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MARITAL RAPE

BREAK THE SILENCE, STOP THE VIOLENCE.

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Student Of Law, Bennett University.**

Abstract:

India is thriving in every arena and establishing itself on a global basis, yet the rules that control Indian citizens are outdated, and it is past time for Marital Rape to be criminalized in India. Inherently as the idea of the Marital Rape Exception creates a distinction between married and unmarried women, and denies the former equal protection under the law, it appears to be a violation of Articles 14, 15 and 21 of the Indian Constitution.

We live in a country where criminalizing marital rape is seen as a threat to the institution of marriage. Does this threat not have any validity to the life of the women and her mental stability? The paper is explorative in nature and tries to suggest to readers the methods in which India can do better in terms of respecting women, her choice and dignity. The paper also tries to demystify the traditional thoughts which have lesser validity when compared to compromising standard of living. This study examines the practice of marital rape, as well as the difficulties involved, from a human rights standpoint, and critically analyses proposals made by various segments of civil society to make marital rape a punishable offence by amending relevant sections of the IPC, as well as the 172nd Report of the Law Commission of India and the Justice Verma Committee. The paper also focuses on examining the concept of Indian judicial activism in relation to the delicate issue of marital rape criminalization and its evolution in modern India.

Introduction:

We must not have him come forth to violate the self-esteem and dignity of women in this modern day where every nation recognizes their sexual autonomy. Prof. PSA Pillai's remarks that the husband's protection from material rape is assumed to depend on the concept that when a woman marries, she conveys her agreement to the husband for sexual intercourse for the rest of her life i.e., her husband is given the right to have both non-consensual sex or consensual sex with her, and this turns out to be an obligation as she has no choice except to yield or submit to his demands.¹

The following elements must be present in order for rape to be considered offence. The elements have to be under any of circumstances, where a man must have sexual intercourse with a woman against her consent or permission. further the permission must not be obtained by threat or under fear of death or hurt. it must also not be based on the false assumption that the man is her husband. Consent is provided due to insanity, intoxication, or being under the influence of any stupefying or unwholesome substance can also be accounted as rape. circumstances where with or without the consent of a lady under the age of eighteen or with a woman who is unable to give her consent verbally, such sexual intercourse is also treated as rape. Every law in this world has some exceptions and loopholes and such an exception to this law is marital rape. The exception of marital rape specifies that if the wife is under the age of 15, non-consensual sexual intercourse by the husband with his wife qualifies as rape. It means that if the wife is over 15 years old, it is not rape, and by reading Exception-2 with the conditions, the exception will prevail, and it means that if the wife is over 15 years old, her permission or will or consent thereof will be irrelevant. Now the question arises whether a 15-year-old girl can give consent or knows the implications of such an act.

The simple question that comes into the mind of every broad-minded Indian citizen is why we need such an exception where a husband has authority to rape his own wife without her consent. Moreover, whether the Indian Courts has the authority to strike down the IPC clause based on constitutional validity. Further, if we strike down this clause, what will be the repercussion?

If all sexual acts between a husband and his own wife meet the criteria as marital rape, the wife will be the final authority of whether it is a marital rape or not. The question in such circumstances is what evidence the Courts will rely on, as there can be no evidence in these cases. The Central Government argued before the Hon'ble High Court of Delhi that removing Exception 2 would be ineffective since a man's definition of 'rape' under Section 375 of the IPC² cannot be the same in the event of marital rape.³

¹ Prof. PSA Pillai, Criminal Law, 12th Edition/PSA Pillai Criminal Law 2014/CHAPTER 1 Nature of Crime CHAPTER 1 Nature of Crime, <https://old.amu.ac.in/emp/studym/99998340..PDF>

² Section 375 of the Indian Penal Code

³ Rit Foundation v. The Union of India, W.P. (C) No.284/2015, https://www.livelaw.in/pdf_upload/written-submission-407338.pdf

Effects Of Marital Rape

As the rapist is husband, with whom she had agreed to spend the rest of her life in positivity, marital rape is more serious and a particularly vulnerable situation for women. On the body, we may find injuries to private organs, bruises, fatigue, lacerations, torn muscles, fractures, and other complications, such as broken bones, blackened eyes, and wounds inflicted by any kind of weapon, and women who have to face this suffer from physical violence, as well as other complications such as broken bones, blackened eyes, and wounds inflicted by any kind of weapon, during sexual violence. Women are more likely to experience difficulties such as miscarriages, infections, infertility, and the risk of diseases such as STDs as a result of marital rape. Additionally, there are no adjectives to describe the anguish a woman feels when her own husband rapes her repeatedly. Physical symptoms may still be treated, but psychological symptoms can be more severe in some circumstances. Depression, panic, self-hatred, anxiety, low confidence, shock, low self-esteem, fear, suicidal tendencies, tension, and other post-traumatic stress symptoms can be seen in women who have been subjected to marital rape.

