



MARITAL RAPE: UNDERSTANDING THE PLIGHT OF THE MARRIED WOMEN

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Abstract

Marital rape is one of the most common forms of violence done on women, but ironically no law exists to have them safeguard against such heinous crime. Thus type of crime goes unnoticed and unreported because so many societal customs, norms and taboos which undermine the respect of a girl who dares to go in public & takes an unconventional step to report in police. It high time both for the judiciary & legislation change their century old traditional thinking that women are chattel and rightful owner of first father then husband and marriage gives them unrestricted right to have sex without her consent to adopt a rational thinking that consent is very important aspect for sexual intercourse and if done without her consent then it's a crime.

Also law-makers should take into account that is rape by a stranger is a very serious crime, then rape by a person whom you have to live with for long time is more mentally frustrating and it's more serious offense. Though the judiciary has taken step in making marital rape for spouse whose age is less than 15 years of age is illegal, still judiciary should understand that rape is such an offense that it doesn't

matter if the wife is age of 18 or of age 30, its still mentally, physically and emotionally stressful.

Its high time for India to change its legislation so that its laws are as per to that of CEDAW which explicitly makes any kind of rape illegal & of which India is signatory. The whole world is moving towards protection of women & it will be shame if India lacks behind it.

Marital Rape: Understanding the plight of the Married women

“Rape •rape no matter if it had been done under the disguise of marriage or not.”

introduction

We should absolutely clear the concept that there can be no difference between good rape and bad rape, which most people confuse with the case of marital rape. The recent hue & cry for the pro-marital rape law doesn't provide any special privileges to the married women, instead it safeguard them from different kinds of rape, and makes all rape fall under one category without distinguishing different categories of rape.

Marital rape is often described as an act of sexual intercourse where there is no consent of wife. Marital rape is often a chronic form of violence for the victim which takes place within abusive relations. It basically works on the traditional concept of the marriage, where its accepted that after marriage, husband



has the full right of sex with or without the consent of the wife, and wife has to get on board with it even if she is not feeling well or don't have the mood for it. Marital rape alone are not the factors or the elements which affect the plight of the victims of the marital rape, there is societal norms, customs and taboos which plays a big role in making those victims silent and silently making them accept that fact that those conditions are regular things.

There is quite some hesitation in criminalizing and prosecuting marital rape which has been attributed to traditional views of marriage, interpretations of religious doctrines, ideas about male and female sexuality, and to cultural expectations of subordination of a wife to her husband views which continue to be common in many parts of the world. But gradually with the advent of second wave feminism and change in the way of thinking many European countries have started to change their laws criminalizing marital rape.

In our society there exist three different types of marital rape, which are as follows¹:-

1. **Battering Rape:** -in this case, women in their marital relationship are battered during the sexual violence act and on the other hand they have to face the physical violence after the rape.

Majority of marital rape victims fall under this category

2. **Force only Rape:** -in it only that amount of force is used by the husband of the wife which is necessary to coerce them into the sexual intercourse. This type of assault takes place when the wife refuses to have sexual intercourse.
3. **Obsessive Rape:** -In this type, torture and perverse sexual acts takes place which are physically abusive.

historical background

The origin of the concept that marriage gives free leeway in having sex with one's spouse without one's consent² was propounded by Sir Mathew Hale, in his book "History Of the Pleas of the Crown" where he wrote that *the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*. The same was followed in American English law, which used to consider that after marriage a woman's legal rights were subsumed by those of her husband, meaning that one's married spouse can no longer be charged with raping one's wife, this would be no difference than raping oneself³.

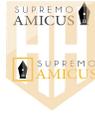
The view propounded by Sir Hale was changed in case of **R vs Clarence**⁴ where the concept of marital rape was discussed

¹ R. Thornhill & N. Thornhill, 'The Evolution of Psychological Pain' in Bell, R. & Bell, N. (eds) *Sociology and Social Science* (Texas Tech University Press, 1989).

² Jonathan Herring, "Family Law: A Very Short Introduction" (1st edn, oxford 2014).

³ Michelle J Anderson, 'Marital Rape Laws Globally' in Kersti Yllö and M.G. Torres (eds), *Marital Rape: Consent, Marriage and Social Change in Global Context* (Oxford University Press, 2016).

⁴ R vs. Clarence, 5 (1888) 22 QBD 23.



for the first time in English court. In that case, even though the defendant was acquitted, of the rape charges, even then the case served as an important precedent for wives to save themselves from marital rape as opposed to Sir Hale's statement⁵.

