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THE CRIMINALIZATION OF MARITAL RAPE IN INDIA: A DISTANT DREAM

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Abstract

As per Indian Penal Code, 1860 (Sec.375) "Rape" is an offence whereby a man has sexual intercourse with a woman without her consent or when the consent is obtained through fraud, deceitful means or when the woman is of unsound mind or intoxicated. On one side where this section protects the women by providing strong punishment which would act as a deterrence, on the other hand the same section explicitly removes "Marital Rape" from the ambit of it and does not define it as rape, making women nothing but helpless sufferers at the hands of their spouses. Rape is a clear violation of human rights and the relationship between the sufferer and the perpetrator cannot be used as a defense in cases of rape under any circumstance. The argument that the Honorable Court puts forth is that criminalizing marital rape would destabilize the institution of marriage, this shows the presence of innate social misogyny present in our society which has led to exploitation of women at different stages of life. The exception clause of Sec. 375 is very evidently giving an upper hand to the husband and constant consent to sexual intercourse to which the wife has no option but to submit. This article is an attempt to expose the shortcomings and fallacies in the criminal justice system of India with regard to marital rape.

Keywords

Marital Rape, Human Rights, Injustice, Consent, Sexual Intercourse

1. Statement of Problem

The research shall focus on the problem of rape happening within the ambit of marriage which has clearly been given legal protection under the exceptional clause of Sec.375 of IPC in India. There has been no punishment which could specifically be provided for marital rape, the presumption of consent without actually taking the consent of the wife for having sexual intercourse within marriage is a major problem, the fallacies in the Indian law shall be brought before the people and certain suggestions would be put forth with the basic objective to create awareness amongst women of this country so as to recognize it as a crime.

2. Objective of the Study

- **To focus** on problem of categorization under the subhead of rape that has been clearly recognized in the penal code as a heinous crime that could occur to mankind.
- **To examine** the legal framework in the country with special reference to landmark judgments in this regard.
- **To suggest** measures that can be brought under the penal laws of the country.

3. Hypothesis

It has been presumed while conducting this research that with the existence of this exceptional clause excluding marital rape from the ambit of crime, there is always presumption of consent from the wife's side for having sexual intercourse after marriage whether and if she wants or not and hence "Marital Rape" is not recognized as a crime under Indian Penal Code, 1860.

4. Research Methodology

A Doctrinal Method of research has been adopted with the use of both primary and secondary sources for reaching a conclusion.

5. Prologue

Marital Rape is a term that is not recognized by the Indian Judiciary neither does it fall under the ambit of an offence. It is a situation where the husband has the right to decide whether he wants to have sexual intercourse or not as and when he likes but the consent of the wife is

never taken into consideration mainly because of the patriarchal society that still exists in our country. The basic understanding that is put forth while one supports the argument of criminalizing marital rape in India is that the premises of marriage are very different from what people assume it to be, it is not a license for a husband to have sex with his wife especially when it is involuntary. Everyone has an autonomy over their body which is an absolute right and this right is not curtailed post marriage. The plight of the women in our country is such that they have to protect themselves even in the house that they are living in and because there's no law punishing the offender in such case, all that the wife can do is submit before the husband. After the brutal gang rape that happened in Delhi in 2012, Justice Verma Committee had submitted a report concerning recommendations for the change in the laws related to rape. Most of the recommendations were accepted other than the one which was to criminalize marital rape in India. The absence of law relating to marital rape is not only in contravention with the fundamental rights of a citizen that have been guaranteed by the law of the land but is also a prima facie violation of human rights.

■ Forms of Marital Rape: -

- Sexual intercourse where the wife is coerced into that relationship by the husband by making her realize that it's her duty towards her husband after marriage.
- Battering Rape - A form of rape where the wife is beaten, and the husband uses aggressive methods to have sexual intercourse with his wife
- Obsessive Rape - Where the husband forces the wife to have sexual intercourse with him in order to gain pleasure over his obsession even if there is no consent from her side.
- Forced Sex- Where the wife does not give consent and sex happens as a result of physical force inflicted on the wife by the husband.

Sec. 375 of Indian Penal Code, 1860: - The Issue in Concern

Rape. —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

[\(First\)](#) — Against her will.

