

CRIMINALISATION OF MARITAL RAPE: NEED OF THE HOUR***ADV. TANVI JOSHI & TANYA JOSHI****ABSTRACT**

The Indian Penal Code, 1860, does not recognise that it is a crime for a husband to rape his wife, hence marital rape is not a crime in India. The reasons for this are numerous, as evidenced by multiple Law Commission investigations, Parliamentary discussions, and judicial rulings. The reasons range from preserving the sanctity of the marriage institution to the availability of legal alternatives. With the ongoing debate on whether to remove the exception to Sec. 375 of the Indian Penal Code, the need for proper examination of these alternative remedies and the effectiveness arises. This Article seeks to examine the Constitutional and Penal provisions in determining whether the severance of the Exception clause is justified.

Keywords: Marital Rape, cruelty, fundamental rights, IPC, Constitution

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“ Where women are honored, there the gods are pleased; but where they are not honored, no sacred rite yields rewards.”¹

I.

INTRODUCTION

In India, marriage is seen as a sacred union of two souls. It is assumed that after a marriage is solemnized, there is an implied permission to have sexual relations between them. This concept of marriage has been used to hide the harsh reality of marriage, such as domestic abuse, marital rape, cruelty, and other gruesome and horrible crimes committed against women. There are laws in place to protect women in the country from barbarous crimes like rape, but rape that occurs within marriage has never been protected. Since ancient times in India, it has been the man's responsibility to leave the house and earn money to support his family. In India, the male has gone out of the house to earn money for his family's survival since ancient times, while the woman takes care of all the household responsibilities. As a result, it has evolved an illusion of male supremacy that is universal. We live in a world dominated by male chauvinist ideals, in which men believe they should rule their wives in all aspects of their lives, whether professional, personal, or sexual. And patriarchy is one of the most significant barriers to eliminating gender discrimination.

The principle of equality is enshrined in our Preamble, but societal pressure on women has shown to be greater than on males. Women are expected to satisfy the desires of the family and keep it intact, therefore when they go to the police to report a crime against their husband, they are not welcomed by their family or community. Women are constantly afraid of being rejected by their families or society. Our country's ladies have been oppressed by this social outcast. Women are afraid to leave their homes and fight for their

¹ Manusmriti

fundamental human rights. The ‘right to live with dignity’ is our Fundamental Right.²

Marital Rape: Meaning

Marital rape is when a husband engages in sexual activity with his wife without her consent, which can be achieved through coercion, threats of physical assault, or mental torment.³ According to Section 375 of the Indian Penal Code – “Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim.”⁴ However, there is an exception provided which says that if non-consensual sexual intercourse takes place between a married couple, in that case, it will not amount to rape. As previously stated, marriage is a sacred union of two souls in which the implied permission to lawfully complete their marriage is a requirement of the ritual. Nothing, however, authorizes a husband to force his wife to have sexual relations against her will. In India, a mutual matrimonial ceremony is regarded as permission to engage in sexual activity. As a result, this horrible and gruesome deed remains unpunished in India. The status of the existence of Marital Rape India is *de facto* and not *de jure*.⁵

² Aruna Ramchandra Shanbaug v. Union of India (2011) 4 SCC 454

³ G.V. Akshaya and M. Kannappan, A Study on Marital Rape in the Indian Legal Scenario, 119IJAPM, 1090 (2018), <https://acadpubl.eu/hub/2018-119-17/1/94.pdf>.

