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MARITAL RAPE AND ENTANGLEMENT IN LEGAL FRAMEWORK

AUTHORED BY - SNEHA JHA

Marital rape, also known as spousal rape¹, is the act of engaging in sexual intercourse with one's spouse without their consent. It is crucial to understand that the absence of consent does not require physical violence. Marital rape is unequivocally recognised as a form of domestic violence and sexual abuse. In the historical context, sexual intercourse within the confines of marriage was often perceived as a prerogative of spouses. However, it is paramount to acknowledge that engaging in such activity without the explicit consent of one's spouse is widely accepted as a form of rape in numerous societies worldwide. This is in line with the condemnation of such actions by international conventions and the ongoing trend of criminalisation.

The absence of legal protection against marital rape is an urgent women's rights concern for India, given that estimates from the third (2005-06) and fourth (2015-16) rounds of the ²National Family Health Survey (NFHS) revealed that the prevalence percentage of Intimate Partner Violence (IPV) against women ranges between 3% to 43% in different states of the country. The 5th round of the survey, held in 2019-20 and conducted in about 637,000 sample households in 707 districts of 28 states and eight union territories, suggests that 1 in 3 women in India aged 18-49 experience spousal violence, with at least 5%-6% of the women reporting sexual violence. The NFHS survey findings found a strong link between sexual and physical violence, so it recorded marital sexual violence under the umbrella of spousal violence. A breakdown of the findings shows that 5.6% of married women were physically forced to have sexual intercourse with their husbands, 2.7% of women were physically forced to perform sexual activities that they did not wish to perform, and 3.7% of the women were forced to perform sexual activities against their will through threats of physical violence.

The current definition of rape under section 375 of the Indian Penal Code does not encompass marital rape as a criminal offence. Exception 2 of section 375 specifies that sexual intercourse by

¹ <https://articles.manupatra.com/article-details/Marital-Rape-and-Law> (LAST VISITED ON 21/05/2024)

² https://equalitynow.org/news_and_insights/a-ruling-on-marital-rape-in-india-is-coming-up-heres-why-you-should-be-watching-closely (LAST VISITED ON 21/05/2024)

a man with his wife, as long as she is not under fifteen years of age, is not considered rape. Based on traditional beliefs, it is often assumed that within marriage, a woman forfeits the right to refuse sexual intimacy with her husband. This presumption grants husbands unrestricted sexual access to their wives, infringing upon fundamental human rights and essentially legitimising spousal rape.

The IPC defines rape under sec. 375 as:

1. Against her will
2. Without her consent
3. With her consent, obtained through fear of death or hurt
4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married
5. With her consent, when, at the time of giving such consent, due to unsoundness of mind, intoxication, or the administration of any stupefying or unwholesome substance by him personally or through another person, she is unable to understand the nature and consequences of that to which she gives consent
6. With or without her consent, when she is under sixteen years of age

The Bhartiya Nyaya Sanhita (BNS) of 2023, intended as a replacement for the Indian Penal Code (IPC), does not explicitly classify marital rape as a criminal offence. Despite incorporating significant reforms and updates, the BNS maintains an exception wherein sexual intercourse by a man with his wife is not considered rape, provided she is not under 18 years of age. This provision results in the continued absence of recognition of marital rape as a criminal act under the new legislation.

As per Justice ³J.S. Verma committee report, The IPC differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists concerning un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, in an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.

³ <https://clpr.org.in/tag/justice-verma-committee/> (LAST VISITED ON 21/05/2024)

This article seeks to examine and confirm the assertion that the absence of criminalisation of marital rape leads to substantial violations of women's rights. The study will explore the legal, social, and psychological consequences for women in India where marital rape is not explicitly outlawed, offering evidence to support the necessity of legal changes to safeguard women's rights.

The absence of criminalisation of marital rape in India infringes upon fundamental rights as guaranteed by the Constitution of India, including the rights to equality, protection from discrimination, right to life and personal liberty.

Right to Equality

ARTICLE 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

In the rulings of *ANWAR ALI SARKAR VS. STATE OF WEST BENGAL*⁴, the Supreme Court established that any classification under Article 14 of the Indian Constitution must undergo a test of reasonableness. According to this test, a classification can only be deemed reasonable if it demonstrates a rational connection to the objective intended to be achieved by the law.

*JOSEPH SHINE VS. UNION OF INDIA*⁵: The Supreme Court struck down Section 497 (Adultery) of the IPC, emphasising that the Constitution upholds equality and that laws discriminating based on gender are unconstitutional. This case highlights the need for laws to treat individuals equally, suggesting that the exclusion of marital rape from criminal offences is a similar violation of Article 14.

Prohibition of discrimination

ARTICLE 15. (1) The State shall not discriminate against any citizen based only on religion, race, caste, sex, place of birth or any of them.

ARTICLE 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children.

