

LEGAL FRAMEWORK OF MARITAL RAPE IN INDIA: A NON CRIMINALIZED CRIME

ABSTRACT

Humanity remains on two pillars, men and women, they should have equivalent significance and role in its turn of events and development, however women have consistently been exposed to a lot of harassment or humiliation by men, rape is apt illustration of the outrages committed against the dignity of women. The offence is quite possibly the most frightful and brutal wrongdoings executed against the women. Marital rape, however not recognized as a crime, in India is quite possibly one of the most divergent and debatable issues. The present article is based upon a short analysis of marital rape in India and its legal framework. The aim of the article is to present the legal situation or legal aspects of marital rape in India. In light of this, the idea that women must have sex with her husband irrespective of her assent, will, wellbeing and so forth, is totally inadmissible to a socialized society. In this manner no justification or relevance of the idea of marital exception in the current times is there. It is correct that simple criminalization of marital rape in India won't end the issue, however it is surely an important step towards changing women's experience of sexual violence in a marriage. It is high time that the idea of "rape is rape, irrespective of the connection between the person in question and the culprit" is perceived by the law and put strictly to implement.

INTRODUCTION

"I SAY NOTHING, NOT ONE WORD, FROM BEGINNING TO END, AND NEITHER DOES HE. IF IT WERE LAWFUL FOR A WOMAN TO HATE HER HUSBAND, I WOULD HATE HIM AS A RAPIST".

~Philippa Gregory

"Marriage is viewed as quite possibly the most pious obligation, but when a similar pious obligation becomes curse for the women for the sake of intimate duties, when the spouse who is viewed as a shadow of god for a wife on this planet goes to be the perpetuator of dread to her, when the relatives believe marital rape or assault to be the a vital part in everyday life of a women or above all the tradition that must be adhered to assurances balance under the steady gaze of law when turns a deaf ears to the voice of that aggrieved women."

In this 21st century the stage wherein the greater part of the women's activists are raising their voice against different wrongs of the general public which are committed against women but still the evil like marital rape had stayed under in this male dominated society. Still in this time of human rights acknowledgment, the mere presence of the women is still not perceived.

The human rights infringement innate in acts of violence against women are as of now especially perceived. Anyway marital rape or conjugal assault is a particular sort of gendered severity that has moved away from both criminal law assents and human rights recommendation in pretty much 33% of the world's lands. This withdrawnness in the law conveys a legitimate invulnerability for men who unequivocally assault or attack women who are their spouses or intimate partners, whereby legitimizing this specific character of viciousness against women.

This is a human rights issue that yells out for rehabilitation, both legally and socially. Evaluation of precedent-based law and human rights standards show that state setbacks to condemn or criminalize rape in marriage breach the due steadiness standard and lapse to consent to international human rights law. The truth that there persist fundamental holes in in-laws around the society securing legal exemption for men who explicitly disregard their intimate partners

show the global size of the human rights law improvement yet to be made here. It stays a human rights issue without adequate legal remedies.

MEANING OF RAPE

Rape is characterized under Section 375 of the Indian Penal Code, 1860.¹ For any act to turn into an offense under Indian Penal Code, two conditions should be satisfied:

- Actus Reus

It means an act or conduct which is done in compatibility of a malafide/evil intention. So to constitute a wrongdoing of rape a man perpetrates any of the accompanying 4 four acts:

1. Penetrate his penis into her mouth, vagina, urethra or anus of a lady to any degree or causes her to do such act with himself or some other individual.
2. When a man inserts an item or any part of the body apart from the penis into the vagina or the urethra or the anus of a lady or causes her to do as such with himself or some other individual.
3. If a man controls any part of the body of a woman to cause penetration into the vagina or urethra or anus of a woman.
4. Or applies mouth to the vagina, urethra or anus of a woman.

- Mens Rea

Mens rea implies guilty mind/evil aim of an accused. To set up the act to be an offense of rape the previously mentioned actus reus should be done under any of these seven conditions:

1. An act done was against the desire of a woman.
2. An act done was without her consent.

¹ Gazala Parveen, Criminalization of Marital rape, Much needed reform, (March 23, 2021, 10:04 AM), <https://blog.ipleaders.in/marital-rape-reform/>

3. The consent got by putting her or any individual whom she is close to, in instant fear of death or hurt.
4. The consent given is a direct result of the misconception that she is lawfully married spouse of the individual committing the previously mentioned acts. However, a man realizes that he isn't her husband.
5. When the consent is acquired on account of unsoundness of mind at the time of giving consent.
6. When she is under 18 years old, irrespective of consent was given or not given comprises rape.
7. When she can't convey her consent.