After that case, another landmark case was **R vs. R**⁶ it was held that exemption provided to husband regarding marital rape was illogical and that "the fiction of implied consent had no useful purpose to serve today in the law of rape". As a consequence R's appeal was dismissed and he was convicted of rape. This case was the beginning of the criminalization of marital rape in England.

In the US case of **People vs. Liberta**⁷, same stand as that of England after the case of R vs. R was taken where it was decided by the New York Court of Appeals that, "a state arguably has no interest in protecting marital privacy or promoting marital reconciliation where a marriage involves domestic violence and where the marriage has decayed to a point where the sexual relations of the spouses are no longer consensual and sexual abuse has occurred". It provided the following observation⁸:-

1. Marital privacy is meant to provide privacy of acts that both husband and

wife find agreeable; it is not meant to shield abuse.

2. Many crimes without witnesses are hard to prove, yet this is no reason for making a crime "unprosecutable".
3. Labelling all wives as potentially vindictive is a poor stereotype backed by no evidence.

The **People vs. Liberta** case provided a precedent for the case of **Kirchberg v. Feenstra**⁹, in which it was held that law which gave sole control of marital property to the husband is unconstitutional, thus ending the long battle of marital rape.

The concept that marriage is the exception of the rape comes from the fact that traditionally the marriage is considered as an institution where a husband has the control over his spouse's life, her sexuality, she was actually considered as an chattel so when an offence of adultery is committed it's not to safeguard the interest of the women but that since women is considered a property it's an invasion of property. In 1707, English Chief Justice **John Holt** described the act of adultery as "the

⁵Arima Pankaj, 'Independent Thought vs. Union of India: An evaluation of the judgement and its repercussion in the field of marital laws.' (2017) 22 IOSR- JHSS
<<http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue11/Version-4/L2211047985.pdf>> accessed on 20 December 2017.

⁶R vs. R, (1992) 94Cr App R 216.

⁷People vs. Liberta, 90 A.D.2d 681 (1982).

⁸Samparna Tripathy, 'Marital Rape, and Not Its Criminalisation, Debases Society' (*The Wire*, 5 September 2017) <<https://thewire.in/173906/marital-rape-and-not-its-criminalisation-debases-society/>> accessed on 30 December 2017.

⁹Kirchberg v. Feenstra, 450 U.S. 455 (1981)



highest invasion of the property”¹⁰. So rape was considered as the crime against the property of father or husband not against the women’s dignity.

Historically, the generic term for “rape” came from the word “Raptus” which imply violent theft applied to both property and person. It was synonymous with abduction and women’s sexual molestation was considered to be theft as she was considered a property of father or husband, so it was theft against the guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries¹¹.

Usually it was considered that marital rape was very uncommon and that it was just a rumour, but the statistics points to other direction. Approximately every 6 hours a young married woman is burnt or beaten to death, or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged between 15 to 49 have been beaten, raped or forced to provide sex. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands’ families. 56% of Indian women believed occasional wife-beating to be justified.

According to the National Family Health Survey 2005-06, almost one in

ten married women (aged 15-49 years) in India reported to have been forced to have sex by their husbands against their will. Out of 9% of the women who reported sexual assault, 94% suffered it at the hands of their husbands.

legal aspect

The concept that marital was providing an exception to the act of rape was widely criticized as an inconsistent concept of human rights and dignity. With the constant effort from feminists since 1960 to overturn the marital rape exception and criminalizing the same¹² as criminalizing the same would be reclassifying the sexual crimes “from offenses against morality, the family, good customs, honour, or chastity to offenses against liberty, self-determination, or physical integrity”¹³ and the same was achieved on December 1963, when the UNHRC published the “*Declaration on the Elimination of Violence Against Women*”, where the marital rape was considered as an violation of human right.

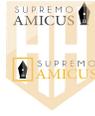
Despite the attempts made by the international organisation most of the countries still doesn’t have the sound legislation to protect women form marital rape. Determining the criminal status of marital rape may be challenging, because, while some countries explicitly criminalize the act, the most apt example would be Namibia, which had a

¹⁰ Sameul H Pilsbury, ‘Judging Evil: Rethinking the Law of Murder and Manslaughter’ (rev. edn, NYU) 2000.

¹¹ Priyanka Rath, ‘Marital Rape and Indian Scenario’ (2009) 2 IJL.

¹² Jill Elaine Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ [2000] CLR.

