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MARITAL RAPE: A CRITICAL ANALYSIS IN THE PURVIEW OF INDIA AND COMPARISION WITH OTHER COUNTRIES

AUTHORED BY - SHRUTI YADAV

ABSTRACT

The study examines the urgent problem of marital rape in India and sheds light on the ethical, societal, and legal implications of this grave situation. It draws attention to India's current legal system, which exempts marital rape from prosecution and contrasts it with international norms that acknowledge the seriousness of this violation of consent inside marriage. In the paper, the urgent necessity to criminalise marital rape in India is emphasised, and a thorough justification is provided based on international precedents, human dignity, and constitutional rights. It potrays the harm done to victims' physical and mental health and claims that failing to provide justice to survivor's feeds gender inequity and prejudice. Along with cultural values, complex legal issues, and political opposition, barriers preventing the criminalization of marital rape are also looked at. The government's policy of protecting marital peace at the expense of women's rights is criticised in the article. The discussion also covers recent judicial developments, particularly the conflicting opinions held by the Delhi High Court, which paves the way for the Supreme Court's upcoming consideration of the issue. It also contrasts India's position on marital rape with that of other nations, emphasising the need for a thorough legal system to safeguard victims. The article concludes by urging quick action to make marital rape a crime, highlighting the importance of legislation in resolving this pervasive problem, and promoting gender-sensitive laws.

Key words: Marital rape, Human rights, Gender discrimination, Sexual abuse, Marriage.

INTRODUCTION

“One religious woman even suggested I stay with him, but turn off all my senses and treat him only as a pay check. All I could say in response was, “What you’re describing to me is prostitution”.” This was quoted by Reham Khan, a renowned British-Pakistani journalist, embodying the gravity of marital rape.

According to section 375 of the Indian Penal Code, rape is when a man has sex with a woman against her will. Then again, Section 375 does not classify engaging in sexual activity with a wife without her consent as rape. On the other hand, Section 375's Exception 2 exempts unwilling sexual intercourse between a husband and a wife who is over the age of fifteen from the definition of "rape," shielding such conduct from legal action. In India, violating sections 375 and 376 of the Indian Criminal Code results in punishment for rape by an outsider. Strangely, it explicitly precludes marital rape from being punishable by law. When a husband has sexual contact with his wife against her will or under coercion, it would come under the purview of marital rape.

Any sexual act carried out within the bounds of a marriage is not regarded as criminal because it is a religious event. Rape is defined as sexual activity or sexual penetration that occurs without consent. As a result, proving rape requires establishing that consent was not given. Typically, the burden of proof rests with the victim to show that there was no consent. For instance, minors are legally seen as not being able to consent to such conduct, hence consent is improbable. Yet, when the victim and the criminal are married, consent is frequently taken for granted.

A woman is thought to give her husband her eternal consent to have sex with her after entering into matrimonial relations. While almost every country in the world considers unwelcome sex between a husband and wife to be a crime, India is one of the 36 nations that has not yet made marital rape a crime. The validity of this provision is the subject of numerous writ petitions before the Supreme Court of India and other High Courts, and the Supreme Court recently made a landmark decision-making unwelcome sex with a wife between the ages of fifteen and eighteen illegal. As a result of this decision, more writs contesting the general validity of Exception 2 have been submitted. The legitimacy of Exception 2 is examined in this article in light of recent judicial proceedings. This article also aims to provide an in-depth analysis of marital rape, focusing specifically on India and comparing its situation to other countries. By examining the legal aspects, prevalence, cultural factors, and the role of international human rights in addressing marital rape, we can gain a comprehensive understanding of this widespread problem.

REALITY OF MARITAL RAPE IN INDIA

Rape is a serious breach of a person's fundamental right to life and individual freedom; it is more than just violence against women. Due to the connection between the victim and the criminal, nothing changes. The notion that having sex with your spouse is a privilege granted to the husband

by marriage is therefore untrue. Because it silences a woman's voice against her husband, who uses her position to his advantage and breaches her trust and sense of self. Marital rape has been shown to be highly traumatic and to have long-lasting physical and emotional effects.

