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Analysing the Heinous Crime of Marital Rape

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Law is something that is subject to change according to the needs of the society and its citizens. It should not be kept stagnant. One of the essential needs of the society today is to recognize marital rape as an offense and therefore criminalizing it. Since, time immemorial, women have been considered to be the property of men who do not have their own rights. In recent times, one of the heinous crimes meted out to women is marital rape. After getting married, women are considered to have lost their rights over their own bodies and are considered to be in the possession of their husbands. The husbands without the consent and will of their wives, have sexual intercourse with her. Having sex with a woman without her permission is equal to being raped.¹ But unfortunately, still today marital rape has not been identified in the Indian Penal Code 1860, as an offense. This is not at all justified and some steps should be taken to criminalize it and serve justice to women who are mentally and physically tortured by their husbands.

Keywords: *marital rape, criminalize, consent, sexual intercourse.*

¹ Tanish Gupta, 'Marital Rape as a Ground of Divorce' (2021) 4(2) International Journal of Law Management and Humanities <<http://doi.org/10.1732/IJLMH.26205>> accessed 04 September 2023

INTRODUCTION

According to Sir Matthew Hale, the Chief Justice of England, when a man and a woman are lawfully married by mutual consent, then the husband cannot be made guilty of rape. This is because when a couple has been married by mutual consent, the woman is deemed to have entered into a contract with her husband and now she is considered to be his property. In light of this, the husband is neither guilty nor responsible for raping his wife.²

In India as well, there is no law that defines marital rape as a crime. An individual's human rights are completely destroyed by the horrible act of rape. According to Section 375³, 'Except in the instance above excluded, a man is deemed to have committed rape if he engages in sexual activity with a woman against her will and without her consent.'

Marital rape or rape in bed is not quite different in meaning from the actual meaning of the word 'rape'. The only way to distinguish between rape and marital rape is that in the case of the latter, the victim is the wife and the culprit is none other than the spouse. When a couple is lawfully married, the husband feels that he has implicit consent from his wife to have sexual intercourse with her whenever he wants whether or not his wife is interested or giving her consent to engage in it. As marital rape is not recognized as rape in the IPC, it becomes difficult to take a divorce and seek remedy for the injustice meted out to the married woman. There has been an archaic notion that the wife is the husband's property and therefore he can have sex with her whenever he wants. So, in order to serve justice, this line of thought should be questioned by placing it parallel to modern society and its progressive laws.⁴

FORMS OF MARITAL RAPE

There are mainly three kinds of marital rape which are as follows:-

² Saima Gous, 'Marital rape: A valid ground for divorce' *Legal Bites* (India, 30 Sept 2021) 1

³ Indian Penal Code 1860, s 375

⁴ Ayush Mathur, 'Marital Rape: An Exclusive Ground for Divorce' (2022) 15(2) *NUALS Law Journal* <<https://nualslawjournal.com/2022/12/27/marital-rape-an-exclusive-ground-for-divorce>> accessed 04 September 2023

Battering Rape - The wife is subjected to sexual and physical abuse in this type of rape. Women are beaten up and engaged in sexual intercourse against their will. The rape is usually followed by a violent act by the husband and afterwards, he forces his wife to make up with him by having forceful intercourse. Battering rape is one of the most common types of rape faced by married women all around the world.

Force-only Rape - When the wife refuses to engage in sex with her husband, he coerces her to have sexual intercourse with him. It involves the use of force and having sex against her will, but does not necessarily involve battery.

Obsessive Rape - Here, the husband engages in forceful sexual intercourse or other sexual acts with a view of eliciting a strong emotional response from the wife.⁵

MARITAL RAPE: AN INFRINGEMENT OF FUNDAMENTAL RIGHTS

The law commission has mentioned many a time, that if it omits the exception clause, it can interfere with a person's private sphere of life. But one can also say that criminalizing cruelty under Section 376B⁶ also means interfering in a person's private life. But this interference within the private sphere is much needed in order to deliver justice to married women who have been made victims of marital rape.