Laws In India

Domestic Violence

The Domestic Violence Act of 2005, Section 3⁴, addresses sexual violence in a broader sense. Domestic violence can also be referred to as domestic abuse, including beating, or family violence when it occurs between two people who are legally married or have a connection that is similar to marriage and involves various forms of violence such as physical violence, sexual violence, emotional violence, and economic violence, all of which can be a result of societal inequality. As per domestic violence act, marital rapes can be handled by using various sorts of violence and may have a history of domestic violence's or ill-treatments; non-consensual acts that may result in bodily injury to the victim; hence, a husband is not permitted to instigate any type of violence or cruelty towards women under any circumstances.

Child Marriages

The age of consent for sexual intercourse within marriages has been decided to be raised to 18 by the Supreme Court.⁵ Here, The Criminal Law Amendment Act of 2013 revised Section 375 of the Indian Penal Code⁶ to raise the age of consent to sexual intercourse to 18, laying the law in conformity with provisions in all other statutes that recognize a child as a person under the age of 18. A marriage contract between two

⁴ Section 3 of the The Domestic Violence Act of 2005

⁵ Independent Thought v. Union of India, National Commission for Women, WP (C) 382/2013

⁶ Section 375 of the Indian Penal Code

parties where one of them is a minor, i.e., under the age of 18 for girls and 21 for boys, can be declared void and nullified by the person who was a minor at the time of the marriage within two years of attaining majority under the Prohibition of Child Marriage Act, 2006. Further, in the case of a minor girl, i.e., under the age of 18, early marriage and consummation does not ensure her ability to give consent, and the legislature will impose severe penalties under the POCSO Act if this occurs. Families must be educated about women's marital rights of intercourse, as well as gender empowerment, to restore women's integrity. This will be accomplished through adult literacy programs and sexuality education for children.

Exception 2 of s.375, on the other hand, creates an element to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is 15 years of age or older, and as this has not been amended, resulting in an alarming situation in which forced sexual intercourse by a husband with a minor wife between the ages of 15 and 18 is permitted. In this regard, Independent Thought and Child Rights Trust stated that categorizing married and unmarried young girls for the purposes of penalizing sexual abuse had no rational connection to the Section's purpose nor objective and pointed out that it also goes against the state's duty under Article 21 and international conventions to protect children's rights.

The Union of India, on the other hand, asserted that it was up to Parliament to correct the anomaly found in the Exception in Section 375, as the reason to preserve the categorization was made in response to social pressures and the State's aversion to interfering in marital life. Consequently, Exception 2 to Section 375 of the Indian Penal Code⁷ raised the age of consent to 18 for the purposes of the Exception and advocated for legal measures to prevent and remedy breaches of girls' rights caused by child marriage. The India Penal Code provides an arbitrary and discriminatory differentiation between married and unmarried women that has no rational nexus with any specific objection meant to be reached, and the illusory division is not in the best interests of the women.

Discrimination towards minor girls infringed their fundamental rights prior to Independent Thoughts' verdict. The verdict of this case has brought remarkable impact in society because it raised concerns about the impact on sexual and reproductive health and invalidated an outmoded classification in rape legislation.

Conjugal Rights

People may believe that restitution of conjugal rights has no legal significance, but the truth is that it plays an important role in society. Restitution of conjugal rights does not provide any individual right to rape his spouse and thus they do not overlap or contradict each other. The courts ensure that women's sexual liberty is not jeopardized by the concept of conjugal rights. It is to be noted that Marriage is not a contractual relationship in which the right to privacy is violated; its formation or dissolution is not comparable to contractual relationships as it is a sacrament, and the decree of restitution of conjugal rights does not

⁷ Exception 2 of the Section 375 of the Indian Penal Code

permit marital rape. Restitution of conjugal rights is a measure of safeguarding the marriage institution, in which persons are obligated to share a household. Sexual intercourse is not the prime objective of the decree; rather, it is an attempt by the state to sustain the marriage institution, and state does not an attempt to impose one to give up one's body and sexual privacy without one's consent through restitution of conjugal rights.

