

Criminalization of Marital Rape in India

Prof. Sunishtha Moghe,

Assistant Professor, Symbiosis Law School, Symbiosis International University:
sunishtha.moghe@symlaw.ac.in.

Sanjana Saha,

L.L.M, Symbiosis Law School, Symbiosis International University: 20010143048@symlaw.ac.in

Abstract:

Rape is nothing new in our world, this crime is very old just like Adam. Rape is like a weapon used on women by men and this practice is going on for many centuries. Stranger rape is very different from marital rape. Rape has been criminalized in the world but marital rape has not even been criminalized and many authorities and agencies have not paid attention also to this type of crime. Marital rape is not criminalized in many countries.

Marital rape means sexual relationship between husband and wife where the consent is not given willingly but it is compelled or forced or has taken place due to some threat, fear or danger. It is a very violent act against the women. Women are looked as chattel or objects for sexual pleasure. This type of rape violated the integrity, dignity and also destroys the self respect of the women as it occurs in her matrimonial house.

In this paper the researcher will analyze the evolution of rape law in India in the first part. In the second part the researcher will discuss the arguments for criminalization of marital rape and also the arguments against the criminalization. In the third part the researcher will give suggestions and an analysis to why criminalization is necessary.

Keywords: Criminalization, Forced Sexual Intercourse, Marital rape, Spouse.

Introduction: Marital rape in India is very prevalent and they have been victims of this marriage for so many years. In India, arrange marriages and getting married at the age of eighteen or twenty-one is not a very big deal. The girl gets to meet her husband twice or thrice and then they are married. She is literally married to a stranger, and her dreams of care and love are shattered when she is forced for sexual intercourse in her first night. She is being tortured, forced by her partner who promised to love and take care of her throughout her life, she even tries to open up this kind of torture to her parents but she is told to adjust and the police instead of helping tells her to be happy that he is not visiting a prostitution centre.¹ Even the court system in India does not change the very law and has claimed this issue to be a personal issue rather than a public claim. It has been seen that the very law regarding this issue hasn't changed at all and the view, idea opinion is very patriarchal and it has been said by many

¹ Chhavi Sachdev, Rape Is A Crime In India - But There Are Exceptions (2016), (July. 5, 2021, 08:30 AM) <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception.i>

judges that this issue is a personal issue and if they start criminalizing marital rape then it destroys the very sacrament of marriage and disrupts the family structure in our country. This is the main reason why Indian women are given no protection under this issue.

In this paper the researcher has divided its paper into four parts. Firstly, the paper throws light on the growth of rape law in India. Second, the researcher has tried to draw ideas about the criminalization of marital rape and tries to frame arguments from both sides as to why is it necessary for criminalizing? and why is it not necessary for criminalizing? In the third part, the researcher has given suggestions and ideas for controlling marital rape in India which is followed by suggestions and an analysis.

Growth of Rape Law in India: Till 1983, the sections enumerated for rape in Indian penal code, 1860 did not change at all. The rape laws only changed when there was a very violent case that had taken place against women and the public. In 1972, the very famous Mathura gang rape happened², which shook the public, where the court stated that she was not raped and she had consent and there were no visible marks on her body³. So in this Mathura gang rape case the police officers were acquitted and this led to a movement of protests led by the women's group.⁴ This group did protests against the attitude and ill treatment given to the rape victims and misuse of power at every level by higher or superior authorities. So in 1983 an amendment took place, after this incident. This amendment brought many changes in the provisions of rape and recognized custodial rape and also abuse of power through this medium.⁵ There were punishments prescribed for abuse of power by police authorities, public servants, in jails and also the hospital authorities.⁶ After this amendment, the burden of proof was not on the victim but it was on the accused.⁷ This amendment also created a provision for husband and wife who are living apart and there has been forceful intercourse and thus punishing the husband for this act.⁸ It was stated by the lawmakers that consent of rape in a marriage is only material if the age of the girl is below fifteen years and taking consent above this age is immaterial.⁹ It was very shocking to see that a fifteen year old girls consent to such an act is just humorous.¹⁰ There were two negative parts of this amendment first is that rape was recognized by authorities and family and secondly spousal rape was recognized that also during the separation period not during the marriage.