Fundamental Rights are the indispensable and inalienable rights that every human is born with. In the context of marital rape and its encroachment upon fundamental rights, looking into the constitutionality of the 'Restitution of Conjugal Rights' is much needed. According to Section 9 of the Hindu Marriage Act 1955⁷, if a married couple does not live together and does not provide a valid explanation, the court may issue a Restitution of Conjugal Rights ruling. Thus intervening in the private life of the couple might compel the woman to again become a victim

⁵ Abhayan, 'Types Of Marital Rape' (*Legal Services India*, 2021)

<<https://www.legalserviceindia.com/legal/article-5571-types-of-marital-rape.html>> accessed 04 September 2023

⁶ Indian Penal Code 1860, s 376B

⁷ Hindu Marriage Act 1955, s 9

of marital rape.⁸ Given that the Indian Constitution's Articles 14⁹ and 21¹⁰ provide the 'Right to Equality' and 'Right to Life and Personal Liberty' respectively, this is a violation of the woman's fundamental rights. Therefore it violates a woman's right to sexual choice when the court issues a decision of restitution of marital rights.

Women were still viewed as the property of men at the time the IPC was written, lacking any sense of their own identity. Exception 2 of Section 375¹¹ provides the idea of the merger of women's identity with that of men, which has its roots in British law, also known as the Victorian patriarchal norms. But in modern society, women are becoming independent and they do not want to be considered as the property of their husbands. Because of this, the Parliament passed the 'Protection of Women from Domestic Violence Act 2005' and the 'Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 to safeguard women from sexual harassment and violence.¹²

Now, coming to Article 21¹³ of the Constitution, which protects the rights to life and personal liberty, declares that it does not only mean a mere animal existence but also includes the bare necessities of life as well to live with dignity and reputation. In *K.S Puttuswamy (Retd) v Union of India*, the Supreme Court stated that the right to privacy is also included in Article 21¹⁴ which further includes any decisional privacy made by any person with regard to engaging in any kind of physical or intimate relationship with another person or with regards to deciding one's procreative or sexual desires.¹⁵

Further, in the case of the *State of Karnataka v Krishnappa*, the Supreme Court stated that a woman's privacy and sanctity are intruded upon when sexual violence is inflicted upon her. It

⁸ Gupta (n 1)

⁹ Constitution of India 1950, art 14

¹⁰ Constitution of India 1950, art 21

¹¹ Indian Penal Code 1860, s 375 ex 2

¹² Prateek Mishra, 'Marital Rape and Violation of Constitutional Provisions' (2019) 2(4) International Journal of Law Management and Humanities <<https://www.ijlmh.com/wp-content/uploads/2019/10/Marital-Rape-and-Violation-of-Constitutional-Provisions.pdf>> accessed 04 September 2023

¹³ Constitution of India 1950, art 21

¹⁴ *Ibid*

¹⁵ *Justice K S Puttuswamy (Retd.) & Anr v Union of India & Ors* (2017) 10 SCC 1

went on to say that engaging in non-consensual sexual activity with a woman is regarded as committing sexual and bodily abuse against her.¹⁶

Thus, exemption 2 of Section 375¹⁷ breaches Article 21 since it interferes with some of life's most fundamental rights, including the right to privacy, the right to sexual orientation, and the right to live with dignity. This exception of law fails to prevent the husband from forcing himself upon his wife in terms of having sexual intercourse.

DISSECTING THE GOVERNMENT'S POSITION

The standpoint taken by the Indian Government with regard to marital rape is quite disheartening. By making marital rape illegal, the administration said in 2017 that it would not only harass the husbands but also the institution of marriage would be undermined. It can be said to be a misogynistic and sexist viewpoint that gives more importance to preserving the artificial conception of the marriage institution rather than giving importance to the fact that the married woman might be a victim of marital rape, not having her independent choices or any bodily autonomy.¹⁸ It still seeks to preserve the age-old conception that believes that once a woman is married, her husband has all rights over her body.

In *Independent Thought v Union of India*, the court invalidated Exception 2 of Section 375 of the IPC which had previously shielded the husband from being charged with rape despite having forced sex with his wedded wife who is older than 15 years. Now, it will be regarded as the same as rape if a man engages in forcible sexual activity with his wife who is older than 15 without her knowledge or consent.¹⁹

According to the Report of the Delhi Commission of Women, many such marital rape cases go unreported. This can be attributed to the fact that even if women go and complain to such

¹⁶ *State of Karnataka v Krishnappa* (2000) 2 SCR 761

¹⁷ Indian Penal Code 1860, s 375 ex 2

¹⁸ Ananya, 'Marital Rape in India: Perpetuating the Patriarchy Through Law' (*Criminal Law Research & Review*, 04 October 2021) <<https://crlreview.wordpress.com/2021/10/04/marital-rape-india-perpetuating-patriarchy-through-law/>> accessed 05 September 2023

