

A STUDY ON MARITAL RAPE

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ABSTRACT

The purpose of writing this paper is to fill the lacuna existing in the present legal system in India. When other countries are reviewing their marital rape laws, India is still discussing on the need of marital rape laws. The main reason why marital rape is not considered as a crime in India is due to the lack of awareness among people. Onus Probandi is difficult in marital rape as there may not be any difference between sex with and without consent between partners. Further, it is against the concept of equality to deny justice to some victims only based on their age or marital status. In this paper, we shall be focusing on a step by step approach for all that needs to be done for implementing stringent laws against marital rape in India. The Indian Penal Code only criminalizes rape between spouses wherein the wife is below 15 years of age. But irrespective of age, there should be laws to protect married women against this cruel act. In the process of research work, it was found that marital rape is not an offence in India because marriage is considered to be sacred and wife's consent is not only necessary but also irrevocable. This inhumane act of the partner results in permanent health issues, incurable infections and psychological issues such as trauma and phobia. This has a bigger impact not only on the individual but on the surrounding as well. In a civilized society, it is totally unacceptable to have no laws against marital rape and hence it should be penalized in India.

INTRODUCTION

The act of sexual intercourse with one's spouse, without the spouse's consent or will amounts to marital or spousal rape. The dictionary meaning of word rape is "the ravishing or violation of a woman" and when such rape is committed by the victim's husband, it is called Marital Rape. It refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.²

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² http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html

A married woman would be as interested in protecting her right of choice and bodily autonomy as an unmarried woman, and the law cannot take away this right under any circumstances.³

THE SOCIETY AND MARITAL RAPE

Modern laws are made to express the general will. There is no point in simply bringing a law on this issue as, law does not change mindsets. In a patriarchal society like ours, the extent of normalization, of a crime like marital rape, is astonishing. For instance, in a NFHS survey, about 37% of men and 32% of women said that a wife is not justified in refusing her husband sex. The apathy, with which marital rape is dealt with, in our country, is frightening. Ours is seen as one of the most moralistic societies in the modern world but the society's approval of cruel acts such as this, speaks otherwise.

The customs, values, religion, education, and the sanctity of marriage are grounds for sustaining of marital rape as not a crime⁴. These domains affect people's views on marital rape to the extent that it is not considered a crime at all. The seriousness of this crime is not felt by the people as there is no general awareness among them. At the societal level; laws, policies and practices emanating from the State, as well as from traditional or customary practices at the broad social level, can directly contribute to violence against women, fail to respond to it, and create an environment where violence against women is tolerated, excused or justified.⁵ Societies that value women's participation and representation, and where there are fewer economic, social or political differences in power between men and women, have lower levels of marital rape. The community or the social norms also play a vital role in deciding the way people of that particular community view the subject. In a community where it is common for a man to control his wife's behavior or the notions of masculinity is tied with the idea of dominance or where there are rigid gender roles, it is more difficult to criminalize marital rape.

Our country came into the limelight for a brutal rape in 2012 and since then there was a revision in our rape laws. However, the revision in the rape laws only increased the punishment for rape outside of a marriage but not rape done by a husband on his wife. It is unacceptable in a civilized society to force sexual intercourse on any being, regardless of the

³Crimes against women and the law by Dr. Surinder Mediratta

⁴ Interpersonal violence by Kersti Yllo

⁵ <https://www.fokuskvinner.no/aktuelt/saker/what-causes-violence-against-women/>

marital status. This cruel act affects a woman's psychological, mental and emotional stability and lowers her status down to the level of an object which can be used to satisfy her husband desires. The history of the status of women in Indian society also adds as to why there is an opposition for marital rape not being criminalized.

HISTORICAL PERSPECTIVE

In ancient India, it was believed that there cannot be rape in marriage. The ancient Hindu scripture Manusmriti, mentions that a woman is not capable to live independently and that she is a possession of her father, before marriage and husband, after marriage. After the death of her husband, she becomes the possession of her son. Women were seen as objects which men have to take custody of. This is precisely the reason why even now, people are under an impression that there cannot be rape in marriage. Marriage was seen as a sacrament and rather than an institution for the regularization of sex.

