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MARITAL RAPE: A SHAME ON THE SOCIETY

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Abstract

“Silence does not mean yes. No can be thought and felt but never said. It can be screamed silently on the inside. It can be in the wordless stone of a clenched fist, or fingernails digging into a palm. Her lips were sealed. Her eyes closed. His body just taking, never asking, never taught to question silence” –

Amy Reed, *The Nowhere Girls*

The research article: “Marital rape: A shame on society” mainly focuses on the question of why marital rape is still not criminalized in India, what conditions are given in the provisions of the Indian law that criminalizes marital rape, etc. The research article also focused on the doctrine of unity and its applicability in not criminalizing marital rape. The research article talks about marital rape criminalization in other countries and the reasons why India still did not criminalize marital rape. The reasons included were that people still perceive the matrimonial relationship as sacred and cannot be estranged, or interspousal relation doctrine, etc. The article also included the need for the criminalization of marital rape such as violation of fundamental rights like Article 14 and Article 21, etc., and what is the different judiciary opinions on the criminalization of marital rape. The article emphasizes the fact that “yes means yes” and “no means no” which explains that no person can be forced to do something against their will that also includes the wife not being involved in sexual intercourse with their husband if they don't want it. The analytical and descriptive methodology is used for the research article. The article focused on statistics of marital rape in different countries, different countries' laws, etc. At last, the judicial point of view is also a necessary consideration in understanding the need for the criminalizing of marital rape. Also, different agencies in work to criminalize marital rape.

Keywords

The doctrine of Unity, Section 375, matrimonial relationship, interspousal relation doctrine, judiciary opinions, Rule 3B (a) of Medical Termination of Pregnancy Rules and common law system.

Introduction

Home has become one of the most dangerous places for women. At least 32 countries, especially in Asian countries including India, have not made marital Rape a crime. Although marital rape is one of the most heinous crimes in India, we are obligated to stay silent since it is not a criminal offense here. Marital Rape is a social stigma that is still legalized in India even after countless cases are heard, even though it is prevalent in many Asian countries and developing countries

According to the Indian government's latest [National Family Health Survey](#), about 30% of Indian women aged 18-49 reported having experienced spousal violence. In terms of sexual violence, the average Indian woman is 17 times more likely to face sexual violence from her husband than from anyone else, according to a survey of 724,115 **women**.⁶⁰² Women can file for divorce in cases of sexual violence, but rape offenses cannot be charged since they are married to their husbands and society believes

⁶⁰² M.V. Sankaran, *The Marital Status Exemption In Rape*, 20 *JILI* 594, (1979)

that women do not have rights over their bodies after marriage since both men and women are bound by their marriages. Therefore, women's consent in marriage is not considered important. My article will focus on Indian laws regarding Marital Rape, the judiciary's opinion on Marital Rape, and criticism around the subject.

Provisions of marital rape in the Indian Legal System

There is only one provision in the Indian laws for the prosecution of marital rape as an offense, Section 375, in which marital rape is only an offense if it is committed against a girl who is 15 or younger; otherwise, it will not amount to rape in India. Rape offenses under sections 375 and 376 have been amended to include custodial rape, and rape against pregnant women but marital rape is still not considered to be rape. Even though these provisions were included in the Indian Penal Code, 1860 at a time when women did not have the same status as men and were seen as under the authority of their husbands, they still exist. Even the Domestic Violence act came in 2005 and only stated that any kind of sexual violence in a live-in relationship and marriage relationship is prohibited but it only provides civil remedy like judicial separation under Section 10 of the Indian Divorce Act, 1869 but it is still not criminalized under IPC. The question is still to be answered how can a woman get relief if she was raped in marriage? Even after India gained independence, women are still fighting for the legalization of marital rape to be recognized.

Doctrine of Unity

The reason why marital rape is not an offense is because of the Doctrine of Unity. Traditionally, this doctrine holds that man and woman become one after marriage, which makes it impossible to rape oneself, therefore it is not an offense. It takes away a woman's independent nature to make her own decisions. Many judges have used this doctrine as a reason to treat marital rape as a non-crime. This Doctrine is

mostly prevalent in the states of the United States of America, which defend marital rape to be legal by using this doctrine as justification. In India, the doctrine of unity is implicitly applicable in cases of marital rape. For example, recently, the Delhi High court, a 2-judge bench comprising Justice Rajiv Shakti and C. Hari Shankar, has given a split verdict on marital rape and its constitutional validity. While Justice Rajiv Shakti wants to strike down marital rape, Justice Shankar believes that sexual intercourse is a conjugal obligation and rape should not be considered in marriage. Thus, sexual intercourse with a husband is considered a woman's obligation to be fulfilled and it does not matter if she gave consent or not.

