



## MARITAL RAPE: EXISTING DEFENSES TILL AN EXCLUSIVE LAW IS IN PLACE

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### ABSTRACT

Marital rape is an aspect of marriage that is solely not taken care of by the present existing laws. This paper is an attempt to throw light on the aspect and the existing laws that can be used as a defence by a partner in case of marital rape. There are many descending opinions on the idea of marital law, few are that criminalisation of marital law would flaw the institution of marriage and courts aren't supposed to interfere within what goes around with a husband and wife.

India is currently the seventh largest country in the world, and the pace at which the crime rates are going up is highly alarming and embarrassing for a thriving, multi-cultural, large and secular country like India. Marital rape is not only the chief concern in the field of women's rights at the moment, but it also violates several constitutional provisions at the same time. Somebody rightly pointed out that a country's growth and development can be assessed by looking at the position and respect that it gives to its women.

In this paper, the researchers would like to give out the scope of marital rape in India, the laws that it violates, a comparative study between the laws of other successful countries compared to the laws in India, an analysis as to why hasn't it been legalised

yet and why it should be legalised and a final note on suggestion and conclusion.

### Chapter I Introduction

*"Her friends used to tell her it wasn't rape if the man was her husband. She didn't say anything, but inside, she seethed. She wanted to take a knife to their faces" – F. H. Batacan*

The idea of marital rape has always been under a limelight when it came to the situations of India. The laws in India have extensively worked on rape, sexual assault and sexual abuse but have turned a dead eye to the concept of marital rape. Not that marital rape doesn't exist in India, or its existence is close to negligible, but the central government apparently claims that it would break the values of family system and act like a strong hit against the institution of marriage. They also made a claim that the husbands will be harassed if so is given a statutory position. Marital rape is generally regarded as the act of initiating sexual intercourse with one's spouse without the other spouse giving consent to do so. In many forward countries, marital rape has been criminalised and thus, it holds the same legal consequences and statutory position as rape to any other individual.

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the same time. Somebody rightly pointed out that a country's growth and development can be assessed by looking at the position and respect that it gives to its women.

Everyone in the world has their own perspective on whether marital rape should attract punitive actions or it should just be treated as a part and parcel of marriage as a broad institution. The question surrounding this matter is whether marital rape is evidently guarded by the provisions of the Indian Constitution and the Indian Penal Code or the said provisions deny its illegality.

The idea of marital rape generated international attention and momentum in the second half of the 20<sup>th</sup> century. International bodies started working towards the idea of marital rape and thus, to clear off the dark, hidden violence against married women. International covenants and laws came into existence, thus, proving marital rape null and void, but some countries still follow it as a part and parcel of the institution of marriage.

In ancient India, marital rape had legal and social backing which backed it up on the ground that a spouse was entitled to the right of having sexual intercourse with his spouse. That is rather a patriarchal claim in this context. Marital rape in India strongly depends on nonexistent, sometimes interpretative verses in the Indian Constitution or the Indian Penal Code and the varying understanding of Courts.

However, the central government alone cannot be blamed for such a heinous and gruesome act against women is still in place, it is the very patriarchal and male dominated

set up of the Indian society that we live in. The very society gives its men the power to commit such crimes and get away with it at the end of the day. Marital rape, in itself, is a part of domestic violence. It is a means of forceful control of another individual's thoughts, ideas, body and mind. It invades an individual's Right to Privacy and Right to live a dignified life.

In this paper, the researcher would like to give out the scope of marital rape in India, the laws that it violates, a comparative study between the laws of other successful countries compared to the laws in India, an analysis as to why hasn't it been legalised yet and why it should be legalised and a final note on suggestion and conclusion.

#### **Research Objective-**

#### **Hypothesis:**

Marital Rape is guarded by existing laws in India and should also be outrightly be considered null and void

#### **Research Question:**

Should marital rape be criminalised?

#### **Research Methodology:**

The methodology adopted for the present research is doctrinal method. The doctrinal research involves thorough scrutiny and analyses of prior laws, cases, articles, books and websites.

### **Chapter II**

#### **Laws guarding Marital Rape in India**

##### **2.1 The Indian Constitution**

Not only is the Indian Constitution a safeguard against all the wrongs for the Indian citizens, but it also clearly



demarcates what's right from what's wrong. Along with rights, it also crowns upon its citizens the responsibility that go hand in hand with it. Each citizen has a responsibility towards the State and its fellow citizens.