Not only in India, but everywhere the world, women were faced with discrimination. In England and the United States since at that time it was regarded that the status of women was politically, economically, socially and sexually subordinate to that of the men. These infirmities brought forth the doctrine that on marriage, the rights of the woman were subsumed by the rights of her husband. This is how the concept of marital rape exception is vested in a whole set of discriminatory practices that justified denial of a woman's identity and freedom, and stranded her political, economic, social and sexual status in her husband. This view was described by Sir Mathew Hale, in History of the Pleas of the Crown (1736), where he wrote that the wife "hath given up herself in this kind unto her husband, whom she cannot retract." He introduced within the marriage, a notion of 'Implied Consent'.⁶ Agreeing with the same view, the Supreme Court of Virginia has noted, it is "hard to imagine how charging a husband with the violent crime of rape can be more disruptive than the violent act itself."⁷ married women may hesitate to question forced sex because they believe they have no right to refuse sexual advances made by their husbands⁸

MARITAL RAPE AS A FORM OF EXPLOITATION

⁶ Hale, Matthew, 1 History of the Pleas of the Crown, p. 629. (1736, London Professional Books, 1972)

⁷ Weishaupt v. Commonwealth, 315 S.E.2nd 847 (Va. 1984).

⁸ Wife rape: barriers to identification and treatment: Weingourt R: Am J Psychother: 1985 Apr.

Marital rape is also used by men to show their dominance over women. Sometimes it could also result from the general backwardness of women, in a country. Although we can see women goddesses being worshipped in India from the pre-historic times, women are not even treated with respect mostly, in rural areas. Presently, Indian women are facing the toughest time mentally and physically, mainly due to unawareness and lack of knowledge.

PSYCHOLOGICAL PERSPECTIVE

Marital rape often causes intense damage to a person's psyche and mental status in addition to damaging the person's idea of self. Every person should have a good idea about oneself but marital rape victims often have low self-esteem, and blame themselves for their fate instead of blaming their husbands.

The study conducted by Jennifer. A. Bennice and Patricia. A. Resick, on 62 women, examined the effects of intimate partner physical and sexual violence on Post Traumatic Stress Disorder (PTSD) symptomology. It found that the results of this study were consistent, finding significant and positive relationships between physical and sexual violence as well as sexual violence and PTSD symptoms. Further, a handful of studies have found post-traumatic stress disorder, fear, anxiety, depression, and sexual dysfunction to be consequences of marital rape⁹. Taking PTSD in detail, we can see that many of the marital rape victim's psychological state accompanies Post-Traumatic Stress Disorder (PTSD) symptoms, including difficulties falling or staying asleep, nightmares, flashbacks, increased startle responses, and/or numbed affect.

Marital rape is also known to cause a lot of traumas and phobias. Phobias are intense fears of a particular person, thing or situation. Traumas are horrific events which could bring panic attacks to the person facing it. The most common phobias of marital rape victims are agoraphobia (fear of going outside a confined space), haphephobia (fear of being touched), androphobia (fear of men) etc. and other fears and even paranoia. Depression can also be one of the major effects of marital rape. The victims of marital rape think that they are inadequate and that they do not satisfy their husbands well and hence they have a greater risk of going into deep depression because of this.

LEGAL POSITION IN INDIA

⁹Frieze, 1983; Hanneke & Shields, 1985; Kemp, Green, Hovanitz, & Rawlings, 1995; Shields, Resick, & Hanneke, 1990; Whatley, 1993.

There have been a plenty of legislation passed by the Indian Government but none the government heeds its consideration to marital rape. The submissive role of women in the society is due to the patriarchal thinking that they are not more than property belonging to men. The Indian Government has penalized many offences such as rape, assault, voyeurism etc. The law commission of India in its 42nd report put forward the prerequisite of including marital rape under the ambit of section 375¹⁰. It is prevailed in the society that marriage gives the authorization to rape his own wife because raping another woman leads to punishment.

Section 375 of The Indian Penal Code has criminalized rape and section 376 of The Indian Penal Code states the punishment for rape as imprisonment of either description for a term of seven years extending up to ten years. The main drawback of this section is that under its exceptional clause it states that sexual intercourse by a man with his wife the wife not being under the age of eighteen will not constitute rape.

This section has given its exceptional clause only on the basis of the marital status of the women. An unmarried woman has the bodily autonomy whereas a married woman just by her marital status is denied of her right. A contemporary study by the World Health Organization exposed that sixty-nine percent of women face rape by their spouses at least once in their lifetime. The exceptional clause is considered to be constitutionally valid due to the perception of implied consent of the woman during the time of marriage which is considered to be irrevocable

The exceptional clause of section 375 has transgressed various other rights which is enshrined to the citizens by the constitution. Article 14 of the Indian Constitution guarantees right to equality to all its citizens. The main purpose of this article is that equals should be treated equally and not the unequal. Here the exceptional clause by encompassing the offence to the age of eighteen has violated the very fundamental right. The classification must be based on a reasonable nexus. There is no reasonable nexus in the severance of age as to constitute a crime.