In 2013 again after the Delhi Gang rape case there was a change in the provision relating to the Indian Penal Code, 1860.¹¹ A young girl was brutally gang raped in a bus and she had a lot of multiple injuries as there was metal rod which was penetrated through her vagina and such force was used which is very shocking.¹² The girl died after two weeks of the incident. This shook the nation tremendously and there were protests all around. The supreme Court established a Justice Verma Committee to amend the laws relating to rape and sexual assault and take a strict action against such heinous crimes. During such suggestions from the Committee it also suggested that the exception relating to marital rape should be repealed as it gives a picture to the society that wives are just properties or chattel of their husband and

² Tukaram v. State of Maharashtra, A.I.R. 1974 SC 514 (India)

³ Dr K I Vibhute, P S A Pillai's Criminal Law, 715-730 (12th ed. 2014)

⁴ supra note 2.

⁵ Ayush Verma, Comparison of rape laws before and after the Criminal Amendment Act, 2013 (July.5, 2021, 09:00 AM), https://blog.iplayers.in/comparison-rape-laws-criminal-amendment-act-2013/#Marital_rape.

⁶ Id.,

⁷ Id.,

⁸ Ayush verma, supra note 5.

⁹ Id.,

¹⁰ Id.,

¹¹ Mukesh V. State (NCT of Delhi) (2017) 6 S.C.C. 1 (India)

¹² Id.,

they can do whatever they feel like with their wives and wives consent should be there all the time.¹³ The Committee did suggest to repeal this exception. This Act 2013 brought many changes like, it changed the definition of rape and broadened it and explained the various forms of penetration.¹⁴ It changed the meaning of consent and added clauses regarding consent, vaginal penetration which is just not limited to a mand penis but other objects as well.¹⁵ Under Section 376, it did punish and recognize rape by family members, authorities, causing grievous harm, done by a person who is dominant, there were many categories that were mentioned under this section.¹⁶ It also criminalized acts such as stalking, voyeurism, acid attacks. The negative parts of this amendment was that it changed the consent of age from sixteen to eighteen. It also did include a section regarding the outraging of the modesty of women which is being exploited by many women. There were many changes made by this amendment some were very necessary but their Act also failed to criminalize marital or spousal rape and couldn't remove the exception made in Section 376 where forced sexual intercourse will be punishable if the girl is below fifteen years.

In 2017, the Supreme Court gave a decision¹⁷ related to the exception 2 reiterated in Section 375 regarding spousal rape. This exception gives the husbands an exemption to rape their wives. In this case, the court held that this exception will not be applied on child brides which are ranging between fifteen to seventeen.¹⁸ The court stated that this exception creates a barrier and also a discrimination among the married and unmarried girl children.¹⁹ The Supreme Court gave very substantive and rational defenses against this exception and change the age from fifteen and make it under eighteen years.²⁰

This discrimination between married and unmarried girl is very much contradicting article 15(3) and 21 of the Constitution of India.²¹ It also stated that it violated Article 14 which talks about equality.²² A man to have forceful sex with his child bride will violate the rights stated in Protection of Human Rights Act, 1993.²³ The court through this case also try to bring in the picture a women dignity, integrity and her privacy is also very much important. The court also stated that husbands are spared from a very serious crime through this exception. They are not charged or punished for raping their wives.²⁴ The court stated that this should change as it very necessary for the protection of women of all age and this judgement has been a very big step in the law field as it will help in fighting other spousal rape cases.

Criminalization of Marital Rape

Justifications Against Criminalizing Spousal Rape

1. Many options is already there against spousal rape

It has been stated by many scholars that there are already existing legal help created for women in this field through Hindu Marriage Act,1955, Indian Penal code, 1860 and also through Protection of Women from Domestic Violence Act of 2005. The Domestic Violence Act provides civil remedies like compensation, separation from their husbands and they also get the

¹³ Ayush Verma, *supra* note 5.

¹⁴ Criminal Law (Amendment) Act, 2013, The India Penal Code, 1860, section 375.

¹⁵ *Id.*,

¹⁶ The Indian Penal Code,1860, section 376.

¹⁷ *Independent thought v. Union of India*, (2017) 382 S.C.C. (India).

¹⁸ *Id.*,

¹⁹ *Id.*,

²⁰ *Id.*, Child Spousal Rape is illegal now.

