

A COMPARATIVE ANALYSIS ON THE CONCEPT OF MARITAL RAPE BETWEEN INDIA AND USA

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Abstract

This paper consists of the concept of marital rape between India and USA. Till today's date marital rape has not been criminalized in India and such kind of rape is committed within the institution of marriage. Whereas in USA, marital rape has been criminalized decades back. There are 50 states in USA and each state has different set of laws to deal with the issue of marital rape. Such act not been criminalized in India states that it is an accidental loophole in Indian Penal Laws. There can be an establishment of a model to criminalize marital rape in India and it is the responsibility of the Indian judiciary to take important steps for the beneficial application of criminalization of marital rape in India. The scope of the paper is limited to understand the concept of marital rape in India and USA from the view of their legal setup and the reforms which needs to be introduced in the IPC and Indian Evidence Act so as to criminalize marital rape in India.

Introduction

Rape is considered to be the most heinous crime against the women. It hampers them physical as well as mentally. Rape can be considered as a social and political issue which has its roots connected to the imbalance of relationship between man and woman. In a layman's language, rape is the act of aggression in which the victim is completely denied the rights of self-determination. But when it comes to marital rape which is done within the institution of marriage, it can be defined as an unwanted sexual intercourse by using force and threat and against the will of the wife by the husband. The rationale as in not to include marital rape as a criminalized act lies in the statement of Sir Matthew Hale made in year 1678. He stated that, "The husband cannot be guilty of rape committed by himself upon his lawful life, for their mutual matrimonial consent and contract the wife given up herself in this kind to her husband, whom she cannot retract."²

Marital rape is rarely recognized as a criminal act by many legal systems around the world. The social notion behind such thought is that wife is always considered as a property of the

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² Dr. Vandana, 'Marital Rape and exemption under Indian Penal Code', 44(12) ,ILR, (2017)

husband. This is an undefeated notion of the patriarchal system in India. Hence, India has not yet criminalized marital rape. But when it comes to USA, marital rape is considered to be crime in all the 50 states. There is not any existing of national law in USA for marital rape as such but all the states have their own separate laws regarding marital rape and more specifically in some states they have differentiated between rape and marital rape in different sections and ways but the most important aspect is that marital rape is considered to be crime in all the 50 states of USA.

The suggestion to criminalize marital rape in India was made by the Verma Committee. But it was seen that the Domestic Violence Act, 2005 has provided for certain remedies to the victims of such offences. But then too, DVA, 2005 has failed to criminalize marital rape in India. But marital rape has been criminalized in USA since decades now. All the 50 states of USA have different ways and laws to deal with marital rape. Its high time marital rape should be criminalized in India as it is the violation of human rights.

Concept of Marital Rape between India and USA

Concept of Marital Rape in India

The Indian Penal Code talks about rape under section 375. It states that; **“ Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—**

- 1) Against her will.**
- 2) Without her consent.**
- 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.**

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”³

It consists of both sexual intercourse and sexual penetration such as oral sex within the dimension of rape in India. But this section excludes the forceful sexual intercourse between a husband and a wife. Hence a wife does not have a remedy under the Indian Penal laws if her husband rapes her.⁴ Though marital rape is not criminalized in India but a specific form of marital rape is criminalized in India which is the forceful sexual intercourse when the husband and wife are living separately on the grounds of judicial separation.⁵

The issue of marital rape in India was first addressed in the 42nd law commission report.⁶ This report made certain important suggestions with regards to marital rape. First suggestion of this report was that if the husband and wife are already separated then section 376B will not apply and the second suggestion was if there is a non-consensual sexual intercourse with a woman by her husband who falls in the age gap of 12-15 years then it cannot be regarded as a rape, it should fall under the separate arena of laws. In all, this report indirectly rejects the notion of criminalization of marital rape in India as it may create many unwanted differences in the institution of marriage.⁷

In year 2012, the Verma Committee submitted a report which laid down the suggestions for criminalizing marital rape in India. This report made a suggestion that exception clause regarding rape should be deleted and marriage cannot be used as a defense for the offence of rape.⁸ The criminal law amendment bill, 2012 has replaced the word ‘rape’ to ‘sexual assault’ so as to widen the scope of section 375 of IPC, 1860 but this bill does not contain any provision related to criminalization of marital rape in India.⁹ The protection of women from domestic violence act, 2005, mentions rape as a type of violence under crimes against women. So under this act, a woman can go to the court and seek judicial separation on accounts of marital rape in India. But this act does not criminalize marital rape.