¹³ David John Frank & others, ‘Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005’ [2010] ACR.



legislation to deals with marital rape called 'The Combating Rape Act, which states that "*No marriage or other relationship shall constitute a defence to a charge of rape under this Act*" conversely countries which explicitly exempt spouses from the charge of it, like for example **South Sudan**, where its rape law Article 247 states that "Sexual intercourse by a married couple is not rape, within the meaning of this section"

In many countries the ordinary rape laws are silent on the issue that is, they do not address the issue one way or another in such cases, in order to determine whether marital rape is covered by the ordinary rape laws it must be analysed whether there are judicial decisions in this respect and former definitions of the law are also important.

In 2006, the UN Secretary – **general** in-depth study on all forms of violence against women stated that- "*Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt marital rape from general rape provisions. Marital rape is not a prosecutable offence in at least 53 States. Four States criminalize marital rape only when the spouses are judicially separated. Four States are considering legislation that would allow marital rape to be prosecuted*".¹⁴

After the protest from different feminist and international women's organisation, many countries have change their rape laws and included a new clause which deals with, marital rape. As many as 18 American states, 3 Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia has done away with the traditional concept and made marital rape strictly illegal.

South Africa has removed the earlier exemption provided to husbands with regard to marital rape. In section 5 of The Family Violence Act 1993, it states that "Notwithstanding anything to the contrary contained in any law or in common law; a husband may be convicted of rape of his wife", thus making marital rape illegal in the country¹⁵.

Similarly **Australia**, under Section 73(4) of the Criminal Law Consolidation Act, 1953 "No person shall, by reasonably of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.

In **Indonesia**, in cases of marital rape, a time limit of 3 months is given for filing the complaint within which the case will terminate if the survivor or his/her family withdraws the complaint. Since of the victim being socially blamed for the crime, it is the women who withdraw

¹⁴Ending violence against women, (united nation publication 2006)

¹⁵Udisha Ghosh, 'Marital Rape: The Need for Criminalisation in India' [2015]

ACADEMIKE<<https://www.lawctopus.com/academike/marital-rape-need-criminalisation-india/>> accessed on 30 December 2017.



their cases generally. That leads to setting the criminal free.

In **Lesotho**, marital rape is only explicitly criminalized if the parties are separated and there are no provisions of violence committed by men against their wives.

legal aspect in India

The current position on marital rape in India states that there can be no rape in the institution of marriage. Despite the fact that international organisations like UNHRC and different European countries have change their stand on the same issue. So basically it states that at their event of marriage there is no law in India to protect the rights and dignity of a women from any sexual abusive from the husband. Women has either of the two choices as of present, either silent accept the abusive as part and parcel of marriage or apply for divorce.

Our criminal law is basically governed by century old Indian Penal Code (IPC) which was made by the British at the time when the idea was popular that women were chattel of father and husband. So as per section 375 of IPC¹⁶ there is an exception clause in the act of rape which states that. “*Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape*”. And section 376 provides for the punishment of rape which states that, “*Rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years*

and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.”.

Even in the case of sexual assault section 354¹⁷, the protection to marital rape is based on very narrow view. It states that rape within marriage stands only if the wife be less than 12 years of age, if she between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife.

The traditional definition of rape as per section 375 has to be modified with the passage of time, as situation demands it. Traditionally rape is only considered when there is penal penetration, but now not just penal penetration but also threatening, forceful coercive use of force against the victim, or the penetration by any foreign object, however slight. Also different types of offenses have to be included in the definition of rape which includes oral sex, sodomy. Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

The importance of consent of women in any sexual activity cannot be over emphasized. It was and is general

¹⁶ Indian Penal Code 1860, s 375.

¹⁷ Indian Penal Code 1860, s 354.



thinking that woman can protect ones right to life and liberty but when it comes to marriage then woman has no right over her body, it becomes the property of the husband, so if women has no right over her body, how she is able to ensure that her right to life and liberty not restricted? It is in itself an irony. The only recourse a spouse has against any assault from her husband is section 498-A, which deals to protect against the perverse sexual conduct by the husband.

Another hurdle in prosecuting cases of marital rape is that due to section 122 of Indian Evidence act¹⁸ which prevents the communication in marriage to be disclosed in court except in cases when one spouse is being prosecuted for the offences of another. Now marital rape is not an offense, so whatever happens in marriage can't be prosecuted even if relevant evidence can be produced. So prosecution of marital rape combining the provisions of IPC and evidence act becomes nearly an impossible task.