375 has contravened various other articles. Article 15 of The Indian Constitution prohibits discrimination on the basis of caste, sex, religion. Here under this section discrimination on the basis of sex is to be read as the marital status of the women and this exemption victimizes

married women¹¹. A few safeguards are provided such as the Constitution of India permits 'protective discrimination' in favor of women according to which state can make special provision for women and the scope of this article is wide enough to cover the entire range of state activity including employment.¹²

Article 19(1)(a) of the Indian Constitution guarantees to its citizens the freedom of speech and expression. So, every female has the right to deny sex but when it is coercive this contravenes with the basic fundamental right which is being ensured to the citizens of India. This article gives the freedom to every citizen to communicate their opinion but when it comes to a married woman she has no control over her body.

Article 21 of the constitution undertakes the right to life and personal liberty. This article though it does not explicitly affirm the right to live with dignity, right to privacy, right to good health, right to sexual privacy, right to bodily self-determination it has impliedly assented over these rights. The Supreme Court said that 'rape is a crime against basic human rights and violation of the victim: most cherished of the fundamental right, namely, the right to life enshrined in Article 21 of the Constitution.'¹³ By non – criminalizing marital rape it contravenes with Article 21. The elucidation of the article 21 has been changed after the Maneka's case. The observations of Bhagwati. J in Maneka's case that 'respect for the individual' lay at the back of all the Fundamental Rights guarantees by part III of the Indian Constitution.¹⁴ The interpretation has widened its scope and under right to human dignity includes equal respect for every human being.

Article 51-A of the Indian Constitution lays down the fundamental duties to its citizens. Article 51-A (e) of the constitution states that "to promote harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women". Though the Constitution has explicitly stated that the derogatory practices must be renounced, marital

11.Marital Rape: - Current Legal Framework in India and the Need for Change
Dr.Bhavish Gupta &Dr. Meenu Gupta.

12.National Legal Service Authority vs. Union of India & Others on 15 April,2014.

¹²Art.15(3) of the Constitution of India.

¹³Bodhisattwa Gautam v. Subhra Chakraborty on 15 December, 1995.

¹⁴Human rights in constitutional law -D.D.Basu.

rape is still not considered as a crime as people do not fathom the mental agony a female goes through.

This unrecognized offence also infringes the human rights of women. In 1994 the U. N Economic and Social Council adopted resolution of the U. N Commission on human rights and established the mandate special Rapporteur on violence against women to recommend violence against women and its causes, and to remedy its consequences. The resolution emphasized that it is: “the duty of the governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and in, accordance with national legislation, to punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by the private persons, and to provide access to just and effective remedies and specialized assistance to victims. ”¹⁵The Istanbul Convention obligated its parties to criminalize sexual violence, when committed against former or current spouses or partners, living together or separate. All these Conventions have highlighted on criminalizing this, is due to the infringement of the human rights. Those rights include right to life, right to liberty, right to security of person, physical and mental integrity, sexual and reproductive choice.

Section 377 of the Indian Constitution affirms that penetration is itself enough to cause rape. This section mainly deals with sex in unnatural ways. Even this section has a lacuna by setting a benchmark of eighteen years to constitute an offence under this section. The main reason is that it is not enough to punish a person for marital rape under section 377 is such that consent is not to be considered as a deciding factor in constituting the crime but to constitute spousal rape consent plays the influential factor.

Section 498-A of The Indian Penal Code defines cruelty and the persons will be imprisoned of either description for a term extending 3 years and shall be imposed with fine. Under this section it largely covers only the cruelties faced by women for dowry. So, the punishment under this is not ample to punish a person guilty of rape.

¹⁵The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law
Melanie Randall
Vasanthi Venkatesh.

If the question of criminalizing marital rape arises it is defended that Domestic Violence Act is sufficient to deal with it. But this cannot be considered as a penal provision because Domestic Violence is civil law and it aspires in protecting the people and providing compensation, but the criminal law deals with offence and punishments. The punishment for any offence under this Act the person would be imprisoned for three years. The protection for the wife is not only against the husband but also against the mother-in-law, sister-in-law and even widows can file a case under this Act. This helps in compensating the amount for expenses incurred. The mental agony faced by the women cannot be compensated so marital rape must be criminalized.

The Criminal Amendment Act, 2013:

Justice Verma Committee was set up to formulate recommendations in the criminal law for speedy justice after the awakening call from Delhi rape case which shook the entire nation. The committee made recommendations on rape and under this marital rape to be included, punishment for sexual offences, registering complaints and medical examinations and bill of rights for women. On the basis of the recommendations made, the criminal amendment act was made to the Indian Penal Code. After this amendment, sexual offences to be punished with imprisonment of three years, assault to be punished from three to seven years and voyeurism and stalking was made a crime and the ambit of rape was enlarged by making non-penetrative act as an offence amounting to rape. Justice Krishna Iyer quoted “a murderer kills the body, but a rapist kills the soul”¹⁶. But even in this Amendment Marital Rape was not criminalized avowing that in India marriage is considered to be sacramental and on the basis of the literacy and poverty level in India.