Justice Verma Committee

The Justice Verma Committee Report is a result of the increase in rape cases in India, which includes majorly the terrifying Nirbhaya Case⁸. The government was forced to amend the rape laws to make them more rigorous in order to generate deterrence as a result of the report. The JS Verma Committee report and the Usha Mehra Committee report were key influences on the Criminal Law Amendment Act, 2013, which took effect on February 3, 2013.⁹

The committee emphasized the words of Lord Keith, "Marriage in modern era is viewed as a partnership of equals, rather than a relationship in which the wife must serve as the husband's chattel." The committee considered jurisdictions that allow for the criminalization of marital rapes, such as Canada, Australia, and South Africa, along with the fact that "The nature of rape does not vary with partnerships, and the view of marital rape is not different" for comparison. Further, the definition of consent was discussed, with the conclusion that it cannot be inferred from the relationship status. The committee report also discussed sentencing, which is a critical issue, by presuming that courts may view marital rape as a less severe crime with light sanctions.

The CEDAW Committee's recommendations were also underlined, with more detail. Sensitization, training, and awareness should be the initial steps in ensuring that marriage does not destroy the wife's legal and sexual autonomy. One of the significant contributions in light of marital rape in a more thorough and appropriate manner where sexual interactions were distinguished with sexual activity and sexual violence was these guidelines.

India Vis-A-Vis World

The dominance of male and patriarchal society resulted in the infringement of women's rights in traditional marriage ideas. However, during the 1960s and 1970s, most Western countries' attitudes on marriage and sexuality have been challenged, particularly by the second wave of feminism. People began to recognize and respect a woman's individual rights from this point forward.¹⁰ There have been numerous debates in which parliament was asked to recognize marital rape as a crime in India, but the outcome has been

⁸ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.

⁹ Law Commission of India, Reviews of Rape Laws: Some Suggestions, Report No.172

¹⁰ Nazrin Bano, Marital rape in India, <https://blog.ipleaders.in/marital-rape-in-india/>

unfavorable. India is among 36 countries in the world that still did not criminalize marital rape, and even when the courts are inundated with writ petitions demanding that the violation be made a crime, the Supreme Court declines to intervene due to multiple legal exceptions. Furthermore, conflicting judgements issued by the High Courts on this subject are making reconciling the disparities even more challenging. In India, a man can legally rape his wife without legal repercussions, because consent is assumed if one is married, and it comes as more of a distress, especially when one in every three women between the ages of 15 and 49 has admitted to enduring some kind of a sexual violence from their spouse.¹¹

Due to the spousal exception provision in the Indian Penal Code, marital rape is not recognized as a form of sexual violence in India, but it is regarded as a kind of sexual violence that can be described as non-consensual sexual intercourse by the victim's spouse. "The regressive notion that "A husband can't rape his wife" is legal; it is legal sexual intercourse with the potential for unwanted sex, sexual assault, violence, and so on."¹² elaborating the statement with interpreting the mindset of the writer it can be said that Sir Matthew Hale was trying to give the readers the view that when matrimonial consent was given by wife to her husband, she agreed for all when she agreed for marriage, and this all has no limit and can be as inhumane as rape as well.

When Chief Justice Gita Mittal and Justice C. Hari Shankar questioned if there had been any research done on the impact of criminalizing marital rape in nations like Nepal, the United Kingdom, or the United States, they were informed that many countries around the world have made marital rape a criminal offence and think that it should be punished.¹³ The court noted that the exception in the legislation offering immunity to a spouse was exceedingly broad, allowing him to do whatever he wished in a marital relationship. "The relationship between the offender and the victim has nothing to do with consent for sexual intercourse, and a husband or wife may be charged with an offence under the Criminal Code whether or not they lived together, and a husband might be found guilty of raping his wife."¹⁴

In Austria, marital rape was considered illegal in 1979 with a maximum penalty of 15 years in jail. Finland criminalized and prohibited marital rape with punishments of up to four years in 1994; however, if violence is perpetrated against a married woman, the punishment is more severe. In Jordan, a husband who has committed marital rape will be sentenced to at least ten years in jail whereas the exemption for marital rape was abolished from Irish criminal law and similarly Germany also removed exemption through amendment. In 1980, the Israeli Supreme Court ruled that marital rape was a felony offence punishable by up to 16 or 20 years in prison.

