

LEGALFOXES LAW TIMES

MARITAL RAPE: MOST CONTROVERSIAL TOPIC IN INDIA

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ABSTRACT

Marriage is considered to be sacred under Hindu Law. We define marriage as a bonded permanent relationship between husband and wife in which they are in physical, social, and cultural ties. Our society portrays marriage as a holy and religious relationship that is pure, but beneath this lies social evils like Marital Rape, Domestic Violence, etc. Marital Rape is defined as Non-Consensual sexual activity done by a spouse, i.e., spouse abuse. Marriage gives the spouses the Right to have Sex. Still, does it allow them to have forced non-consensual sex? Off-course not! Non-consensual intercourse between two strangers is considered rape in the eyes of the law; how is it that when a husband does the same crime, the matter is deemed private? Rape is rape, no matter who does it. Even though India will not criminalize Marital Rape to safeguard its cultural and religious values, Justice Verma Committee did recommend making Marital Rape a crime. However, even they failed to include it in the amendment of Article 376 of Indian Penal Code 1860 that took place after the 2013 Nirbhaya Case.

Keywords: Marital Rape, Non-consensual, Criminalizing, spouse abuse, cultural and religious values.

INTRODUCTION

Marital Rape has still not been criminalized in India, making India one of the Thirty Sixth country that has still not criminalized marital rape. Article 375 defines Rape, and under this Article, there is an exception that shields Marital Rape. This exception states that “Sexual acts done by a man with his wife, the wife not being under 15 years of age, is not rape”. Does rape is considered rape only if the wife is under 15 years of age, and after that, it is not rape? It does not matter what age the wife is; the mental trauma affects the same at any age. National Family Health Survey (NFHS) had evaluated, and its 2015-2016 data specify that around 99.1% of sexual abuse cases are not reported. An average of Indian women is 17 times more likely to face

spouse abuse than any others.¹ “Intelligible differentia,” which means difference capable of being understood and this difference that the only wife under 15 years will be considered rape did not pass the test of “Intelligible Differentia” and also violates Article 14 of our Indian Constitution that states ‘Equality for all. A PIL was filed by an NGO named Independent Thought in 2017, challenging this ‘only under 15 years age’, and they claimed that married women over 15 years of age should also be granted protection. The Supreme Court extended the age limit in Section 375 from 15 years to 18 years. ²This judgment was a small step toward striking down the legislation of marital rape. It is high time that the exception protecting Marital Rape under Section 375 of IPC should be eliminated. This elimination would make women safer from spouse abuse and also give women the position that they deserve as humanity stands on two pillars, men and women, both having equal importance and role.

MARITAL RAPE: MEANING AND EFFECTS

Marital rape is not different than any other rape. It is a non-consensual sexual activity between spouses—a forced sexual act done by a husband to his wife without her consent. So, here consent is the word that should be highlighted. Consent is something that should be considered essential in any relationship, even between husband and wife. Marriage, as mentioned above, is a permanent bond between men and women where they two vow to live together in both happiness and pain, giving the right to consummate their marriage lawfully. But being married does not provide permit the husband to force sex on the wife. Sex is not an obligation for women, and it should be consensual.

To understand the complication of Marital Rape, one should be able to differentiate Rape from Marital Rape. As mentioned above, no rape is different, and rape is rape no matter marital or other, but there is a slight difference as Marital Rape is more personal than any other rape. Rape is defined as the ‘Violation of a woman.’ A psychologist and science writer who notably wrote for New Yorker, ‘Morton Hunt,’ said that “a marital rapist is a man who believes in the theory that husbands are superior to their wives and they rule to this extends that they feel that the wife should be glad that they want them or at least willing and if they are not then they have the right to force her.” Under Section 375 of Indian Penal Code 1860, rape is defined as sexual intercourse with a woman against her will or without her consent. If the consent is obtained by coercion or causing grievous hurt or death, it will be considered rape. If a man fraudulently makes a women believe that he is her husband and has sexual intercourse with her, this is also rape. If a woman cannot consent for a sexual act to a man due to unsoundness of mind, this is also rape.³ Apart

¹ Anirudh Pratap Singh, “The Impunity of Marital Rape”, The Indian Express, December 20th 2020

² Legal stance on marital rape, available at <https://counterview.org/2020/12/21/criminalize-marital-rape-in-india-marriage-is-not-a-license-to-rape/> (visited on May 18th 2021).