Section 122 of the Indian Evidence Act furnishes the matrimonial privilege. Under this section the husband and wife have the protection to not to unveil any matter about them which was made in the absence of a third party. If marital rape is not being criminalized this section cannot be invoked and when the husband does it with a malafide intention that cannot be produced as a valid evidence before the court.

The need for criminalizing marital rape is high and it should be criminalized under a special provision under The Indian Penal Code and the exemption under section 375 must be

¹⁶Rafiq v. State of U.P. on 14 August, 1980.

obliterated. This can be proved by forensic evidence as she would have been subjected to sexual abuse several times.

GROUND FOR DIVORCE:

❖ Hindu marriage law:

Under this law adultery, cruelty, desertion, conversion, non-resumption of habitation, mental disorder, leprosy and refusal to intercourse for a period is made as grounds for divorce.

❖ Muslim marriage law:

The grounds for divorce under this law would include: when the whereabouts of the partner is not known for more than four years, failure to provide maintenance, when the spouse has been imprisoned for a period of seven or more years, when neither of the party is unable to meet the obligations of the marriage, when the spouse indulges in the act of cruelty.

❖ Christian marriage law:

The law includes the following a ground of divorce: adultery, conversion, lunacy, leprosy, venereal diseases, non-consummation of marriage, non-compliance with the decree of restitution of conjugal rights, desertion and cruelty.

Under all these personal laws governing non-consummation of marriage is considered to be a ground for divorce. When that can be made as a ground even rape by the husband shall be made as a ground for divorce. The Kerala High Court observed that “because the wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376A”¹⁷. Article 21 of the Constitution assures right to bodily self- determination. The fundamental right of a person is being violated that person’s right should be restored by the law. The government cogitating the need of the hour must make provisions to formulate marital rape as an offence and making it as a ground for divorce.

PROPOSAL

¹⁷SreeKumar vs. Pearly Karun on 22 June, 1998.

Due to the lacunas existing in the current legal system, we have formulated a new section for marital rape to ensure the safety of women not contravening the rights of men.

INDIAN PENAL CODE

SEC X: sec x in the Indian penal code

Marital rape -A man is said to commit marital rape when he forcibly has sexual intercourse with his legally wedded wife.

FIRST: It should be against her consent.

SECOND: Against her will

THIRD: Incapable of giving her consent by reason of unsoundness of mind and intoxication.

FOURTH: Consent obtained by threat, coercion

FIFTH: Commits rape on a pregnant wife,

(a)Whoever commits marital rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to ten years and shall be subjected to fine.

(b)It shall be made as a ground for divorce.

EXPLANATION: (1) Penetration shall include insertion of penis and/or any other object into women's vagina, urethra, or anus.

(2) Fine shall extend to five lakhs depending upon the grievousness of the crime.

(3) The burden of proof lies on the wife/ victim.

(4) There should be necessary medical examinations conducted that should not infringe men's right.

REASONS WHY MARITAL RAPE ARE NOT PREENT IN OUR COUNTRY:

Among all the Crimes against the women, marital rape seems to be the most under reported crimes in the country. The reason for this is the lack of awareness among the people and also the fact marital rape is not an offence in the IPC under section 375.

Marital rape is a grave violation of human rights and not just a crime of passion. While most of the nations have penalized marital rape, surprisingly, there is no law to protect married women against marital rape in India.

Home affairs Minister Haribhai Chaudhary had said that marital rape can't be made a criminal offence in India because of high illiteracy rate, poverty, extreme religious beliefs and the very 'sanctity' of marriage.

India is one of the 36 countries where marital rape is still not a criminal offence and is untouched by the lawmakers of our country. Rape laws in India continue with the patriarchal mindset of considering women to be the property of men post marriage with no autonomy (or) agency over their bodies. In a nutshell, it can be concluded that marital rape is one of the most abhorrent crime against the women. In the Indian society where, premarital sex is a taboo, marital rape is an accepted social reality. On the other hand, there are talks of empowering women and at the same time we are not protecting the dignity and right to life of married women. The autonomy of a woman over her body is lost in the hypocritical discourse on the principle of covertures. Law is not static and needs to be changed with time and society. As consequences of marital rape are really high, the legislature cannot afford to turn a blind eye to the same.

