

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to

the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted IMoot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and

learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

IJLRA

Marital Rape — Myth, Reality and Need for Criminalization

Author: Chaya Gaur

Research Scholar

Manav Rachna University, Faridabad

Co-Author: Mr. Shaharyar Khan

Associate Professor

Manav Rachna University, Faridabad

Abstract

Marital rape is a social crime that violates the fundamental rights and dignity of a married woman. It twists the concept of patriarchy and violates a woman's trust. Despite this, rape has not been criminalized in India because we believe marriages are sacred. But how is violence within a marriage justified? Does a woman have to give up all rights to her body when she marries? The statistics paint a worrying picture of the condition of the married women in our country. We live in a society where marriage is seen as a license for sexual pleasure, but what happens when sex is non-consensual? Is it legal for a husband to rape his wife? Is it because the wife is viewed as the husband's object or property? Why are there different rules for women exposed to sexual violence inside and outside of marriage? Why does our country forget the atrocities committed against women after marriage? Today we talk about empowering women in broad perspectives. But in such a male-dominated society, would women be strongly empowered to not criminalize spousal rape?

The main objective of this article is to examine the socio-political and legal paradoxes related to spousal rape, to provide arguments and reasons that require the criminalization of spousal rape, and finally to recommend certain norms of behaviour that are adopted in society can be used to improve the situation of women in this field.

Keywords: Marital rape, sexual autonomy, violence against women, human right

Introduction

Marriage is the joining of two hearts, the harmony of two souls, and the joining of two families.' It is an eternal commitment made by two people to love and care for each other, to build trust and understanding, but never to ravish. "A man remains half as long as he is a bachelor, but after marrying a woman, he becomes complete," Manu says. So only when a man and a woman marry do they become perfect and complete. The wife is the Ardhgani of her husband, and the marriage ritual emphasises and reinforces conjugal intimacy. Panigrahana (taking the bride's hand) and saptapadi (going seven steps together) are important rites that represent union on two levels of equality and friendship.

According to Hindu sages, the goals of marriage are dharma, praja (progeny), and kama (sexual pleasure). Personal gratification (kama) is one of the ends of marriage; however, its last place indicates that it should not be the guiding rule of life, and thus the least desirable goal of marriage.

Patriarchy And Other Associations Of Domination And Subjugation

We believe marriages are made in heaven and celebrated on earth, so how can violence within a marriage be justified? Is raping a wife legal for a husband? Does a woman give up all control of her body when she walks around the fire seven times, says "I Do," or "Qubool Hai?" Marriage, according to Karl Marx, is a bourgeois institution in which wives become instruments of production for a legalised system of private prostitution. In *The Communist Manifesto* (1848), he argued that the continuing sexual exploitation of women in marriage is "hypocritically concealed." According to feminist leader Marlene Dixon, "the institution of marriage is the primary vehicle for the perpetuation of women's oppression; it is through the role of wife."

This clearly indicates that marriage is a patriarchal institution designed to subordinate and subjugate women by men.

Patriarchy has become embedded in social and cultural norms, as well as in the law and political structures, as well as in local and global economies. It is also embedded in formal ideologies and public discourse. Patriarchy has taken various historical forms, and it operates differently in different cultural, geographic, and political contexts. It is intertwined with other subordination and exclusionary systems. Statistics paint a bleak picture of marriage in twenty-first-century India. Domestic violence has emerged as India's single most serious crime against women. In 2013, the National Crime Records Bureau (NCRB) reported over 118,000

domestic violence cases, accounting for one-third of all reported crimes. According to the United Nations Population Fund, more than two-thirds of married women in India between the ages of 15 and 49 have been beaten or forced to provide sex. Based on data from the National Crime Records Bureau and the National Family Health Survey (2005-06), a study conducted by the US-based RICE Institute and published by UN Women in 2014 revealed that "the number of women sexually assaulted by their husbands is 40 times the number of women who suffer such violence from others." Only 2.3 percent of rapes were committed by men other than the victim's husband. However, only about 0.6 percent, or one in every 167 incidents of sexual violence by husbands, are officially reported.