Marital Rape: A crime in other countries

According to the Indian legal system, women can only consent if they are not married and not in a marital relationship. She is exonerated as a married woman only if she is under the age of 15 or is living under a court order due to separation from her husband. She receives this relief under Section 376-A. But before criticizing Indian laws, it's important to consider the reasons other countries have given for decriminalizing her spousal rape. This removes the immunity given to her husband for sexually assaulting his wife. In the United States, all the states declared marital rape a crime, in 1993, as women and men are equal partners in marriages, and wives are not the property of their husbands. The concept of the wife as property should be disregarded, therefore. In Spain, however, after the court ruled that criminalizing marital rape is an offense, the ministers approved a bill that included marital rape also as a non-consensual sexual act, since "only yes means yes" according to ministers. Also, the law says, any penetration without consent will be seen as rape, punishable by between four and 10 years in jail. The offense of Aggravated rape will have higher punishment with a maximum of 15 years, and the punishment will be higher if the victim is the rapist's wife or

former partner. By considering these examples, it can be seen that some countries have moved away from viewing women as property and have begun to recognize their right to sexual freedom, while other countries like India have had a hard time accepting women's right to sexual freedom and still consider women under her husband's dominance and subject to family traditions.⁶⁰³⁶⁰⁴

Reasons for exemption of Marital Rape as an offense

To understand why marital rape is a stigma, it is important to understand why it is exempt for so long. According to a 2011 study by the International Centre for Research on Women, one in five Indian men forced their wives into sex. In the 2005-06 National Family Health Survey, 31% of women reported being physically abused. Even after seeing such statistics, some people still believe that marital rape should not be criminalized. The husband is usually excluded from marital rape for many reasons. If we follow traditional notions, the wife is the husband's property, so how can he rape her? Also, as stated above, according to the doctrine of unity, a woman and man become one after marriage and how can a man rape himself. Even if we look at the reasons given by countries for not criminalizing marital rape as a rape offense, there is also the traditional notion of implied consent by the wife. For example, in the United Kingdom where the common law system prevails and Indian law is derived from British law, therefore the law's exemption of the husband is based on the perspective of the British legal system. As per the common law system, the rape of a woman by her husband is not criminalized, and only if a husband is the second party to the rape of his wife, then he can be convicted of the offense or live judicially separated from his wife, as the implied consent given by wife during the matrimonial

relationship is revoked when she starts living separately from her husband.

In marital rape cases, the wife's consent is implied when she is living with her husband. In the 18th and 19th centuries, we can see that judges such as in a case in 1736, Sir Mathew Hale perceived that a man is not guilty of raping his wife as he gained her unconditional consent through marriage, and wives entered into a binding contract with husbands from which they cannot retract. Moreover, sexual violence often falls under domestic violence but is not considered violence because marital harmony is considered to be restored, so under the interspousal doctrine, women cannot sue their husbands. Thus, her rights and identity are merged with those of her husband. Therefore, the husband protects the wife in the marriage contract, and in return, the wife provides obedience to her husband. This theory is known as Contract Theory which says that marriage is a contract and one of its conditions is that wife needs to fulfill the sexual needs of her husband. Therefore, the concept of marital rape is absent from this theory. This ideology is imbibed in the Indian legal system which follows the common law system, as Sir Hale's ideology for exemption of marital rape is applied here, women must fulfill the sexual desires of their husbands. One of the reasons for an exemption to marital rape is also that for centuries the laws were made by men and the judicial system is dominated by them which is bound to be biased towards the husband's plea to be exempt from marital rape.