³ Marital Rape-Meaning, available at <https://www.lawctopus.com/academike/marital-rape-a-crime-undefined/> (visited on May 18th, 2021).

from the definition of rape, there is also an exception under Section 375 of Indian Penal Code 1860, which states that men having sexual intercourse with his wife under 15 years of age is also rape which was further extended to 18 years.

A woman is awfully affected by Marital Rape, but it is believed that rape in a marriage is less traumatic, which here is a myth. To be raped by a person you considered your partner in happiness and pain, giving you the pain himself is more traumatic, and living with the same person is more sad and painful. This affects women both physically and psychologically. Physical it includes injuries to private organs, bruises, muscle torn, fractures, etc. The psychological effects are far worse than the physical ones, including fear, trauma, shock, stress, and suicidal feelings.⁴ This leaves a woman with a scar that cannot be faded ever. A woman was once asked that after being raped by her husband, does it ever feels better or normal after a particular year. The lady answered that 'No, it never gets normal even after years, but eventually you start to feel better if you have people you love around, but the scar is always there, and you carry it with yourself everywhere you go.'

WHY NOT CRIMINALISED IN INDIA?

Marital Rape is the most controversial topic in India. Why? Because it is connected to our cultures, our norms, our traditional values. The reason India is not criminalizing is because of the restriction these cultural values create in front of the judiciary. Another reason for the misuse that could be done if it would be criminalized. Some women can use it as weapon against their husbands and accuse them for false rape and due to these woman the one who are genuinely violated and are genuine victims of marital rape suffers. Our own culture is stopping us from criminalizing it, criminalizing marital rape will act as a dark spot on our own values and customs. If these personal relations would be brought in court and discussed publicly then this will disgrace, dishonor and bring shame to our own upbringing. The relation which is considered to be holy and religious would become a scandal in front of the whole world and how would that affect our society. All these reasons are considered but what about the woman who is suffering this quietly, what about her rights, her values, and her peace of mind. She, as a citizen of India also has equal rights, so why we are only thinking about the traditional values that will be hurt and its effect in the eye of society and not that maybe it would enlighten our society by also showing the dark and evil site of a marriage in which wife is suffering quietly because she is taught to swallow this violation as now she has to quit being an individual and become a wife and this is her only identity.

The concept of marital rape cannot be applied in India because of many reasons like the main reason which is the education factor i.e. illiteracy, poverty, countless social customs and values,

⁴ Effects of Marital Rape, available at <https://www.lawctopus.com/academike/marital-rape-a-crime-undefined/> (visited on May 18th, 2021).

religious believes, societies mindset about marriage being holy and sacrament. Miss Kanimozhi Karunanidhi, a member of Lok Sabha, told 'The Hindu' that marriage is an essential part of our society and it is considered to be sacred but that did not stop us from making anti-dowry laws and laws against domestic violence. If criminalizing marital rape may hurt the sentiments of our social customs and values and may question the values and concept of marriage being a sacrament then how does law against dowry, domestic violence and cruelty by husbands does not disturbs these values and sentiments. Protecting women from abuse can never be against our culture. Miss Kanimozhi was of this opinion and she introduced a Private Member Bill seeking removal of marital rape exception from the Indian Penal Code 1860.⁵

Few years ago there was a story all over in newspapers about a 26 year old women who went to Bangkok with her husband and returned injured and bruised because her husband forced violent sex on her. Still having this point of view that removing the exception of marital rape will threaten the institution of marriage is vague. It is believed that criminalizing marital rape in India would sabotage the institution of marriage and can be used as a weapon by wife against husband for harassing him. I don't understand this fact that how does they did not see that by not criminalizing it is already harassing wife and they are already using it as a weapon but our law is worried about that criminalizing it will harass the men. This is also a reason behind not criminalizing it as we tend to think about what will happen and not focus on what is happening and ignoring what is happening never lays out positive results and what happens always depends upon the present.