### **Article 21: Right to Life and Right to Live with Human Dignity**

The Right to Life is an all encompassing right. Every time an issue on human rights violation crops up, the Right to Life comes to play an integral role in that scenario. The Article 21 guarantees each and every citizen a Right to a healthy and a decent life without any kind of encroachment from the State or any other party. Once this right is violated, the victim can approach the Court to seek Constitutional remedies against the violation under Article 32 of the Indian constitution.

In the celebrated case *Francis Coralie Mullin v The Administrator, the Union Territory of Delhi*<sup>1</sup>, the Honourable Supreme Court of India stated that one cannot arrive at a perfect definition of the Right to Life. Until that, the Courts can give varied interpretations to the Right and thus further explore the ambit of the right. It might also mean that an individual can enjoy the right to a decent and dignified life. Even prisoners or detenus have such a right. They have all the access to their human rights, except those that they cannot enjoy being prisoners.

In another landmark case, *Chairman, Railway Board & Others v Chandrima Das & Others*<sup>2</sup>, a foreign woman, Smt Hanuffa Khatoun was raped in the Yatri Nivas by

four men belonging to the Railway Department and thus later raped again by a member of the Railway department where she was gagged and abused. Hearing her hue and cry, the people from the rented flat had rescued her and she was given Rs10 Lacs as compensation from the Court. The Supreme Court in this regard pointed out that rape is not only a crime against the victim individual but it is also a crime against the society at large. Rape disturbs the entire society as well as the victim equally.

### **Right to Privacy**

The Right to Privacy is a recent judicial development where the Court realised that no individual should be subjected to encroachment to their personal space and privacy. More than 150 national Constitutions give the Right to Privacy a legal standing in their respective countries. In the celebrated case of *Justice K S Puttaswamy (Retd) vs Union of India*, the Honourable Supreme Court of India unanimously upheld the Right to privacy as an important and intrinsic part of the Article 21- Right to Life and Personal Liberty.

This could also be interpreted in favour of marital rape. A woman is entitled to the Right to Privacy. No one can encroach upon or invade her Right to privacy. More so, she is entitled to the Right to her sexual privacy. No man or woman can invade into another man or woman's sexual privacy. It is something that isn't open for anyone to violate or infringe her right according to their wish.

<sup>1</sup> 1981 AIR 746

<sup>2</sup> AIR 2000 SC 988



In the landmark case of *Vishaka vs State of Rajasthan*<sup>3</sup>, the same was observed. It is a woman's personal right. No one can infringe her Article 21 against her wishes. In the case of *State of Maharashtra vs Madhakar Narayan*, the Supreme Court held that a woman's sexual privacy is not open to all according to their wishes. It's her own personal right and decision and it should be respected accordingly.

## 2.2 Indian Penal Code, 1860

The Indian Penal Code, 1860 is the main criminal code in India. It is a comprehensive act which is divided into twenty-two chapters and five hundred and eleven sections. The Indian Penal Code lays down crimes along side of its punishments. However, it doesn't give out any kind of procedures because that arena is dictated by the Code of Criminal Procedure. The following are the relevant sections of the IPC, 1860 in this regard:

**Section 319 – Hurt** Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

**Section 320- Grievous Hurt** The following kinds of hurt only are designated as "grievous":-

First- Emasculation.

Secondly- Permanent privation of the sight of either eye.

Thirdly- Permanent privation of the hearing of either ear,

Fourthly- Privation of any member or joint.

Fifthly- Destruction or permanent impairing of the powers of any member or joint.

Sixthly- Permanent disfiguration of the head or face.

Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

**Section 321-** Voluntarily causing hurt  
Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily cause hurt".

**Section 322-** Voluntarily causing grievous hurt  
Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

**Section 339- Wrongful restraint** Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

**Section 349-** Force  
A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that

<sup>3</sup> (1997) six SCC 241



the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

**Section 351- Assault** Whoever makes any gesture, or any preparation intending or knowing, it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

**Section 375- Rape** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First- Against her will.

Secondly,- Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

### Chapter III

### Status of marital rape in other countries

#### 3.1 United Nations of America

Marital rape or spousal rape is criminalised in all the fifty states in the Unites States of America. However, not all the states in the United States of America treat marital rape and rape the same. Some states like Ohio, Michigan, Nevada treat them differently. But anyhow, marital rape is a crime under some section or the other. In no state is it legal in accordance with the existing laws.

For instance, in Maryland, two individuals who have separated paths by way of judicial separation or divorce are totally strangers to one another. Any coerced sexual act between the two will be considered no different than rape. This part of the US law is quite similar to that of India. The same law applies to the Indian legal scenario. However, the twist takes place when two spouses are residing together, if one of them coerces, threatens or uses force on the other, without the consent of the other spouse, then a valid prosecution can take place.

