



MARITAL RAPE: A CRIME UNDEFINED IN INDIA

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ABSTRACT

Men and women, society stands on two pillars, they should have equal significance and role in their creation and growth, but women have always been subjected to a great deal of humiliation by men, and rape is a fitting example of the atrocities committed against women's dignity. One of the most grotesque and barbarous offences committed against women is the offence of rape. In India, marital rape is one of the most debatable and divergent problems, although not described as a crime. Since time immemorial, women have been seen as an object of gratification. They were victims of crimes such as rape, sodomy, sexual assault, infanticide by women, etc. In recent years, the rate of violence against women has been proliferating as the general population is struggling for equal justice for both men and women. Rape is a crime that women all over the world suffer because of. In making laws for the safety of women, other nations have done their best.

India focuses on the protection and prevention of violence against women, but by not having any legal provisions recognizing marital rape as a crime, it fails to protect a married woman from her abuser, who tends to be her husband in such situations. Instant

criminalization of marital rape is required. The study paper presents the reason for the lack of law in India by not describing marital rape as a crime and the implications of it.

INTRODUCTION

Marital rape refers to rape committed when the victim's partner is the perpetrator. If lack of consent is granted, the concept of rape, i.e., sexual intercourse or sexual penetration, remains the same.¹ Approval. Traditionally, the general definition of rape was "Raptus" to signify violent theft of both property and individuals. It was associated with the abduction and kidnapping or sexual abuse of a woman, with the mere theft of a woman against her guardian or of any person with legal authority over her. The harm to her father or husband, women being wholly owned subsidiaries, was ironically perceived as a mistake.

Just fifty-two countries actually have legislation acknowledging that marital rape is a crime.² In several jurisdictions across the world, including India, marital rape is not recognized, i.e., the Indian penal code 1860 does not provide for marital rape that recognizes and criminalizes the husband's act of raping his wife. Although nations recognize marital rape as a crime and prescribe penalties for it, they prohibit the implementation of that law where there is a marital relationship between victims and perpetrators. This is often called the 'marital rape exemption clause'. As items or goods in these jurisdictions, women were subject to

¹ The Indian Penal Code, 1860 section 375

² UN Women, 2011-2012 Progress of the World's Women, 17, (2011) available at <http://www2.unwomen.org/>

/media/field%20office%20eseasia/docs/publications/2011/progressoftheworldswomen-2011-en.pdf?v=1&d=20160810T092106 (last visited on December 15, 2017).



laws and society and such treatment was justified under three ideologies

- Chattel Theory
- Doctrine of Coverture
- Marital unity theory

This hypothesis was based on the assumption that the female identity fused with that of her husband after marriage. Therefore, the law did not grant a personality to married women outside of their spouse.

During the 1600s, the immunity from marital rape can be attributed to claims by Sir Mathew Hale, Chief Justice of England. He wrote, "For their mutual matrimonial consent and contract, the husband cannot be guilty of rape committed by himself against his lawful wife, the wife gave herself in kind to the husband whom she cannot withdraw."

Because of the above statement made by the married woman chief justice of England, the rape laws in our country or any other country have never been subject to. The first voice raised against marital rape in United states of America by the women activist in the year 1970s.

More than 2/3rd of marital women aged between 15 and 49 in India have been beaten, raped or forced to provide sex in India, according to the UN population fund. In 2005, 6787 cases of a woman being murdered by her husband or their husbands' families were recorded, 56 percent of Indian women believed it was justified to sometimes beat a wife.

Marriage is considered a civil contract and a defining feature of this contract is assumed to

be consenting to sexual intercourse. The most recent reason for marital rape is that the marital relationships between the husband and the wife are not interfered with by criminal law.