172nd law commission report has made some recommendation for substantial change in the law of rape¹⁹:-

1. Rape' should be replaced by the term 'sexual assault'.
2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

3. In the light of Sakshi v. Union of India and Others²⁰ 'sexual assault on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

The National Charter for Children, 2003 was notified on 9th February, 2004. Clause 11 reads: "The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated."

Even in Justice Verma Committee report, it stated that exception under

¹⁸ Indian Evidence Act 1872, s 122.

¹⁹ibid 4.

²⁰Sakshi v. Union of India and Others, AIR 2004(5) SCC 518.



section 375 of IPC should be repealed immediately. It even said to widen the scope of section 498A of IPC which deals with only mental & physical abuses, and recommended that it should also include sexual abuses, as most of the time it goes unpunished.

For the protection of children against any sexual abuses, in **Juvenile Justice (Care and Protection) of Children Act**, 2015, states that, “a child who is at imminent risk of marriage before attaining the age of marriage and whose parent’s family members, guardian and any other person are likely to be responsible for solemnization of such marriage”

It’s often argued that the proving and prosecution of marital rape is difficult, but that doesn’t mean that it can be used as an excuse to ignore a crime. If that’s the logic then sexual harassment in workplace is difficult to prove, even then there is law against it.

First and foremost thing to analyse whether there was any marital rape would to look for any historical domestic violence and physical assault was done by the husband to wife. Again argument is given that lack of forensic evidence could be hurdle in criminalising marital rape, for that matter, SC in the case of Zakir vs. State of Bihar²¹, held that absence of medical records would not be of much

consequence if the other evidence on record is believable. Few basic evidences will be enough to prosecute under marital rape are²²:-

- 1. A history of physical violence**
- 2. Result of rape-kit**
- 3. Medical examination of the wife**
- 4. Witness testimony**

recent development

Recently in Independent Thought case²³, SC gave a landmark judgement in which it stated that an act of rape under to one’s spouse who is under age of 18 years of age will be considered as marital rape. Thus Supreme Court of India altered the exception 2 of Section 375 of IPC which now stands thus altered, “Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape”.

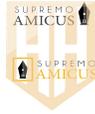
In Independent Thought, an NGO in a petition in 2013 challenged exception 2 which states that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. Here lies the discrepancy, first the law states that if a man has sexual intercourse with a girl under the age of 18 will be prosecuted for statutory rape under POSCO Act, on the other hand if a man has sexual intercourse with his wife whose age is under 28 but above 15 then it shall not fall under rape. So a girl above

²¹Zakir vs. State of Bihar, 1983 AIR 911.

²²Ramanathan S., ‘Justice, misuse and proof: Why the legal debate on marital rape is wrongly set up’ [2016] The News minute
<<https://www.thenewsminute.com/article/justi>

[ce-misuse-and-proof-why-legal-debate-marital-rape-wrongly-set-40468](https://www.thenewsminute.com/article/justi)> accessed on 2 January 2018.

²³Independent Thought v. Union of India, W.P. (Civil) No. 382 of 2013.



age of 15 will have protection from rape till the time she becomes someone's wife then there is no law to protect her²⁴.

So girls between the ages of 15 to 18 fall under a legal vacuum who are unprotected by law from intrusive sexual intercourse. So basically IPC divides the girls under the age of 18 into two categories: - those who are married and those who are not. Any logically also girl under the age of 18 years don't have the emotional, physical or mental maturity to understand and have informed decision regarding sexual intercourse.

Thus taking into the account of the following discrepancies, SC declared exemption to marital rape unconstitutional giving following ground²⁵:

1. Supreme Court considered that since India is signatory to international instruments such as the Convention on the Rights of the Child (CRC) & CEDAW, so having exemption in marital rape making legitimized the practice of child marriage is contravention of the obligations imposed by these instruments. Article 16.2 of the CEDAW states "that the betrothal and the marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specify a minimum age

for marriage and to make the registration of marriages in an official registry compulsory".

2. Exception was found to be derogatory of Article 14 and 21, and therefore, unconstitutional.
3. It was observed that the exemption was inconsistent with other laws in force, and also created internal contradictions within the IPC. In 2013 Criminal law (Amendment) Act 2013 examined the present circumstances and increased the age of consent for sexual intercourse by girls from 16 to 18 years. Exception 2, however, still contains the age of consent for a married girl as 15 years.

