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Marital Rape - A Concealed Crime in India

Pranay Bhardwaj^a Ananya Panicker^b

^aDamodaram Sanjivayya National Law University, Visakhapatnam, India ^bDamodaram Sanjivayya National Law University, Visakhapatnam, India

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Marriage is a sacred bond that binds two people and their respective families together. However, this bond can turn into a burden if the people involved in this marriage are not content with their marriage or their union wasn't done with their consent. With time, the Indian society has started to accept that a marriage without love and consent is of no good. It is because of the changing perspective of society that people have started demanding the criminalization of Marital Rape. Although there are strict laws in India against the offense of rape under the Indian Penal Code, 1860, India still doesn't have a law that criminalizes Marital Rape. As a result, if a case of Marital Rape on a woman comes to light, the offender goes unpunished due to the non-existence of the said law. It can be said, that these laws were made by the British when society didn't consider Marital Rape as a crime. However, with the changing times, it is important that the law too should change and should include marital rape as an offense.

Keywords: *rape, harassment, marriage, legality, India, abuse, marital rape.*

INTRODUCTION

Marriage has traditionally been regarded as a sacred institution in Indian culture. However, it has also been interpreted as permission to engage in lawful sex. Many people encourage a woman to provide sex to her husband anytime he wants it, but they forget to teach her that her

consent is also important. It has been widely reported that women are frequently forced to have sex with their husbands despite their objections. Sexual intercourse is done only as some social obligation and not because a woman consents to it, this is called marital rape. Marital Rape is still a concern in our society as any such act on the part of the husband goes unpunishable in the Indian society. This article is an attempt at defining the term 'Marital Rape' in its right context and also explains why it should be criminalised.

WHAT IS RAPE AND WHERE IT IS DEFINED?

Rape is defined as any sort of sexual assault that usually involves sexual intercourse or other forms of sexual penetration carried out by a male against the will of the victim and without the victim's consent. Physical force, coercion, abuse of authority, or acts against someone unable to grant legitimate permission, such as someone who is incapacitated, unconscious, has an intellectual disability, or is under the legal age to consent, are all examples of such acts. In India, section 375 of the IPC¹ deals with rape. There are certain circumstances when it can be said that a man had committed the rape for example – "If it's against her will, or without her consent, or if a man commits sexual intercourse with a woman in spite of her consent when he is aware that he is not the husband of that women, or if a man commits sexual intercourse with a woman with her consent when she believes or thinks that she is legally married, or when a woman is under 16 years of age irrespective of her consent is said to be rape."

Exception: -

The first exception is when any medical expert or a doctor performs any kind of medical procedure or intervention, it shall not amount to rape The second exception deals with intercourse or sexual acts performed by a person who is lawfully married to a woman and who is not under the age of fifteen, often known as marital rape, which is not rape under the IPC exceptions.

WHAT IS THE PUNISHMENT FOR RAPE IN INDIA?

In India, *Section 376* of the IPC² defines Punishment for rape: -

¹ Indian Penal Code, 1860, s 375

² Indian Penal Code, 1860, s 376

Section 376 defines what is the punishment for rape, it says that except to the subsection (2), if any person commits rape then he shall be liable for rigorous imprisonment which should not be less than 10 years and which may be extended to life imprisonment and shall be liable for fine depending upon the severity of the crime.

“Under sub-Section (2) persons of various designation are defined and if they commit rape they shall also be liable for Rigorous imprisonment for 10 years which may extend to life imprisonment and fine, these personnel includes if a rape is committed by a police officer or any public servant or any member of armed forces or any person being in the management or on the staff of jail etcetera.”

If rape is being committed by any person on a woman who is under the age of sixteen years will be liable for rigorous imprisonment for 20 years which may extend to life imprisonment and fine.

WHY MARITAL RAPE IS NOT PUNISHABLE IN INDIA?

Most of the countries in the world have criminalised and made the law for marital rape, but India is not among those counties, in India, there is no law that deals with the issue of marital rape but India is among those thirty- six counties on the earth that have not criminalised marital rape. Despite the fact that everyone woman out of three in India who are between the ages of fifteen to forty-nine who had ever been married says that their partners had abused them in some way or other. Criminalizing marital rape has long been a demand of feminists and women's rights organisations. Unlike domestic violence and any other forms of rape, however, marital rape remains a taboo subject, addressed in whispers and quickly forgotten. In India, after a woman enters into a marital relationship, it is presumed that the woman has given her husband a lifelong agreement to have sex with her. Moreover in India, the concept of marital rape exemplifies the concept of what we call ‘implied consent’. In this regard, it is presumed that marriage between a man and a woman implies that both the parties have given their consent to engage in sexual activity, and for the woman, there is no escape from this barbarous act of marital rape.