MARITAL RAPE EXEMPTION RULE

In R v. R,³ 17th century, Sir Mathew Hale, a Chief Justice in England, conceived the irrevocable implied consent theory that would later on emerge as the marital exemption rule. He stated that:

"The husband cannot be guilty of rape committed by himself upon his lawful wife, for by the mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

This rule was observed in common law countries of USA and England. The first case in the USA that applied the exemption rule was Commonwealth V. Fogarty⁴ in 1857. The Massachusetts Supreme Judicial Court ruled that revealing marriage to the victim would still be a defense of rape. Several others adopted a similar rationale, all of them citing the principle of Hale as the basis.

The rule was challenged in the 1970s by the women's movement in the USA demanding its abolition for violating the right of married women to be fairly protected under the laws of rape.

In New York in 1983, the marital exemption provision was abandoned when the New York Court of Appeals ruled the same unconstitutional in People v. Liberta⁵ for lack of rational basis in distinguishing between

³ [1991] UKHL 12

⁴ 85 Mass. App. Ct. 1116, 7N.E. 3d 494

⁵ People v. Liberta, 90 A.D. 2d 681



marital rape and non-marital rape for lack of rational basis in distinguishing between marital rape and non-marital.

In New York in 1983, the marital exemption provision was abandoned when the New York Court of Appeals ruled the same unconstitutional in *People v. Liberta*⁶ for lack of rational basis in distinguishing between marital rape and non-marital rape for lack of rational basis in distinguishing between marital rape and non-marital. The decision, which also renounced Hale's irrevocable implied consent theory, ratiocinated follows:

We notice that there is no logical justification to differentiate between marital rape and non-marital rape. The multiple rationales asserted in support of the exemption are either based on obsolete concepts of consent to marriage activities and property rights or are simply incapable of avoiding even the slightest scrutiny. Therefore, in the New York law, we declare the marital exemption for rape to be invalid.

INDIA: PRESENT SCENARIO OF RAPE LAWS

The definition of rape codified in Section 375 of the Indian Penal Code criminalizes the offence of rape. It is most expansive definition which includes all forms of sexual assault involving nonconsensual intercourse with woman and other sexual penetration such as oral sex within the definition of 'rape'⁷. Exception 2 to Section 375, however, exempts unwilling sexual intercourse between a husband and a wife over the age of fifteen from the definition of 'rape' in Section 375 and thus immunizes those actions from

prosecution. As per current law that exists in India, if a husband rapes her and refuses to have sexual intercourse with a husband after marriage, a wife does not have recourse under criminal law, then it would be regarded as an amiss.

Not unexpectedly, married women were never subject to the laws governing rape. The law granted the husband full immunity in relation to his wife, purely on the basis of the marital relationship.

• Definition of Rape

The wording of section 375 of the IPC on account of the Criminal Law (Amendment) Act, 2013 are:

"375. A man is said to commit "rape" if he—

penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or

applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances

⁶ *People v. Liberta*, 90 A.D. 2d 681

⁷ Indian Penal Code § 375, No. 45 of 1860, India Code.



falling under any of the following seven 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 eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication,

communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”⁸

It is worth remembering that the 2012 Criminal Law Enhancement Bill was drafted to expand the reach of S.375. There was no clause that criminalised marital rape. In addition, in relation to marital rape, it did not take into account the Justice Verma Committee study recommendation.

In its 167th Article, the Parliament's standing committee on Home Affairs proposed that S. 375 be amended to delete the 375 exception clause. However, on the grounds that the whole family system would be under considerable stress, the standing committee declined to consider this request, and maybe the committee might be doing more injustice.

