



MARITAL RAPE: A COMPARATIVE ANALYSIS BETWEEN INDIA, USA, UK AND SINGAPORE

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ABSTRACT

Introduction-Marital rape means rape committed by the person to whom the victim is married. There has been a huge controversy regarding the concept of marital rape. It is said that a husband can never rape his own wife. Wife's consent to marriage means her consent to sexual intercourse and that right to have sexual intercourse is provided to the husband because of the marriage. Although India has moved a lot towards reform and civilization by adopting various liberal policies and global standards, marital rape in India is still not a criminal offence.

Methodology-This paper will be comparatively analyzing the position of marital rape in India with the much-developed countries like UK, USA and Singapore.

Interpretation-The paper begins by explaining the concept of marital rape in detail and discusses the approach of different countries in interpreting this kind of rape within marriage. After critiquing its current position in India based on an orthodox notion, the paper further proceeds with analyzing the position of marital rape, the laws, criminal procedure and sentencing in UK, USA and Singapore separately.

Keywords – Marital Rape, India, UK, USA, Singapore

INTRODUCTION

Marital rape though has gained attention recently, still remains an unstable concept. The legal definitions of this concept differ from one country to another because the experiences and sufferings of women in every country have been of a different degree. While some countries are at one extreme where ejaculation is an important essential to prove rape¹, there are countries at another extreme that define rape as sexual intimacy pressured on one individual.² Like a rape between two known or unknown individuals, rape in a marriage includes forceful anal and oral intercourse as well.³ When there is a conversation about marital rape, there are three main controversies. Firstly, the legal offence of rape does not include the offence of marital rape because the legal definition and general understanding of the crime states that the victim of rape can be anyone but the wife of the perpetrator. Secondly, using the term "marital rape" becomes problematic because it gives a judgmental sense to label the interpersonal relationship and feelings between husband and wife as rape. Thirdly, the entire concept is questioned when an issue is raised as to whether a woman being sexually assaulted and raped by her husband is itself problematic.⁴

In most of the countries the two criteria for marital rape are constant i.e. as stated, the

¹Irene Hanson Frieze, 'Investigating the Causes and Consequences of Marital Rape' (1983) 8 Signs 532.

² Susan Brownmiller, 'Against Our Will: Men, Women, and Rape', (1975).

³ Katz and Mazur.

⁴Richard J Gelles, 'Power, Sex, and Violence: The Case of Marital Rape' (1977) 26 The Family Coordinator 339.



perpetrator and the victim are married when marital rape is being committed and rapist is immune from prosecution in such a case.⁵ This is the major issue with all the countries. The debating parties i.e. the opponents and the defendants in today's world agree on the fact that the issue of the debate has only recently arisen. The Women's Movement in the 1970's has increased the sensitivity of the women towards this crime.⁶ Therefore the defendants of the exemption of marital rape as an offence argue that the women began challenging their husbands on this issue only twenty-five years ago.⁷ The American judges also state that the women never challenged the subject until the 1970s.⁸

There are various implicit and explicit factors that cause marital rape of the women in the marriage. Broadly there are two main categories of these factors. Firstly, whether the marital rape is caused due to the woman's fault, fault of both the parties or fault of the husband. If the woman blames herself or is to be blamed in one kind of this situation, she would be unlikely to report the same in comparison to the other two situations. They might try to solve and suppress their sufferings through therapy.⁹ Secondly, whether the attributions of the parties in the marriage are stable, uncertain or unstable. The stable factors depict that the

marital rapes are continuous and are not going to stop, uncertain factors mean that there is no certainty in the situation i.e. the situation might get better or worse and unstable factors are those factors that make marital rapes short lived and stop after a period of time.¹⁰

Whom to blame	Stable Factors	Uncertain Factors	Unstable Factors
Woman is to blame	She was raped in the past. She is unresponsive sexually. She doesn't love him anymore. She doesn't like men.	She is not affectionate enough	She refused to have sex with him. She was raped by someone other than her husband.
Joint Responsibility	Their sex drives are different. They are not compatible. He does not respect her.	They have a communication problem	
Husband is to blame	He has emotional problems. He enjoys using force. He is an alcoholic. He is a sex maniac. He feels it is his marital	He is insensitive. He needs to prove his manhood.	He was emotionally upset. He was drunk.

⁵Jacquelyn C Campbell and Peggy Alford, 'The Dark Consequences of Marital Rape' (1989) 89 The American Journal of Nursing 946.

⁶*Ibid.*

⁷Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 California Law Review 1373.

⁸ Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985).

⁹ Irene h. Frieze, 'Perceptions of Battered Women', (1979) New Approaches to Social Problems: Applications of Attribution Theory 79-108.