²¹ *Id.*, (Deepak Gupta, J., concurring)

²² *Id.*,

²³ *Id.*,

²⁴ *Independent Thought v. Union of India*, 382 S.C.C. at 121.

privilege of being protected by the police authorities.²⁵ It has also been stated by the Indian Penal Code, 1860 that cruelty done against women will be penalized under Section 498A.²⁶ Under the Hindu Marriage Act, 1955 a women can file for divorce on the grounds of cruelty.²⁷ In the Domestic Violence Act, the remedies are only available civil wise but nothing is related to the criminal side and it has also not declared marital rape as an offense.²⁸ Under the Indian Evidence Act it has been seen that communication between a husband and wife cannot be disclosed until and unless a criminal action has been taken place.²⁹ So under Domestic Violence Act only civil remedies are there so the section enumerated in the Indian Evidence Act is not admissible. These Acts do help women to get away from this violence but nothing is done related to the violent behavior. A wife can take divorce on the grounds of cruelty and get away from the husband but he is still free to marry another women and again repeat the behavior with another women as well. It has also been stated by Madras High Court that not having sexual intercourse can lead to cruelty in a marriage and it can be a ground for divorce.³⁰ But it did not state that marital rape will eb a ground for divorce as it allows the government to legalize marital rape.

2. Related to Culture

This concept of spousal rape cannot work in India because India has many cultures beliefs and customs and it is very much different from the concept of marriage in the Western countries.³¹ In India marriage has been seen as a sacrament since many ages and criminalizing spousal rape would destroy the very sacrament of marriage, the privacy of marriage and disrupt the institution of marriage. So, criminalizing marital rape is a very big task for India.³² The Supreme Court in a case has stated that marriage is a personal thing and it will not affect the society.³³ It also stated that divorce and separation are also hampering the very institution of marriage then this concept will also not disrupt anything.³⁴ It has also been stated by the Gujarat High court that without consent having sexual intercourse with his wife will not only destroy her self integrity but also there is a breach of trust in the marriage which has been destroying the institution of marriage from many years.³⁵ The most important thing why marital rape cannot be criminalized is that because half of the women are illiterate and are very much financially dependent on their husbands and if this concept is criminalized then women outside marriage cannot survive for long.³⁶ The States have also made many institutions where women can survive and can get assistance.

3. Consent

²⁵ The Protection of Women from Domestic Violence Act, 2005

²⁶ The Indian Penal Code, 1860, section 498A.

²⁷ The Hindu Marriage Act, 1955, section 13.

²⁸ Sakshi Kanodia & Ranjabati Ray, Why Penalize Marital Rape, 21 J. OF HUMAN. & Soc. Sci.53 (2016).

²⁹ The Indian Evidence Act, 1872, section 121.

³⁰ Manish Raj, Denial of sex by spouse is cruelty: Supreme Court, THE TIMES OF INDIA Sept 26, 2014, <https://timesofindia.indiatimes.com/india/Denial-of-sex-by-spouse-is-crueltySupremeCourt/articleshow/43470243.cms>

³¹ Saptarshi Mandal, The Impossibility of Marital Rape - Contestations Around Marriage, Sex, Violence and the Law in Contemporary India, 29 AUSTL. FEMINIST STUD. J. 255, 256 (2014)

³² Chavi Sachdeva, *supra* note 1.

³³ *supra* note 17.

³⁴ *supra* note 17.

³⁵ Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2017) No. 26957 (India).

³⁶ Swarupa Dutt, Why marital rape should be criminalised, REDIFF NEWS, Sept 12, 2017, <http://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/20170912.html>.

It has been seen that when the marriage takes place the women's consent is taken from before and there is no need of taking any consent. Since many years this process has been followed where husbands cannot be prosecuted for committing rape on their wives.³⁷ It has been seen that wives are just treated as property who do not have any say and declared as chattel.³⁸ They do not have any equal status and there is no partnership. These ideas and opinions were removed by England where the court stated that marriage is a companionship of two people where they are both treated as equals and not chattel of their husbands.³⁹ This idea was also supported by the European Commission where they did not agree to the marriage being taken place between the rapist and the victim.⁴⁰ Implied consent is still being used by India to not criminalize marital rape and it supports the exception in the Indian Penal Code and it has also been seen in one of the Commission reports of 2000.⁴¹

4. Spousal Rape is not Common

The advocates who are willing to keep the exception of this rape stated that there are very few cases regarding this issue. Many surveys have been done and it has been seen in India that men do some type of violence to their wives may be sexual violence, mental torture and half of the women suffer physical, sexual and emotional abuse.⁴² It has been seen through these surveys that they are victims of forceful sex and sexual acts and they are scared to say or speak up.⁴³