[\(Secondly\)](#) —Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) —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.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation. —Penetration is enough to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —**Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape** (S, A. P. P., & Vibhute, K. I, 2019)

6. Lacunae in Indian Laws

- Exception of Sec. 375 makes it clear that any man who has sexual intercourse with his wife without her consent who is below 15 years of age won't be considered as rape. The definition of rape has been expanded in the Criminal law (Amendment) Act, 2013 but unfortunately still does not include marital rape as an offence under it. Even Sec. 376 that lists the punishment for rape has two years of imprisonment for a husband who rapes his wife during separation. So, the notion that exists is a husband raping his wife is always a lesser crime than a stranger raping a woman. In India when a woman goes through this situation where she is suffering from physical and mental trauma that is being inflicted on her all she can do is take recourse to 498A of IPC, 1860 which provides imprisonment that may extend up-to 3 years along with fine. Even under this section punishment for marital rape is not explicitly mentioned and one that is given to the accused under the name of cruelty is very less in comparison to the laws related to rape.

- Sec.3(d)(2) explains sexual violence under the Domestic Violence Act, 2005 as an offence, it condones any such form of violence. (Sharma A., 2019) But marital rape has not been specifically addressed and it is covered under the ambit of cruelty which is not a ground for divorce, it is a mere ground for compensation or in other words monetary relief. While rape is a criminal offence providing civil remedies is certainly akin to justice.
- Also, even under Hindu Personal Law Marital Rape is not a ground for divorce whereas Sodomy, Bestiality, Cruelty is.

7. Current Position in India

There have been several petitions that have been submitted before the Indian courts by women asking for the criminalization of Marital Rape. But the courts in our country and the Central Government have put forth certain arguments concerning this issue and they have been explained below: -

- The government seems to have explained some vague co relation between the sacrosanct union of marriage and criminalizing marital rape. Their argument is that bringing a law against marital rape would destabilize the institution of marriage and this is based on the most basic premise that it happens within the confined walls of the socially accepted sacred union of marriage. However, such heinous acts cannot be allowed to happen in the name of culture that has been existing since many years. Where on one hand the country got together on various occasions to celebrate the glorious judgments given recently by the Supreme Court of India whether it is in the matter of Triple Talaq, Sabrimala Temple, decriminalization of homosexuality or the striking down of the 158 year old adultery law under Sec 497 of IPC, here on the other hand the Central Government's stand against criminalization of marital rape is very ignorant.
- The Centre has also argued that what might be marital rape for one might not be marital rape for some other person. But this argument can be concluded based on the test of reasonableness i.e. as a prudent man. (Sharma K, 2017)
- It has also been argued that marital rape in India does not exist in a large scale so a law cannot be made for just few people keeping in mind the effect it would have on the society. However, the basic thing that we need to understand that most women who are subject to sexual abuse, forced intercourse do not even know that it is an offence especially in the rural areas. And the ones who approach the police on the first hand for lodging a complaint are

returned without taking their complain and their refusal is on the ground that there does not exist any such offence as marital rape. And hypothetically even if we consider that only a few women are subject to such heinousness it is the transgression of the law and hence there must be a law that protects them. (India marital rape victim's lonely battle for justice, 2015)

- The court also expressed their views by saying that if marital rape gets criminalized it has a potential to be misused by woman against their husbands but only because the law can be misused does not mean that the law should not exist. If the logic behind not criminalizing marital rape is that it has a potential of misuse, then we shouldn't have laws for domestic violence as well. When a woman registers a complaint of rape she is immediately asked to go for a medical examination and the procedure and protocols that the rape victim has to go through is very difficult and moreover rape cannot be proved with mere accusations one has to back it up with facts.
 - One more point that was raised by the courts was that it is extremely difficult to prove marital rape but as it happens in every other cases of rape, circumstantial evidence plays a very important role in ascertaining facts. If a lady is being raped by her husband this wouldn't have happened once but in most cases there would be a series or a history of sexual abuse by the husband which can be proved with the help of forensic tests, the testimony of a witness at some point of time can also be taken into account, things like the admission of guilt by the husband recorded in any form can also be admissible in the court of law and just because she is married her marital status does not nullify the evidence of rape but the unfortunate and sad reality in India is that women cannot even register complaints about marital rape as there exists no ground regarding the same.
 - ❖ As per Constitution of India every law that is passed must be in conformation with the principles that are enshrined in the law of the land and if any law is passed which is in contravention with the provisions of the constitution would be declared ultra vires or unconstitutional. But here the exemption of Sec.375 of IPC, 1860 withdraws the protection of women based on their marital status. (Roy, 1962)
- A. Violation of Article 21** - Article 21 states that "No person shall be deprived of his life or personal liberty except for the procedure established by law" and the exception clause of Sec.375 is contradictory to this article according to the interpretation made by the judiciary that has expanded the scope of Article 21 by leaps and bounds. It is quite evident that the

fundamental right of a woman is infringed in this case which calls for the state to interfere into the personal sphere of marriage because if not the woman is only left to suffer at the hands of her husband which is also against the principle of natural justice. This exception to Sec. 375 is clearly arbitrary and discriminatory.