¹⁹ *Independent Thought v Union of India and Anr* (2017) 10 SCC 800

commissions regarding sexual violence, their facts are not given adequate importance and are often disregarded resulting in victim blaming as well as the victims being invalidated. So, this can be asserted to the fact that what goes on behind the scenes, which might include, bribing, blackmailing, coercion, etc. therefore, the cases brought upon by the victims are often regarded as false accusations even before going for trial and it is an attempt by the wife to simply harass and defame the husband. Thus, it becomes very necessary to analyze how many cases are truly false accusations so that delivering justice to the actual victims is not delayed and frees them from such violent relationships the person is into.²⁰

THE FRAMEWORK FOR CRIMINALISING MARITAL RAPE

The J.S Verma Report suggested that domestic rape should be made a crime by eliminating the exemption clause and that it should not be used as a defense by the concerned person and also stated that the quantum of punishment given should be proportionate and that the presumption of consent should also be excluded. But however, the 42nd Commission suggested that there should be a separate section containing the provision of marital rape with different punishments allotted to it.

Marriage Relationship, not a walkout - In order to ensure that the crime of marital rape is covered, it is not sufficient to merely remove the exclusion language from Section 375²¹. Because of the excessive judicial interpretation that might result, there will be more cases and discretion in the courts. To prevent too much ambiguity, each definition must be set separately and any exceptions must be explicitly indicated.

Presumption of Consent - In the instance of marital rape, consent cannot be assumed. However, in these situations, the judiciary will undoubtedly consider a certain level of force to determine consent. While determining consent, consent might be handled in three ways. First, by assuming consent and putting the onus of proof on the victim. Second, assume there is no consent and put the onus of proving consent on the perpetrator. The third and most crucial step is to use the

²⁰ Ananya (n 18)

²¹ Indian Penal Code 1860, s 375

Indian Evidence Act to create a specific mechanism to track consent in unique situations like marital rape.

Problems in the case of Marital Rape:

- The mere evidence that there has been sexual intercourse between the married couple is not enough to prove the case of marital rape since it is very natural for any married couple to engage in some form of physical intimacy. However, some signs of bodily injury, as a result of violent sexual intercourse can be taken into consideration as cruelty inflicted upon the woman as part of marital rape.
 - To prove a husband's repeated brutality toward a woman, a history of assault and domestic abuse might be connected to a woman's testimony. Although Sections 53²² and 54²³ of the Indian Evidence Act stipulate that a person's previous bad behavior is irrelevant to the current case, doing so would be in violation of those provisions.
 - It has been well established that any evidence that might state that a woman has been sexually active does not necessarily imply consent. When she is having consensual intercourse with her husband it cannot be considered marital rape in contradiction to the case when she is forcefully engaged in any kind of nonconsensual intercourse. So, in order to relate to the facts regarding the exact mental and psychological trauma faced by the victim, the expert testimony of a doctor is required in every such case.
1. **Punishment Policy** - Under Section 376²⁴ of the IPC, which carries a prison sentence of seven to life, the punishment for marital rape must be the same. Since both the crime's offense and its essential elements, the lack of free will and consent are the same.

GROUND FOR DIVORCE

There are primarily two sorts of marriage acts in India, they are the Special Marriage Act of 1954 and the Hindu Marriage Act 1955 respectively. Apart from these two marriage acts, there are certainly other types of legislative acts that are mainly for the purposes of governing the

²² Indian Evidence Act 1872, s 53

²³ Indian Evidence Act 1872, s 54

²⁴ Indian Penal Code 1860, s 376

marriages of minority groups such as the Muslim Marriage Act 1939, the Parsi Marriage and Divorce Act 1862 etc.