Our state fails to fulfil its responsibility to ensure sexual fairness, which includes protection from wrongdoing and mistreatment, by not criminalizing spousal rape.

Numerous nations have now approved legislation that forbids marital rape or implements rules that make no distinction between marital and common rape.

This proves that rape in marriage is now viewed as a human rights violation. Despite the fact that India has established various laws and institutions addressing violence against women in their homes, such as laws prohibiting the murder of girls and domestic abuse, the holy veils of marriage in India stand to conceal marital rape.

The true prevalence of marital rape in India is unknown, as it is in the majority of other nations, but numerous studies carried out, suggest that it is widespread, despite the reluctance of many officials to accept it. Various research and their findings pertaining to marital rape in India are mentioned henceforth:

- One in five Indian males have allegedly forced their spouses to engage in sexual activity, according to a 2011 survey.¹
- More than two-thirds of married Indian women between the ages of 15 and 49 reported that their husbands had abused them or coerced them into having sex.²
- According to a different survey, one in seven married women in India have experienced rape at least once, at the hands of her husband³

Such findings prove the existence of marital rape in India and, how such gruesome acts go unpunished, as the law does not consider these rapes to be crimes.

¹ The International Men and Gender Equality Survey, 2011.

² The United Nations Population Fund Survey, 2000.

³ Conducted by the Joint Women's Programme, an NGO, New Delhi.

JUSTICE VERMA COMMITTEE REPORT (2013)

The Justice Verma Committee was established in 2012 as a result of the Delhi gang rape case to recommend changes to the criminal code that would allow for a more expedited legal process and harsher penalties for those who commit sex assault against women.

The IPC distinguishes between rape within marriage and rape outside of marriage, according to the report that the Committee submitted on January 23, 2013. Sexual activity without consent is forbidden by the IPC. Unwanted sexual contact between a husband and wife does, however, fall under an exception to the rape crime. The Committee suggested eliminating the exception for marital rape.

Marriage shouldn't be viewed as a sexual act's unconditional permission. The relationship between the victim and the accused should therefore not be considered relevant for determining whether the complaint agreed to the sexual activity.⁴

The panel placed a significant amount of reliance on the rulings issued by courts in various nations, saying that "Our view is supported by the judgement of the European Commission of Human Rights in *C.R. v UK*⁵, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim."

WHY MARITAL RAPE MUST BE CRIMINALIZED?

Many prominent jurists, women's rights activists, and social activists have argued for criminalising marital rape. Here is the list of all arguments:

- Marriage shouldn't be considered giving a husband the capacity to impose sexual relations at will. Marriage cannot signify implicit, Irrevocable consent. Marital rape infringes on a married woman's right to equality, which is protected by Article 14 of the Indian Constitution.
- The IPC's marital exception to the definition of rape was written in accordance with Victorian patriarchal standards that did not acknowledge men and women as being on an equal footing.

⁴ The Justice Verma Committee Report, 2013

⁵ (1992) 1A.C.599

- It creates an unfair distinction between married and unmarried women and, by extension, denies a married woman the ability to consent to sexual activity. It also forbade married women from owning property and combined the identities of husband and wife under the "Doctrine of Coverture."
- A fundamental right under Article 21 is additionally violated by forced sexual cohabitation.
- Section 375 of the IPC is directly at odds with marital rape. Section 375 specifically aims to defend women and punish those who harm them inhumanely. The goal of Section 375 cannot be achieved by protecting husbands from prosecution because rape carries the same penalties whether a victim is married or not. The exception of section 375 IPC shields males from acts done against their wives by dividing people into two categories depending on marital status.
- If marital rape is not made a crime, a woman's dignity is suppressed, meaning her dignity while she is married is given less significance.
- In *State of Karnataka vs. Krishnappa (1993)*⁶, the Supreme Court stated that "sexual violence, in addition to being humiliating, is an unlawful trespass into the private and dignity of a woman. The court also determined that non-consensual sexual activity qualifies as both physical and sexual violence."
- The Supreme Court equated the right to select a sexual activity with Article 21 in *Suchita Srivastava v. Chandigarh Administration (2009)*⁷. (Right to personal liberty, privacy, dignity, and bodily integrity).
- In *Justice K.S. Puttuswamy v. Union of India*⁸, the Supreme Court upheld everyone's right to privacy (2017). Decision-making privacy is a crucial component of privacy, especially when it comes to choices involving one's sexual orientation, ability to procreate, or intimate relationships.
- "Does a man or woman lose their sexual autonomy after they are married," Justice Chandrachud asked this question in *Joseph Shine v. Union of India (2018)*⁹. "No, I believe. The right to decline sex should continue to exist after marriage", he added.

