

MARITAL RAPE IN INDIA

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Abstract

Remember, as children, when our parents used to buy our clothes for us without even asking us if we like them or not? It used to make us angry as we also wanted to be a part of that decision. At the time, we could not do anything about it but cry. This is because, even as children, we wanted to have control of every single thing that concerned us. There are several things or situations which we may never have control over but one thing that we, as human beings, would want to have absolute control over is our bodies. And what if someone tries to steal this right from us or tries to take control over our bodies? We would feel violated and that is exactly what rape does but when this crime is committed by an individual whom we trust with our protection, it is even more hurtful. The following part of my research deals with a similar topic, that is, marital rape wherein I discuss the relevant statutes and judgements and subsequently draw my analysis.

INTRODUCTION

One should not be surprised to know that the issue of marital rape became a major public concern across the globe only in 1978 when a man named John Rideout was tried for the rape of his then-wife, Greta Rideout in Oregon and even in this case, at the time, the man was acquitted. But this case definitely helped in making this offence a debatable topic in the public domain due to the immense media coverage it received as earlier even scholars specializing in rape cases had not conducted much research on the topic, let alone the general public². Since the exposure to the topic is still quite new, the world still does not seem to hold a firm stand when it comes to marital rape. At the same time when we take the Indian society into consideration, where marriage is more than just a ceremony and signifies a strengthening bond between two families, naturally the citizens have had a hard time understanding the occurrence of rape within marriage. It becomes all the more difficult to substantiate one's claims in a nation where the legality of a marriage depends on

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²Irene Hanson Frieze, "Investigating the Causes and Consequences of Marital Rape" 8 *The University of Chicago Press* 532 (1983).

“consummation” and the failure to do so may result in annulment. Moreover, a man can even take the help of the state for the “restitution of conjugal rights” in case his better-half is unwilling to cohabit and at the same time is available only to husbands³. Therefore, as we saw, there are numerous loopholes and contradictions when it comes to marital rape in our constitution and I will try addressing some of these issues in the following part of my research paper.

WHAT IS MARITAL RAPE?

It becomes difficult to assign a solid definition to a term when there are so many conflicting opinions especially when it comes to accepting forced intercourse as a crime within the institution of marriage. But apart from all our legal biases, for the sake of this research, one maybe define this term as the demand of forced sexual activity by a husband from his wife⁴.

RELEVANT STATUTES

Article 14 of the Indian Constitution:

“Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

Article 21 of the Indian Constitution:

“Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Section 375 of the Indian Penal Code: A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

1. Against her will.
2. Without her consent.

³ --, “Marriage and Rape: We need a law on marital rape but such acts cannot be separated from the structure of the Indian family” 48 *Economic and Political Weekly* 7 (2013).

⁴ *Supra* note 1 at 533.

3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
5. With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
6. With or without her consent, when she is under sixteen years of age. Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception- —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

KEY STATISTICS

While the nation is debating about the need for criminalization of marital rape, there are few places which have a clear answer to this question. In 2015, an NGO named Sneha, having a few counseling centres across the city of Mumbai, recorded 664 cases of domestic violence among women out of which 159 were cases that also included marital rape. Another counseling centre in Bandra (Mumbai), Dilaasa, reported that hospitals often come across cases of marital rape but the complains are rarely registered due to Section 375 of the Indian Penal Code. This NGO also analysed about thirteen cases of sexual misconduct from the emergency rooms of two public hospitals in Mumbai between 2011 and 2014. It found out that only five of these thirteen cases were registered in a police station. These cases were also registered under either Section 498A or Section 377. A data collected by the NGO shows that in almost sixty per cent of the cases reported under domestic violence, women have been subjected to forced sexual activity. Dilaasa further noted that in most of these cases police does not seem to be very active when it comes to collection of medical evidence as a result of which either these women themselves have to follow up on the investigation or they prefer living a life of anonymity away from their violent husbands.

