted the sacredness of marriage affect the relationship between the two people involved? Attempts or actual sexual assault by one of the spouses have already shattered the foundation of the marriage. Fast-track courts and their expedited proceedings can address the second problem, "harassing husbands." Establishing additional fast-track courts across the country would aid in the eradication of fictitious cases. However, if the state is adamant about not pursuing criminalization of marital rape, it might take years. To ensure that married women may use the law to resolve their concerns, it is vital to criminalise this practise. Only by making the distinction between rape and non-consensual intercourse between married couples clear we will be able to criminalise this crime as marital rape.

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