Rape by a spouse in the relationship of marriage is not punishable in itself, because it is not considered rape in itself. It falls within the ambit of cruelty which can be considered as a ground of divorce. Section 10(2) of the Divorce Act²⁵ states that a married couple can seek divorce on only some specific grounds. If cruelty is inflicted upon either of the spouses, or if the husband proves to be impotent after the marriage, if maintenance is not given for two years, adultery, a husband is lost for four years, if either of the spouses converts to a different religion, or the married couple had failed to restore the conjugal rights for around two years, in these circumstances the court can pass a decree of divorce. But there is no other special provision for obtaining a divorce on the ground of marital rape. It is evident from all the divorce judgments made under the act that any form of cruelty, or inability to perform marital duties, like engaging in intercourse, When a partner is abused or neglected, is a sign that the state has intruded into their marital or private life. When cruelty is accepted as a reason for divorce, marital rape becomes a genuine cause of divorce.²⁶

The heinous crime of rape which was already mentioned, also involves assault, violence, and moral degradation. In addition, the Dissolution of Muslim Marriage Act of 1939's Section 2(iii)²⁷ provides that divorce is legal if the spouse is given a seven year sentence in prison, which implies that a husband and wife will be apart for more than four years if the minimum sentence for rape is seven years in prison.

THE TEST OF MANIFEST ARBITRARINESS

Regarding the standard for evaluating legislation under Article 14, manifest arbitrariness is a novel phenomenon. In *Shayara Bano v Union of India*²⁸, Justice Nariman made it clear in his majority opinion that the criteria of evident arbitrariness entails the legislature acting in an

²⁵ Indian Divorce Act 1869, s 10(2)

²⁶ Vedant Karia, 'Marital Rape- A Ground for Divorce?' (*Juris Centre*, 26 July 2023)

<<https://juriscentre.com/2023/07/26/marital-rape-a-ground-for-divorce>> accessed 05 September 2023

²⁷ Dissolution of Muslim Marriage Act 1939, s 2(iii)

²⁸ *Shayara Bano v Union of India* (2017) 9 SCC 1

unreasonable or insufficiently principled manner. Therefore, such a law is obviously arbitrary when anything is done excessively and disproportionately.

The critics contend that the marital rape exception is illegal because it fails the evident arbitrariness test. They claim the clause is unfair because a husband's immunity arises from his wife's non-consensual sexual participation. The same behavior would be criminal if the couple weren't legally wed or if it was carried out by a stranger. This undermines the goal of rape legislation, which is to punish those who participate in forced sex regardless of their relationship to the victim, by creating an artificial hierarchy between sexual acts. This can also make it difficult for married women to obtain legal relief because they must demonstrate that their bodies were subjected to cruelty or reference to any other crime when they were being sexually assaulted by their husbands.²⁹

Therefore, the detractors have made it abundantly clear that the primary objective or intention of the exception included in the IPC regarding marital rape is to support the conventional conception of the family unit by insulating it from criticism through the use of some moral justifications or judgments. The main intention is to convey the idea that it is very much pertinent that is illegal and most obviously favors the rights of those involved in a situation over the purported holiness of a certain institution. The rule of law does not exclude the institution of marriage or the conception of family structure. Thus, they cannot be utilized as a basis for guiding important principles when they are fighting to establish a form of equality between the married couple. Section 497³⁰ of the IPC was found to be blatantly arbitrary in *Joseph Shine v Union of India*.³¹ This holds true because of the patriarchal foundation which operates under the premise that the wife's libido is under the control of her spouse. Thus, critics have asserted that the exemption of marital rape is very much needed to safeguard the unit of family and the institution of marriage.

²⁹ Linnea Balazsi, 'Marital Rape in India- the subject of a private matter within the four walls of a marital home?' (Thesis, Örebro University, School of Law, Psychology and Social Work 2021)

³⁰ Indian Penal Code 1860, s 497

³¹ *Joseph Shine v Union of India* (2019) 3 SCC 39

RECENT DEVELOPMENTS

On 30, 2021, the Kerala High Court issued a significant ruling regarding marital rape. The court ruled that domestic rape constituted cruelty and qualified as grounds for divorce. The strongly worded ruling noted the emotional and mental damage experienced by victims of such nightmares while also acknowledging that this violated the rights to privacy, bodily autonomy, life, and liberty that are guaranteed by the Constitution. As a result, it sets a precedent and offers victims a crucial, albeit highly limited, means of escape.