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THE CURRENT LEGAL FRAME ON MARITAL RAPE

In India, currently there is no law for marital rape. This is the most controversial topic and many have recommended for making a law for marital rape and removing the exception under the Section 375 of Indian Penal Code 1860. India is one of those country that is still struggling to make laws on marital rape giving excuses of social and cultural norms. The most important and horrifying case which attracted society and many legislators was Queen Emperor v Hari Mohan Maiti also known as Phulmoni Dasi case in 1881. The facts of this case was that there was an eleven years old girl Phulmoni Devi. He was dead due to heavy bleeding caused by her husband, Hari Mohan, who was around thirty years old. This happened during physical intercourse between them even when her wife was only eleven years old which resulted in her death. The autopsy report indicated it ruptured vagina as the cause of death but then too Hari Mohan was acquitted with the charge of rape under Section 375 of Indian Penal Code as there was no law for marital rape and it was exempted. The prevalent law permitted husbands to have sexual intercourse with his wife, irrespective of her consent, and the age limit was 10 years. But in this

⁵ Special Correspondent, "India not to criminalize Marital Rape", The Hindu, August 30th 2016.

case Hari Mohan was charged under section 304, 304A, 325, 338, of IPC.⁶ Court held that the man did not have the right to enjoy a person, ignoring health and safety and causing her harm. This was the case that triggered the concern of age of the child bride. In my view this was a big irony as the child Marriage is currently unlawful and illegal and still the exception says that the wife should not be under 18 years of age. Anyways, this brought an amendment to the Age of Consent Act, 1861 and the age was changed from 10 to 12 both in marital and extramarital cases. Further Amendment Act, 1925 was enacted and distinction was made between marital and extramarital, thirteen and fourteen years respectively. After this in a landmark judgement Supreme Court said that a man will be charged with rape if he is engaged in a sexual intercourse with wife aged between fifteen to eighteen years still this does not give any protection to wife above the age of eighteen years, a protection for which still the struggle continues. The National Commission for Women have also suggested to make marital rape a crime and consider it as sexual assault. After the Nirbhaya case, the Verma Committee was constituted on 23rd December 2013, headed by Justice J.S. Verma, former Chief Justice of Supreme Court. The motive of this committee was to suggest amendments to criminal law for making fast trials and improve given punishments for the criminals who are accused of sexual assault. They aimed to improve women's access to legal system so that they would not be re-victimized while approaching the legal system against the act of rape. The United Nations on the Elimination of All Forms of Discrimination against Women (CEDAW), is also of the view that this type of discrimination against women is against the principle of equality and human dignity. The Commission on Human Rights also suggested to criminalize marital rape in their fifty-first session, titled "the elimination of violence against women".⁷

In India, marital rape is not defined in any of the statute or law. Women Rights activist have moved to High Court for criminalizing it and fighting against marital rape. In 2018 the Centre told High Court that if marital rape would be criminalized then it may sabotage the institution of marriage and become an easy weapon for harassing husbands. Miss Nandita Rao, the Governments Additional Standing Counsel said that, "Not a Violation", non-criminalization of marital rape is not a violation of Article 21 of the Constitution. She further added that wife is not forced or compelled to live with an abusive husband under personal law and all personal laws considers marital rape as a cruelty which is given under Section 498A of Indian Penal Code 1860 and it can be used as a ground for divorce. She also submitted to the High Court that if Section 375 exception is held as violating our Indian Constitution then the entire section would be removed and the court does not have the authority to create new offences.⁸ Again there is a big

⁶ The IPC 1860 on Marital Rape, available at <https://www.helpline.law.com/family-law/CLFM/the-current-legal-framework-on-marital-rape-in-india.html> (visited on Mar 18th, 2021).