MARITAL RAPE/ASSAULT IN INDIA

Indeed, even as we acclaim 70 years of Independence, the women in our country are at this point not truly protected and autonomous and continue living under the area of haziness and fear. It is a grave reality of India. In India, the entire set of laws relating to rape is a major wreck and quite possibly the most incomprehensible lacunae that arrive in a manner is that a spouse can not be indicated or prosecuted for an offence of rape/assault of his own wife. With this, it sets a thought that consent for marriage assumes implied consent for sex. To be more exact, it implies that a husband can have sex anywhere, whenever and of any kind against the desire of his wife is one of the implied terms of the agreement of marriage which is a binding condition upon the wife and she can not breach it.²

The meaning of rape codified in Section 375 of the Indian Penal Code ("IPC") incorporates a wide range of assault or rape including non-consensual intercourse with a woman. In any case, Exception 2 to Section 375 excludes reluctant sex between a couple over fifteen years of age from Section 375's meaning of "rape" and in this way inoculates such acts from arraignment.

² Bhagyashree Bhandarkar, A Non Criminalizing Crime: Marital Rape, (March 23, 2021, 10:45 AM), <http://www.legalserviceindia.com/legal/article-4567-a-non-criminalizing-crime-marital-rape.html>

As per current law, a wife is presumed to convey unending consent to participate in sexual relations with her husband to going into intimate relations. While reluctant sexual contact between a husband and a wife is seen as a criminal offence in basically every country of the world, India is one of the 36 countries that actually have not condemned marital rape.³

The Supreme Court of India and different High Courts are presently overpowered with writ petitions testing the dependability of this special case, and in a new milestone judgment, the Supreme Court criminalized reluctant sexual contact with a wife between fifteen and eighteen years old.

The meaning of consent for every individual choice can't be over underscored.⁴ A woman can secure her entitlement to life and freedom, yet not her body, inside her marriage, which is essentially interesting. Women so far have had action plan under section 498-A of the IPC, managing cruelty, to get themselves against unreasonable sexual conduct by the spouse.

Because of the ancient standard, the conjugal assault or marital rape isn't adequately seen as an offence, it is normal by the law that, marriage suggests the life partner offering consent to all the conjugal responsibilities including sex. In spite of the way that India as a nation relies upon the theory of significant value, in any case it has not seen the privilege a woman has in controlling marital intercourse as a part of equality.

As the nation misses the mark on any sort of legal arrangements as for conjugal assault, the unfortunate losses only resort is to go to court. Courts have different systems or strategies to perceive marital rape and have given outrageous punishment at any rate due to the absence of legitimate plans, they are bound and thus can't depict "compelling intercourse by a man upon his wife" as marital rape. Consequently, the Judiciary isn't sufficient and it needs the help of the legislature. The laws need to conform to the changing reality of society.

³ Anasyawar, Marital Rape: A Non Criminalized Crime in India, (March 25, 2021, 4:15 PM), <http://www.legalserviceindia.com/legal/article-4056-marital-rape-a-non-criminalized-crime-in-india.html>

⁴ Ibid.

LACK OF CRIMINALISATION OF MARITAL RAPE AS A FUNDAMENTAL RIGHTS VIOLATION

INFRINGEMENT OF ARTICLE 14

Article 14 of the Indian Constitution ensures that:

The State shall not deny to any individual equality before the law or the equal protection of the laws within the domain of India."

This Article expounds the idea of Equality before the law and equal insurance of law. The primitive act of marital rape obviously violates the equal right to be heard by the law courts when something wrong happens to any individual.⁵ Although the Constitution guarantees equality to all, Indian criminal law abuses female victims who have been attacked by their own personal mates. At the time the IPC was drafted during the 1860s, a married woman was not seen as an autonomous legal entity. She was seen as the property of her better half. Thus, she didn't have a large number of the rights presently guaranteed to her as an autonomous legal entity, including the advantage to document a complaint against another under her own special identity.

INFRINGEMENT OF ARTICLE 21

Article 21 communicates that "no person shall be denied of his life and personal liberty except as per the procedure set up by law" The Supreme Court has interpreted this arrangement in various choices to stretch out past the essentially demanding confirmation to life and freedom. Or maybe, it has held that the rights revered in Article 21 consolidate the rights to prosperity, security, respect, safe day to day environments, and safe condition, among others.