If we see through the lens of Indian society and traditions for the reasoning given to exempt the husbands from marital rape, then many legal jurists and other scholars believe that India is still behind in terms of literacy, people still perceive the matrimonial relationship as sacred and cannot be estranged. Also, husband and wife are one after marriage then how can men rape their wife, a good wife is to be obedient to her husband, and cannot refuse him for anything. Moreover, if we see the Hindu law,

⁶⁰³ Vandana, Sexual Violence Against Women Penal Laws and Human Rights Perspectives (Lexis Nexis 2008)

⁶⁰⁴ Leah Rodriguez, All Non-Consensual Sex Considered Rape Under Spain's New Law, Global Citizen (20th February 2023, 7:00 PM), <https://www.globalcitizen.org/en/content/spain-approves-only-yes-means-yes-law/>.

says that daughters are a gift of the father to her husband, which means that she is considered private property that was given to the father to a husband who now has all rights over her. Therefore, women are subject to a variety of patriarchal social and cultural settings. Thus, the man and woman relationship is determined according to society, so the ideology of Sir Hale's marriage contract applies here.

Need for the criminalization of Marital Rape

These reasons show why marital rape is not criminalized by the Indian legal system but there is also the question as to why marital rape is to be addressed as stigma and criminalized. Women have been given many fundamental rights over time like the right to have property, the right to have an equal share in their ancestral property, the right to have equal opportunity to work, etc., but the time they did not get the right to have sexual freedom. Therefore, even after so many centuries when even the United Kingdom whose laws and ideologies have influenced Indian laws heavily had criminalized marital rape in 1991, India is still trying to come to terms with women having sexual freedom and having consent to say no, it still believes that women are property of man and is to abide by her husband's rules. Thus, now it's time to break this belief of women as the property of their husbands. Also, marital rape is an act of repeated violence that is not **acknowledged**⁶⁰⁵ by the law merely because it is committed within the framework of marriage. We need to understand that rape broke a women's mental and physical being and it is very hard for a **woman**⁶⁰⁶ to overcome such a heinous crime which is marked on her forever as a memory that she cannot remove but when a person, whom she loves and trusts have committed such crime towards her, she doesn't even have even legal remedy towards such

crime and the only relief she can get is to file a case of divorce in the court on grounds of cruelty under section 498-A of Indian Penal Code (IPC) or to file the case under domestic violence. The law should emphasize that if a man forces a woman to have sex, this amounts to rape, and courts should not focus on the relationship between the man and the victim. Rape by relatives other than the husband is considered rape, which portrays the hypocrisy of the ideology of matrimonial harmony because the husband also forms a relationship, which is of utmost importance in the woman's life yet forced sexual intercourse between spouses is not rape. Because rape is also considered a crime against society, forced sex within marriage is also rape because it violates a woman's dignity, which is a concern of society.

Application of Fundamental rights to criminalized marital rape

The fundamental rights are present to every citizen of India, even those who are not citizens of India have the fundamental rights because these rights are considered to be basic human rights, that's why marital rape violates these fundamental rights yet still it is not criminalized. Article 14 is "Right to Equality" which is a fundamental right that is violated by marital rape as not an offense because the women don't even have a remedy against this offense and are treated as property. Article 21 is the Right to life and Privacy, and marital rape treats women as mere objects of sexual desire which are to be used by the husband, which violates the right to have consent. The right to privacy gives her the right to say no to sex if the act makes her uncomfortable and violates her privacy, thus, marital rape is also a violation of article 21. In *Govind vs State of Madhya Pradesh*, it is said that any type of intense sex damage violates the women's security as she is entitled to security under the right to privacy, and therefore marital rape violates this right as it endangers women's security which should be provided by the so-called husband. Also, to

⁶⁰⁵ Himanshi Rathi, Marital Rape in India, Times of India (20th February 2023,8:30 P.M.), <https://timesofindia.indiatimes.com/readersblog/criminology/marital-rape-in-india-36543/>.

⁶⁰⁶ Flavia Agnes, Section 498A, Marital Rape and Adverse Propaganda, 50 EPW 12, 2015

defend marital rape, an argument is given that consent is implied in the marriage and therefore the husband is not at fault to rape his wife, but the right to sexual intercourse is not the husband's inherent right. Rather, the consent of the husband and wife is to be taken afresh as it is an act of sexual desire and not merely wifely duty enforceable by use of force as this belief violates the concept of equality. At last, it is given an exception that a girl below 15 years of age cannot be raped even if she is someone's wife but even the wife who got married ^{at}⁶⁰⁷ the age of 18 or above was subject to marital rape goes through psychological trauma and if in such situation they got pregnant then it will be emotionally and physically challenging for her and the baby, thus endangering both of them. Therefore, discriminating the marital rape on the grounds of age is not justified.