⁴ The Indian Penal Code, 1860 (45 of 1860), Exception to s. 375

⁵ Raveena Rao Kallakuru & Pradyumna Soni, Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact, 11 NUJS L. Rev. 1 (2018), <http://docs.manupatra.in/newslines/articles/Upload/8787A55C-D93F-4589-8A68-A9A032AF0E.pdf>

Effects of Marital Rape

a. Psychological Effects

Women who have had encounters relating to Marital rape have had cases of depression, PTSD, fear, self-esteem issues, rape trauma syndrome and also being sexually unstable, unavailable or dysfunctional.⁶ Rape Trauma Syndrome is the medical term for a survivor's reaction to rape, and it is a psychologically healthy person's natural reaction to the trauma of rape.⁷ This could happen right away, or it could take months or even years. Victims may feel ashamed or degraded as a result of their ordeal. The victims may be perplexed as to why this occurred and how they were unable to help themselves during the incident. Some victims may blame themselves for not being strong enough to stop it or for not wanting to engage in sexual activity as their husband's desire. Self-blame is an essential psychological aftereffect of rape, and the victim develops Post-Traumatic Stress Disorder as a result of the sense of helplessness; not being able to prevent yourself from being raped and self-blame.⁸ Also, in a hearing for criminalizing marital rape, Hon'ble Delhi High Court in 2018 said that: "Force is not a pre-condition for rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses unless she indulges in sex with him and she has to do it under threat."⁹

b. Effects on Health

Because of the numerous rapes, most women are in constant pain. As a result, they end up with fractured ribs, knife wounds, markings on their bodies from the assault, and black eyes. These are just a few of the issues that women may face. The majority of sufferers have complained of vaginal bleeding and feeling sore. Due to an extensive rupture of the vagina, bleeding occurs.¹⁰

⁶ Campbell, R., Dworkin, E. and Cabral, G., An ecological model of the impact of sexual assault on women's mental health. *Trauma, Violence, & Abuse*, 2009

⁷ Surjibhai Badaji Kalasva v. State of Gujarat, (2018) 59 (3) GLR 2498

⁸ Ann Burgess and Lynda Holmstrom, Rape Trauma Syndrome, *American Journal of Psychiatry* 981-986 (1974)

⁹ Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490

¹⁰ *supra* note 5

Anal intercourse can cause bleeding, agony, and anger in those who are forced to do it. If they are reminded of the abuse episode in any way, they may feel nauseated. Unwanted pregnancy might occur as a result of this, putting the victim under additional mental and psychological strain.¹¹

II. CONSTITUTIONAL CONTOURS OF MARITAL RAPE EXCEPTIONS

Marital rape is also a violation of a woman's fundamental right under Articles 14 and 21 of the Indian Constitution. The lack of criminalization of marital rape violates a woman's fundamental rights. Even though the crime of marital rape happens within the private realm of a marriage, it is the State's job to break through this barrier. If the state does not intrude into this private realm, a woman who is raped by her husband is left without recourse.

However, an examination of judicial decisions concerning issues traditionally considered to be inside the private domain of marriage and family reveals the judiciary's reluctance to bring these issues before the public.

A. Article 14 and Marital Rape

Over the last few decades, the concept of marriage in Indian law has changed dramatically. The realm of marriage is currently governed by specialized laws for numerous religions, or if the parties to the marriage so choose, a religion neutral legislation will apply. The dynamics of the spousal relationship have been altered by the codification of marriage laws. The traditional perspective of women's role in marriage was that they were the husband's property from the beginning. With the codification, however, neither the husband nor the wife's status in the marriage has changed. There is no distinction in the laws addressing the position of the wife and the husband under codified legislations such as the Hindu, Christian, Parsi, and Special Marriage Act. In light of extensive case law and constitutional jurisprudence in favour of gender equality, and with the Supreme Court now moving beyond the binary of man and woman to recognize the third gender as well, an argument of inequality of women before men in marriage will never satisfy the

¹¹ Sarkar J. Mental health assessment of rape offenders, 55(3) Indian J Psychiatry 235-243 (2013)

requirements of Article 14.¹² To begin with, marriage is inextricably related to sexual intercourse. The second point to consider is that marriage does not imply a sexual connection. The idea that marriage is fully divorced from sexual interactions does not retain much legal weight, as proven by the fact that so many divorce claims are based on sexual relationships. Marriage, on the other hand, cannot imply permission to all sexual activities. Even if we imagine sexual connections as a provision in the marriage contract, agreement to sexual intercourse at any moment throughout the marriage cannot be valid due to normal contract law norms. A contract that is vague, in violation of public policy, and uncertain is not legal.¹³

