

Marital Rape

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Abstract: *Marital rape refers to the act of sexually assaulting one's spouse. It is a crime in most countries except thirty nations including India. Section 375 of the Indian Penal Code [IPC] defines and criminalises rape but contains an exception clause for when it happens between a married couple. This exception declares 'sexual intercourse by a man with his own wife' legal in the absence of circumstances like willingness or consent, listed under Section 375. Such an exception legally absolves the aggressor if sex is demanded or imposed within a marriage. In 2015, a husband raped and sexually assaulted his wife, leading to her hospitalisation. Despite approaching the Supreme Court, her petition was dismissed stating that the law cannot be changed based on one individual's experience, and her husband was never prosecuted. In view of this incident and numerous other petitions filed in the court for striking down the exception clause, the discussion was reopened for hearings on 7th January 2022. A two-judge bench of the Delhi High Court presided over the hearings and on 11th May 2022, giving a split verdict and shelving the criminalisation of marital rape under the IPC. This issue brief assesses the historical challenges in the removal of the marital rape exception clause of Section 375 of the IPC. In doing so, it also examines the judicial arguments on the issue of marital rape in light of the recent Delhi High Court ruling.*

Keywords: Marital Rape, Sexual Assault, Gender Violence, Dignity, Consent

I. INTRODUCTION

Marital rape refers to rape committed when the perpetrator is the victim's spouse. The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent. Therefore, an essential ingredient to prove the crime of rape is to prove the lack of consent. This burden to prove the lack of consent often rests on the victim. In some instances, as in the case of minors, it is presumed that consent does not exist as they are presumed by law to be incapable of consenting to such sexual acts. On the other hand, there are also instances when consent is presumed to exist. Often, this presumption exists when the victim and the perpetrator are married. In such instances, the idea of marital rape becomes antithetical.

At present, only fifty two countries have laws recognising that marital rape is a crime. In many jurisdictions across the world, including India, marital rape is not recognised as a crime by law and society. Even when countries recognise rape as a crime and prescribe penalties for the same, they exempt the application of that law when a marital relationship exists between victim and perpetrator. This is often called the 'marital rape exception clause'. Across these jurisdictions, there are four major justifications advanced for not criminalising marital rape. The initial two justifications are not used in present day context due to advancements made with respect to gender equality. The first justification stemmed from the understanding of the wife as subservient to her husband. Women were chattel to their husbands, and this meant that women did not have any rights in the marriage. In such a scenario, it would not be possible to fathom a husband raping his wife since the husband was the master to the wife, and enjoyed privileges over her body. Along with this justification, the unities theory also existed. This theory rested on the idea that after marriage, the identity of the woman merged with that of her husband. Therefore, law did not give the married woman a personality independent of her husband. This is linked to the previous justification in terms of looking at women as chattel of the husband.



ARTICLES

Saurabh Mishra and Sarvesh Singh in their research article have talked about how marital rape is the most common and repugnant form of masochism in the Indian society and is hidden behind the iron curtain of marriage. The authors threw light upon the discrimination, shortcomings and fallacies of criminal justice system in India with respect to marital rape. The authors also discussed the physical and psychological effects of marital rape which destroys a woman both mentally and physically. The authors also talked about types of marital rape and legal position of marital rape in other countries and in India wherein they stated that marital rape in India exists de facto and not de jure simultaneously throwing light upon why marital rape should and should not be criminalized and also stated the lacunae in Indian law and suggestions for recommendations.

AnudhaSinghai in her article quoting Sol Wachtler, “A marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity” briefly analyzed the exclusion of marital rape as a crime in any statute in India and discussed the validity of the exception to Section 375 of Indian Penal Code, 1860 which was addressed in 172nd Law Commission report but was rejected as it would result in “excessive meddling with the issue of marriage”. The article also stated that Indian Penal Code, 1860 does not defines consent clearly and also discussed how marital rape violates women’s rights, throwing light upon how it is a subject to misuse by the husband.

Statement of Problem

The heinous offence of marital rape has not been given legal protection under any law in India except if the wife is below 18 years of age for which there is provision in Indian Penal Code, 1860 under the exceptional clause of Section 375. This lacunae in Indian Law which do not have any provision for the protection of women from marital rape creates a difference between a married and unmarried women and discriminating between them and thus violates Article 15 and 21 of the Indian Constitution.

Hypothesis

There is a presumption of consent impliedly deemed to be given by the wife to have sexual intercourse with her husband so a wife can never be raped. Therefore marital rape is not recognized as a crime under Indian Penal Code, 1860 or under any statute in Indian Law.