It is high time for reviewing our legislation and inculcating in it the needed. But mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is a need to educate the masses about the prevailing myth because without change in the patriarchal mentality, no legislation can bring reforms. Rights, Duties and obligation in a marriage for both the spouses are mutual and coextensive and also includes the right of continuing a natural biological process.

The cultural view of a rape is very much related to the issue of externalization to blame of rape i.e. Blame for rape is directed primarily towards the women and not the assailant.

As a society, we are extremely uncomfortable to publicly acknowledging that marriages can be potentially disharmonious, abusive and dangerous sites of human interaction. Gender inequality backed by data on a low female labour participation rate, the socioeconomic dependence of women on their spouses, a "blame the victim" approach of exposing intimate relations, being ridiculed for not being able to perform the "wifely duties" of keeping the

husband happy, poor sensitization and the slow speed of the criminal Justice system are just few of the reasons for gross under-reporting of such cases. India borrowed this exemption from early British common law when women were considered as chattel (owned by father's and then by their husband's) who lacked the agency to make decisions for themselves. A husband forcing himself upon his wife was just making good use of the property he owned. There was no concept of the wife's consent, deemed to have been irrevocably surrendered to her husband on entering the contract of marriage. The wife's legal identity was subsumed under that of her husband's post marriage. Husbands have been historically given the right to exercise corporal punishment to control their erring wives (a Victorian law interestingly also found in Manusmriti). The domestic fortress is privacy stronghold. How was it justified for the state to review the intimate acts of a married couple?

When all reasons fail men often use the weapon of fear to perpetuate regressive cultural practices and laws. As of today, 70 countries across the world-Europe (22), America (22), Asia and Australia (15) and Africa (11)- have criminalized Marital rape.

For an average Indian man, masculinity is about "acting tough, freely exercising his privilege to lay down the rules in personal relationships, and, above all, controlling women", found a 2014 study by the United Nations population fund and the international centre for research on Women.¹⁸ Only one in four abused women has ever sought help, found the survey and the women are much likely to seek help, they'd rather go to family members than police.

Despite an increase in reporting among survivors following the passage of criminal law (Amendment) Act, 2013, rape continues to remain under-reported. Only about six of every 100 acts of sexual violence committed by men other than husbands actually get reported, said a report by Aashish Gupta of Rice Institute, a non-profit organization. "Most incidence of sexual violence, however, were committed by husbands of the survivors: the number of women who experienced sexual violence by non-intimate perpetrators,"

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable

¹⁸Study by United Nations Population Fund and International Centre for Research on Women.

partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's as important as taking legal steps to protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination.

A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

ARTICLES AND CASE LAWS

On august 10 2015 after much debate supreme court said marital rape cannot be considered criminal offence as it affects the Indian culture and most importantly it affects the marriage institution wholly. "Parliament has extensively debated the issue of marital rape and considered that it was not an offence of rape. Therefore, it cannot be considered as a criminal offence," a bench of justices MB Lokur and Deepak Gupta said. Advocate Gaurav Agarwal appearing for NGO Independent Thought said that distinction made in between 18 and 15 is illegal and unconstitutional.¹⁹

The Delhi government had said that quashing the protection husbands enjoy against prosecution for marital rape would lead to "creation of an offence", which is a legislative job and courts cannot create or legislate an offence, which would be the inevitable outcome of striking down of the exception in the IPC.²⁰This is highly unacceptable though it is a legislative job, judgments is in the hands of the government who needs to decide this. It is not a creation of offence as it should be treated in the eyes of law as such rape is being treated. Hence there is no creation of offence.

On July 18,2018 the Delhi High court comprising of Gita Mittal and C. Harishankar said that, "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party." They rejected the opposition petition filed by men's welfare trust because their ground of

¹⁹<https://www.firstpost.com/india/supreme-court-says-marital-rape-cannot-be-considered-criminal-offence-after-much-debate-3912611.html>.

²⁰<https://economictimes.indiatimes.com/news/politics-and-nation/marriage-doesnt-mean-wife-always-ready-for-sex-delhi-high-court-on-marital-rape/articleshow/65034722.cms>.

argument was so senseless as they compared the domestic violence act along with this highly heinous act of marital rape.²¹

Menaka Gandhi, the Minister for Women & Child Development, ruled out the possibility of making marital rape a criminal offence by making this statement: "It is considered that the concept of marital rape as understood internationally cannot be suitably applied in the Indian context due to various factors like level of education, illiteracy, poverty, myriad social customs & values, religious beliefs, mindsets of the society to treat the marriage as a sacrament etc."²²

Being a women welfare minister, she should be supportive and should work for the development of women. The wordings she used in the above paragraph is highly discriminating as she discussing about factors such as education, illiteracy, poverty, culture and values but why these are factors are even for consideration when it is not for rape.