Historically, gender roles - the socially constructed roles of men and women - have been ordered hierarchically, with men exercising power and control over women, according to the United Nations Report (2006). Male dominance and female subordination have ideological as well as material foundations.

Family demands, religious texts and ceremonies, and even popular fiction and Bollywood films reinforce this idea of male superiority from the time a girl is young. Since birth, the majority of young brides have been taught that "it is the woman's sacred duty to keep the home intact and that even when the husband is unreasonable, unjust, or abusive, she must be patient, forgiving, and loving."

Physical And Psychological Effects Of Marital Rape

Despite the historical myth that rape by one's partner is a minor event that causes little trauma, research shows that marital rape frequently has severe and long-lasting consequences for women. Marital rape can cause injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue, and vomiting. Women who have been battered and raped by their husbands may suffer from broken bones, black eyes, bloody noses, and knife wounds as a result of the sexual violence.

Miscarriages, stillbirths, bladder infections, infertility, and the potential transmission of sexually transmitted diseases such as HIV are all gynaecological consequences of marital rape.

Women who have been raped by their partners are more likely to suffer from severe psychological consequences.

Anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress disorder are some of the short-term effects of marital rape. Long-term consequences frequently include disordered eating, sleep problems, depression,

difficulties establishing trusting relationships, and increased negative feelings about oneself. Longterm psychological effects are likely. Some survivors of marital rape report flashbacks, sexual dysfunction, and emotional pain for years

after the incident.

Types Of Marital Rape

Legal scholars have identified three types of marital rape as commonly occurring in society:

Rape by battering: In "battering rapes," women are subjected to both physical and sexual violence in the relationship, and they are subjected to this violence in a variety of ways. Some are beaten during sexual violence, or the rape may occur after a physically violent episode in which the husband wants to make amends and coerces his wife to have sex against her will. This category includes the vast majority of victims of marital rape.

Force-only rape: In "force-only" rape, husbands use only the amount of force required to coerce their wives; battering is not common in these relationships. The assaults usually occur after the woman has refused sexual contact.

Obsessive Rape: Other women have reported "sadistic" or "obsessive" rape; these assaults often involve torture and/or "perverse" sexual acts and are physically violent.

Position In India

Marital rape exists in India de facto but not de jure. While in other countries, the legislature has criminalised marital rape or the judiciary has taken an active role in recognising it as an offence, the judiciary in India appears to be working at cross purposes. The Supreme Court stated in *Bodhisattwa Gautam v. Subhra Chakraborty*¹³ that "rape is a crime against basic human rights and a violation of the victim's" most cherished fundamental right, namely the right to life enshrined in Article 21 of the Constitution. However, it contradicts this declaration by not recognising marital rape. ¹⁴ Though there have been some advances in Indian domestic violence legislation, these have primarily been confined to physical rather than sexual abuse.

Women who have experienced and wish to challenge sexual violence from their husbands are currently denied State protection because Indian law has a general

marital rape exemption in Section 375 of the Indian Penal Code, 1860. This exemption can be traced back to statements made by Sir Matthew Hale, C.J. in 17th century England. Hale stated:

“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract.”

This established the notion that once a woman is married, she has no right to refuse sex with her husband. This gives husbands sexual access to their wives in direct violation of human rights principles and gives husbands a "licence to rape" their wives.

Only two groups of married women are protected by rape legislation: those under the age of 1516 and those who are divorced from their husbands. While rape of a girl under the age of 12 may result in rigorous imprisonment for a period of 10 years or more, rape of a girl under the age of 15 results in a lesser sentence if the rapist is married to the victim. Domestic violence against the wife was criminalised in 1983, when Section 376-A was added to the Indian Penal Code, 1860, making rape of a judicially separated wife a crime. It was an amendment based on the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India's recommendations. 18 The Committee dismissed the claim that marriage is a licence to rape.

Thus, a husband can now be indicted and imprisoned for up to two years if he has sexual relations with his wife, secondly, without her consent, and thirdly, she lives separately from him, whether by decree, custom, or usage.

However, the Task Force on Women and Children established by the Government of India's Woman and Child Department believes that there should be a wider debate on this issue. The Task Force's mandate was to review all existing women's legislation and schemes.