In Mississippi, a similar situation exists. A prosecution can come into existence only if the rapist and the victim are married and living together at the time of the incident and the rapist performs penetration against the victim's will. However, this law would exclude a situation where the victim is incapable of controlling their conduct, under drugs or narcotic influence or any other substance the victim is subjected to which numbs down their sense and presence of mind.

In Nevada, marriage can only be a defence in a situation where there was no threat or force. In a scenario where the victim was



subjected to any kind of force or threat, then the defence of marriage is to no avail.

However, in Oklahoma, a person cannot charge their spouse for rape if they were compelled to submit under the influence of narcotics and drugs.

Laws in the USA vary according to the state. In some places marital rape is considered null and void by law in all its forms, in other states the laws have missed out the influence of drugs and narcotics and some other aspects which have not yet come to light.

### 3.2 United Kingdom

In the United Kingdom, all kinds of sexual offences are dealt with under the Sexual Offences Act, 2003. In the UK too, marital rape is expressly considered a crime. Section 1 of the same talks about rape. A person is said to have committed the crime of rape if the accused penetrates his penis into the vagina, anus or mouth of the person without their consent and on purpose. It doesn't matter whether the victim resides with the accused or not, knows the accused or not, or is or was married to the accused or not. What matters is the element of consent. If the victim hasn't consented to the penetration, then it will be considered as rape.

A landmark case in this regard is *R v R*<sup>4</sup>. In this case, the House of Lords held that it is possible under the English Criminal Law the commit rape on his own wife. The defendant, that is the husband, claimed that he can commit rape on his wife since the wife gave him irrevocable consent by the contract of marriage. Thus, as a reaction to

this, both the House of Lords and the Court of Appeal held that there is no exception of marital rape under the English law.

#### COUNTER ARGUMENTS:

- Criminalising marital rape would be an attack to the holy sacrament of marriage
- Women can misuse the defence of marital rape with every disagreement they face with their husband
- Criminalising marital rape for women is too woman centric
- Marital rape is okay as long as its between the husband and wife
- Courts cannot interfere in a personal matter like marriage

### CHAPTER IV ANALYSIS

As one can deduce from the words given above, there are several sections in the Indian Penal Code which could be used to safeguard a woman from marital rape. There are several sections from the IPC which are violated when ideas like Marital Rape aren't taken seriously in a marriage. However, countering the counter arguments, the idea of marital rape is one that tarnishes the idea of marriage because it is a woman's own husband that forces her for sexual encounter, whom she trusts and has faith to protect her. This causes more of a trauma than being raped by a total stranger.

As one can see that the country of England has made much progress in accepting marital rape as a flaw and making laws towards it. Not far behind is the United States of America, which has banned marital rape in few states now.

### Chapter V Conclusion

<sup>4</sup> R v R [1991] UKHL 12



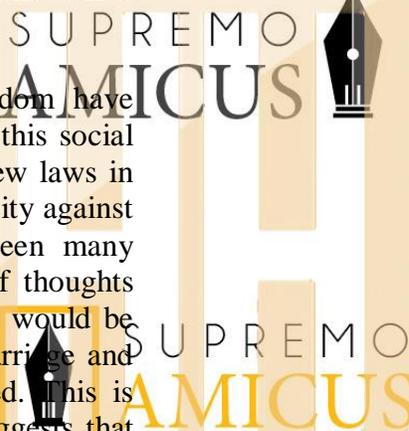
Taking into account the laws of other countries in comparison to the Indian nation, India is far behind from taking a step to create an exclusive law for MARITAL RAPE at the moment. Till a new law comes into being, the provisions from IPC and the Indian Constitution could be used as a defence. However, in the changing times every law needs to go through a change as one is discovering new things everyday and human mind is constantly evolving. Thus, till a new law is in place, one can use the existing provisions. After a scrutinising study one can bring a new law in place for Marital Rape or add relevant sections to IPC or the Domestic Violence Act.

Countries like the United Kingdom have taken relevant steps to recognise this social evil and are constantly making new laws in order to fight this kind of an atrocity against woman. However, there have been many counter arguments in this line of thoughts namely, that curbing marital rape would be an attack on the institution of marriage and thus would be constantly misused. This is the reason why the researcher suggests that the law making authorities may take time to analyse and scrutinise the consequences and results rather than haphazardly put a law in place. Marital rape, without a doubt, is a violation of a woman's right to dignity and wellbeing and thus, for a progressive country to thrive, a law should be brought into place.

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