In Francis Corallie Muin v. Association Territory of Delhi⁶ case, idea to life under Article 21 of the Constitution was highlighted. According to this case Article 21 solidifies the advantage to live with human pride and all that goes with it, to be express, the essential things of life, for example, adequate food, dress and shelter over the head and facilities for examining, creating

⁵ Supra Note 1.

⁶ Francis Corallie Muin v. Association Territory of Delhi, 1981 AIR 746, 1981 SCR (2) 516.

and conveying in various structures, transparently moving about and mixing and blending with others. The advantage to live with human pride is a standout among the most principal part of the privilege to life which sees the self-rule of a person.

The Supreme Court has held in a catena of cases that the offense of assault abuses the advantage to life and the option to live with the human balance of the survivor of the wrongdoing of crime. The Supreme Court has held that assault isn't only an offense under the Indian Penal Code, yet is a wrongdoing against the entire society.

Rape is less significantly a sexual offence than an exhibition of enmity highlighted toward corrupting and humiliating the women. In this way, the marital exemption of education is moreover suggestive of a woman's entitlement to live with human balance. Any law which legitimizes the advantage of a spouse to compel the wife into engaging in sexual relations without wanting to and without her consent goes against the actual core of the right to life under Article 21 and is consequently unlawful.

EFFECTS/CAUSES OF MARITAL RAPE

Despite the historical myth that rape by one's spouse is a moderately inconsequential event causing little trauma, research demonstrates that conjugal assault frequently has serious and durable consequences for ladies. The actual or physical impacts of conjugal assault may incorporate injuries to private organs, lacerations, irritation, bruising, torn muscles, weariness and spewing.⁷ Explicit gynecological results of conjugal assault incorporate unnatural birth cycles, stillbirths, bladder contaminations, infertility and the likely contraction of sexually transmitted illnesses including HIV.

Women who are assaulted or raped by their spouses are probably going to suffer extreme mental outcomes also. A portion of the short term impacts of conjugal assault incorporate tension, shock, extraordinary dread, misery, suicidal tendencies, and post-traumatic pressure.

⁷ Ritoprita Ghosh, Marital Rape: Current legal scenario in India in comparison to the world, (March 25, 2021, 5:01 PM), <http://legalserviceindia.com/legal/article-3759-marital-rape-current-legal-scenario-in-india-in-comparison-to-the-world.html>

INDIA'S JUDICIARY ON MARITAL RAPE

Following the historical backdrop of judicial decisions on punishment of serious injury by the husband on the wife the court in *Emperor v. Shahu Mehrab*, the husband was sentenced under section 304A Indian Penal Code for causing death of his child wife by rash or careless act of sexual intercourse with her.

In *Sareetha v. T. Venkata Subbaih*,⁸ the Andhra Pradesh High Court held: 'There can be no uncertainty that a pronouncement of restitution of conjugal rights subsequently implemented outrages the sacredness of the body and mind exposed to the decree and annoys the integrity of such an individual and attacks the marital privacy and domestic intimacies of an individual'.

In the milestone judgement of *Independent Thought v. Union of India*,⁹ the SC has made a significant move to secure the girl child by criminalizing the sexual intercourse with a wife under 18 years as it is discriminatory and violates the fundamental privileges of the Constitution of India.

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which in spite of the fact that didn't consider about marital rape as a wrongdoing, did take into account as a part of domestic violence. Under this Act, if a woman has gone through marital rape, she can go to the court and acquire judicial separation from her husband. However, the same doesn't altogether protect the women from the crime and give her protection and justice in such manner. The entire general set of laws identifying with rape is wrecked, replete with paradoxes and major legal lacunae come in the method of empowering women against marital rape.

Recently, the Gujarat High Court in its new judgment on *Nimesh Bhai Bharatbhai Desai v. State of Gujarat*, while inspecting the law identifying with sexual offences saw that husbands should be reminded that marriage isn't a license to persuasively assault their wives. Marital rape is in existence in India, a disgraceful offence that has scared the trust and confidence in the foundation of marriage. A huge population of women has confronted the brunt of the non-criminalization of the practice.

⁸ *Sareetha v. T. Venkata Subbaih*, AIR 1983 AP 356.