⁶ : 2000 CriLJ 1793, JT 2000

⁷ S.L.P. (C) No. 17985 of 2009

⁸ WRIT PETITION (CIVIL) NO. 494 OF 2012

⁹ WRIT PETITION (CRIMINAL) NO. 194 OF 2017

- The Special Marriage Act of 1954 and other personal laws do not recognise marital rape as a basis for divorce, hence cruelty to the husband cannot be cited as a justification for divorce. As a result, the women continue to suffer silently and helplessly. No matter who the perpetrator is or how old the victim is, it is still rape.
- Women who have been sexually assaulted by strangers or their spouses often have lasting memories of the horrific attack they experienced.

The Supreme Court affirmed Article 21 of the Constitution in each of these cases, holding that all women, regardless of whether they are married or not, have the right to refrain from engaging in sexual conduct.

Criminalizing marital rape grants women fundamental human rights as well as a sense of protection from the most terrible crime that may occur within marriage. Individuals will be granted the right to refuse sexual activity when they so want.

The ability to directly pursue justice will be made possible by making marital rape a crime.

THE CHALLENGES HINDERING THE CRIMINALIZATION OF MARITAL RAPE

Gender discrimination, in my opinion, is the main factor contributing to sexual assault against women in India. A legal instrument used by the state to institutionalize gender discrimination is the marital rape exception found in IPC Section 375. The government is expected to take all necessary measures to safeguard its female citizens and to change social and cultural norms that support gender stereotypes. Failing to comply with this demonstrates gender prejudice. Violence, especially sexual violence, is prevalent, frequent, and a crucial tool in the enslavement of women and their confinement to private areas.

The government claims to recognize the violence women experience in their marital homes, thus the existence of this exception is an abnormality. This suggests that the laws that are currently in place, which do not punish marital rape, are insufficient to address the issue of marital rape in India since they do not properly address the issue of gender discrimination in the context of many other issues. Many such reasons against such criminalization are:

- The notion of eliminating the husband exemption clause under IPC Section 375 was recently rejected by the government, which claimed that doing so would amount to excessive meddling with the marital relationship.
- According to former Indian Chief Justice Dipak Mishra, "criminalizing marital rape will bring about chaos in homes and our nation's survival depends on the family institution, which supports family values."
- Simply making marital rape illegal may not be enough to put an end to it because "moral and social awareness" is crucial to putting an end to such an atrocity.
- Due to ingrained customs and social mores, marital rape cannot be made a crime. The Indian government claims that individuals who work to stop women from being raped by their husbands are imitating Western nations.
- Our culture is based on the tenet that once a woman marries, she perpetually consents to her husband's sexual advances. The wife has thereby ceded her rights to her husband by mutual consent and marriage contract, which she cannot revoke. The union government absurdly argued that if all sexual acts between a husband and his wife take place, then the wife will be the only judge of whether they constitute marital rape or not in an affidavit to the Delhi High Court, claiming that a law criminalizing marital rape could be used to harass husbands.
- As there is no long-term evidence in such a case, a man's sexual interactions with his wife cannot be used as evidence in court.
- Due to issues like poverty, illiteracy, social conventions, religious beliefs, and the sacredness of marriage, many people also believe that the idea of marital rape is an international one that cannot be applied under Indian pretext.
- The wife's testimony is frequently the only proof of the rape on the issue of whether the husband raped his wife. DNA or semen samples would be meaningless as there may have been consensual sexual contact between the couples prior to the rape. It would have been common for the husband and wife to have intercourse often, making it nearly impossible to establish that there was no consent. Many have stated that after a woman claims that she has been raped in a marriage, there won't be much evidence, such as CCTV footage or other proof, to show whether the woman has or has not been raped. As a result, applying the burden of proof in these cases will be challenging.
- Misuse of the law is a big reason why several individuals, jurists and even men's rights activists have raised alarm over the criminalisation of marital rape. Statistics about the