¹¹ World Health Organization, Understanding and addressing violence against women

¹² R v R (Rape: marital exemption), [1991] 4 All ER 481

¹³ 52 countries criminalised marital rape, HC told, https://www.business-standard.com/article/news-ians/52-countries-criminalised-marital-rape-hc-told-118010201102_1.html

¹⁴ R v L, (1991) 174 CLR 379 & R v J, (2011) 2 SCR 40

According to statistics, marital rape is more common in rural areas where marriage is seen as a free license to perpetrate this crime. If many countries around the globe could criminalize marital rape, why not India as and it is past time for India's court to act on this matter and safeguard our country's marital rape victims by striking down the laws that make marital rape not a crime. The judiciary needs amendments to produce better judgements. However, as the term marital rape is ambiguous in and of itself because marriage implies that both parties agree on a mutual contract of sexual intercourse, and if marital rape is acknowledged, it can lead to abuse because the proof cannot be submitted authentically in this case, making it difficult to determine whether it is rape or mutual intercourse, the judiciary is trying its best to find a balance.

The Indian Constitution establishes the rights to equality and life in Articles 14 and 21, respectively, and marital rape infringes on both fundamental rights, as well as the right to privacy to some extent. The Puttaswamy¹⁵ decision made it obvious that every individual's fundamental right to privacy is guaranteed by the Indian Constitution, specifically Article 21 and Part III as a whole and thus the author believes that its not appropriate for the husband to infringe on the right to privacy of his spouse as it is a fundamental right.

Breaking a marriage has long been regarded as an evil act and a social taboo, according to society. Our society views marriage as a fairy tale with a happy conclusion, and everything that contradicts this view is ignored. But, as a community, we must recognize that such challenges in marriage are not normal, and what the women go through is not something they deserve. Such obstacles should not be kept within themselves for the good of society. The health of these victims, and the rapist, regardless of whether he is her husband, should face the same sanctions. If rape is regarded a violation of a fundamental right, laws and society should not make a distinction between a husband and a stranger.

It should be clear to Indian society that “the introduction of equality clause within home will destroy the institution of marriage.” stated in the case of Saroj Rani v Sudarshan Kumar Chadha¹⁶ does not mean that the women in the house must be discriminated or treated in the wrong manner. The basic credo of the laws designed for Indian citizens is that no innocent person should be punished, even if it means letting the guilty go free. Furthermore, it is critical that women in the country begin fighting for their freedom from all the atrocities, since this is an essential necessity right now. Considering our law is not static, it changes to meet the demands and requirements of society, and in order to see a change in our judicial system, all citizens must understand the repercussions of marital rape for it to be criminalized.

¹⁵ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors, (2017) 10 SCC 1

¹⁶ Saroj Rani v Sudarshan Kumar Chadha, 1984 AIR 1562

Relevant Cases:

Judgements that created an impact with respect to protecting women from marital rape are numerous as courts from time to time interpret natural law and morality.

Under Article 21 of the Constitution, the Supreme Court associated the right to make sexual activity-related decisions with the rights to personal liberty, privacy, dignity, and bodily integrity.¹⁷ The Supreme Court in the case of *Arnesh Kumar v State of Bihar*, also declared that criminalizing marital rape would result in the "collapse of societal and family systems."¹⁸ and in the case of *The Chairman, Railway Board v Chandrima Das*, the court further elaborate that Rape, is not just a criminal offence under the Indian Penal Code, but also a crime against society as a whole.¹⁹ Rape is more of a display of animosity aimed at corrupting and mortifying the women than it is a sexual transgression. In this way, the marital exception principle deprives the spouse of his or her right to a dignified life. Any law that jeopardizes women's right to dignity and empowers husbands to force their wives into sexual relations against their will is unconstitutional, was held in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*.²⁰

Under Article 21, the right to privacy includes the right to be able to sit without being harassed or aggravated, and any form of violence, including intense sex (marital rape) jeopardizes the right to protection and sexual security. Moreover, it is argued that teaching marital exclusion to rape jeopardizes a married woman's right to protection by forcing her into a sexual relationship she does not desire.²¹²²²³ *Vishakha v State of Rajasthan*, in addition stated that by decriminalizing rape within a marriage, the marital exception doctrine infringes on a married woman's right to privacy, making it illegal.²⁴

The Gujarat High Court has decided that marital rape is what has harmed the institution of marriage since it is a non-consensual act that undermines trust and confidence within a marriage. However, on the other side of the coin there are many judgements where courts have said that even if by force, the sex between married couple cannot be considered as marital rape.²⁵ The concept of marital rape was explored in depth in a 2014 Delhi High Court case, but the court eventually ruled that now is not the time to criminalize

¹⁷ *Suchita Srivastava v. Chandigarh Administration*, (2009) 14 SCR 989, (2009) 9 SCC 1