Argument advanced by the government against criminalization revolves around three major themes:

- Protection of institution of marriage
- Existence of alternate remedy under section 498 and DVA,2005
- The cultural norms prevalent in India

⁸ The Indian Penal Code, 1860. Section 375



MARITAL RAPE LAWS – A COMPARATIVE STUDY

For a woman who has lived for centuries across the world, marital rape is a common issue.⁹ While marital rape has been largely ignored in the literature on rape and domestic abuse, social scientists, legal professionals, the criminal justice system, and society as a whole have received relatively little attention to this problem, but after examining the need for In eighteen American states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia marital rape is illegal . And of some of such countries and penalization in their laws are as follows-

U.S.A

Any non-consensual sexual intercourse between non-spouses is known as rape and it has always been illegal. Every state, however, had a "marital exemption" until 1975, which allowed a husband to rape his wife without fear of legal consequences. By 1993, every state and the District of Columbia had passed legislation against marital rape, primarily in reaction to the women's rights and equality movement. All 50 states and DC have adopted legislation against marital rape since 1993. The only marriage exception in some jurisdictions that still exists is for statutory rape. Rapture within marriage is now known as a crime by all states, and most prosecute the crime in the same manner that rape between strangers would be prosecuted.¹⁰

⁹ Russell, 1990

¹⁰ Marital Rape Laws, available at: <http://www.criminaldefenselawyer.com/marital-rape-laws.html>, (Visited on July 16, 2015)

U.K.

The marital rape exemption was removed by the Appeal Committee of the House of Lords in 1991 in England and Wales, in the case of R v R. The exemption had never been a rule of law, having first been promulgated in 1736 in the History of the Pleas of the Crown of Matthew Hale, where Hale stated: But the husband can not be guilty of a rape committed by himself on his lawful wife, for the wife has given herself up to her husband in this kind by their mutual matrimonial consent and contract, which she can not remove. Section 147 of the Criminal Justice and Public Order Act, 1994, adopted a related provision to the existing law. This judgment was also affirmed by the European Court of Human Rights in the decision of SW v. UK. Many countries have not recognised marital rape as a crime, such as India, Bangladesh, Pakistan, Yemen, Kuwait, Iran, and Egypt, etc., and there is no legal redress available for victims of such crimes. But the burden of proof is always on women, even in countries where it is a crime. It is difficult for women who are married to show that they have not consented to sexual intercourse, thereby complicating these provisions.

INDIA

As mentioned earlier, marital rape is characterised as any unwanted intercourse or penetration gained by force, threat of force, or when the wife is unable to consent.[xix] There is de facto and de jure marital rape in India.



As the single-largest crime against women, domestic violence has emerged. In 2013, over 118,000 cases of domestic violence were registered by the National Crime Records Bureau (NCRB), which accounted for a third of all crimes against women, well ahead of harassment (70,739) and rape (70739) (33,707). The number of reported domestic violence cases also shot up from a mere 50,703 in 2003 before the passage of the Domestic Violence Act, 2005. Sexual violence, including rape, falls within the larger ambit of domestic violence, but rape by husbands within marriages is a shadowy subject in India and exact numbers are hard to come by.

In India, sexual offences against women have become a very sensitive issue. After the Delhi Gang Rape Case, India's government attempted to develop and enact tough laws that kept women's safety in mind. Marital Rape, although it has not yet been able to obtain a crime status.

Article 14 of the Indian Constitution states "Equality before law." It prevents state from discriminating amongst the citizens on any ground, but in regard to defining marital rape as a crime the State discriminates against women.

Section 375 of Indian Penal Code allows married women to allege their husband against the charge of marital rape. The article does not provide reasonable classification for this discrimination within the gender. Article 51A (e) of the Indian Constitution states that every Indian Citizen to renounce practices derogatory to the dignity of women. There is

immediate need to criminalize marital rape in India.