³ Section 375 of Indian Penal Code, 1860

⁴ Pradyuman Soni and Raveena Rao, 'Criminalization of Marital rape in India', 11(1), NUJS LR, (2018)

⁵ Dr. Vandana, 'Marital Rape and exemption under Indian Penal Code', 44(12), ILR,(2017)

⁶ Ibid

⁷ Dr. Garima Pal and Kshitij Naikade, 'Issues and Challenges related to marital rape in India', 7(4) IJHRSSI 58-69 (2018)

⁸ Sangamithran Longananthan, 'Marital Rape', *Legal Service India*, (30 Aug, 2021, 10:00PM) <<http://www.legalserviceindia.com/article/2369/Marital-Rape.html>>

⁹ Sangamithran Longananthan, 'Marital Rape', *Legal Service India*, (30 Aug, 2021, 10:00PM) <<http://www.legalserviceindia.com/article/2369/Marital-Rape.html>>

In case of, **The Chairman, Railway Board .V. Chandrima Das**¹⁰ it was held by the court that rape is just not an offence under the Indian Penal code but it is a crime against the complete society. In the case of, **State of Maharashtra .V. Madhkar Narayan**¹¹ it was held by the court that, every woman is entitled to her sexual privacy and it is against her will to violate her sexual privacy against her will and consent. But in the case of **Independent Thought .V. Union of India**¹², it was held by the Supreme Court that, “The sexual acts done by a husband with his wife against her consent and will cannot be considered as a rape.” Although this is a discriminatory judgment and it violates the fundamental rights mentioned in the Indian Constitution. But such judgments act as an alarming signal to amend the Indian Penal Laws which normalize marital rape in India.

Different perspectives of Indian judiciary on marital rape

I) Kerala High Court judgment on marital rape (2021)

The Kerala High Court on 6th August 2021, delivered a judgment stating that marital rape is a form of cruelty and is a reasonable ground for divorce. This judgment was delivered by a division bench comprising of Just. A. Muhamed Mustaque and Just. Kauser Edappagath. The court stated that, *“right to respect for his or her physical, mental integrity and dignity encompasses bodily integrity as well and that any disrespect or violation towards bodily integrity is a violation of individual autonomy, human rights and gross violation of principles of natural justice.”*

The bench further stated that it is the need of the hour to have a common code for sensitive issues related marriage and divorce irrespective of the community backgrounds. The court also stressed on the point that the divorce law in the country should be based and exercised on the choice and interests of the individual.

II) Chhattisgarh High Court judgment on marital rape (2021)

The Chhattisgarh High Court on 26th August 2021, delivered a judgment stating that forceful sexual intercourse by a man against his own wife will not be considered as a rape. Thus, completing negating the offence of marital rape. While delivering the order, the court made reference of exception of section 375 of Indian Penal Code, 1860 stating that the act of husband cannot be said as rape if the wife is not a minor.

¹⁰ AIR 2000

¹¹ AIR 1991 SC 207

¹² AIR 2017

There has been a lot of demands from all the corners of the country to criminalize marital rape in India. Certain suggestions were made by the Justice Verma committee with regards to marital rape, the Union government has been reluctant to criminalize marital rape in India. It has been stated by various authorities that by criminalizing marital rape it will destabilize the institution of marriage in India.

Concept of Marital Rape in USA

The concept of marital rape in USA is different. There exists two types of laws in USA. They are the national laws and the state laws. There are total 50 states in USA and each state has their own way to deal with the concept of marital rape. There is no national law for marital rape in USA. In USA, the offence of rape is defined in the Uniform Code of Military Justice particularly under chapter 47X, section 920 and article 120.

In USA, South Dakota was the first state to criminalize marital rape and North Carolina was the last state to criminalize marital rape in USA. The important fact to look here upon is that, every state has different set of laws to deal with marital rape and provide justice to victims.

The set of laws made in different states of USA with respect to marital rape are as follows;

1. **Maryland** – According to their laws on the marital rape it is stated that, if two people have parted ways by the means of judicial separation or by divorce then any forceful sexual intercourse between husband and wife will be considered as marital rape only.¹³
2. **Mississippi** – According to their penal law, the offence of marital rape requires the husband and wife to be living together at the time of incident and the accused must commit a coerced sexual intercourse and must penetrate the victim without their consent.¹⁴
3. **Nevada** – The defense of marriage can only be applicable if there was no threat or force at the time of the incident of marital rape but if the sexual intercourse was done with any kind of threat or coercion then the defense of marriage cannot be availed.¹⁵

The legal position of marital rape is not clear in the legal systems of both India and USA. In India, marital rape has not been criminalized yet but this problem has been discussed in the 42nd law commission report and also by the Verma committee and to a certain extent this problem has been solved stating that judicial separation can be gained on the grounds of marital

¹³ JJ Gross, 'Marital Rape: Laws between India, USA and Israel' 15(1) IJCCJ (2018) at 207-216