¹⁰*Ibid.*



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Table 1. Hypothetical Causal Explanations for Marital Rape, Source: Irene Hanson Frieze, 'Investigating the Causes and Consequences of Marital Rape' (1983) 8 Signs 532.

OBJECTIVES OF THE STUDY

1. To compare the marital rape laws and debates in for major countries of the world
2. To understand whether the countries which have made marital rape an offence will be able to guide the countries with no laws on the same.

METHODOLOGY

The paper is a qualitative research that relies on certain facts and data. It has attempted to lay down the status of marital rape as an offence in mainly four countries that is India, UK, USA and Singapore. Within this structure, the paper aims to explain the details of marital rape as an offence in UK and some states in USA whereas the debates have been laid down for the other countries that try to understand the reasons behind not making marital rape an offence.

DISCUSSION

CURRENT POSITION IN INDIA-

In India, marital rape is still not a crime. The struggle for criminalizing marital rape has been huge but couldn't beat the orthodox foundation of the legal norms that allow the husband to indulge in sexual activity with his wife any time at his will but without her consent. This foundation rests on the notion of marriage as a sacramental bond between the husband and wife, where the wife is in a

subordinate position to the husband. There is no legal development with respect to the criminalization of marital rape even after filing plethora of petitions in this regard. October 11, 2017 can be remembered as an important stepping-stone for the issue of marital rape being made a criminal offence. The Supreme Court on this day recognized this offence as a crime for wives below 18 years of age and made it punishable in the case of *Independent Thought v. Union of India and Anr.* While Justice Madan B. and Justice Lokur recognized the second exception of section 375 of the Indian Penal Code as against the fundamental rights of the women, it clearly refrained from commenting on the issue in general.

POSITION OF MARITAL RAPE IN SINGAPORE

Marital rape is partially allowed in Singapore. Section 375(4)¹¹ of the Singapore

¹¹ Section 375(4) of the Penal Code – No man shall be guilty of an offence under (1) against his wife, who is not under 13 years of age, except where at the time of the offence-

- (a) his wife was living apart from him.
- (b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;
- (c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
- (d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or
- (e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred



Penal Code, which deals with rape, clearly states that a man will not be held liable for sexual intercourse with his wife unless the wife is under 13 years of age or the man has been living separately from his wife due to an injunction, court order or under another procedure. Sir Matthew Hale originated this exemption rule when he wrote extra-judicially to state that when a man and woman marry, the woman contractually and consensually gives herself to her husband. Hence the husband can never be guilty of raping his wife.¹² There is no evidence of any authoritative support to this argument.

The first case where Hale's doctrine was being discussed in detail was *R v. Clarence*¹³ in 1888. In this case, the man was accused of occasionally causing bodily injury to his wife and having sexual intercourse with her when he was suffering from gonorrhoea without informing her of the condition. The wife claimed that if she had known of his condition, he wouldn't have consented and therefore this amounts to assault. The husband was convicted at the first instance but later his decision was overturned. The six judges who were pronouncing on the exemption rule on marital rape had conflicting views. The first judge Will J. stated that sexual intercourse between married couples in a situation like above would constitute rape unless the offence of marital rape does not exist in the first place. He, personally, did not believe in the absence of marital rape as an offence.¹⁴

The second judge was also concurring with Wills J. to state that though Hale C.J. is a

high authority to comment on such laws, no higher authority has been cited to support his claims. Therefore, it becomes difficult to accept such claims because there can exist legal situations in a marriage where the wife can refuse sexual intercourse with her husband. For example, when the wife is sick, and the husband forced himself on her by bringing a third party into the equation. Therefore, there should be provision left to state that marital rape might become an offence.¹⁵

Smith J. and Stephen J. have agreed on similar lines to state that when two individuals get married, the woman gives herself to the man and consent to allow her husband to exercise his marital obligations, rights and duties. However, if the wife rejects or revokes her given consent, the husband should no longer be allowed to exercise his right of sexual intercourse. An interesting observation to make is that the judges don't disagree with the slight possibility of marital rape as an offence, rather only keep the interpretation of revoking the consent open.¹⁶

Hawkins J., the fifth judge, was in alliance with Sir Mathew Hale to state that a marriage is a contractual relationship between two individuals and the consent of the wife given to the husband is irrevocable which is not the option a woman being forced upon by anyone other than her husband has.¹⁷ Pollock B. is a concurring judge with Hawkins J. and claims that the husband and wife should feel connected in a marriage of which sexual intercourse is an

to in paragraph (d), and such proceedings have not been terminated or concluded.

¹² 1 Hale, 'Pleas of the Crown' 629.

¹³ (1888) 22 Q.B.D. 23.

¹⁴ *Id.* 33.

¹⁵ *Id.* 58.

¹⁶ *Id.* 37.