It has to be noted that due to a lack of proper legislation, many of the victims admitted to the hospitals abstain from talking about it or informing it to the medical officials as they feel that it is not a crime. Such a practice results in the formation of a pattern wherein younger women often do not report about such offences and choose to suffer in silence which, gradually, gives the offender the freedom and the audacity to offend her even more. Finally, she decides to speak out only when the violence has reached a level where she can deal with it no more. Senior Lawyer Indira Jaisinghas also expressed her opinions when it comes to marital rape and she felt that, “forced sexual intercourse within marriage should be brought within the ambit of definition of rape under Section 375 IPC, by deleting Exception 2”. She further stated that, “when the criminal laws were amended in 2013, I had sought to make it an offence if a separated husband forced himself on his wife (Section 376). Though that was a victory, [the law] doesn’t take care of women who are not separated”. These comments were made by Ms. Jaising as she believed that there is no proper documentation of marital rape cases as the police does not report these cases due to the absence of a proper statute⁵.

ANALYSIS

Section 375 of the Indian Penal Code which specifically deals with rape, itself exempts the possibility of marital rape when it states that sexual acts committed by a man with his own wife, as long as she is not under fifteen years of age, does not constitute rape. Although the statutes do not specifically criminalize marital rape but it does prohibit the rape committed by a man on his wife while they are judicially separated. Therefore, it can be said that the Indian legislature may have mistaken cohabitation for consent. Further, the 172nd Law Commission Report acts as a testament to the unwillingness of the Indian constitution to consider marital rape as an offence. This is because it stated that criminalizing marital rape would imply interference with an individual’s personal marital affairs. These finds become even more confusing and contradicting when repeatedly in its various judgements, the Supreme Court has emphasized that a woman’s chastity does not allow to lie about such offences therefore even a statement from the victim’s end

⁵Roli Srivastava, “Marital Rape: the statistics show how real it is”, *The Hindu*, June 30, 2016, available at <[https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece#/> \(Oct. 27, 2020, 5:50 PM\).](https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece#/)

is enough to convict a man on charges of rape. While on the other end, the report chooses to ignore such claims when they come from a married woman who is above fifteen years of age.⁶

These statutes and findings are also in consonance with one of the most important portions of the Indian Constitution, that is, the fundamental rights. For instance let us take the example of Article 21 of the constitution which talks about a citizen's right to life and personal liberty. It can be said that the Supreme Court has not left a stone unturned in emphasizing upon the importance of this fundamental rights by further adding up to its interpretation and also in its various judgements like in the case of *Shri BodhisattwaGautam vs. Miss Subhra Chakraborty* wherein it was stated that, "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21."⁷ Whereas on the other hand, the marital exemption of rape by Section 375 seems to violate Article 21 by not taking the personal liberty of married women into account. Secondly, the section also does not ensure equal treatment of the victims of sexual offences by extending the remedies only to unmarried women and not to the married ones thereby acting in violation of Article 14 of the constitution.

POSSIBLE REASONS FOR EXEMPTION

1. **CONSENT:** One of the main reasons why marital rape is not considered a punishable offence is because it is often assumed that consent is implied between spouses. This assumption provides an unchecked immunity to husbands at the expense of the dignity of a woman and denies her protection from the criminal law against any such crime that may be caused as a result of this immunity.
2. **LEGAL STATUS OF WIFE:** Another reason for such an exemption could be the traditional views on the status of women in the Indian women. Rape hampers the reputation

⁶PranayaDayalu and L. K. Swaraj, "Marital Rape: A Crime" 3 *International Journal of Trend in Scientific Research and Development* 181 (2018).

⁷*Bodhisattwa vs. Subhra*, 1996 AIR 922.

of a woman and historically, it has been seen that the society is not very welcoming towards unmarried rape victims. But when it comes to married women, traditionally they have been considered as a property of their husbands, therefore any forced sexual activity against them does not constitute a crime as the husbands are just making use of their property.

3. **PROBLEMS OF EVIDENCE:** One of arguments given in defence of such exemption is the possibility of a fake case being filed by a woman against her husband. This argument, though sounds reasonable, is not enough to deny a woman justice against a genuine crime. Also, here the law is being particularly biased against married women as it does not pose any such imposition on unmarried women who may want to file a complaint against a man whom she may be sexually familiar with.
4. **RECONCILIATION:** Another argument which is often presented to justify this exemption is that the codification of such a statute would result in the decrement of possibility of reconciliation between the spouses. This reason is inconsistent and unjust as it promotes the victim to cohabit with her rapist thereby indirectly asking her to compromise on her self-respect.⁸

IMPORTANT JUDGMENTS

In this section of my research paper I will discuss some of the judgements given by the Indian judicial system that act as a ray of hope amidst this legislative chaos. These judgements express how the judiciary of our nation itself does not agree with the biases put forth by the law-making body of our society and also emphasize on the need for change.