¹⁴ Ibid

¹⁵ Ibid

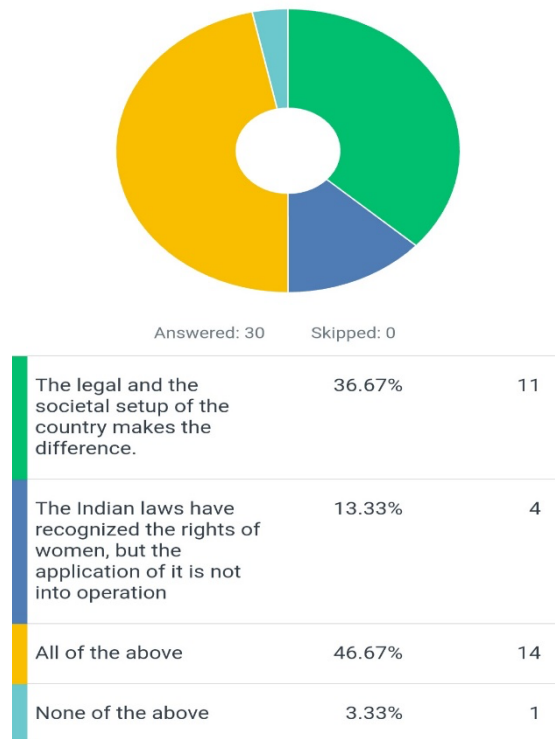
rape. But this step does not criminalizes marital rape in India. Though in USA, the marital rape has been criminalized by all the states but still in few states marital rape is still account for an exemption if committed under substance abuse or under mistake of law or fact.

Analysis of Survey

The analysis is based on the comparative analysis of marital rape between India and USA.

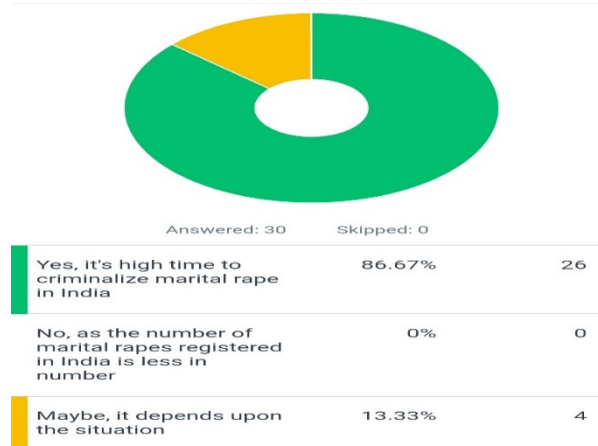
The sample size of the survey is 30.

Q1. India and USA both are democratic countries. But when it comes to the concept of marital rape, India has not criminalized it yet whereas USA has criminalized it decades back. What can be the possible reasons behind it?



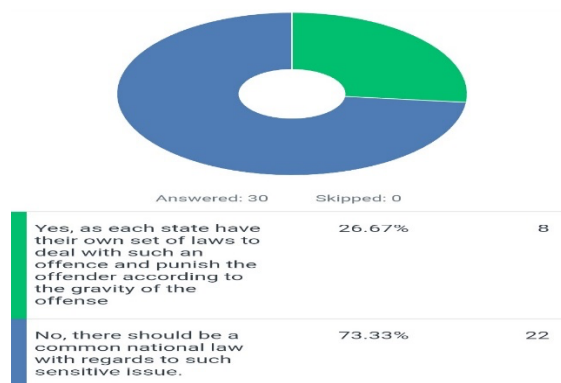
As mentioned above, both India and USA are democratic countries. In the former one, marital rape has not been criminalized yet but in the latter one marital rape has been criminalized in all states but with certain exceptions. In the above mentioned question, the reasons behind not criminalizing marital rape in India is that it will destabilize the institution of marriage, the legal and the societal setup of the country makes the difference and more specifically the Indian laws have recognized the rights of women but its application is still not into operation. Out of 100%, 46.67% think that all the issues mentioned above are reasons for the non criminalization of marital rape in India

Q2. Recently in August 2021, a judgment was passed was passed by the Kerala High Court concerning marital rape stating that it recognized as a ground for divorce. After such a revolutionary step, should India criminalize marital rape in India?



In the month of August 2021, the Kerala High Court recognized marital rape as the ground for divorce as it also amounts for cruelty. But even after such a judgment, marital rape has just been considered as a ground of divorce but has not been criminalized yet in India. Now the question arises that after such judgment whether India should criminalize marital rape in India? Out of 100%, almost 86.67% think that it's high time to criminalize marital rape in India.