In a landmark decision, the Supreme Court of India and various High Courts have been swamped with writ petitions challenging the constitutionality of this clause, and the Supreme Court has criminalised unwanted sexual intercourse with a wife aged fifteen to eighteen.³ In 2013, the IPC was amended to include new clauses under the law such were increasing the age of consent, acid attacks, and voyeurism as offences but the authorities, on the other hand, kept themselves away from making any changes or amendments to the existing rules related to the marital rape at that time. Like in every law there is the provision of punishment for any particular crime, rape is not an exception to it and it is also a crime under the definition of rape it is clearly mentioned that sexual intercourse or any other forms of sexual penetration carried out which is against the will of that person and if the consent for the same is not given by the person is said to be rape, then why under the veil of marriage man are absolved from such crime and women who are undergoing rape do not leave with any remedy at all. Then if a married woman is not giving her consent or is not willing for sexual activity then the same need to be treated as rape because marriage is irrespective and it should not act as a partisan of such act (rape) and for constituting whether it is rape or not consent needs to be the sole basis. There is a strong need for amendment in this particular law because of the exception given under section 375 of IPC, a victim is not getting justice and we need to understand that rape is rape and it needs to be irrespective of marriage and the person who is doing something forcefully and wrongly need to be punished otherwise justice will not be served and it will hinder the justice delivery system. Indian men have the legal right to rape their wives. In India, getting married is a way to get a license to rape which is very shameful and we all should feel ashamed to be a member of such a society.

JUDICIAL VIEWS AND LATEST JUDGEMENTS RELATED TO MARITAL RAPE

A UN commission proposed that the Indian government make marital rape a crime in 2013. The same was proposed by the JS Verma committee, which was formed in the aftermath of the Nirbhaya protests. Many committees and reports have been formed, yet the tiny print remains the same. In India, successive administrations have demonstrated neither willingness nor interest in recognising women's right to their bodies after marriage.

³ *Independent Thought v Union of India* (2013) Writ Petition (Civil) No. 382/2013

Several petitions to criminalise marital rape have been filed in various courts across the country. Unsurprisingly, none of them has been proved fruitful till now. In this regard, a woman filed a PIL in 2015, but it was dismissed by the court and the explanation offered by the court for the rejection was “the law shall not change for one woman.” Similarly, the Supreme Court ruled in *Arnesh Kumar v State of Bihar*⁴ that criminalising marital rape would result in the “collapse of the social and family system.” So from these instances, we can understand that the Judicial approach for these cases is strict and inflexible as mentioned under the law, which needs to be changed because due to such reasoning and statements many women are undergoing Physical assault, mental stress, and some cases women are committing suicide as well, so the current law needs certain amendments which make such acts punishable, as these women need justice and that can be achieved only if there is a proper law which makes such acts punishable.

The RIT Foundation and the All-India Democratic Women's Association filed a case in the Delhi High Court in January 2015, requesting that marital rape be made a crime. The PIL is still being worked on, and it aims to make marital rape a criminal. “But, here, we have questioned the constitutional validity of section 375 (rape) of the IPC on the ground that it discriminated against married women being sexually abused by their husbands,” the petitioner said during the appeal, noting that the bench said, “*Misuse cannot really be an argument on whether an act should be criminalised or not.*”⁵ The court was hearing a petition from the NGO Men Welfare Trust, which had filed a petition to oppose and challenge the appeal by the All-India Democratic Party to make marital rape a crime. Bench said “*Marriage does not imply that the woman is always willing, ready, and consenting (for establishing physical relations). The male will have to show that she was a willing participant,*” the bench observed.

When the distinguished Chhattisgarh High Court judge NK Chandravanshi freed a man accused of raping his wife by stating that sexual intercourse between a man and his wife is not rape even if it is forced or against her will, he was simply citing the law of the land, he

⁴ *Arnesh Kumar v State of Bihar* (2014) Criminal Appeal No. 1277/2014

⁵ Shraddha Chaudhary, ‘Marital Rape: An Indignity to Women’ (*The Hindu*, 17 August 2021)

<<https://www.thehindu.com/opinion/op-ed/marital-rape-an-indignity-to-women/article36188225.ece>>

accessed 09 April 2022

received a lot of condemnation and was castigated by the public at large. This can serve as a clear illustration of why this law needs to be amended and why punishment is necessary

WHY SHOULD MARITAL RAPES BE CRIMINALIZED?