The most important of the Task Force's four recommendations regarding rape under the Indian Penal Code concerns the definition of rape. It argued that the definition of rape should be expanded to include all forms of sexual abuse.

According to the recommendation, the Law Commission's proposed definition of "sexual assault" could be used instead of the existing definition of rape in Section 375 IPC because "it is more precise."

However, the Task Force, like the Law Commission, did not recommend including marital rape in the new definition. As of now, Indian law is completely inadequate in terms of supporting mechanisms for women to exercise bodily integrity and sexual autonomy.

Rebuttal Of Arguments Against Criminalization Of Marital Rape

The following are some of the most common arguments raised in opposition to the idea and proposal of criminalising marital rape:

— There is no need for legislation to address marital rape because it is extremely rare. Due to the near-impossibility of proving marital rape, criminalising it would only add to the already overburdened legal system. Dissatisfied, angry, and vengeful wives may charge their innocent husbands with marital rape. When a woman marries a man, there is an implied consent to have sexual relations. Marital rape laws would destroy many marriages by making reconciliation impossible.

A reading of these arguments reveals that they are merely fanciful, lame excuses of a male-dominated society, devoid of any legal substance or moral force. It is not difficult to refute the preceding arguments.

Marital rape is a widespread but underreported crime. According to a study conducted by the Joint Women Programme, an NGO, one out of every seven married women has been raped at least once by their husband. 20 Because the law does not support them, they frequently do not report these rapes.

Regarding the second argument, that marital rapes are difficult to prove, it can be demonstrated that criminalising marital rape serves to recognise rape in marriage as a criminal offence and would serve as a deterrent to prospective rapist husbands. The fact that marital rape would be difficult to prove is no reason to ignore it as a crime.

Concerning the third argument of women imposing malicious charges, it should be noted that proving a claim of rape in marriage is difficult; proving a fabricated claim is even more difficult. Because of the stigma associated with rape trials, it is unlikely that women will choose to go through such an ordeal out of spite. Furthermore, the criminal justice system incorporates safeguards such as the requirement of proof beyond a reasonable doubt. This is no reason to deny victims protection simply because someone may be involved in a fabricated case.

In terms of the fourth argument, it is true that after marriage, a wife implicitly consents to sexual intercourse with her husband, but the expression of love through sexual intimacy is not the same as forced sex. On the other hand, regardless of whether the marriage is a sacrament or a contract, it strikes at the

very foundation of matrimony.

Marriage does not, by any stretch of the imagination, constitute consent to harm or violence, nor does the law allow anyone to give such consent.

Finally, a marriage in which the husband rapes his wife is doomed. One of the goals of matrimonial laws may be to keep marriages together.

However, it cannot override the fundamental goal of law in general, and of criminal law in particular, which is to protect and preserve a human being's bodily integrity. Withholding justice and denying equal protection for marriage preservation is thus, at best, an inappropriate legal goal. The law should not promote forced cohabitation or protect a raping husband.

Lacunae In Indian Law

The entire legal system surrounding rape is a tangle of contradictions. The following are the major legal gaps that prevent women from being empowered against marital rape:

— The judicial interpretation has greatly expanded the scope of Article 21 of the Indian Constitution, and the "right to live with human dignity"²¹ is now included. Marital rape clearly violates a woman's right to live with dignity, and it is argued that the exception provided under Section 375 of the Indian Penal Code, 1860 violates Article 21 of the Constitution.

— Article 14 of the Constitution guarantees the fundamental right that "no person shall be denied equality before the law or equal protection of the laws within the territory of India." As a result, Article 14 protects a person from discrimination by the state. However, the exception under Section 375 of the Indian Penal Code, 1860 discriminates against a wife in terms of rape protection. As a result, it is argued that the exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus violates the protection guaranteed by Article 14 of the Constitution.

— Though the Constitution²² makes it a fundamental duty for every citizen to "renounce practises derogatory to the dignity of a woman," it appears that domestic violence and marital rape do not fall under the definition of dignity.

— According to the "United Nations Convention on the Elimination of All

Forms of Discrimination Against Women" (CEDAW), to which India is a signatory, such discrimination against women violates the principles of equality of rights and respect for human dignity. Furthermore, at its fifty-first session,

the Commission on Human Rights recommended that marital rape be criminalised in Resolution No. 1995/85 of 8-3-1995 titled "The elimination of violence against women."