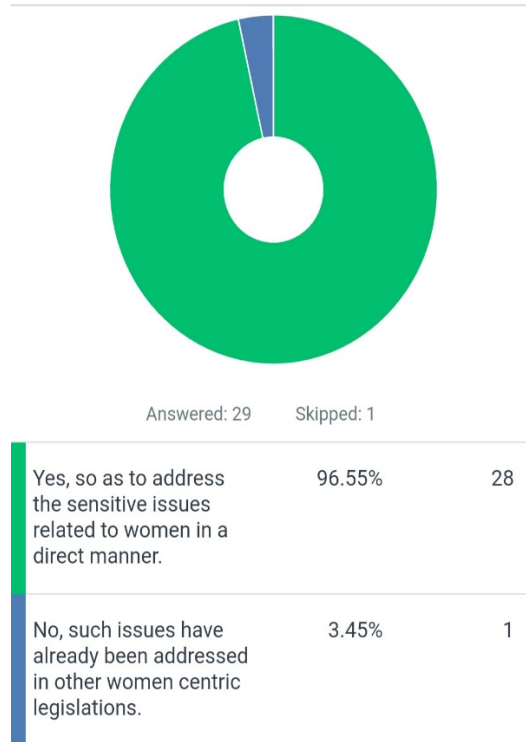
Q3. USA consists of 50 states and the way each state deals with marital rape is different. Whether such a step proves to be a beneficial step in combating the numbers of marital rape in USA?



In USA, there are total 50 states and every state has a different set of law to deal with marital rape. The most important thing is that marital rape has been criminalized in USA decades back. Every state in USA has its own way to deal with marital rape and thus have framed laws according to it. But there is no national law on marital rape in USA. Out of 100%, 73.33% of

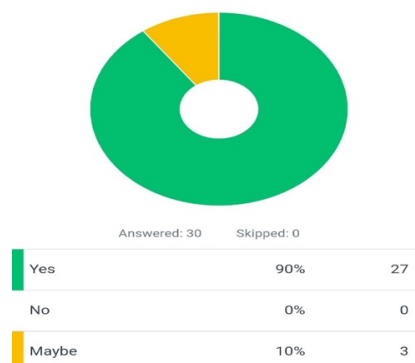
people think that there should be establishment of common national law with regards to marital rape in USA as it is a sensitive issue.

Q4. Whether reforms are required to be done under the Indian Penal Code, 1860 and Indian Evidence Act, 1872 to criminalize marital rape in India?



The Indian Penal Code, 1860 and Indian Evidence Act, 1872 have many provisions with regards to rape and the procedural law to deal with this issue. Especially under IPC, section 375 and the exception clause attached to it needs to go under reformation as to criminalize marital rape in India. Out of 100%, 96.55% of people think that there is need of reformation in IPC and IEA so as to address the sensitive issues related to women in a direct manner.

Q5. When it comes to forming certain laws with regards to marital rape, the notion ‘No means No’ must act as a foundation stone?



The framing of laws for marital rape must be done with a sensitive approach and in a clear manner. Such laws cannot be assumed under the light of other laws and provisions under it. So, when it comes to the formation of laws with regards to marital rape, the notion 'No means No' act as a foundation stone as decided by 90% of people.

Suggestions and Conclusion

Suggestions to criminalize marital rape in India are:

- 1) Gender neutral laws must be framed to address sensitive issues related to one's bodily integrity.
- 2) The offence of marital rape must be considered as a ground of divorce irrespective of personal laws.
- 3) The exception clause of section 375 of IPC, 1860 must be amended accordingly to address the issue of marital rape.

The concept of marital rape between India and USA is very different. In the former it is still not criminalized but in the latter one it is criminalized. The difference does not lie whether it has been criminalized or not. The way these legal systems look upon the safety of their women and their rights both inside and outside marriage marks the difference. In USA, there are 50 laws of 50 states to deal with the concept of marital rape. A proper model for criminalization of marital rape is required in India. Certain amendments can be done in the Indian Criminal Laws so as to ensure the beneficial criminalization of marital rape in India. Amendments can be done in Indian Penal Code and in Indian Evidence Act. The judgment pronounced by Supreme Court in the case of Independent India .V. Union of India is quite disappointing as it escapes itself from commenting on the issue of marital rape. Recently, 2 judgments were passed by the Indian judiciary stating the outlook of authorities towards marital rape. The main reasons for not criminalizing marital rape in India is that it will destabilize the marriage institution and may work against in many aspects. Certain cases in India speak about such heinous offences, but none of them talk about marital rape.

Here, it must be noted that marital rape and rape are two different offences. Marital rape is more grievous than rape because the former is committed by the husband on his own wife and more than that he even escapes his punishment for such crime. It is to be noted that. "No means No" and the consent cannot be assumed. For marital rape marriage cannot be used as a defense. It's high time that marital rape gets criminalized in India. So that the women in India feel safe and secured in the institution of marriage and her dignity and her self-determination towards her body is protected.

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