Whenever a raped wife stands in court to seek justice for herself, she is told that the exception in the rape law presumes her consent and grants her husband immunity against rape prosecution. The concept of 'Marital Rape' has always been a subject of debate amongst lawmakers and is often considered "controversial". Those who are against the criminalization of marital rape often put up the argument that criminalising it would lead up to the crumbling of the institution of marriage. But the fact is that this exception degrades the institution of marriage by making women tolerate violence in a matrimonial alliance. The problem of marital rape now poses a major socio-cultural issue in India.⁶

The exception in rape law discriminates between women who are wives and non-wives. It also somewhat sends a message to the society that the demands of a husband are always to be met with, even if it is against the consent of the wife and that the husband has legal backing for it. The rape laws in India do a miscarriage of justice as the unreasonable exception for married women violates their right to life and liberty.⁷The marital exception infringes on a victim's right to good health while also causing physical and mental harm.⁸Women are also in danger of developing sexually transmitted illnesses as a result of forced intercourse. Offspring born to abusive spouses and victimised wives hurt their children and subject them to lifetime trauma. It is generally seen that marital rape victims do not have any injuries on their bodies, when in fact injuries are a significant part of determining whether a woman has consented or not. In *Tuka Ram & Anr. v State of Maharashtra*⁹, the rape victim did not have any injuries on her body which was treated as a conclusive piece of evidence that she did not resist and consented to the sex. However, the Supreme Court later changed its opinion and held that injuries are not

⁶ 'Marital rape a crime of cruelty in India, Delhi govt tells high court' (Hindustan Times, 10 January 2022) <<https://www.hindustantimes.com/cities/delhi-news/marital-rape-a-crime-of-cruelty-in-india-delhi-govt-tells-high-court-101641579049116.html>> accessed 09 April 2022

⁷ *Francis Coralie v Union Territory of Delhi* (1981), AIR 746

⁸ *Bandhua Mukti Morcha v Union of India* (1984), AIR 802

⁹ *Tuka Ram & Anr. v State of Maharashtra* (1979), AIR 185

necessary for confirmation of rape.¹⁰ It can be inferred that in an average Indian household the authority of a husband is so overwhelming that a woman cannot resist her husband's sexual advances and has to meekly agree to whatever is being told. In fact, in some cases, women often do not resist because they have been a victim of domestic abuse by their husbands and know what their husbands are capable of doing.

As a result, in order to protect themselves from further physical violence, they do not resist being raped by their husbands, which is why their bodies are bereft of injury marks. Lastly, in Indian society, a woman is taught right from her childhood that her duty is to obey her husband to maintain peace in the family. Thus, they also feel that it is their responsibility to have sex with their husbands even if they do not want to. Even if the courts continue to rule that marital rape is not a crime, it is a crime that women have experienced, and the legislation cannot repress it. Notwithstanding the fact that the view of courts in India is still the same and they believe that marital rape is not a crime, if we look at marital rape from the societal viewpoint or from the experience of women who had undergone so much pain and agony it is a crime and there is no law which can repress these experiences, marital rape will remain as a disguised crime that is protected under the ambit of section 375.

CONCLUSION

With the increasing number of marital rape cases in India, it is only in recent times that the issue of Marital Rape has caught the attention of the people in society. This is the right time to raise moral and social awareness amongst people against marital rape, as it is these people who form a society. The myth of the husband has the right to engage in sexual intercourse with his wife without her consent should be removed as it is one of the factors which contributes to the offence of marital rape. Hence, it is important on the part of the legislature to criminalise marital rape in India in order to safeguard the rights of women and to protect them from any kind of sexual or physical abuse from their husbands. Not making a formal law regarding marital rape only shows the non-incompetency of the legislature.

¹⁰ 'Injuries not necessary for confirmation of rape: SC' (*India Today*, 10 July 2009) <<https://www.indiatoday.in/latest-headlines/story/injuries-not-necessary-for-confirmation-of-rape-sc-51863-2009-07-10>> accessed 09 April 2022