— Because consent to matrimony implies consent to sexual intercourse, a husband cannot be prosecuted for raping his wife. This implies that having sex whenever, wherever, and in any form is an implied term of the marriage contract, and the wife could not breach that term of the contract.

— The law prohibits a girl under the age of 18 from marrying, but it legalises non-consensual sexual intercourse with a wife who is only 15 years old. According to the Indian Penal Code, 1860, it is rape if the girl is not the wife of the man involved and is under the age of 16, even if she consents.²³ However, if she is a wife, over the age of 15, and refuses to consent, it is not rape.

— Another paradox is that the Indian Penal Code, 1860, defines rape as non-consensual intercourse with a wife between the ages of 12 and 15 years. However, the punishment may be a fine or imprisonment for a maximum of two years, or both,²⁴ which is significantly less severe than the punishment for rape outside of marriage. Despite the fact that advocates for women's rights secured a clause in 1983 making it illegal for a man to have sexual relations with his separated wife pending divorce, courts are hesitant to sentence husbands despite the law.

IJLRA

Suggestions For Reform

Following the discussion above, the following recommendations are made: — Marital rape should be recognised by Parliament as an offence under the Indian Penal Code.

— The penalty for marital rape should be the same as for rape under Section 376 of the Indian Penal Code.

— The fact that the parties are married should not be used to reduce the sentence.

— The fact that the wife did not fight back and resisted forcefully, or screamed and shouted, should not be used as a defence to the charge.

— If her husband is found guilty of marital rape, the wife should be able to obtain a divorce decree. Though a case of marital rape may fall under "cruelty" or "rape" as a ground for divorce, it is not the only one.

— While divorce may be an option for the wife, if she does not want to divorce and wishes to continue with the marriage, the marriage should be allowed to continue. Matrimonial laws should be amended to reflect this.

IJLRA

Conclusion

It is acknowledged that changing the law on sexual offences is a difficult and sensitive task, especially in a country like India, where there is a diverse and differentiated system of personal and religious laws that may conflict with the new amendments to the statutory criminal law. While there is a need for significant changes in the law on sexual offences, such as gender neutrality and eliminating inequalities, a radical overhaul of the structure of sexual offences is not recommended. 25 The immediate need is for marital rape to be criminalised under the Indian Penal Code. However, simply declaring a behaviour to be an offence is insufficient.

More needs to be done to educate the judiciary and law enforcement. There is also a need to educate the general public about this crime, as the true goal of criminalising marital rape can only be achieved if society recognises and challenges the prevalent myth that rape by one's spouse is insignificant.

1. R. Thornhill and C.T. Palmer, *A Natural History of Rape: Biological Foundations of Sexual Coercion* (1st Edn., MIT Press Cambridge Mass., 2000).
2. R. Thornhill and N. Thornhill, *The Evolution of Psychological Pain, in Sociology and Social Science*, Edn., R. Thornhill and N. Thornhill (Texas Tech University Press, 1989).
3. D.K. Gosselin, *Heavy Hands: An Introduction to Domestic Violence Crimes* (1st Edn., Prentice-Hall Inc., New Jersey, 2000).
4. National Violence Against Women Survey, NCJ 172837, US Department of Justice, Washington, DC.
- 5.527. 65 Am Jur 2d, Rape. Back to Text
- National Clearinghouse on Marital and Dating Violence, 1996.
6. *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, S.J. Schulhofer (Harvard University Press, Cambridge, 1998), p. 30.
7. *R. v. D.*, 2 NZLR 272 (1987). (CA).
- 8.1 SCC 490 (1996) Tandon, N., and Oberoi, N., *Marital Rape — A Question of Redefinition*, Lawyer's Collective, March 2000, p. 24.
- 9.1 Hale, *History of Crown Pleas* 629 (1778). Text 16: Exception to Section 375 of the Indian Penal Code of 1860.
10. Indian Penal Code, 1860, Section 376-A.
11. Law Commission of India, 42nd Report, 1977, Indian Penal Code, p. 277, para 16.115.