Judiciary's opinion on Marital Rape

The judiciary forms one of the most important pillars of democracy as it checks whether the legislature is forming laws within the ambit of the constitution and whether the executive is implementing them correctly, lastly, it fills the gap in the law by giving directions and guidelines till the time legislature comes up with a law. Thus, it gives directions in such a manner that it fills the gap in the law that time has created and therefore, updates the law with time. Marital Rape is continued to not be criminalized because of age-old patriarchal ideology in society and the legal system b in colonial times but now is the time to update the law. Still, there are cases in the judiciary that show the struggle between patriarchal ideology and the ideology of equal rights as even the judges are human who still believe in patriarchal ideologies and therefore, considered that women should act as obedient wives and fulfill the husband's needs. For example, The Supreme Court in the case of *Bodhisattwa Gautam v. Subhra Chakraborty* (1996)⁶⁰⁸

observed the following: Rape is just not a crime against the person of a woman, but it is a crime against society. It shatters the entire psychology of a woman and pushes her into a deep emotional crisis...it is an offense, which infringes not only the fundamental rights but also rights enshrined under Article 21 of the Indian Constitution. As per many scholars, rape is an act of aggression aimed at degrading and humiliating women. Furthermore, in the case of *the State of Punjab v. Gurmit Singh* (1996) the Supreme Court observed that 'A murderer destroys the physical physique of the victim, but a rapist degrades the very soul of the helpless female'. The *Chairman, Railway Board v. Chandrima Das*, the Supreme Court has observed that rape is not merely an offense under the Indian Penal Code, but a crime against society. In *Bodhisattwa Gautam v. Subhra Chakraborty* court held that rape is to a lesser degree a sexual offense than a demonstration of hostility gone for corrupting and mortifying the ladies. In this manner, the marital exception principle is violative of the spouse's entitlement to live with human dignity. Any law which damages ladies' entitlement to live with dignity and gives spouses the appropriate to drive wives to have sexual intercourse without their will is along these lines unlawful. Recently even Karnataka high court had stated that "Marital Rape is Rape". Thus, shattering the many judgments given against married women s claiming punishment against their husbands, and giving chance for such women to believe in the justice system.

Recently, the Supreme Court of India in 2022 in *X vs Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi* held that the meaning of rape must be held to include "marital rape" for the Medical Termination of Pregnancy Act and Rules.

"Married women may also form part of the class of survivors of sexual assault or rape. The ordinary meaning of the word 'rape' is sexual intercourse with a person, without their consent or against their will, regardless of whether such

⁶⁰⁷ Srimati Basu, *Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory*, 37(1) *Fem. Stud.* 185, 2011

⁶⁰⁸ Vijay P. Singh, *Judicial Approaches to the Criminalisation of Marital Rape*, 29(1) *Indian J of Gend Stud.*, 2022



forced intercourse occurs in the context of matrimony. A woman may become pregnant as a result of non-consensual sexual intercourse performed upon her by her husband", the Court held.

Also, the court said that sexual assault by a husband can take the form of rape. The court held that rape under Section 375 of IPC will also include marital rape when read with Rule 3B (a) of Medical Termination of Pregnancy **Rules**.⁶⁰⁹

Thus, the Indian legal system is changing its perspective on criminalizing marital rape but still has a long way to go.

Conclusion

At last, many law commission reports like 84th and 172nd had recommended for the exemption of marital rape to be criminalized but the people representing a patriarchal society and too scared to lose their votes are refusing to form laws against it. Women who are considered to be such an important part of a man's life is treated as a mere object, in Hindu traditions without a wife, any ritual performed by the husband is considered to be incomplete then how can be subject to such cruel treatment? We are required to speak up against this crime, although voices against marital rape are rising but still, there are not properly addressed as the stigma is heard in Lok Sabha and Rajya Sabha councils, we still to unite these voices through the judiciary, NGOs, and using government tools such as law reports and government departments working for women because if we lose faith in these instruments then these voices will always be unheard of.

⁶⁰⁹ Areeb Uddin Ahmed, & Aaratrika Bhaumik, Supreme court's verdict on MTP Act Might Pave Way for Criminalization of Marital Rape of India, Livelaw (19th February 2023, 9:00 P.M.), <https://www.livelaw.in/columns/marital-rape-criminalization-supreme-court-verdict-mtp-act-rules-210728>