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MARITAL RAPE: IS 'SPOUSAL EXCEPTION' VALID?

AUTHORED BY - SHREYA SHOREWALA

1. INTRODUCTION

What would you call it if the happy occasion of your wedding suddenly took a turn at night and your husband turned into a nightmare- a monster? Marital rape? Why does it remain legal? What exactly is marital rape? These are one of the most debated topics for academic researchers and legal professionals. This research paper will attempt to assemble the various arguments raised by them and discuss the discrepancy in Indian law concerning marital rape and the lack of criminalisation of it, unlike the United Kingdom and United States of America. This essay contends to make this married women's nightmare a crime and governments and courts must take decisive action. The definition of marital rape is "non-consensual sex where the offender is the victim's spouse" (Shivali,2014)¹ Marital rape can be subdivided into two more types of rape- violent rape and force-only rape. The former is using aggressive and physical violence to cause injury, excluding the injuries from rape, and the latter is using force to keep the wife from escaping or defending herself. (Nayak , 2006)²

2. STEREOTYPE-INDIA & USA

The leading cause of marital rape going unnoticed by criminal law is India's social system, which prioritises the family values more than a women's modesty as a critical social unit. Even so, when women experience this, it affects their physical and mental health, which indirectly affects the family. This is especially true when women are forced to keep quiet because of the social stigma associated with it, social pressure to maintain the façade of the sacrosanctity of marriage, and the fact that they have no legal way out of it. In **Bodhisattwa Gautam v. Subhra Chakraborty (1996)**, the Supreme Court described it as a "deathless disgrace and the gravest crime against human dignity." In the past, this horrifying husband's behaviour has been

¹ Shivali (2014) "Marital rape in India – Existing laws and need for change," *Madras Law Journal Criminal (Journal Article)* [Preprint].

² Nayak, N. and R.P. Janani (2006) "Recognition Of Marital Rape Under Section 375 Of I.P.C.-Need Of The Hour," *Madras Law Journal* [Preprint].

tolerated more readily in rural communities with a lower level of global knowledge and education. Lord Hale's text from the 17th century and J.S.Mill argue that the right to express permission is explicitly waived by women when they get married and have no right to express consent and it is implied at husband's will (Marital rape in India, 2014)³ because women might use it to punish the male family members and not preserving marital rape as an exemption will destroy the institution and sanctity of the family, according to supporters of this absurd argument. When the bill to make it a crime was brought up in the Rajya Sabha, Haribhai Parathibhai Chaudhary, India's Minister of State for Home Affairs, said the same and that international rape definition does not suit Indian socio-economic status. This point of view uses religious and societal traditions as a crutch to support orthodox and backward thinking.

Traditionally the USA practised Sir Mathew Halls British common law ideology, which is evident through the 1962 model penal code. However, it started to decline in 1970, especially when in **Oregon v Rideout (1978)** husband was held guilty of marital rape while the couple was living together for the first time, which led to reform. In the 1984 New York Court of Appeals case of **People v. Liberta**, judge Sol Wachtler stated that a marriage license is not a license to rape and married women have the same protection from law as unmarried and separated women. Furthermore, today all 50 states have criminalised Marital rape in United States Of America. Such as In California, marital rape was recognised as a crime by Section 262 of California's Penal Code in 1979 and Connecticut Penal Code Sec. 53a-70b deals with the same. This does not apply only to spouses but also to unmarried cohabitants. In **Weishaupt v. Commonwealth 227 Va. 389**⁴, the court firmly disregarded the defendant's argument that marital rape should be exempted as it would interfere too much with marriage and that Va. Code § 18.2-61 did not alter the common law notion that in marital rape case husband is legally liable.

3. RAPE ON SEPERATED OR MINOR WOMEN & PUNISHMENT

India's laws on sexual offences have been evolving slowly and mainly due to a sudden uproar over a case. **Tukaram v. State of Maharashtra (1976)** led to the 1983 revisions, while December 16, 2012, the Delhi Nirbhaya gang rape (Section 376 D) led to the 2013 amendments. However, despite all the lobbying and suggestions made by committees, such as those in the Justice Verma Committee Report, in the section 375 of IPC, marital rape exemption remained