PERSPECTIVES ON CRIMINALIZATION OF MARITAL RAPE

A. Arguments against Criminalization of Marital Rape

1. Protection of institution of marriage

According to Hindu law, marriage is a sacrament: (1) it is a sacramental union, which means that marriage is not intended to fulfil one's physical needs, but is mainly intended for the performance of religious spiritual duties; (2) a sacramental union means that a marriage may not be dissolved on any ground once joined, and (3) a sacramental union also means that it is a union of mind, body and body. Not just for this life, but for all lives to come, it is a union. The Union is not only for this universe, but for other worlds as well.¹¹

As established by marriage, it forms the pillar of society, as the frightening institution of our society. The state hesitates to enter the private domain because of the fact that it results in the infringement of the right to privacy. Because of this notion, if the state refuses to enter the private sphere, it can prove dangerous in certain instances that a state does not force or force a person to marry or pursue divorce. For e.g. There can be no redress for women if a woman is subjected to cruelty and the state refuses to enter the society.

¹¹ Hinduism, Marriage and mental illness, Indian J Psychiatry. 2013 Jan;55(Suppl 2): S243-S249



Similarly, if the State may not interfere in the private sphere in the case of marital rape, there is a serious violation of the fundamental rights of women enshrined in Articles 14 and 21 and no recourse can be made to the infringement of their spouses.

The presence of limited state penetration in the private realm. While it relates to the institution of marriage, the state penetrates the law of abortion. Non-interference of state in restitution of conjugal rights as determined in *Harvinder Kaur v. Harjinder Singh*¹². This conceptualization of the 'private sphere' is not conclusive and is bound to shift, as per the state's decision. On the basis of self-equality and choice, we need to move from the 'privacy' argument to the 'woman' viewpoint on the rights of women.

The Home Minister was once again asked about the nature of the exemption from marital rape and whether the government wanted to criminalise marital rape. Again, the Home Minister replied that the Ministry of Home Affairs recently repeated this statement in 2015 in response to a bill introduced by a Member of Parliament aimed

at criminalising marital rape.¹³ The press release claimed that it was felt that the definition of marital rape, as internationally understood, could not be implemented sufficiently in the Indian context.¹⁴ One of the reasons given for this was the "mind-set of the society to treat the marriage as sacrament. Further, notably, a private bill was introduced on this topic in December, 2015.¹⁵ During the ensuing discussion, the Home Minister stated that this was being considered by the Law Commission, and any decision would only be taken after the report came out.¹⁶ His reference to the current remedy of 'cruelty' that already existed in the IPC was a striking feature of his speech.¹⁷ The Law Commission investigated the matter in 2016 and no decision was made to criminalise it because it was decided against by the Parliamentary Standing Committee.¹⁸

This attitude towards marital rape criminalization is not limited to the legislature alone, but extends to the judiciary. While there are no instances where the constitutionality of the exception clause has been expressly upheld in section 375, there have been instances where the courts have clearly avoided this issue,¹⁹ Rejected

¹² *Harvinder Kaur v. Harjinder Singh*, AIR 1984 Del 66.

¹³ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by

Ms. Kanimozhi on the 28th of November, 2014. The status of the Bill is currently pending as of 1st December, 2017).

¹⁴ Press Release, PRESS INFORMATION BUREAU, April 29, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938> (Last visited on December 17, 2017).

¹⁵ *Supra* note 10

¹⁶ RAJYA SABHA DEBATES, *Discussion on the Indian Penal Code (Amendment) Bill, 2015*, 53,

Session Number 237, December 4, 2015, available at <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf> (Last visited on December 15, 2017).

¹⁷ *Id*

¹⁸ LOK SABHA DEBATES, *Question on Marital Rape, 2016*, Question No. 2872, March 15, 2016, available

at <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf> (Last visited on December 16, 2017).

¹⁹ See *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2017 SCC OnLine Guj 1386. The Gujarat High Court notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same. See also Deya Bhattacharya, 'Marital Rape a Disgraceful Offence': *Gujarat HC's Ruling*



petitions to strike down this exception provision or otherwise used the exception provision to avoid answering questions about whether his wife was abused by a husband.²⁰

2. EXISTENCE OF ALTERNATE REMEDIES

The most widely cited provision as an alternative remedy for the criminalization of marital rape is inadequate under Section 498A of the IPC and DV Act 2005 and the Hindu Marriage Act, for the following reasons:

- There is a difference between rape and cruelty. The very act of rape is different from that of cruelty.
- The section of cruelty is not enough to deal with the marital rape.