Research Methodology

The researcher intends to adopt doctrinal method of study. The nature of research is intended to be descriptive and analytical. Data for study will be gathered from both primary sources such as, statutes, legislations, government policy documents, case laws, etc.; as well as secondary sources such as textbooks, journals, articles and relevant international instruments, both online as well as offline.

What is marital rape?

Rape originating from the Latin term “raptus” which implies violent theft of a property or a person is the most heinous, brutal and shameful crime that completely destroys a woman’s dignity, chastity and pride and gravely impacts a woman in so many ways; be it physically, mentally, or emotionally, whether it is done to an unmarried woman by any person or done to a married woman by her own husband. The victims who suffer from it are left traumatized in unimaginable ways for the rest of their lives.

Rape must be acknowledged as the most severe form of sexual violence against any woman completely negating her rights and thereby stripping her off of her dignity and chastity.

LEGAL POSITION IN INDIA WITH RESPECT TO MARITAL RAPE

Past position

In India, rape of a married couple is not considered rape. India adopted the English common law exemption for marital rape, which was first articulated in 1736 by English Chief Justice Matthew Hale in History of the Pleas of Crown wherein he stated that, “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, whom she cannot retract.”

The marital rape exemption gained further support when Blackstone put forth the Unities Theory, which viewed the husband and wife as becoming one on marriage. In Blackstone’s Commentary on the Laws of England (1765), he wrote, “Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband. If a wife is injured, she cannot take action without her husband’s concurrence.”

Present Position

Unfortunately, the current status of marital rape laws in India is de facto and not de jure. In contrast to other nations, where either the legislature has criminalized marital rape or the judiciary has actively recognized it as a crime, the judiciary in India appears to be working against the law. According to the Supreme Court’s ruling in *BodhisattwaGautam v. SubhraChakraborty*, “rape is a crime against basic human rights and a violation of the victim’s” most cherished fundamental rights, specifically the right to life enshrined in Article 21 of the Indian Constitution. However, by not recognizing marital rape, it contradicts this very declaration. Only two categories of married women are included in the rape legislation: those under the age of 1518 and those who are divorced from their husbands.

MARITAL RAPE AS A VIOLATION OF WOMEN’S RIGHTS

While the previous section of the paper outlined the history of debates on marital rape, this one brings forth the arguments in favour of criminalisation. The argument is based on international laws and treaties and it also outlines which constitutional provisions get violated by marital rape’s non-criminalisation.

Violation of Article 14

Under the Constitution of India, lack of criminalisation of marital rape also violates a woman’s Right to Equality as Article 14 of the Constitution says, “the state shall not deny to any person equality before law and equal protection of the law.” This article provides protection to every citizen of India except for married women in denying them the right to seek redressal against sexual violence within a marriage. The Centre’s recent stand on the matter stating that deletion of the exception would result in harassment of husbands also undermines women’s right to equality. It only encourages the patriarchal mindset which gives precedence to the victimhood of men over women’s.

Its important to note that the socio-historical context in which Section 375 was drafted was different. Women’s rights were severely limited in 1860. They were only availed because the rights of women were merged with their husbands’ since they were viewed as independent legal entities and enjoyed full legal, social, and political rights (Mishra, 2019). However, while context has changed entirely with time, what remains is the legal inheritance of Section 375’s exception. Today, a section that was created in colonial India comes in direct contention with the Indian constitution’s Article 14 as it disregards women’s right to equal treatment and protection.

Violation of Article 21

Marital rape further violates Article 21 of the Constitution of India which states, “no person shall be deprived of his life and personal liberty except according to procedure established by law.” Over the years, the expanse of Article 21 has been elaborated in meaning and effect. As a result, right to healthy life, privacy, choice in matter of sexual activity has been read by the Supreme Court as flowing from and protected under Article 21. Recently, the Supreme Court has also recognised the woman’s right to abstain from sexual intercourse in recognition and protection of her fundamental right under Article 21 (Makkar, 2022). In marital rape, a married woman’s right to sexual privacy and bodily integrity are infringed upon. This further violates her right to a healthy dignified life as it affects her self-esteem, physical health, and mental health directly (Mehta, 2021).

II. CONCLUSION

The lack of discussion and recognition of marital rape’s grave implications, both within the private and the public sphere, leads to undermining the impact and consequences of rape inside or outside marriage. Criminalising marital



rape is necessary. The 1860s exception 2 of Section 375 of the IPC is iniquitous and inapplicable since it fails to uphold the basic constitutional rights of women such as right to life and liberty. The split verdict suggests that pre-existing ideas against criminalisation based on the state's primary duty to protect the sanctity of marriage prevail. Such an outlook assumes consent to sex through marriage, merges woman's identity with the legal identity of the husband after marriage. These attitudes need to be challenged and re-evaluated through passing sound legislations that protect women.

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