5. Misuse of this Clause

It has been brought by many lawmakers into the picture that removing this exception will lead the women to misuse these sections and charge their husbands of rape. It has been seen that this type of misuse is seen also in the Violence Act, Dowry Act and also in the Indian Penal Code. The Supreme Court has stated that Section 498A of the Indian Penal Code is being misused by women so the court stated that before arresting the family and her husband for such cruelty a thorough investigation will be done then only arrest will be possible.⁴⁴ It has been seen that women do go and report but the treatment given in police stations and other areas is very cheap and unacceptable. They are asked sensitive questions. Sometimes they are asked to withdraw the FIR they have lodged. Secondly it is that there is lack of education and poverty and if this concept of spousal rape is criminalized then this law will also be used by women to solve their problems.

Justifications for Criminalizing Spousal rape.

1. Contradicting Domestic Laws

It has been seen that in India, there are many other crimes where the husbands have been charged of against their wives but this crime they are not being charged of it makes it fully discriminatory.⁴⁵ If they can be charged for other crimes why not marital rape. This exception clause also contradicts with the Protection of Human Rights Act, 1993 where the protection is

³⁷ 1 M. HALE, HISTORIA PLACITORUM CORONAS 628, 629 (Emelyn ed. 1847); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (P. Glazenbrook ed. 1971)

³⁸ *Id.*,

³⁹ *Id.*,

⁴⁰ *supra* note 17.

⁴¹ Law Commission of India, 172nd Report on Review of Rape Laws (2000)

⁴² Ministry of Health and Family Welfare Government of India, National Family Health Survey, NFHS-3 at 95-96 (2005-06).

⁴³ *Id.*,

⁴⁴ *Arnesh Kumar v. State of Bihar*, (2014) 9127 S.C.C. (India).

⁴⁵ *Saptarshi Mandal*, *supra* note 31.

given to children brides and why not to adults, so it is violating this act as well and causing inequality and discrimination.⁴⁶ The same has been seen in the Domestic Violence Act, 2005 where the husbands are tried by courts for beating and causing physical injury then why not the concept of marital rape has been introduced and thus it violates the act as well.⁴⁷

2. Violating Constitutional rights

The exception violates Article 15(3), 14 and 21 of the Indian Constitution. Article 14 is violated as it brings a distinction between married and unmarried women as they both can be victims of this kind of rape. Article 21 is violated by this exception as it violates the right to stay with human dignity and integrity.⁴⁸ Such type of rape violates these rights. It is also been seen that privacy of a female is also hampered through this exception. Every woman is entitled to sexual privacy.⁴⁹ Sexual intercourse or forceful rape not only causes harm to the body but also causes psychological problems.⁵⁰ In Independent Thought Case it has been stated by the Court that adults as victims face a lot of problems and they also get affected by these circumstances.⁵¹ In short this exception does violate any rights of the Constitution.

Recommendations and Conclusion

Recommendations

Spousal Rape in India, is a very problematic issue that India is facing and India needs to take many actions to control this issue. There are few recommendations:

- **Repeal:** It is very much necessary that this exception clause is repealed and in the Indian Penal Code, marital rape is defined as a criminal offence. If this clause is repealed then it gives a very clear message to the society that this kind of behavior or practice is unacceptable and whoever tries to practice this kind of behavior will be punished.
- **Consent:** It is also important that consent should be there in the definition and not implied consent as it gives women that they have right on their body and marriage is not a place where the dignity or bodily respect is lost.
- **Police Authorities:** The police authorities should not embarrass women while they are filing complaints but instead they should help the victims and guide them throughout the process. There should be female police officers to deal with such abusive cases as the victims would be more comfortable talking about the abuse.
- **Judiciary:** Female judges should be assigned especially for dealing such sensitive cases.
- **Awareness:** In every state, especially at the ground levels, awareness regarding such an abuse should be spread so that wives can file complaints without any fear and shame. This kind of awareness also educates the wives regarding such a grave abuse.
- **Counselling:** There should be help line numbers where the victims can call and get help regarding such abuse. It is very much important that medical help should be given not only physical medical help but also psychological help as well. This type of abuse not only destroys the bodily integrity but also disturbs the mental strength. So counselling after such abuse is very much necessary for women after such abuse.