abuse of 498A, the law that deals with dowry cases, are used to argue against making marital rape a crime. Some campaigners assert that up to 85% of dowry accusations are unfounded, and that India cannot handle another disastrous law that will amount to "legal terrorism" if it fails. Many men's rights advocates are particularly reluctant to make marital rape a crime because they believe this will lead to even greater abuse than the anti-dowry law.

JUDICIAL PRECEDENTS AND ONGOING LITIGATION

The Division Bench of the Delhi High Court in the case of *RIT Foundation vs Union of India*¹⁰, which was decided on May 11, 2022, consisting of Justices Rajiv Shakdher and C. Hari Shankar held two different views regarding marital rape. The question before the court was if a husband should be held criminally liable for raping his wife who is not under 18 years of age.

- The question of whether the distinction between married and unmarried couples has a rational connection to the purpose of Section 375, which is to prevent a woman from being subjected to a sexual act against her will or with her consent, was raised by Justice Rajiv Shakdher. The categorisation is illogical and arbitrary since it implies that forced sex that occurs outside of marriage is "true rape" and that similar behaviour that occurs within marriage is anything other than rape. A woman has the moral right to reject unwelcome, coerced sexual contact. It was misconceived that eliminating MRE would result in the creation of a new crime for a number of reasons, the most important of which was that it would only result in the extension of the ambit of Section 375 to even offending husbands.
- According to Justice C. Hari Shankar, "Section 376B of the Indian Penal Code is based on the evident assumption that when a couple is separated, the demographics that would otherwise be applicable to a marriage that is subsisting and enduring between them are absent. This clause treats the man's act of non-consensual sexual contact with the woman in such circumstances as a separate and entirely different offence, with a different punishment prescribed for its commission. The husband has no reasonable expectation of having sex with his wife when the marital ties have been severed, even if there isn't a legal divorce. So, the distinctive signs of a sound, enduring, and lasting marriage are no longer valid. Once more, this is a circumstance that is qualitatively different from sex between strangers as well as sex between a husband and wife who are living together. As a result,

¹⁰ W.P.(C) 284/2015 & CM Nos.54525-26/2018

it cannot be compared to sexual activity between strangers, but it also cannot be compared to sexual activity between a married couple who live together. In order to address these situations, the legislation has carved out a middle ground. Of course, the court would have to decide if the couple is truly "living separately" in each case. Even though the couple is not together, the marriage is still valid, so the legislature decided to impose a suitable, milder sentence for the offence. The use of legislative discretion is fully appropriate, there is absolutely no basis for challenging the validity of the provision. Section 198B solely specifies how to handle complaints made in accordance with Section 376B. Hence, there is no reason to invalidate the provision."

After such polarizing views of the Delhi High Court on this issue, the Supreme Court is all set to take cognizance of the case and will begin hearing a series of petitions seeking to [criminalise marital rape](#).

Comparing Marital Rape Laws: India vs Other Countries

Comparison with Global Laws: Numerous countries have acknowledged the seriousness of marital rape and enacted legislation to protect their citizens. Let us examine the approaches taken by a few countries:

Marital Rape Laws in Western Countries

In contrast to India, many Western countries have recognized marital rape as a criminal offense. Legislation criminalizing this act exists in countries such as the United States, Canada, the United Kingdom, and Australia. These nations prioritize individual consent and recognize the importance of protecting victims within the institution of marriage.