Though this judgement will save the teenage girl from the abuses of her spouse, but SC explicitly stated in the judgement that this decision will not be applicable to marital rape of an adult women. Court stated that, "We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally". It further said that "Parliament has extensively debated the issue of marital rape and considered that it was not an offence of rape. Therefore, it cannot be considered as a criminal offence".

²⁴Deya Bhattacharya, 'SC says marital rape can't be considered criminal: Tradition doesn't justify assault, child marriage' *FirstPost*(India, 11 October 2017).

²⁵ShraddhaChaudhary, 'INDEPENDENT THOUGHT V. UNION OF INDIA AND THE

UNCONSTITUTIONALITY OF MARITAL RAPE' [2017] SGR
<<http://www.sociolegalreview.com/independent-thought-v-union-of-india-and-the-unconstitutionality-of-marital-rape/>> accessed on 28 December 2017.



Though in **Protection of women from Domestic violence Act 2005**, offers victims of marital rape to get civil remedies. It's quite unsatisfactorily that heinous crime like rape is seen as civil wrong rather than criminal wrong²⁶.

consequences of marital rape

It doesn't matter whether it's the adult women or a teenage girl cause both of suffer from psychologically, Emotionally, physically, mentally & emotionally & it makes there life quite hard and there health degrades on a continuous basis. Most of the victims of marital rape victims have to live drastic consequences:-

1. Anxiety, depression and stress leading to suicide.
2. A number of bodily injuries to vaginal areas including bruising.
3. Miscarriage, bladder infections, STDs and infertility.
4. Long lasting effects like insomnia, eating disorders, sexual dysfunction, and negative self-image

Furthermore, marital rape is, more emotionally & physically damaging than rape by a stranger, cause in latter one it's a typically one-time event and woman knows she has recourse, but in the former case the rape takes place with a long time

sexual partner and the relationship affects the victim's reactions. Most of the times marital rape occurs as a part of abusive relations and the trauma from rape add to the effects of abusive relationship & it has a serious long term consequences for victim²⁷.

Moreover, in other forms of rape, victim has the opportunity of never interacting with the rapist, but in marital rape they have to interact in daily basis and above it they have to live with them, which increase the stress level. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him.

recommendations

Rape, whether it's a rape by a Stanger or by a known person or by spouse himself is a rape, whether we accept the reality or not, the crime of rape is increasing in an alarming rate in every part of the world. There needs to be general awareness among men and women about the consequences of rape victims and more helplines needs to be set up so that they can easily be addressed. But most importantly we have make laws which are sufficient, consistent and systematically enforced for the protection of women. Some recommendations are:-

²⁶Peter Foster, 'India outlaws wife-beating and marital rape' *The Telegraph* (India 27 October 2006)
<<http://www.telegraph.co.uk/news/worldnews/1532567/India-outlaws-wife-beating-and-marital-rape>.> accessed on 3 January 2018.

²⁷Hidden Hurt, 'Marital Rape'
<<http://www.hiddenhurt.co.uk/marital-rape.html>> accessed on 2 January 2018.



1. Increasing awareness among men & women about the consequences of rape and also to what authorities should they report of they are the victims.
2. Increasing the helpline centres so that proper care can be given.
3. Increasing awareness among school children by promoting sex education & making them learn about good touch and bad touch.
4. There should be strict laws which can restrict the perpetrator to reach any type of settlement which can include marrying the victim.
5. Amendment in the IPC section 375 to include the provision of marital rape and exception should be done away with.

sacrosanct relationship of husband & wife. It should be keep in mind that marriage doesn't only thrive on sex but mutual respect & trust to each other is equally important. In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law. It is important that there should be more awareness among women and capacity building is the need of hour. Societal stigmatization and the chauvinistic attitude of the people should change. Rape is rape and marriage cannot be an excuse for committing such a heinous offence. The first step to stop such an offence is to empower and educate the women to stand up against such inhumane acts and abolish the existing marital rape exemption.

conclusion

Even today, in the 21st century, the idea that marital rape exists becomes very difficult for people to accept and women who speaks against it seems like she has not done her so-called 'wifely duties' towards her husband and frowned up by society. It is believed that if the girl has consented for marriage then she has automatically given her body and her consented for fulfilling husband's desire for sexual intercourse even without her consent. Sexual consent is the right of every woman whether married or unmarried as that of men. If the sexual intercourse is without consent, the same should be penalized regardless of the relationship the perpetrator has with the victim, which even include so called