B. Violation of Article 14- Article 14 of the Indian Constitution provides equality before law and equal protection of laws to all the citizens of the country (Eastern Book Co., 2012) but the exception clause of Sec 375 makes it look like the wives who are raped by their husbands are clearly not given the protection under the ambit of Article 14. There is again a clear contradiction between the two and if there is any law which contravenes the fundamental rights of a citizen it is to be declared ultra vires by the court of law but this does not seem to happen in the case of marital rape.

- In the case of *Neera Mathur v. LIC* the Apex Court of the country had viewed any type of intense sex as a damage to the right of protection of sexual security that is included under Article 21 that is Right to Life. Right to Privacy is an implied right under article 21 and it incorporates the right to sit unbothered and unaggravated. It is therefore an infringement of the right that is provided to the wife who is also a citizen of this country when she is forced to have sexual intercourse without her will and consent.
- In the case of *State of Maharashtra v. Madhukar Narayan* the Apex Court perceived that every woman is entitled to her sexual privacy and no one can violate it as and whenever he wished. There have been recent judgments in the year 2017 where in *Nimeshbhai Bhartbhai Desai v. State of Gujrat* the high court made it quite clear and evident that making marital rape an offence will without any doubt discourage the destructive attitudes that promote marital rape but since it has still not been recognized as a crime under Indian Penal Code the court held that the husband is only liable for outraging the modesty of his wife.
- In a recent landmark judgement in 2017 the Supreme Court made some major changes in the exception clause of Sec. 375 of IPC where it criminalized involuntary sexual intercourse by a husband with his wife who is below 18 years of age. But the issue in concern is the constitutional validity of exception of Sec. 375. It is illogical that a man can be convicted for the rape of a 20-year-old girl but will be allowed to go Scott free if he is married to that 20-

year-old girl. The judiciary needs to reconsider its decision of not criminalizing marital rape.

8. Legal Position in Other Countries

- The ground on which a husband got immunity from marital rape was laid down by Chief Justice Sir Mathew Hale in “The History of the Pleas of the Crown” published in 1736, 60 years after his death. (Anderson, 2016) He had expressed his views saying that when a wife marries her husband, she enters into a contract with him to submit herself to her husband and hence as she cannot retract from the contract thereafter, the husband is not liable for raping his lawfully wedded wife. This Implied Consent theory became a part of the Common Law System of the Britishers. But in 1991 the House of Lords in United Kingdom struck down its common law principle that when a woman enters a union of marriage, she gives implied consent to sex as and when her husband asks for.
- The wave of feminism was a blow to the legal system of Australia and hence in the year 1976 Australia was the first common law country that made marital rape a criminal offence. Poland in 1932 was the first country to explicitly have laws mentioned against marital rape. In the late 1980’s several other countries like New Zealand, Ireland, South Africa, Malaysia, Ghana and Israel also criminalized marital rape.
- In the United States between the time period of 1970-1993 all 50 states agreed to the fact that marital rape should be criminalized and passed laws prescribing punishment for it. In U.S. researchers estimated that 10% to 14% of married woman experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes.
- In New Zealand the immunity provided to the husbands in case of marital rape was abolished in 1985 when Sec.128 to the Crimes Act,1961 was enacted. The law explicitly mentions and makes it clear that marriage won’t serve as a defense in cases of rape and by no way would the sentence be reduced on the basis that the perpetrator and the victim were husband and wife.
- In the year 2002 The Supreme Court of Nepal criminalized marital rape on the ground that it was contradictory to Right to privacy and Equal Protection before laws. The court laid down that the classification of the law that an act committed against an unmarried girl to become

an offence and the same act committed against a married woman not to become an offence is not a reasonable classification.

9. Issue of Human Rights

Human Rights are rights that are inherent in all human beings irrespective of sex, ethnicity, place of birth, nationality, language, religion or any other status as such. Human Rights include right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to education and work and a lot more. And no matter what the situation might be every human being in this world is entitled to these rights without any discrimination.ⁱ International Human Rights law makes it an obligation for the government of every country to act in such a way so that the human rights of the individuals are safeguarded, they cannot be compromised at any instance so anything which infringes these rights should be refrained from doing. Marital Rape is clearly a violation of human rights as it discriminates based on gender keeping aside the principle of equality and infringes the right to life and liberty of a wife who is a victim of Marital Rape. In the absence of law against Marital Rape the husband assumes that he gets the right over his wife to have sexual intercourse according to his consent when and where he wants which is in direct contravention with the principles of Human Rights. To force a woman to have sexual intercourse without her consent is serious violation of her right to live with dignity, right to self-determination and it is moreover an “abuse” of her human rights. All the arguments that have been put forth by people who believe husbands get a license to rape their wives according to their will after marriage are nothing but lame excuses of people having misogynistic mindset and chauvinistic views with no legal substance or moral force. Therefore, in the light of those international instruments on Human Rights it cannot be said that marital rape is permissible.