Section 376-A was added in the Indian Penal Code, 1860, which criminalized the rape of a judicially separated wife. The act says that if a husband and wife have been legally separated then the husband cannot force his wife to have sexual intercourse with him. If he does then he will be imprisoned for 2 years. Likewise, the marital rape should be criminalized in India but it should not be treated as a civil offence.

The 42nd law commission in its report stated that when a man commits a rape against his minor wife it is offensive under sec.375 of IPC. It's a ray of hope in Indian law culture. So, the joint law committee proposed for criminalizing marital rape but the report rejected by saying that husband could not be found guilty of raping his wife whatever be her age. When a man marries a woman, sex is also a part of the package.

The Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes pertaining to women. They argued that the scope of rape should be broadened to all types of sexual abuse

²¹<https://www.livelaw.in/marital-rape-hearing-marriage-does-not-mean-that-wife-should-always-be-willing-to-engage-in-sexual-relations-delhi-hc/>.

²²<https://www.thebetterindia.com/123017/supreme-court-criminalise-marital-rape-laws-india/>.

including marital rape.

Supreme Court and various High Courts had observed the growing misuse of section 498A (harassment caused to a married woman by her husband and in-laws) of the IPC. It is totally sustainable but by saying this court should not come to a conclusion of not criminalizing marital rape.

“It has to be ensured adequately that marital rape does not become a phenomenon, which may destabilize the institution of marriage apart from being an easy tool for harassing the husbands,” the affidavit, filed through Central government standing counsel Monika Arora, said. The Indian people are insensible as they could not understand the meaning of marital rape. By saying that marital rape would affect the marriage institution we are making it unpretentious in front of other countries.

“What may appear to be marital rape to an individual wife, it may not appear so to others. As to what constitutes marital rape and what would constitute marital non-rape needs to be defined precisely before a view on its criminalization is taken,” it said.

Answering to the above point non-marital rape is that having coerced sexual intercourse with a woman without her consent. Whereas marital rape is coercing his own wife to have sex without her consent. Main distinction is that rape is perpetrated against a complete stranger and marital rape is committed against his legally wedded wife. Both suffers same injury but people highly discriminating marital rape because marriage is an institution and husband are like god and sex is the integral and main part of marriage. And burden of proof may differ, if we take rape it is simple and the needful tests have been taken against the people. But in marital rape the forced sexual intercourse occurs against her will but with her consent. So, the burden of proof is too difficult in marital rape.

REAL LIFE STORIES

A petition has been filed by RTI foundation, AIDWA and anam in the Delhi high court. A 26-year-old anam says with the smile in her lips that her husband strenuously has sexual intercourse with her and stops only when she fell unconscious. Almost tried everything to persuade her family members but she failed in doing so. Because they warned her not to walk out of marriage and advised her to chin up and bear it. The situation became too worse so she went to the lawyer. Anam is a simple girl and like every other girl she too needed time as it

was arranged marriage. But by her utmost request the ruthless man forced her for sex. In her contention she said that she has been raped by her husband 7 times. She has suffered from abdominal injections. So, she checked with the gynecologist. She showed the prescription to her husband but he was not ready to buy it. In the mid of January anam came to her parents' home for a wedding. Her husband intimidated her to kill her if she complained to anyone. And withal she didn't get the buttress of her family. So, she contacted an NGO in Delhi. And she stayed in sakthi shalini for few months. With the help of HRLN, she filed a petition for divorce. As marital rape is not recognized in India she filed case under criminal intimidation, outraging modesty and under domestic violence act. But there are no severe punishments under these sections and act. To enact these sections there should be visible injuries. Rape is a heinous act and grievous hurt has been suffered by the victim. Marital rape should be treated as that of rape. The HRLN senior Supreme Court advocate Colin Gonsalves has took this case.

A 2014 sample survey titled 'Masculinity, Intimate Partner Violence and Son Preference in India', by the United Nations Population Fund (UNFPA) and global research institute, International Centre for Research on Women, shows how women have internalized the normalization of domestic violence. About 31 per cent men surveyed admitted to perpetrating sexual violence on their wives, whereas only 17 per cent women reported having ever experienced sexual violence. The survey attributes the under-reporting by women to the stigma associated with marital rape. By the above research it has been found out that people are not ready to come out of their home and have audacity to face our Indian society. Marital rape is happening against their will but with their consent. Now rape laws are too stringent. So people are ready to marry and abuse their wife legally as there is no law against marital rape. They also got support from FEM and they say, "Marriage is an equal-relationship contract and not a one-time consent to everything. This kind of legal exception to the rape laws gives men unequal privilege. We feel this is wrong." Being a men's welfare trust they understand the situation better than those who criticized of making marital rape a law by giving some senseless explanation of marriage is a social institution and it would be used as a element for harassing men at large. Anam says, "My parents didn't support me. But they gave me education. I know the difference between right and wrong". Being our parents, they teach us what is right and what is wrong. But if we want their help of getting separated or divorced from our marriage then they won't come forward instead they advise us to adjust. Adjusting

is not pertinent word that should be suggested by our own parents for this abhorrent act of marital rape.²³