Within India's territory, Article 14 of the Indian Constitution protects the fundamental right to equality before the law and equal protection under the law. However, there is still no criminal statute that addresses the discrimination that victims of marital rape experience. The Exception to Section 375 of the IPC is a discriminatory law for married women because it creates a new stratum of women who will not be protected by the law if they are sexually harassed by their husbands. It is arbitrary, artificial, and evasive because it creates a new stratum of women who will not be protected by the law if they are sexually harassed by their husbands.

The Supreme Court held in *Budhan Choudhary v. State of Bihar*¹⁴ and *State of West Bengal v. Anwar Ali Sarkar*¹⁵ that any classification made under Article 14 of the Indian Constitution is subject to a reasonableness test that can only be passed if the classification is rationally related to the goal of the act. However, Exception 2 defeats the objective of Section 375, which is to protect women and punish those who commit rape. Exempting husbands from penalty is diametrically opposed to that goal. Simply put, whether a woman is married or single, the repercussions of rape are the same. Furthermore, because they are officially married, married women may find it more difficult to flee violent situations at home.

B. Article 21 and Marital Rape

¹² *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

¹³ The Indian Contract Act, 1872, §§23 and 29.

¹⁴ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India)

¹⁵ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India)

Exception 2 also violates article 21 of the Indian Constitution. [12] According to Article 21, "no one shall be denied his life or personal liberty except in accordance with the procedure established by law." In several decisions, the Supreme Court has construed this phrase to go beyond the simply literal protection of life and liberty. Instead, it has ruled that the rights enshrined in Article 21 include, among other things, the rights to health, privacy, dignity, secure living circumstances, and a healthy environment.

In recent years, courts have come to recognize that these broader rights to life and personal liberty include a right to abstain from sexual intercourse and to be free of unwanted sexual behavior. In *The State of Karnataka v. Krishnappa*, the Supreme Court held that "sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female."¹⁶

Non-consensual sexual intercourse is considered physical and sexual violence, according to the same decision. The Supreme Court later associated the right to make sexual activity-related decisions with the rights to personal liberty, privacy, dignity, and physical integrity under Article 21 of the Constitution in *Suchita Srivastava v. Chandigarh Administration*.¹⁷

Under recent years, the Supreme Court has clearly acknowledged a right to choose intimate partnerships in Article 21. The Supreme Court recognized the right to privacy as a fundamental right of all citizens in *Justice K.S. Puttuswamy (Retd.) v. Union of India*, holding that it includes "decisional privacy reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations."¹⁸ In this vein, courts have consistently found that the "right to life" includes the right to live in dignity.¹⁹ Exception 2, on the other hand, which fails to dissuade husbands from engaging in acts of forced sexual contact with their wives, has a negative impact on women's physical and mental health, as well as their capacity to live with dignity.

III. LIMITATIONS, RECOURSES AND SUGGESTIONS

¹⁶ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India)

¹⁷ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

¹⁸ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India)

¹⁹ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India)

Our society has progressed in practically every subject, and there have been several changes and new laws enacted, but marital rape is still not regarded a criminal offence in our country. There are no laws safeguarding a woman in the institution of marriage, and matters relating to it are left to the court's discretion. Under Section 375 of the Indian Penal code, has mentioned exception that – “Sexual intercourse by a man on his own wife, the wife not being under 15 years of age, is not rape”.. In India, laws prohibiting marital rape are either non-existent or esoteric, relying on judicial interpretation.