The United Nations Conventions on the Elimination of all forms of Discrimination to which even India is a signatory has stated that this sort of discrimination against women as something that violates the basic principle of equality and is also against the dignity of the woman who goes through such a traumatic situation.

10. Consequences of Marital Rape

- Injuries in the vagina, anus and other body parts which would result into a lot of physical pain being suffered by the victim. As there is no legal protection the woman suffers from physical and mental pain and lives a substandard life. (Tjaden & Thoennes, 2006)
- Mental agony which could include anxiety, panic attacks, moderate to severe depression and suicidal thoughts within the victim which would be even more difficult to handle in case she had maternal duties to be fulfilled towards her children.
- As the issue of marital rape takes place within the closed doors of marriage no amount of government policies or actions would be able to empower women if they continue to suffer at the hands of their husbands and keep leading a miserable life because of long term effects like low self-esteem, loss of confidence, loss of appetite, insomnia. that would result from sexual violence inflicted in the past.

11. The Suggested Model for Criminalization of Marital Rape

The paper has addressed the issues related to marital rape and has established the need for criminalization of the same. Further a model has been proposed for the purpose of making marital rape an offence by putting forth suggestions that would resolve the complexities related to evidence, burden of proof, punishment and most importantly consent. We have critically examined and observed it in the light of various sections under statutes which include Indian Penal Code 1860 (*Ratanlal & Dhirajlals*, 2014), Indian Evidence Act, 1872 (*Ranchhoddas & Thakore*,1963).

- Consent should not be presumed in marriage. It is extremely difficult to prove lack of consent but some of the factors that would help in resolving this complex issue would be the testimony of a wife corroborated with history of sexual violence if any. Although Sec. 54 of the Indian Evidence Act says that the bad character of the accused in the past cannot be admissible in a future case but in an issue of marital rape this possibly would be an important evidence in order to prove that the husband is habitual to such behavior. Testimony from neighbors, family members could also be of utmost importance. One more factor that could help in establishing guilt could be the statement of a doctor if at all the wife consults a doctor for the mental trauma she would have been going through.
- Also the argument where it is put forth that criminalization of marital rape would increase the number of cases and hence will overburden the judiciary, it can be prevented from

happening by appointing more number of judges as there is a high number of pending cases in the Indian Courts but there is only one judge per one lakh people approximately, this will also help in ensuring speedy delivery of justice. And in instances where the cases are proved to be false the penalty should be considerably high and stringent.

- The statute must make it clear and shall mention it explicitly that the relationship between the perpetrator and the victim cannot be used as a defense even in the case where they are married. This is moreover important also because of the reason that there would be a lot of opposition to this law in the name of culture. And therefore, exception to Sec.375 should be regarded as unconstitutional.
- Sec.376 lays down punishment for rape that is between seven years to imprisonment for life. There should be no difference in the sentencing policy by the court. However, the clause (b) of Sec.376 punishes the husband who has raped his wife during separation with an imprisonment of three to seven years. We can clearly conclude after observing the laws that the reason behind giving the husband less punishment was because of the defense of marriage. And this is contradictory to Article 14 that provides Right to Equality and hence is ultra vires. Hence Sec 376 (b) should be repealed.
- Also, gender-neutral laws should be framed and inequalities should be eliminated.
- Marital rape should compulsorily be a ground for divorce under all personal laws.

12. Conclusion

Even though India being a democracy which upholds the principle of equality this is a major loophole in the Criminal Justice System of the country. It is high time that Indian government needs to stop putting rape into different categories and take an immediate action in order to criminalize marital rape by removing the exception under Sec.375 of IPC. Also, an important step towards this would be educating the masses about challenging the myth that is prevailing in our society since long that involuntary sexual intercourse by a husband with his wife is a trivial issue. It is inherently wrong and disturbing to assure dignity and sexual autonomy to the husband and not the wife. It is only when both the partners are given the right to consent and autonomy over their bodies will the sacrament union of marriage survive.

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