- United States: All 50 states in the United States criminalize marital rape without any spousal exemption. The laws treat marital rape on par with other forms of sexual assault, emphasizing the importance of consent for any sexual activity, even within marriage.
- Sweden: Sweden was the first country to explicitly criminalize marital rape in 1962. Their legislation underscores the significance of sexual autonomy, recognizing that consent cannot be assumed merely based on marital status.

Marital Rape Laws in Asian Countries

Asian countries present a diverse range of attitudes towards marital rape. While some countries like Japan and South Korea have criminalized marital rape, others like Bangladesh and Pakistan

still lack explicit legislation on the matter. The varying legal frameworks underscore the need for comprehensive legal reforms across the region.

Marital Rape Laws in African Countries

Africa, too, experiences significant disparities in terms of marital rape legislation. Some countries, like South Africa and Zimbabwe, have criminalized marital rape. However, numerous others still lack specific legal provisions to address this issue. Consistent efforts must be made to establish comprehensive legal frameworks throughout the continent. South Africa's laws explicitly criminalize marital rape and affirm that no individual should be compelled into any sexual act without their consent, irrespective of their marital status. The legislation prioritizes the protection of women's rights and bodily integrity.

CONCLUSION

Marital rape is not entirely forbidden in India. It is without a doubt a significant instance of female abuse that calls for government action. Women who have been sexually assaulted by their spouses or partners are more susceptible to various attacks and frequently experience persistent physical and emotional problems. For a woman in this circumstance, living with her tormentor on a regular basis makes marital rape more scarier. It is obvious that marital rape has to be made a felony due to how serious the effects are. In India, the law is improving for women, but more needs to be done to make social and legal improvements, such as criminalising marital rape and altering views towards women in marriage. Since marital rape is not officially outlawed, the law defending women from domestic violence has many shortcomings. Positively, passing a law prohibiting domestic violence cleared the path for a law forbidding marital rape. This represents a change in the mindset of the state, which before favoured not interfering in family affairs. Marital rape, a kind of sexual violence against women, is simply one manifestation of a larger systemic problem. Fragmenting the problem means preserving and defending places of abuse and violation. Many social, economic, and political illusions regarding the place of women in Indian society have been strengthened by the lack of a criminal law provision to safeguard against marital rape. Due to the lack of accountability for the perpetrators, this gap has aided in the normalisation of this form of sexual violence, making marital rape more prevalent. Many women now find it difficult to refer to forced sex that occurs during marriage as "rape" as a result of this. Therefore, it is crucial to separate the public and private domains and to identify and document violence against women as a social issue. Similar to altered intestate succession laws, legislative reforms surrounding marital

rape are inevitably met with hostility since they offer a serious threat to the status quo, which views men in dominant roles of power and control within families and throughout communities. Despite this, legislative reform has the potential to result in more gender-sensitive policies and initiatives, and as such, it is an essential step in the direction of reducing marital rape in India. In the end, the law can play a significant role in combating marital rape by eliminating the "marriage between an intimate connection and the incorrect assumption of continued consent to sexual intercourse," since such separation is necessary by equality. It is past time for India to respect a woman's dignity and freedom over her body and person. Should the government really interfere in a married couple's home? Indeed, is the answer. In instances of abuse, divorce, and dowry demands, it already does. Why should the most vile and horrific crime remain outside the purview of the state and its laws? Why can't it address the issue of marital rape? A state must defend a woman's right to fundamental physical integrity even if it has no role in the marriage itself but serves as an arbitrator following the divorce. Marriage is regarded by the patriarchal power systems as a permit for forced sex. This undercuts women's sense of worth. India is rife with contradictions for a nation that prides itself on being on the path of growth. Despite the fact that mainstream national movements have been built around "non-violence," structural violence against women still permeates the social, political, and cultural fabric that is the foundation of our nation as a whole. The nation has access to the most advanced defence technologies, ensuring the security of the state, yet its women live in fear for their lives and dignity within the family on the nation's land. Our society is rife with gender discrimination problems. A reduction in sexual violence against women and the ensuing liberation of women from fear and subjugation will remain an unfulfilled dream unless the series of complex and interconnected issues is carefully explored and addressed.