A progressive change in rape laws represents a rise in women's position in society. Moreover, as a new set of evidence is needed entirely, the crime of rape differs from that of violence. Not only to punish the individual, but also to prosecute him for committing the particular offence, a separate clause is required.

An individual cannot be convicted under the cruelty for the marital rape because cruelty does not have a straight jacketed meaning it is very subjective and varies from case to case and the threshold that a person must cross in

Progressive, But Mere Condemnation of Practice Rings Hollow, Child Marriage, FIRSTPOST (India) November 9, 2017.

²⁰ In a judgment delivered by Justice Virender Bhat, an Additional Sessions Judge of the Special Fast Track Court, he noted that forced sex cannot be considered rape in a marriage and hence, an analysis of the fact situation was not required. See Apoorva Mandhani, *Marital Sex Even if Forcible is Not Rape; Delhi Court*, LIVELAW (Delhi) May 14, 2014, available at

order to be able to try under the cruelty is very high and marital rape does not seem to cross that threshold.

In the definition of domestic violence, the Domestic Violence Act acknowledges sexual assault and includes legal remedies, including protective orders, judicial separation and monetary compensation.²¹ The fact that this act only includes civil redress but does not classify marital rape as a criminal offence is another solution or an effective reversal of the Domestic Violence Act.²² In addition, the Hindu Marriage Act and DV Act provide women with a solution to remove themselves from abusive and dangerous situations, but neither does anything to prevent violent conduct itself.

3. CULTURAL NORMS IN OUR COUNTRY

The third claim in itself is meaningless because the issue here is the constitutionality of marital rape laws in our country, and in addition to our nation, certain laws that officially contradict the laws that our society follows can also be deducted from the fact that we have more gender-specific laws or laws that do not comply with them for marginalised groups.

As a final argument to illustrate the urgent need for women's safety, here are some of the

<http://www.livelaw.in/marital-sex-even-forcible-rape-delhi-court-read-judgment-close-look-law-relating-marital-rape-india/> (Last visited on January 1, 2018).

²¹ The Protection of Women from Domestic Violence Act, No. 43 of 2005, PEN. CODE; see Sakshi Kanodia & Ranjabati Ray, *Why Penalize Marital Rape*, 21 J. OF HUMAN. & SOC. SCI. 49, 53 (2016); Savla

²² Kanodia & Ray, *supra* note 47, at 53. See also NIGAM, *supra* note 22, at 2.



consequences that a survivor of rape might have to live with:

- Physical injuries to vaginal and anal areas, lacerations , brushing
- Anxiety, shock , depression and suicidal thoughts
- Gynaecological effects including miscarriage, stillbirths, bladder infection ,STDs and infertility.
- Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, and negative self-images.

4. Implied Consent

The principle of implicit consent within a marriage is a common claim used against the criminalization of marital rape. In 1753, when defending the common law theory of coverage, William Blackstone provided reasons for not acknowledging marital rape.²³ "Blackstone stated that: "The husband and wife are one person in law by marriage: that is, the woman's very being or legal life is suspended during the marriage, or at least integrated and consolidated into that of the husband: under whose wing, defence, and cover, she conducts all [sic] and her condition is called her covering during her marriage."²⁴

²³ SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, *442 (1893) (emphasis in original); Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE U. L. REV. 717, 727 (1981).

²⁴ BLACKSTONE, *supra* note 20

²⁵ Gabreil Domínguez, *Misuse of anti-dowry law 'exposes failure of Indian authorities'*, DEUTSCHE WELLE (July 7, 2014), <http://www.dw.com/en/misuse-of-anti-dowry-law-exposes-failure-of-India-authorities/a-17762685> [https://perma.cc/EX3S-ERGJ]; Rajesh Sharma & Ors. v. State of UP and Anr, 1265 SCC.