³ Marital rape in India – Existing laws and need for change 2014 1MLJ Cr147

⁴ Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847, 1984 Va. LEXIS 258 (Va. April 27, 1984)

in place. However, these revisions brought about essential modifications, such as making custodial rape illegal and expanding the definition of rape, respectively (Patel,2019)⁵. The 42nd Law Commission Report was the first to tackle marital rape and stressed on no need to criminalise it because it is difficult to prove as they are in a marital relationship and are cohabitating. Instead, they suggested creating a new section for this type of rape- sexual assault in marriage. Section 375, which states that having a wife who is not under the age of 15 does not constitute rape, is contentious, particularly in light of the Task Force on Women and Children established by the Government of India's Woman and Child Department's opposition to it and demand for further discussion on the subject. However, neither this report nor the task force's recommendations called for the explicit exclusion of marital rape. The identical recommendation—treating marital rape as physical violence—was made in the 172nd law commission report, submitted nine years ago (Gupta & Gupta, 2013)⁶.

Sexual activity with a female under eighteen, with or without her consent, is considered rape after 2013 amendments under Section 375 Sixthly IPC 1890. Nevertheless, let us say a husband tries to force his wife. Even though she is under 18 and older than 15, it is not considered rape in such a situation. The human rights of a married girl as small as 15 needs to be protected and accepted (**Independent though v. UOI**). According to **Bhupinder Singh v. Union Territory of Chandigarh (2008)**, engaging in sexual activity with one's spouse, whose marriage to him is null and void since he was already wed, had a spouse who was still alive, and who was aware of the first marriage, constitutes rape. Anyone who engages in sexual activity without his wife's consent with his wife while they are divorced or otherwise live apart is guilty of rape according to Section 376B IPC1980. A judicially separated husband may be found guilty of rape under section 376 B IPC for no particular cause other than the fact that the couple is not living together. This also aids in sustaining the Indian image of the nation has a low divorce rate. The primary distinction between the penalties for rape and other sexual offences or physical violence—the latter of which has a lighter sentence than rape under section 376(2) of the IPC—is not taken into account by these commissions and in **Bodhisattwa Gautam v. Subhra Chakraborty (1995)** the court explicitly said marital rape is lesser than sexual assault as an offence. While section 376(A) gives 20years- life imprisonment in case of causing death or resulting in persistent state of victim due to rape, section 376(b) gives 2-7 years of

⁵ Patel, K. (2019) "THE GAP IN MARITAL RAPE LAW IN INDIA: ADVOCATING FOR CRIMINALIZATION AND SOCIAL CHANGE."

⁶ Gupta, D.B. and Gupta, D.M. (2013) "Marital Rape: - Current Legal Framework in India and the Need for Change," *Galgotias Journal of Legal Studies*, 1(1).

imprisonment punishment along with fine for forced intercourse with wife during separation and section 276(e) gives life imprisonment for repeat offenders while punishment for sexual harassment under S354A is 1 year or fine or both and assault is 3-7 years and fine under S354B. This shows that even judicially separated wife if raped by husband will be as liable as an assault victim which negates the principle of greater offence receives greater punishment.

Although it is claimed that the Protection of Women Against Domestic Violence Act of 2005 offers married women sufficient protection, pressure from the men's group has weakened Section 498A's restrictions. These organisations are not acknowledging the fact that women are not protected by personal, criminal, or civil laws from being raped or sexually assaulted by their husbands, either once or repeatedly. While restoring conjugal rights is possible and it does not significantly affect marriages but criminalising marital sex, however, would only because it does not fit the stereotype of the ideal Indian wife. Even sexual torture is exempt from the Hindu Marriage Act's cruelty provisions. Due to the betrayal of trust and forcing the victims to live in constant fear and peril, forced intercourse with wife must be counted as rape as it is more painful than rape by a stranger.

As a result of not being taken seriously by lawmakers and being forced to remain silent for the family's honour, the police, relatives, and friends view it as a common practice. Despite marital rape meeting the requirements for mens rea and actus reus of rape since it is intentional and injures, harms, and humiliates women. (Nigam, 2015)⁷ In the case of **Nimeshbhai Bharatbhai Desai v. State of Gujrat (2018)**, the wife accused the husband of having forced affairs with her while also threatening her with carnal and oral sex. She stated that her fundamental rights of 14, 19, and 21 were infringed upon. Despite the apparent health problems and injuries, the court dismissed the appeal since marital rape is not yet a crime. The notion of marital rape has been normalized and converted into automatic consent. Because of how the law is written, women are treated as chattel. No one should be granted the authority to violate another person's autonomy and bodily and mental integrity.