⁴⁶ supra note 17.

⁴⁷ Id.,

⁴⁸ Maneka Gandhi v. Union of India, (1978) SCR 621 (India).

⁴⁹ Madhukar Narayan Mardikar, A.I.R. 1991 SC 207 (India).

⁵⁰ 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).

⁵¹ supra note 17.

- Hindu Marriage Act, 1955: Under this Act, marital rape should also be added as a ground for divorce.

Conclusion

It has always been seen that men treat their wives as a property whom they can use at anytime they want and in the criminal law system this is also evident as there are no specific laws for spousal rape. Wives since centuries have been only used by their husbands according to their own whims and fancies. They are treated as properties because of their gender and men think they can dominate her as the whole society since years has been led that way, like women need to be shut, they need to hear everything, and they have no choice or consent on their life or sex.

The researcher feels that marital rape should be criminalized in India, as it will give rights to the women to stand up for their dignity and self respect in the community and their rights will be given a preference. There are many NGOs which have increased awareness in the masses regarding many issues like domestic violence, cruelty but none of them has focused on the major topic that is marital rape where women aren't safe at their own matrimonial homes and they are raped by their own husbands who seem to be their partners for lifelong. It is seen that the judiciary is fine with accusing those of stranger rape but not rape done by their partners. It is the duty of the law policy makers and the government to see that this rape is also criminalized.

In the western states it has been seen that women's rights have been given importance and regarding this relationship as well. It has to not only bring attention to the states eyes but women itself need to grow from this and take a step. It through many sources that women still in India are raped many times by their husbands and in fact suffer trauma and other physical problems, it has also been seen that marital or spousal rape is very shocking than the rape done by any outsider as he has to live with that partner throughout her life and she is in constant suffering stage or scared as she has to be around that person always.

There are many loopholes in all the laws that has been created yet, we need a solid law so that this crime eradicated. It does not only concern few age groups of wives but all age groups of wives and their dignity and self respect needs to be protected.

References:

1. Ayush Verma, Comparison of rape laws before and after the Criminal Amendment Act, 2013. https://blog.ipleaders.in/comparison-rape-laws-criminal-amendment-act-2013/#Marital_rape
2. Chhavi Sachdev, Rape Is A Crime In India - But There Are Exceptions (2016), <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception>.
3. Dr K I Vibhute, P S A Pillai's Criminal Law, 715-730 (12th ed. 2014).
4. Law Commission of India, 172nd Report on Review of Rape Laws (2000).
5. M. HALE, HISTORIA PLACITORUM CORONAS 628, 629 (Emelyn ed. 1847); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (P. Glazenbrook ed. 1971).
6. Manish Raj, Denial of sex by spouse is cruelty: Supreme Court, THE TIMES OF INDIA (Sept. 26, 2014), <https://timesofindia.indiatimes.com/india/Denial-of-sex-by-spouse-is-crueltySupreme-Court/articleshow/43470243.cms>.
7. 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).
8. Ministry of Health and Family Welfare Government of India, National Family Health Survey, NFHS-3 at 95-96 (2005-06).

9. Sakshi Kanodia & Ranjabati Ray, Why Penalize Marital Rape, 21 J. OF HUMAN. & Soc. Sci.53 (2016).
10. Saptarshi Mandal, The Impossibility of Marital Rape - Contestations Around Marriage, Sex, Violence and the Law in Contemporary India, 29 AUSTL. FEMINIST STUD. J. 255, 256 (2014).
11. Swarupa Dutt, Why marital rape should be criminalised, REDIFF NEWS (Sept. 12,2017), <http://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/20170912.htm>

Cases:

1. Maneka Gandhi v. Union of India, (1978) SCR 621.
2. Madhukar Narayan Mardikar, AIR 1991 SC 207.
3. Arnesh Kumar v. State of Bihar, (2014) 9127 SCC (India).
4. Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2017) No. 26957
5. Independent thought v. Union of India, (2017) 382 SCC (India).
6. Mukesh V. State (NCT of Delhi) (2017) 6 SCC 1.
7. Tukaram v. State of Maharashtra, AIR 1974 SC 514.

Statutes:

1. The Constitution of India, 1950.
2. The Indian Penal Code, 1860.
3. The Indian Evidence Act, 1872.
4. The Protection of Women from Domestic Violence Act, 2005.
5. The Hindu Marriage Act, 1955.