5. Repealing the Marital Rape Exception Will Lead to Misuse by Wives

Finally, supporters of the marital rape exemption profess that repealing the exception would allow wives to exploit the law and make amendments to rape against their husband to settle scores in unrelated disputes. The assertion that women are misusing laws enacted for their safety stems from statistics that only about 15 percent of dowry-related cases and about 14 percent of cases under IPC Section 489A result in conviction under the Dowry Prohibition Act.²⁵ The National Family Health Survey, which reported that two out of five women in India are victims of physical, sexual or emotional domestic abuse, offers contradictory data.²⁶ The discrepancies between survey results and conviction rates indicate the number of conviction do not portray the reality of the situations, also low conviction rates often stem from poorly led investigations, improperly collected evidence and omissions of witness statements.²⁷ In addition, the claim that in India, illiteracy, poverty and lack of education make the definition of marital rape unworkable in the

²⁶ *Women to the Supreme Court: "We Are Not Liars," Protest Against Dilution of § 498A*, INVISIBLE LAWYER (July 31, 2017), <http://www.lawyerscollective.org/the-invisible-lawyer/women-supreme-court-not-liars> [https://perma.cc/57B2-T5CF]; MINISTRY OF HEALTH AND FAMILY WELFARE - GOVERNMENT OF INDIA, GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN INDIA 95-96 (2009), available at http://rchiips.org/nfhs/a_subject_report_gender_for_website.pdf [https://perma.cc/3T7F-T7LC]; NIGAM, *supra* note 22, at 10.

²⁷ *Women to the Supreme Court*, *supra* note 23



country directly contradicts the argument that misuse will result from the criminalization of marital rape.

B. Arguments for Criminalization of Marital Rape

1. In Contravention Of Other National Laws

When looking at the broader picture of laws in India, not expecting marital rape as a crime is irrational. The husband is responsible for many minor and lesser crimes against wives. Under the statute, a husband will be held liable for causing harm willingly,²⁸ voluntarily causing hurt by dangerous weapon or means,²⁹ voluntarily causing grievous hurt³⁰, assault with the intension of outraging her modesty,³¹ sexual harassment³², assault with the intent to disrobe,³³ voyeurism,³⁴ and stalking.³⁵ If all these acts can be criminal then marital rape should be consider as a crime.

2. Violation of Fundamental Right

Marital rape is also a violation of the constitutional rights of women, specifically pursuant to Article 14 and 21 of the Constitution of India. In this section, the lack of criminalization of marital rape violates women's human rights. Although marital

rape happens within the private sphere of a marriage, it is the state's responsibility to penetrate this private sphere. If the state does not enter this private sphere, so a woman is left with no redress when her husband violates her.

Article 14 of the Indian Constitution is an equal protection clause which guarantees equality before the law and prohibits discrimination on the basis of religion, ethnicity, caste, sex or place of birth.³⁶ It provides two facets- equality before law and equal protection of law.³⁷ Equality before the law includes issues such as the denial by jurisprudence of any privileged class or person, as well as the duty of the State to establish a more equitable society as envisaged by the preamble and Part IV of the Constitution.³⁸ In interpreting Article 14, the Supreme Court of India has stated that “all persons similarly circumstanced shall be treated alike in privileges conferred and liabilities imposed.”³⁹ Furthermore, the test under Article 14 is one of reasonable classification made with the object of achieving a certain end.⁴⁰ As such, legislation that is based on an unreasonable and discriminatory classification should be struck down under Article 14 of the Constitution.⁴¹ The marital rape exemption, which now applies to married women 18 years of age and older, may be considered to be arbitrary and