Here comes the next story of marital rape happened in India and that has been told to Darshana Joshi, licensed family and marriage therapist. Here the girl named Anita has been married at the age of 18 years with full hope in her marriage. On her wedding night instead of love and affection she got mouthful of verbal words and sexually abused by her husband. Here her husband is an IAS officer and being in such a prestigious position and he had non-consensual sex with her wife. On one night when she refused had sex with him he forcibly inserted candle into her vagina and said, "Not to worry, you scumbag, I have a remedy for everything." Then she has been locked in a room and after continuous bleeding her in-laws took her to hospital and for next 60 days she had continuous bleeding. Night after night the torture grew her husband asked her to watch porn. It was enough for her to bear everything so she had the courage and went to the near police station but one of them smirked and said, "Be grateful lady that your husband is coming to you every night and not going to a prostitute. Go home and keep him happy." She said that it was the most regretted moment of being a woman in India. She now got separated from him and started a new life but she didn't get any justice because of one reason and that is being an Indian.

The story of Anita is untenable and the highlight is she didn't get any justice. Being an educated IAS officer, he has committed marital rape against his wife. He very well knows that there is no rape in marriage and the consent of her wife is not needed. This led Anita to face a tragic end to her marriage.²⁴

Here is a heartbreaking marital rape story of karnika singh that lead her to commit suicide. She has been sexually abused by her dentist husband and to go through trans-vaginal tests. She after conveying the things committed suicide. The court booked under sec.306 (abetment

²³<https://indianexpress.com/article/india/meet-anam-marital-rape-survivor-criminal-offence-delhi-high-court-4847094/>

²⁴<https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html>

to suicide) and sec.498 a. (2016)²⁵

These are the real-life stories of Indian women suffering from marital rape. But at the end they either accept this injustice act as it's not a crime or they could not able to make their husbands liable under proper law as there is no any special act or separate section in IPC for marital rape.

OTHER COUNTRIES' POSITION

The countries of the West have adopted laws and changed their opinions on marital rape. In the U.S, there was a struggle for the criminalization of Marital rape in the late 1970s and after a long battle, all states had marital rape criminalized by 1993.

Poland was the first country to make marital rape an offence in the year 1932. Punishment is as that of rape in that country

Australia criminalized marital rape in the year 1970s and 1980s. But this has been opposed by various interest groups and individuals by saying that family home and marital bedroom cannot be controlled by state. But In debates over the new legislation in New South Wales, one Member of Parliament claimed: Even after such an appalling event as rape in marriage, some marriages can be saved. However imperfect the institution of marriage may be, it is far too important to society for it to be endangered. This is the reasonable justification given by the member of the parliament. Though it may affect marriage institution and exploit the relationship between husband and wife. But some who are severely affected by this crime can be escaped from the situation.

In the end marital rape was criminalized in almost every country in Australia in the 1970s and 1980s.

The High Court held that, if it was ever a part of the common law of Australia that by marriage a wife gave irrevocable consent to sexual intercourse with her husband, this was no longer a part of the common law by 1991.²⁶

²⁵<https://indianexpress.com/article/cities/jaipur/father-son-doctor-duo-held-in-udaipur-for-abetting-womanssuicide-2838252/>.

²⁶R v L [1991] HCA 48

United States criminalized marital rape in mid 1970s. But that was partial and many countries didn't adopt that law. In the 1984 New York Court of Appeals case of *People v. Liberta*, judge Sol Waechter stated that "a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity."²⁷

But it has been completely adopted in a case. The facts of the case are the wife had left to live with her parents but there was no formal separation, although the wife had consulted solicitors. The prosecution claimed that the husband had broken into her parents' home and raped her. The defense argued that there was no such offence, because of the marriage exemption. The case was appealed until it reached the House of Lords. The judgment was given by Lord Keith of Kinkel who said that the contortions being performed in the lower courts in order to evade the marital rights exemption demonstrated how absurd the rule was. He said that, the marital rights exemption was a "common law fiction" which had never been a true rule of English law. Kinkel concluded that "the fiction of implied consent has no useful purpose to serve today in the law of rape" R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.²⁸

From this almost all United States adopted marital rape laws. The punishment was awarded up to 15 years of imprisonment.