However, this decision can have detrimental effects on the campaign to make marital rape a crime. For many years, the government and courts have been able to prevent the act from becoming a crime by providing a minimal remedy in the form of divorcing the perpetrator. By arguing that divorce is a sufficient remedy, judgment can be used to prevent victims from receiving true justice, which would include putting the offender in jail. However, this decision can have detrimental effects on the campaign to make marital rape a crime by providing a limited remedy in the form of divorcing the offender, the government and courts have been able to successfully postpone the act's criminalization for many years. By arguing that divorce is a sufficient remedy, this judgment can be used to prevent victims from receiving true justice, which would include putting the offender in jail. It disregards Indian women's access to such a remedy while ignoring the shame associated with 'divorce' in Indian society. The only way to escape such a terrible deed is not through a simple divorce. The victim would have to create a divorce petition to apply for divorce. As a result, even while the Kerala High Court's ruling acknowledges marital rape as cruelty, it might still be seen as a win. Additionally, it precludes the potential of making the offense a crime, reversing progress by providing a limited remedy that is inadequate on almost all criteria.³²

Similarly, the Chhattisgarh High Court recently cleared a 37-year-old man of the accusation of marital rape by ruling that under the IPC, having sex with a legally married woman does not constitute rape, even if it is done forcibly or against her choice. Justice N.K. Chandravanshi cited

³² Ananya (n 18)

an exception that is, exception 2 of Section 375³³ which stipulates that, as long as his wife is not a minor, a husband's sexual cohabitation with her is not rape. As a result, the husband is not guilty of the offense for he was charged under the same section.³⁴

CONCLUSION

Marriage rape is an unfortunate reality in our culture, and because there are no legal protections for this terrible crime, as well as little public support in this area, many victims suffer in silence. Section 375 must be altered to eliminate the marital rape exception and make it a crime in order to guarantee that the victims receive proper justice. For the sake of marriage and fulfilling marital obligations, these women's basic human rights are being violated. India's position of women suffers from the notion and assumption that a woman is her husband's property.³⁵

One of the biggest barriers to developing provisions for punishing the culprits of marital rape in India must be entirely eradicated if it is to become a prosperous and developed country. But to ensure that the goal is accomplished, the Indian Legislature and Executive must shift their backward perspectives. When the Indian society, administration, and legislature are able to take direct action in this domain, then only it be assigned the designation of crime. Through its insightful rulings, sufficient pressure must be exerted by the Indian judiciary on the executive and the legislative branches of the government to make marital rape a heinous crime throughout the country.³⁶

SUGGESTIONS

A recent occurrence in an Indian Tribunal suggests that the debate over criminalizing marital rapes may be progressing slowly. A few Indian men who identify themselves as activists of

³³ Indian Penal Code 1860, s 375 ex 2

³⁴ Saima Gous, 'Marital rape: A valid ground for divorce' (*Legal Bites*, 30 September 2021) <<https://www.legalbites.in/marital-rape-a-valid-ground-for-divorce/>> accessed 09 September 2023

³⁵ Saif Rasul Khan, 'Marital Rape: The Bitter Truth' (2004) 2(4) *International Journal of Law and Legal Jurisprudence Studies* <<http://ijlljs.in/wp-content/uploads/2015/06/MARITAL-RAPE-final-draft.pdf>> accessed 09 September 2023

³⁶ Dr. Raj Kumar Yadav & Manish Dalal, 'Marital Rape in India: A Critical Study' (*SSRN*, 27 May 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847118> accessed 09 September 2023

man's rights, have launched integrated social media campaigns in response to recent rulings and have threatened to remain single if the marital rape exception is removed. They contended that such criminalization would lead to women abusing the legal provision thus leading to the disintegration of marriage.³⁷

The Bench of the Kerala High Court offered a few suggestions in order to promote and reform the already existing legislation after observing that the dissolution of marriage is taking place mainly because of the imbalance created by the individual choice and the individual's best interest.

The suggestions are as follows:

1. Paternalistic interference through legislation should be for the purposes of assisting parties so that they are able to make decisions that serve their best interests. Hence, the framework of the law relating to divorce must assist people regarding how to make decisions about one's own life.
2. The established legal forum which is for determining the future of the married couple's relationship, must be accorded the authority to let the parties choose the best course of action for managing their own affairs, rather than taking away their authority and placing it on a fictitious foundation.
3. The parties should be rendered assistance with regard to making decisions of their own choosing with the use of contemporary mediation, medical aid, such as psychological and services related to psychiatry and involvement by close friends and family.
4. Our legal system ought to be prepared to handle marital harm and reparation. A law with a humanitarian response that deals with human issues is necessary.³⁸

³⁷ *Ibid*

³⁸ Kamini Sharma, 'Is marital rape a form of cruelty? Can it be a ground for divorce? HC examines' (*SCC Online*, 10 August 2021) <<https://www.scconline.com/blog/post/2021/08/10/marital-rape>> accessed 09 September 2023