In *D. S. Nakara vs. Union of India*, the Supreme court stated that, “Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is attracted where equals are treated differently without any reasonable basis. The principle underlying the guarantee is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject-matter of

⁸M. V. Sankaran, “The Marital Status Exemption In Rape” 20 *Journal of the Indian Law Institute* 594 (1978).

the legislation their position is substantially the same. Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation.”⁹

In *Suchita Srivastava vs. Chandigarh Administration*, the court laid emphasis on the importance of Article 21 by stating that, “The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures.”¹⁰

In *State of Maharashtra vs. Madhukar Narayan*¹¹, the Supreme Court felt the need to express the importance of the right to privacy possessed by a woman. It was held that no person is entitled to violate this right as and when he wishes and a woman has full freedom to protect herself in case such violation occurs. The issue was also addressed in the case of *ShayaraBano vs. Union of India*¹² wherein the court felt that just because two people got married with mutual consent does not mean that a husband has an absolute freedom to violate his wife’s personal liberty. Opposition against such discrimination was also expressed by a Delhi high Court Bench, consisting of Chief Justice Gita Mittal and C Hari Shankar, wherein the judges felt that, “Marriage does not mean that the woman is all time ready, willing and consenting [for sex]. The man will have to prove that she was a consenting party.”¹³ Moreover necessary corrections were also recommended by J. S. Verma committee which was formed as a result of immense public outrage after the Nirbhaya gang-rape case. The committee was headed by former Chief Justice of the Supreme Court, Justice J. S. Verma and included two other members, that were, Justice Leila Seth and Mr. Gopal Subramaniam. Besides speedy trial and punishment of the accused, the committee also recommended for the constitution to address cases of sexual violences in all its possibilities but unfortunately no

⁹*Dakara vs. UOI*, A.I.R. 1983 S.C.130.

¹⁰*Suchitra vs. CA*, A.I.R. 2010 S.C. 235.

¹¹*SOM VS. Narayan*, A.I.R. 1991 S.C. 207.

¹²*ShayaraBano vs. UOI*, A.I.R. 2017 S.C. 4609.

¹³Pallavi Prasad, “Why It’s Still Legal For Indian Men to Rape Their Wives”, *The Swaddle*, January 20 2020, available at <<https://theswaddle.com/marital-rape-india-decriminalized-crime/>> (Oct. 27, 2020, 7:15 PM).

attention was paid to such recommendation and priority was to bring about changes which were necessary at the time in order to satisfy the general public¹⁴.

CONCLUSION

Through this research I have concluded that it is high time that we consider rape as a criminal offence in its entirety. Justification of rape in any form symbolizes the weakness of our criminal justice system and the condition of women in our society. At the same time one cannot deny that there are situations where it may backfire but each and every statute has its own loopholes. Also several times these remedies have been denied with excuse of pre-existing civil remedies like Domestic Violence Act, 2005 and criminal remedy under Section 498A of Indian Penal Code but both of these statutes decrease the gravity of the offence and result in a maximum of three years of imprisonment. These punishments look like a negotiation deal but we must never forget that justice cannot be negotiated. We must understand that marital rapes do exist and the primary offenders of such evils are still moving freely in the society without any fear or shame. Lack of punishment and trial in such cases, is also putting the lives of many women in danger by forcing them to live with their rapists and discouraging them from approaching the proper authorities for assistance. This lacunae in our constitution is also in a way empowering the wrong set of individuals, that are, the offenders who righteously commit such crimes and do not feel sorry about it. Therefore, it is important for the law-making bodies of the nation to understand that a marriage certificate does not give a husband full-time access to his wife's body and in order to send across this message, it is necessary to criminalize marital rape.

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¹⁴*Supra* note 2 at 7.

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