⁹ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

However, in a different case, the High Court of Delhi dismissed the petition to criminalize marital rape, keeping up that the drafting of the law is the capacity of the governing body as opposed to the court, while the court is more worried about the translation of the law than its drafting. This thinking is unfortunate, particularly taking into account the Supreme Court's unequivocal decision on account of *State of Maharashtra v. Madhukar Narayan*¹⁰ that each lady is entitled for her sexual security and it isn't available for any and each individual to abuse her privacy as and at whatever point he wished.

CRIMINALIZING THE MARITAL RAPE IN INDIA IS IMPORTANT

Despite the fact that marriage is viewed as a profoundly close matter of two people which the State is reluctant to disrupt by reason that the organization of marriage frames the bedrock of our general public or the society, the refusal of the State to enter this private space can be dangerous in light of the fact that it prompts to indoctrination of the broadly held view that woman should bear the weight of the obligation of her family's image. Then again, it is likewise absurd that the overall set of laws in India which aims to get the rights of each person of society unexpectedly gives no legitimate change if that individual is a wife looking for responsibility from her husband for assaulting her. The wife is left in a dilemmatic position where she can neither take help from the State nor from her family. Accordingly, it is significant for the State to infiltrate this private circle since when the gravity of the wrongdoing is just as large as rape, it is moreover required that the sacred establishment of the couple's marriage be brought into question on the ground that whether the marital affairs can be held sacred anymore when an offensive wrongdoing like rape is committed.

Although, the Supreme Court in *Independent Thought v. Union of India* explained that if the judicial separation have not annihilated the institution of marriage, something besides the Indian State criminalizing marriage itself can't destroy the foundation of marriage and hence criminalizing marital rape unquestionably can't either. Interestingly, the High Court of Gujarat likewise decided that the non-consensual act of marital rape violates the trust and certainty inside a marriage and that marital rape is the thing that has harmed the institution of marriage.

¹⁰ *State of Maharashtra v. Madhukar Narayan*, AIR 1991 SC 207.

Consequently, the courts agree that criminalizing marital rape doesn't undermine relationships in any way.

INTERNATIONAL SCENARIO ON MARITAL RAPE

Despite India being one of the signatories of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). This convention viewed such sort of discrimination against women disregarded the guideline of uniformity of rights and infringement of human nobility or respect of a lady.

Likewise a Commission on Human Rights at its 51st meeting, with the title "The Elimination of Violence Against the Woman", in its proposals said that marital rape should be criminalized.¹¹

We definitely realize that in U.S.A. there are two sorts of law that exist one is National law while other is state laws. Laws related with conjugal assault are accessible under state laws and not under public law. The offence of rape has been characterized in the Uniform Code of Military Justice under Chapter 47X, section 920, Article 120 and under this provision marital rape is restricted that it can't be used as a defence by the accused. The situation of state laws is that, taking all things together, in the 50 states of America, marital rape is unlawful. At first, there existed the "Marital Rape Exemption" which permitted an individual to rape a spouse without fear of confronting any legal outcomes. South Dakota was the primary state to drop this exception and North Carolina the last one.

The punishment for marital rape is equivalent to the rape committed by any other individual. The accused can be punished for quite a long while or even life imprisonment.

¹¹ Supra Note 1.

CONCLUSION

It has been inferred that Indian laws have neglected to give a legitimate security to women as prior. As the ladies are still treated as the property of husband and he has all the rights to abuse her and no remedies have been given. In spite of the fact that a husband's rough and non-consensual act of intercourse may entitles a wife to bring an activity for criminal assault, the incorporation of the principle of liability for marital rape in our penal laws is absent. This by all appearances abuses Article 14 and 21 of the Indian Constitution. Non-criminalization of marital rape is the significant concern in the Indian legal system. To ensure the ladies, the Judiciary should take initiatives to shield them. Hitched ladies should be taken proper care and they ought not be subjected to rape or any kind of violence. To address the issue of violence against ladies in a broad manner, the journey needs to begin from every family and from every person. It is principal to make home a shielded spot for women and children. As such, until the discussion around the issue of respect to women and their balance inside the house is begun the condition of women will not improve. It is principal to consider marriage as an equivalent association. Thus this segment has an extremely narrow view in dealing with rape and as such till now there is no legal provision or arrangement which protects the married women.

In any case, marital assault is certifiably not a husband's privilege, but instead a violent act and a injustice that should be criminalized.