¹⁷ *Id.* 53.



essential element. In order to maintain this connection and the marital relationship, the woman does not have the right to refuse to give her consent to her husband for the same.¹⁸

The exception of a man to be held liable for rape if he has sexual intercourse with his wife when the wife has obtained a separation order from the court was carved out in the case of *R v. Clarke*¹⁹. The facts of this case were that the wife had obtained a separation order from the court against her husband. When the husband forced himself upon her, she approached the court for punishing him for marital rape. The counsel of the husband argued that the latter couldn't be held liable for a crime that is not known to criminal law. The judge squashed the argument of the husband and decided that if the wife had been granted a separation order from the court, she does not have the duty to follow marital obligations and her right to refuse sexual intercourse with her husband revives again.

By analysing both the cases, it can be concluded that Singapore, though speedily moving towards development, has not been able to evolve in the ideological aspect. These cases were decided approximately half a decade ago, yet the decisions of these cases still stand as the law for the entire country. Their husbands are raping around 90% of the total population of women. The law on marital rape is archaic and needs to change according to the current demands and needs of the women in society. The marriage is and will always be a sacred contract between two individuals, however,

¹⁸*Id.* 63-64.

¹⁹ (1949) 2 All E.R. 448.

no man should have the right to oppress the woman's sanctity and take away her right to consent, not even her husband. The women deserve to live a healthy and consensual life as well alike men.

POSITION OF MARITAL RAPE IN UK-

Rape in UK is defined in Part 1 of Chapter 42 of the Sexual Offences Act, 2003. Section 1 of the act states that when a person intentionally penetrates the vagina, anus or mouth of another person with his penis, without reasonably believing that the other person consents, the person is said to rape the other person. Section 75 defines consent as the freedom and capacity to make a choice.

Torture against wife in the form of physical assault, whipping and forced sex can be traced to a long history in UK. The male prerogatives of exercising a superior right of over his wife and subordinating her to an inferior position were enshrined in the English Common Law which again recognised the contractual nature of marriage giving husband the right to treat her wife as a subject of domination. Sir Matthew Hale, in his *Legal History of the Pleas of the Crown*, 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 principle that marriage created conjugal rights between the spouses and that it cannot be annulled except by a private Act of the Parliament was framed in the *East's Treatise of the Pleas of the Crown* in 1803 and repeated in *Archbold's Pleading and*



Evidence in Criminal Cases in 1822. Hence, the spouse cannot revoke the conjugal rights created by the contractual marriage and hence no rape can exist between the spouses. The first concrete case to exempt forced sexual intercourse between the spouses from the category of rape was *R v. Clarence*²⁰ where the husband had sexual intercourse with his wife knowing that he was infected with the gonorrhoea. The Court held that, as sexual intercourse within a marriage was consented to, therefore fell short of the requirements for a conviction under s 47 of the Act. It was not long until this position of law was completely changed in the case of *R v. R* where the House of Lords found that it was possible for a man to rape his wife and even within a lawful marriage, any non-consensual sexual activity amounts to rape.²¹ The court examined Section 1 of the Sexual Offences (Amendment) Act 1976 which used the word 'unlawful'. This perhaps had been the biggest stumbling block to progress since it implied sexual intercourse within marriage could never be unlawful.²² The court, declaring the immunity of the husband as propounded by Hale as obsolete and went on to say that times have changed and the modern society sees marriage as a union between two equal partners, therefore the old notion of woman being a property of man is preposterous. This judgement was welcomed by the

Judiciary as well as by various commentators.²³

The General Sentencing Council Guidelines issued in 2014 suggested some offences for the inclusion of some offences in the category of marital rape and provided for the sentencing range for the offence. It provides that, the sentences can range from 4-14 years depending on the facts and circumstances of the case with some aggravating and mitigating factors. Three categories of offences are specified by such guidelines: In category one, the offences with the aggravating factors present attract a punishment of custodial sentence ranging from a 7 years and 19 years. on the other hand, the offences with mitigating factors range from 10-15 years of sentencing. The sentencing of category two along with the aggravating factors range up to 9-13 years and 10-15 years for the offences consisting of mitigating factors. Category three offences provide for low sentencing range for 6 to 9 years in case of aggravating factors and 4-7 years in the cases of mitigating factors.