Pakistan criminalized marital rape since 2006. There the fighter was Dictator Pervez Musharaf who always worked hard for the empowerment of the women.

The Pakistan Penal Code, in section 375, provides the comprehensive definition of rape:

Rape: - A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

- (i) Against her will.
- (ii) Without her consent
- (iii) With her consent, when the consent has been obtained by putting her in fear of death or of hurt,

²⁷[https://en.wikipedia.org/wiki/Marital_rape_\(United_States_law\)](https://en.wikipedia.org/wiki/Marital_rape_(United_States_law))

²⁸ R v R[1992] 1 AC 599

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.²⁹

From this it is clear that rape can be committed against any women who are a stranger or a wife.

South Africa criminalized marital rape in the year 1993. In 1987, the Minister of Justice introduced into Parliament a bill which included the Law Commission's proposal on rape in marriage

This provision supported on March 1989. And in 1993 it was criminalized by stating "a husband may be convicted of the rape of his wife."³⁰

A policy brief on marital rape produced by the African Population Health Research Center for the Kenyan Parliament in 2010 highlighted the stories of various victims in a bid to conscientize legislators on the need for policy change. So, this Marriage, Divorce and Family Relations Bill 2015 have been passed. It had a provision of refuse to have sex in marriage.³¹

STATISTICS

According to 2017 survey:

Nine out of every 100 men, at an all India level, agreed to the fact that a husband can use force and have sex with his wife forcefully.

Percentage of men who forces their wife even she is not willing to have sex with her in India is 9%

Among the all the states Andhra Pradesh is in the highest position. That is no of men who have sex with their wife against their will is 28.5% which has highest percentage like Telangana, Mizoram, Tripura, Jammu and Kashmir, Tamilnadu etc., with the percentage of

²⁹<https://en.dailypakistan.com.pk/opinion/blog/marital-rape-is-it-criminalized-in-pakistan/>.

³⁰<https://www.jstor.org/stable/pdf/1410196.pdf?refreqid=excelsior%3A1200d615b7bb5f9fde0b52a22a25050b>.

³¹<https://www.timeslive.co.za/news/south-africa/2012-01-19-wives-seven-year-wait-for-justice/>

25.6, 19.3, 17.1, 14.8, 12.1, and 11.7 respectively. The least rating country is Himachal Pradesh with the percentage of 2.7

11 out of every 100 men agreed that a husband can refuse financial support to his wife if she refuses to have sex with him.

Percentage of men who force their wife for sex by threatening them of refusing financial support in India is 11%

Among the all states Telangana is high in number with the percentage of 30.7% followed by other countries which has highest percentage like Andhra Pradesh, Mizoram, Tripura, Jammu and Kashmir, Tamilnadu etc., with the percentage of 28.3, 15.7, 17.9, 18.3, 13 respectively. The least rating country is Himachal Pradesh with the percentage of 2.8

A husband has the right to get angry and reprimand his wife if she refuses sexual intercourse, found the survey to be true for 18 out of every 100 men across India.

Percentage of men who force their wife as they have right to get angry and reprimand in India is 18%

Among the all states Andhra Pradesh is high in number with the percentage of 43 which has highest percentage like Telangana, Mizoram, Tripura, Jammu and Kashmir, Tamilnadu etc, with the percentage of 42.6, 29.5, 20, 21.7, 19.7 respectively. The least rating country is Nagaland 7.9³²

CONCLUSION:

The continuing exemption of marital rape from the purview of criminal law sustains the assumption of the wife as exclusive property of the husband. As stated by Katherine O'Donovan," its immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant, familial ideology and female sexuality which treats a wife as property and as having no sexual agency or decision making in sexual activity within the marital

³²<http://www.indianwomenblog.org/shocking-data-reveals-how-many-indian-men-think-its-ok-to-rape-their-wives-if-they-refuse-sex/>.

contract.”³³The burden of proof is the major drawback in marital rape. But in rape if we see there is a medical test and that should be done in the marital rape, if it happened without the consent of the wife surely there will be injuries suffered by her. Only still a handful of countries remain without criminalizing marital rape country will be elevated to the next level in the eyes of the developed countries of the world. In the developing era, this society being less male chauvinistic should give women the equal right not only in the public life but also in her private life. As this unrecognized offence violates various fundamental rights marital rape should be criminalized. By, making a law on marital rape, our country will be elevated to the next level in the eyes of the developed countries of the world

³³ Marital rape: - current legal framework in India and the need for change- Dr. Bhavish Gupta & Dr. Meenu Gupta.