⁴ 1952 SCR 284

⁵ AIR 2018 SUPREME COURT 4898

NAVTEJ SINGH JOHAR VS. UNION OF INDIA ⁶The Supreme Court decriminalised Section 377, emphasising the need to protect individuals from discrimination and to uphold the constitutional values of dignity, autonomy, and equality. This case underscores the importance of eliminating discriminatory laws based on personal characteristics, such as marital status.

Right To Life and Personal Liberty

ARTICLE 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*⁷, the Supreme Court emphasised that rape constitutes a violation of basic human rights and infringes upon the victim's fundamental rights, particularly the right to life as enshrined in Article 21 of the Constitution. It is noteworthy that the current laws in India do not recognise marital rape, which contradicts the Court's pronouncement.

In the case of *State of Karnataka v. Krishnappa*⁸, the Supreme Court ruled that sexual violence constitutes an unlawful infringement on the right to privacy and the sanctity of women, in addition to being a dehumanising act.

In *K.S. Puttuswamy vs. Union of India*,⁹ the Supreme Court recognised the right to privacy as a fundamental right of all citizens under ARTICLE 21

VISHAKHA VS. STATE OF RAJASTHAN ¹⁰This case recognised sexual harassment as a violation of fundamental rights under Articles 14, 19, and 21. Similarly, marital rape undermines a woman's right to personal liberty and dignity.

The PIL filed by Anuja Kapur in the case of *Anuja Kapur vs. Union of India Through Secretary*, 2019, urged the Court to direct the Government of India to establish guidelines and laws on marital rape. However, the Supreme Court bench, led by Justice SA Bobde and Justice BR Gavai, declined the petition, emphasizing that the task of formulating laws falls within the purview of the legislature, not the judiciary. The court's role primarily involves interpreting the law rather than creating it.

⁶*AIR 2018 SUPREME COURT 4321*

⁷ *1996 AIR 922*

⁸ *2000CRILJ1793*

⁹ *AIR 2018 SC (SUPP) 1841*

¹⁰ *AIR 1997 SUPREME COURT 3011*

In 2022, the Delhi High Court issued a divided ruling on the matter of criminalising marital rape, ultimately upholding the existing law. Consequently, the issue is now set to be reviewed by the Supreme Court. Justice ¹¹Rajiv Shukla found that the marital rape exception violates provisions of the Indian constitution as it leads to “denial of bodily autonomy and agency of married women, which must be rectified”. He further observed that the marital rape exemption “suffers from manifest arbitrariness and discrimination as a crime as heinous as rape is not recognised as an offence in marriage”.

Justice Hari Shankar emphasised that a straightforward approach cannot be applied within a marriage. He argued that consent for sexual intimacy may be given without genuine willingness, and the state should not intervene in the private realm of a marital relationship.

"Here's something to think about: What changes can be made to the legal framework to address these discrepancies?"

The criminalisation of marital rape calls for reform in the legal system

Need to propose the following legal reforms:

Amendments to the Indian Penal Code (IPC):

1. Amend Section 375 to remove the exception clause that states sexual intercourse by a man with his wife, if she is not under 15 years of age, is not considered rape.
2. Amend or repeal Section 376B to address ambiguities related to marital rape and explicitly criminalize non-consensual sexual acts within marriage.

Introduce Specific Legislation:

Enact a comprehensive law that defines and criminalizes marital rape, detailing penalties and support mechanisms for victims.

There should be an adequate support system for victims

The state should prioritise the establishment of dedicated centres that offer comprehensive support to victims of marital rape, including medical, legal, and psychological assistance. These centres must be easily accessible, especially in rural and remote areas. Additionally, we need to strengthen the capacity of existing women's helplines to effectively handle cases of marital rape and provide immediate assistance.

¹¹<https://www.thehindu.com/news/cities/Delhi/delhi-high-court-delivers-split-verdict-on-marital-rape/article65403832.ece> (LAST VISITED ON 21/05/2024)

Creating awareness

Launch nationwide campaigns to raise awareness about marital rape, its consequences, and the rights of victims.

Use various media platforms to disseminate information and challenge societal norms that condone marital rape.

Availability of legal aid

To raise awareness about marital rape, its consequences, and the rights of victims, nationwide campaigns can be launched. Information can be disseminated and societal norms that condone marital rape can be challenged by utilising various media platforms.

Conclusion

Marital rape is a despicable form of sexual violence in which one spouse coerces the other into sexual activities without their consent. It is a severe infringement upon personal autonomy and bodily integrity, and it unfortunately occurs within the confines of marriage.

Marital rape can result in profound and diverse repercussions for the victim, encompassing physical, psychological, social, economic, and legal dimensions.

Criminalising marital rape in India is important for various reasons. It is in coherence with the principles of gender equality and fundamental human rights enshrined in the Indian Constitution. Addressing marital rape through legal reform is essential in the fight against gender-based violence and the advancement of societal progress. This action unequivocally communicates that sexual violence within marriage is unacceptable and confronts prevailing attitudes that tolerate or belittle such abuse. This can drive a shift in cultural norms, fostering a stronger emphasis on consent and gender equality.