¹⁸ *Arnesh Kumar v State of Bihar* (2014) 8 SCC, 273

¹⁹ *The Chairman, Railway Board v Chandrima Das*, (2000) 2 SCC 465

²⁰ *Bodhisattwa Gautam v. Subhra Chakraborty*, 1996 SCC (1) 490

²¹ *Kharak Singh v. State of U.P.*, 1964 SCR (1) 332

²² *Govind v. State of Madhya Pradesh*, 1975 SCR (3) 946

²³ *Neera Mathur v. LIC*, 1991 SCR Supl. (2) 146

²⁴ *Vishakha v State of Rajasthan*, (1997) 6 SCC 241

²⁵ *Sohini Goswami, Sex between married couple not marital rape even if by force: Chhattisgarh HC*, <https://www.hindustantimes.com/india-news/sex-between-married-couple-not-marital-rape-even-if-by-force-chhattisgarh-hc-101629970181481.html>

marital rape in India because 498-A provides a sufficient premise to resolve its linked difficulties. The court went on to say that neither new law nor the elimination of the exception clause is required.²⁶

The verdict of Justice M Nagaprasanna, "A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'"²⁷ is something that we Indians must acknowledge and put efforts as to bring positive changes in the world.

Conclusion & Suggestions

Despite the fact that marital rape is not criminalized in India at present, many courts have ruled in favor of women's rights in the with the passage of time. These includes the Kerala High Court ruling that marital rape is a valid reason for divorce, and the Gujarat High Court stated that marital rape is a "disgraceful conduct" that has caused "a significant population of women" to suffer since it is not criminalized. We the people must understand the fact that when a husband is unconcerned about his wife's personal space and disregards her preferences, he is infringing on her fundamental right to privacy. Rape in the home should be treated the same as rape in public. Because if the emotional repercussions of both offences are equivalent, the punishment provisions must also be the same.

When marital rape is not recognized as a type of rape, the 'right to equality' is violated, therefore marital rape must be treated as a criminal offence punishable by severe penalties, i.e., criminalizing marital rape in India as to safeguard its citizens and prevent it from reaching a dead end where there will be no option to protect the rights of women. Sections that normalize the allegedly 'not' normal marital rape culture should be struck down so that the normalization of the marital rape culture can be prevented. Marriage is seen as a shield and sanctity in the eyes of the law; hence these regulations do not apply to marital rape, and this is not the right way to implements rules and regulations in a society. As a result, India requires certain protections for victims of marital rape.

Marital rape cannot be overlooked by the law because it is the same as rape committed by a husband against his wife. If a husband assaults his wife, he will be prosecuted under the IPC for assault, but if the same husband forces his wife to engage in sexual intercourse, he will only be prosecuted for assault under valid marriage and not for rape. A husband who rapes his wife should face the same penalties as any other rapist. Just because they have a marriage certificate does not give him the authority to commit such a heinous crime, and in these circumstances, instead of being too preoccupied with giving he the wrong advice save their marriage by not filing a complaint against the husband, society could play a humanitarian role by assisting such women.

²⁶ State v. Vikash, AIR 1978 SC 1091

²⁷ Mr.Hrishikesh Sahoo V. State Of Karnataka By Women Police Station, Writ Petition No.48367 Of 2018, <https://karnatakajudiciary.kar.nic.in/judgements/WP48367-18-23-03-2022.pdf>

The only reason the spouses must suffer in silence like this is due to the judiciary's continued refusal to recognize it as a rape. The victim's relationship with the rapist should not even be considered; rape cannot be classified based on the relationship between the offender and the victim.

Because of the nature of the relationship, rape cannot be elevated to a higher level is a bizarre statement of societal thinking as it gives more importance to what others might think than to giving self-importance and doing what is best for yourself. It is not a crime only because you are married should not be what India is in future. Our culture that states “Aditi devo Bhava” taught us to treat guests as God and this also indirectly teaches us to treat family even better. From family to society, that is how rape must be eliminated from the world and if marital rape is acceptable in the family between a married couple, how can the world expect its children to not do the same offence in society. Article 21 includes the right to live with human dignity and all that develops with it, including the bare necessities of life, such as adequate nutrition, clothing, and a roof over one's head, as well as the ability to read, write, and express oneself in a various form, as well as the freedom to move around and connect with other people. The right to live with human dignity is one of the most basic components of the right to life, as it determines a person's independence.²⁸ The action of every individual is related to the circumstances that they have gone through, but this cannot give anyone the right to violate a woman's dignity, especially in a country like India where we consider women as goddess of the home.

ENOUGH IS ENOUGH – STOP MARITAL RAPE.

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²⁸ Francis Corallie Muin v. Union Territory of Delhi, AIR [1981] SC 802