A. Existing Remedies

a. The Protection of Women from Domestic Violence Act of 2005

The Protection of Women from Domestic Violence Act of 2005, which deems marital rape to be a sort of local violence, was passed in 2005. A woman can go to court and seek legal split from her spouse for marital rape under this Act. Marital rape is irrational: a lady's body is raped, and her affection and trust are harmed as a result, driving her into a state of instability and terror. At the holy place of marriage, she relinquishes her human rights. However, there are no laws in place to protect the rights of victims of marital rape, and the measures adopted are ineffective.

b. Section 498A of IPC

Sec. 498A of the IPC is the most relevant clause that is frequently regarded as a potential alternative to true criminalization. The IPC was amended to include Section 498A to address situations of cruelty to women. Rape is, without a doubt, a sort of cruelty; nonetheless, it is distinct from physical and emotional violence. It is surrounded by intricate patriarchal and power structures. This is also evidenced by the fact that rape is treated as a separate crime in criminal statutes from serious bodily harm or assault. Rape also has its own set of legal standards in terms of evidence. The maximum penalty under Section 498A is just three years in prison, with or without a fine. Rape has a potential sentence of life in prison.

B. Committee Recommendations

In the 172nd Law Commission Report, the Law Commission was immediately confronted with the legitimacy of the exemption clause. Arguments were made during the consultation rounds on the legitimacy of the exception clause itself. It was maintained that if other forms of abuse by a husband against his wife were criminalized, there was no reason for rape to be exempt from the law. This argument was rejected by the Law Commission because it was concerned that criminalizing marital rape would lead to "excessive interference with the institution of marriage."²⁰

In 2012, a committee chaired by Justice J.S. Verma (Retd.) recommended for the criminalization of marital rape, which was a change from earlier talks. This committee was founded in response to a nationwide movement to improve the efficiency of criminal law in dealing with incidents of severe sexual assault against women. The 'Report of the Committee on Amendments to Criminal Law' (J.S. Verma Report') was published by the committee in 2012. One of the recommendations in this report was that marital rape be made a crime. A two-fold suggestion was made to this effect. The preliminary recommendation was to simply remove the exception clause. The second recommendation was that the legislation should expressly specify that a marital or other comparable relationship is not a viable defense for the accused, nor is it important in deciding whether consent exists or not, nor should it be considered a mitigating element in sentence. The immunity offered in cases when the perpetrator is the victim's husband arose from the archaic view of women being the property of men and irrevocably consenting to their husband's sexual wants, according to this article. It noted that this immunity has been revoked in a number of jurisdictions, and that such an exclusion clause cannot hold under the present paradigm of marriages between equals.²¹

IV.

CONCLUSION

²⁰ Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000)

²¹ JUSTICE J.S. VERMA COMMITTEE, *Report of Committee on Amendments to Criminal Law* (January 23, 2013)

Justice Krishna Aiyar in the case *Rafiq v. State of Uttar Pradesh* said that “*A Murderer kills the body but a Rapist kills the soul*”²² The importance of raising awareness about marital rape cannot be overstated. As a culture, we are quite culturally diverse and place a high value on tradition. This eliminates the need to talk about taboos. Turning a blind eye to these taboos will not fix the problem; it will continue to exist. Marital rape will not be legalized until the nation's residents have become acquainted with it. Even if marital rape is made a felony, a comprehensive description of the act/statute must be provided. Various organizations have made commitments in this direction, but no major steps will be taken unless citizens draw the attention of the judiciary to how serious the problem is already. According to studies, 70% of women have suffered physical and/or sexual assault from an intimate partner at some point in their lives. This is in direct opposition to the fundamental liberties for which our predecessors battled. Articles 14 and 21 of the Indian Constitution discuss equality, as well as freedom of life and liberty. India must make a decision on whether or not to continue to promote marital rape. In a country where goddesses are respected and worshipped, India cannot afford to remain mute any longer on this problem. It would be a heinous miscarriage of justice to do so.

²² *Rafiq v. State of Uttar Pradesh*, 1980 Cr. L.J. 1344 SC