It is thus inferred that; the offence is punishable more severely with the presence of aggravating factors. These factors include previous conviction of the defendant, betrayal of trust, planned assault, abduction and detention of the plaintiff, plaintiff being blackmailed and coerced, use of any weapon, drugs or alcohol, committing the offence in the presence of children,

²⁰*R v Clarence* [1888] 22 QBD 23

²¹*R. v. R* [1992] 1 AC 599

²² Law Commission Report in Rape within Marriage (Law Com No. 205), 1992, London (available at: <http://www.official-documents.gov.uk/document/hc9192/hc01/0167/0167.pdf>)

²³Rithika Panicker, *A Study of Marital Rape Laws in Different Countries*, Vol 1 Issue 2 International Journal For Legal Developments And Allied Issues 232–237 (2015), <http://ijldai.thelawbrigade.com/wp-content/uploads/2015/09/24.pdf>



preventing the plaintiff from filing the complaint, tampering the evidence.²⁴ On the other hand, the presence of the mitigating factors reduces the overall sentence passed which include, the previous good character of the accused with no previous convictions or when the defendant successfully shows remorse after committing the crime.

In addition to these aforesaid punishments, the defendant husband when found guilty of marital rape also faces consequences in the form of inclusion on the Sexual Offenders' Register and enforced adherence to notification requirements.

There is no provision which punishes a woman for committing rape as the offence requires penile penetration, however the laws of UK provide some remedies to the victim husband. A woman committing a sexual act without the consent or against the will of her spouse, will be said to be committing a sexual offence under UK laws. She will be charged for causing a person to indulge in sexual activity without consent, sexual assault and sexual coercion.²⁵

POSITION OF MARITAL RAPE IN USA

The criminalization of marital rape in USA can be traced back to the history which stretched over several decades. The attempts to criminalize marital rape although began in the 1990s but until 1976, marital rape was legal in many states. In the United States, prior to the mid-1970s marital rape was exempted from ordinary rape laws. The

exemption is also found in the 1962 Model Penal Code, which stated that, *a male who has sexual intercourse with a female not his wife is guilty of rape*. It was not until the decision in *Oregon v. Rideout*, which led many American states to allow prosecution of the husband.²⁶ Moreover, the New York Court of Appeal's decision in the case of *People v. Liberta*, set concrete laws for marital rape by holding its exemption as unconstitutional. The Court stated that *"a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity"*.²⁷

It is however a sexual offence now in about 50 states of the USA. Some states still do not consider marital rape as a serious offence while some states have successfully made no distinction between rape and marital rape and as a result it is treated as a crime under one section of the sexual offences code. The states that have laws that make no distinction between marital rape and stranger rape are Colorado, Delaware, Florida, Georgia, Indiana, Massachusetts, Montana Nebraska, New Jersey, New Mexico. North Carolina, North Dakota, Oregon, Texas, Utah, Vermont, Wisconsin and the District of Columbia. There is no exemption given to the husband from the rape prosecutions in at least 20 states including the District of Columbia.

In the remaining 30 states, the husband may be exempted in cases of statutory rape or in cases when he does not use force but

²⁴ Nick Titchener, Marital Rape Law in the UK: what is it? | Lawtons Solicitors (UK), <https://www.lawtonslaw.co.uk/resources/what-are-the-legal-penalties-for-marital-rape/> (last visited Nov 3, 2018).

²⁵ *Id.*

²⁶ Whitney Woodworth, RAPE AND MARRIAGE: A LOOK BACK AT THE RIDEOUT CASE, STATESMAN JOURNAL(2016), <https://www.statesmanjournal.com/story/news/crime/2016/08/13/rape-and-marriage-look-back-rideout-case/88460204/> (last visited Nov 4, 2018).

²⁷ *People v. Liberta*, 64 N.Y.2d 152 (1984)



however commits a sexual act without her consent because the wife in such a case finds herself in vulnerable position. In South Carolina, a prosecution for spousal battery (rape) may not proceed unless the offending spouse's conduct was reported to law enforcement within thirty days of the event.²⁸ The laws of Virginia aim towards personal marital counselling instead of court proceedings in cases of marital rape.²⁹ There is thus no general criminal procedure and sentence for marital rape, there are different procedures in different states ranging from severe or even mild punishments depending on the facts and circumstances of the case. Most states penalize marital rape like any other rape—that is, with fines that range between several thousand dollars in some states, to over \$50,000 in others; and with prison terms that vary between several years and life in prison without parole.³⁰

that a wife is first a woman and she should be able to give her consent out of her own free will, even if the man she is having sexual intercourse with is her husband.

CONCLUSION

It can thus be concluded that except for United Kingdom and some states in USA, marital rape is not seen as an offence in the other countries discussed in this paper. There are various stigmas attached to marital rape being a punishable offence in the context of the cultures being observed. The most widespread stigma is the concept of patriarchy where it is believed that a woman is the property of her husband and therefore, she needs to comply with all the demands of her husband including his sexual needs. What is still not understood and accepted

²⁸ South Carolina Code, Section 16-3-615
²⁹ Monica Steiner, Marital Rape Laws www.criminaldefenselawyer.com (2017), <https://www.criminaldefenselawyer.com/marital-rape-laws.html> (last visited Nov 4, 2018).
³⁰*Id.*