²⁸ IPC Section 323

²⁹ IPC Section 324

³⁰ IPC Section 325

³¹ IPC Section 354

³² IPC Section 354A

³³ IPC Section 354B

³⁴ IPC Section 354C

³⁵ IPC Section 354D

³⁶ INDIA CONST., art. 14. See generally Sri Srinivasa Theatre v. Govt. of Tamil Nadu, (1992) SCR 164 (India)

³⁷ Sri Srinivasa Theatre v. Govt. of Tamil Nadu SCR 164

³⁸ INDIA CONSTI, Art 14 ; Riya Jain Sri Srinivasa Theatre v. Govt. of Tamil Nadu, SCR 164

³⁹ Re: Special Courts Bill v. Unknown, (1978) 380 SCC (India)

⁴⁰ Independent Thought, 382 SCC at 109-10. See generally Sri Srinivasa Theatre, SCR 164; Re: Special Courts Bill, 380 SCC.

⁴¹ Independent Thought, 382 SCC at 109-10.



discriminatory since it allows for an unsupported distinction between married and unmarried women, even though both may be subjected to the exact same violence.

Article 21 of the Constitution bestows the right to life and right to personal liberty.⁴² Under *Munn v. Illinois*, the US Supreme Court recognized that the right to life is more than mere animal existence.⁴³ This interpretation was later affirmed by the Supreme Court of India under *Bandhua Mukti Morcha v. UOI*.⁴⁴ The Court affirmed that the right to life protected under Article 21 preserves the right to life with human dignity.⁴⁵ The Supreme Court of India has additionally affirmed that rape infringes on the right to live life with dignity.⁴⁶ As such, allowing for an exception to marital rape infringes on the right to life protected under Article 21 of the Constitution.⁴⁷

Furthermore, right to privacy has not been recognized in Indian constitution but this right is protected under Article 21 of the Constitution under the umbrella of personal liberty⁴⁸. And court has also acknowledged

sexual violence is an intrusion into the right to privacy of a female. Also, In *State of Maharashtra v. Madhkar Narayan*,⁴⁹ the Supreme court held that every woman is entitled to sexual privacy. Hence, legalizing rape in the context of marriage violates a woman's right to privacy guaranteed under Article 21 of the Constitution.

In addition to that, Supreme Court of India guaranteed right to good health under right to life in Article 21, rape in any context affects not only physical but also psychological damage. It causes depression, anxiety, pregnancy complications, sexual transmitted diseases as well as various other physical and mental repercussions.⁵⁰

3. In Contravention of International Law Obligations

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").⁵¹

⁴² INDIA CONST., art. 21. *Maneka Gandhi v. Union of India*, (1978) SCR 621 (India).

⁴³ *Munn v. Illinois*, 94 U.S. 113 (1877).

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Bandhua Mukti Morcha v. Union of India, (1984) SCR (India); *Dr. Bhavish Gupta &*

Dr. Meenu Gupta, Marital Rape: - Current Legal Framework in India and the Need for Change, 1 GALGOTIAS J. OF LEGAL STUD. 16, 26 (2013).

⁴⁵ Gupta & Gupta, supra note 110; *The Chairman, Railway Board v. Chandrima Das*, (2000) SCC 988 (India).

⁴⁶ Independent Thought, 382 SCC at 22; *The Chairman, Railway Board*, (2000) SCC; Gupta & Gupta, supra note 110, at 27.

⁴⁷ INDIA CONST., art. 21.

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Kharak Singh v. State of U.P., AIR 1963 SC 1295 (India); *G*

ovindv.State of Madhya Pradesh, AIR 1975 SC 1378 (India); Gupta & Gupta, supra note 41.

⁴⁹ *Madhukar Narayan Mardikar*, AIR 1991 SC 207; Gupta & Gupta, supra note 41

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Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape*, Women's Human Rights, and International Law, 41 BROOK. J. INT'L L. 153, 194 (2015); WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 7 (2012).