⁷ Law on Marital Rape-A much needed Reform in our Legal System, available at <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system#:~:text=According%20to%20the%20section%2C%20the,under%2012%20years%20of%20age%2C> (visited on May 18th 2021).

⁸ Soibam Rocky Singh, "Marital Rape an offence under law", The Hindu, January 19th 2018.

irony here as in my views, firstly, it is said that a wife is not forced or compelled to live with her husband so she can just stand and leave her husband but our customs and our morals have taught us to maintain our marriage. Blaming a husband for marital rape may sabotage the institution of marriage but divorcing and ending the marriage won't sabotage the institution of marriage? Will this be building the institution of marriage? Hence there are so many views and so many debates on this topic and yet there is no conclusion to be found and yet the struggle continues.

COMPARATIVE STUDY OF MARITAL RAPE

Marital Rape is a global problem which has received very small attention from our criminal system, but this requires some reform. Eighteen American States, three Australian States, France, Israel, Canada, Sweden, New Zealand, Denmark, Soviet Union, Norway, Poland and Czechoslovakia are the several countries where marital rape is illegal.

USA

In respect to the response of women's rights and equality movement by 1993 the District of Columbia passed the law against marital rape and since 1993, all 50 states and DC enacted laws against marital rape. They recognize rape as rape even in marriage as rapist cannot be differentiated by relation, age or gender. The rape criminal in marriage is also charged same as rape done by any stranger.

U.K.

England and Wales removed marital rape exception in 1991 in the case of "R v R" by the Appellate Committee of the House of Lords. Under Sexual Offences Act 2003, illegality on rape within marriage was considered and called as Spousal Rape, a Sexual Assault.

There are many countries that still haven't given legality to marital rape like India, Pakistan, Yemen, Bangladesh, Kuwait, Iran, Egypt, etc. Even where marital rape is criminalized the burden of proof lies on the wife to prove whether the sexual intercourse was consensual or non-consensual.⁹

INDIA

In India marital rape exists de facto i.e. in fact, whether by right or not and de jure i.e. by right, according to the law. Indian government has nowhere shown any active interest in criminalizing marital rape. There are several obstacles shown in removing marital rape exception given under

⁹ Marital Rape Laws- A Comparative Study, available at <https://www.lawctopus.com/academike/marital-rape-a-crime-undefined/> (visited on: May 18th 2021).

Section 375 of Indian Penal Code 1860 like cultural or emotional obstacle and statutory obstacle. The exception 2 under Section 375 exempt husband doing sexual intercourse with wife to be considered as rape unless the girl is above 18 years which was done by an amendment made to this Section. This exclude the women below 18 years and they are not given protection as it is believed in India that criminalizing Marital Rape would violate our culture, norms and traditional values.

CONCLUSION

It is a myth that marital rape if criminalized would violate the institution of marriage and would hurt our cultural and moral values as the whole existence of marital rape itself is violating the institution of marriage and hurting our value as our values never teaches a men to disrespect a women like this. India has made laws on several practices which also came under our cultural values like Sati Paratha, Child Marriage etc. if these being a part of our cultural cab be amended and criminalized then what part of the culture does this marital rape lies. A women can give divorce to his husband on ground of marital rape under personal law, is this not violating the institution of marriage? Our own law is giving such a contradicting statements on this topic like marital rape can only be termed as rape if the wife is 18 years or above and in India under Hindu Marriage Act 1995 in Section 5 (c) (iii) states that the age of a girl for marriage is 18 years and child marriage is considered as offence. Another contradicting case if that if a girl aged 16 years does sexual intercourse with consent it is considered as rape but a wife below 18 years is forced by her husband for sex and does sexual intercourse without consent it is not considered as rape. I guess consent should be the main fact to be seen while having sexual intercourse to be considered rape and not the relationship and age. Marital Rape disgrace the sanctity of marriage.

A country like Nepal has given a judgement by Supreme Court that forced sex will be considered rape within marriage and sadly India lags so behind blaming traditions and values and failing to seek changes and ignoring controversies. It is high time that our Indian Judicial system should act on this most heinous crime and criminalize it and preserve the respect and dignity of Women.