Initially in the United Kingdom, Sir Mathew Hale and John Fedrick agreed that a husband could not be held guilty for rapping his wife. However, In *R v R*(1991), the house of a lord called it an 'anachronistic and offensive common law fiction' which does not represent women

⁷ Nigam, S. (2015) "The social and legal paradox relating to marital rape in India: Addressing structural inequalities," *SSRN Electronic Journal* [Preprint].

today and overturned the previous precedents. However, this could not be used retrospectively due to the Article 7(1) convention. (**S.W. v. United Kingdom (1995)**). This stand has further clarified the reasoning in **Shaw (1962)** "In the sphere of criminal law, there is no doubt that there remains in the courts of Law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for." (Viscount Simonds). Punishment for marital rape in UK according to case law is 4-19 years depending on the facts of the case even life imprisonment can be sentenced if necessary and in public interest. (Edward & Allen, 2021)

4. CONSTITUTIONAL RIGHTS

Marital rape violated three fundamental human rights, including the right to sexual privacy, the right to a healthy body, and the right to live with human dignity. Article 14 of the Indian constitution is contradicted if marital rape is not criminalising because married women are not offered the same legal protections as unmarried women and Article 19 as the mistreated and raped married women cannot speak up to uphold Indian norms. When the wife is sexually assaulted or raped, these qualities are absent from the marriage relationship, which is one of love, trust, and affection. No person "shall be deprived of his life or personal liberty unless following the method prescribed by law," according to Article 21 of the Constitution. As these married women are unable to live their lives with complete dignity and freedom, this directly contradicts this.(Judicial Activism: The Indian Experience 2001)⁸.

5. STATISTICS

"Indiana University Press, 1990 reported that "more than 1 in every seven women who have been married has been raped in their marriage" According to United Nation population fund more than two-thirds of Marital women aged between 15-50 in India have been subjected to forced sex, beaten, tortured along with a demand for dowry. Many countries have enacted marital rape laws, repealed marital rape exceptions. Recently Indonesia and Turkey have criminalised marital rape in 2005 and Mauritius and Thailand in 2007." (Akshaya & Kannappan, 2018)⁹. More than 100 countries, including Indonesia, Turkey, Mauritius and

⁸ S. P. Sathe (2001) "Judicial Activism: The Indian Experience," *Washington University Journal of Law & Policy*, 6.

⁹ Akshaya, G.V. and Kannappan, M. (2018) "A Study on Marital Rape in the Indian Legal Scenario," *International Journal of Pure and Applied Mathematics*, 119(17).

Thailand, have criminalised it before 2007, yet India is not one of them despite being the most significant democratic country. The legislation and enactments regarding other female-centred crimes, such as dowry, cruelty, domestic violence, and female infanticide, have not been implemented effectively. These statistics give an idea about the gravity of the necessity of making no distinction between marital rape and 'other' rape.

6. REMEDIES

To change this, a pre-legislative process must be used when drafting a bill, especially with groups representing opposing viewpoints (men's and women's protection groups). This will increase the effectiveness of laws that will be implemented to stop marital rape because they will reveal the reality and what each party demands for efficient implementation, as opposed to the transgender bill, which was received by protests from the public and members of the communist party. Before failing, the proposed bill in the parliament must be carefully considered (Jain, 2020)¹⁰. Even if the abuse occurs inside one's marriage house, the public needs to hear about it; the law does not need to be political in this case. The current reporting regulations for sexual offences need to be softened and made less severe since they discourage women from reporting crimes, promote awareness of stereotypes, and motivate women to come forward. The sentence for marital rape should be determined by a proper sentencing committee¹¹(Satish, 2017)

7. CONCLUSION

These women are helpless victims of society and men. The patriarchal power structures and Victorian ideology have completely undermined a woman's self-worth and self-respect by turning marriage into a licence for marital sex. They are not just there for our sexual satisfaction but are human beings. Laws in this area need to be consistent with recognised international standards. Thus, spousal exception is not valid.

¹⁰ Jain, D. (2020) "Law-making by and for the people: A case for pre-legislative processes in India," *Statute Law Review*, 41(2), pp. 189–206.

¹¹ Satish, M. (2017) *Discretion, discrimination and the rule of law reforming rape sentencing in India*. Cambridge, United Kingdom: Cambridge University Press.