⁵¹ Independent Thought, 382 SCC at 25-26; Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, in NAT'L HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION 22-25 (2012), available at http://nhrc.nic.in/sites/default/files/A_Handbook_on_



India is also a signatory of the Universal Declaration of Human Rights (“UDHR”).⁵² The CEDAW Committee has identified that gender-based violence nullifies various other rights guaranteed under international treaties, including the right to be free from discrimination, the right to life, right to liberty and security, right to equality in the family, and right to health and well-being.⁵³ As mentioned in CEDAW state requires to “take all appropriate measures” to eliminate all forms of discrimination against women.⁵⁴ Also as stated in Article 2(b) of CEDAW mandates states to adopt all legislation necessary to eliminate all forms of discrimination against women⁵⁵.

Furthermore, allowing an exception for marital rape infringes on a woman’s right to be free from discrimination under international law⁵⁶, states are required to recognize marital rape as a pattern of violence against women and take appropriate measure to criminalize and penalize such behaviour.

International_HR_Conventions.pdf [https://perma.cc/A4VW-ZXQU] [hereinafter A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS].

⁵² A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION, *supra* note 48

⁵³ Through General Recommendation No. 19 (11th session, 1992), art. 7, the CEDAW Committee stated: Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal

REFORMS REQUIRED IN THE IPC AND EVIDENCE ACT

First, removing the exception clause in section 375 and adding another explanation clause mentioning that marriage is not a defence:

§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 description.

(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.

armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

⁵⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/29/27, art. 22. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2 [hereinafter CEDAW].

⁵⁵ CEDAW, *supra* note 124, art. 2(b). Report of the Special Rapporteur on violence against women, *supra* note 53, art. 22.

⁵⁶ CEDAW, *supra* note 124, art. 2(b). Report of the Special Rapporteur on violence against women,



(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. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation — The relationship of marriage does not constitute a valid defence.

Second, repeal of section 376B of the IPC

Indian Evidence Act, 1872 to amend Section 54 and to insert Section 114B.

Section 54: In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2- A previous conviction is relevant as evidence of bad character.

Exception: In cases under Section 375 of the IPC, the previous bad conduct will be relevant if the accused is the husband of the woman.

Section 114B: No presumption of consent in prosecutions of rape: There shall be no

presumption of consent in prosecutions of rape, even if the accused is the husband of the woman.

CONCLUSION

The discussion of marital rape is crucial in establishing fundamental equality for married women who are otherwise limited to the limits of their homes in public and legal debate. Women are less likely to expose instances of rape within their marriage because of the social stigma attached to rape victims in India and the disrepute that attacks women who fail to "make their marriage work." As we have consistently shown, there have been stiff political, legal and cultural arguments against criminalization. Widespread education and dissemination of social, political and economic information on women's empowerment would help to eradicate these and other assumptions. In our nation, marital rape is a rather derogatory and heinous crime that remains unrecognized. This act alone places a blot mark on our system of delivery of Indian justice. Decriminalized marital rape is an illegal activity that obstructs a woman's process of growth and serves as an obstacle to realising her ultimate potential.

This proposed policy not only opposes the current pseudo solution offered to victims of marital rape, but also proposes a direct solution by reviewing various committee and commission reports and not allowing any act that is harmful to any human being and one such act is marital rape, so it should be declared a crime and the husband should not be covered under the cloak of marriage.

SUGGESTIONS



In the current scenario marital rape can be only seen as rape which is legally permissible that negates the element of consent from the woman. It is high time that the judicial system in India makes laws criminalizing marital rape to preserve the dignity of the women.

With respect to the above discussion, the following suggestions are made:

1. Marital rape should be recognized as an offence under the Indian Penal Code.
2. The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code.
3. The lack of resistance on the part of the wife should not serve as a defence to the charge.
4. The legal position of marital rape should not only be recognized but also clearly defined; it should form a valid ground for divorce for the wife.
5. Apart from judicial awakening, general awareness of such offence by the citizens is also important.

