

MARITAL RAPE: SITUATION IN INDIA AND NEIGHBOURING COUNTRIES

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ABSTRACT:

Sexual violence is defined as the act of exposing someone to a sexual behaviour without one's consent. Marital Rape solely reflects the perversity of an individual. In fact, it is not just a rape of a women's body, but of her love and her trust as well. Marital rape is a facet of marriage that is currently unaddressed by current legislation. It encompasses a wide range of actions, from caressing to raping. It is the act of having sexual relations with another person without their consent, with the majority of victims being women. The purpose of this research paper is to elucidate the characteristics and the existing legislation that can be utilised as a defence in the instance of marital rape. It is a bitter fact that the theory of Marital Rape has been overlooked for years because of the believes and teachings that promotes men have the right to treat their wives as they desire and the wife must provide or rather fulfil the desire of her husband. The declaration clearly states that, "life on earth is anchored by two pillars: males and females". Regardless of the fact that both men and women should have an equal role in the creation and advancement of civilization, women have been subjected to a great deal of humiliation by men. Marital Rape or just rape is an apt example of the barbarity committed against the dignity of women. India, which is the seventh largest country in the world, is focusing on the prevention and protection of the crimes against women but badly fails to protect a married woman from her husband, seemingly in such a case, is her rapist, not having any strong legal provisions acknowledging Marital Rape. Many countries so far have tried their best in

making and implementing strong unbreakable laws for the protection of women. Over viewing the current scenarios with the growing changes and developments in the marriage, it should be understood that sexual intercourse should be mutually desired by both the parties of the married couple by keeping in mind the violence against women. Otherwise, that should be considered as a sexual assault or violence.

The purpose of this research paper is to explain why Indian law has failed to define marital rape as a crime and the ramifications of this failure.

INTRODUCTION:

"Her friends used to tell her it wasn't rape if the man was her husband. She didn't say anything, but inside, she seethed. She wanted to take knife on their faces." -F.H. Batacan

"ARDHANGINI", a term used for women in India where she is considered as a better half of her husband's soul, and in a true sense we have witnessed men multiply in their lives when they have strong yet supportive companion. Women in all parts of the world have always be facing some or the other form of barbarity like sexual abuse, sexual harassment; some by strangers at workplaces and some by their very own loved ones at their house. In a dedicated relationship like marriage, respect and consent becomes the most important factor where two people tend to commit themselves to spend their whole lifetime together. The patriarchal set of our society has been successful in dragging down the dignity of women in all the aspects be it independence, education, health or in any other field.



Focusing on Marital (spousal) Rape, is similar to any other 'type' of rape in that it involves forcibly unwanted sexual contact between two persons who are married. When a wife or husband is raped by their own partner, it is referred to as marital rape in the legal world. Only a battering rape, a kind of marital rape where in which women in the relationship are subjected to physical and sexual assault in a variety of ways. The wife may be battered during the sexual barbarity, or the rape may occur after a physically violent episode in which the husband attempts to make amends and forces his wife to have sex against her will or an obsessive rape, the most common sort of attack is one that involves cruel torture and/or bizarre sexual practises might be used to commit marital rape. It is a non consensual act of violent perversion done by a husband against his wife in which the wife is tormented physically and sexually.

Our society generally considers that marriage as a gateway to have a free sexual intercourse with women, and her consent is often compromised. It is a bitter fact that the theory of Marital Rape has been overlooked for years because of the believes and teachings that promotes that "men have the right to treat their wives as they wish and the wife must provide or rather fulfil the desire of her husband." A woman loses her right to say NO to her husband just because he is her husband, the same husband whose half soul lies with his wife.

SITUATIONS AND STATISTICS IN INDIA:

Coming straight to the point, we all are aware that a country like India has still not criminalized Marital Rape and still doesn't have any statutes to help to prevent it. We can see the present situation of the women of our country but still we are not able to take sincere efforts to prevent the same.

When it comes to the situation in India, the concept of spousal rape has long piqued public curiosity. In a broad sense, Marital/Spousal Rape is defined as initiating sexual contact with

one's own partner without their consent. The Indian legal system has methodically focused on such heinous crimes as rape, sexual assault, sexual harassment, and sexual abuse, but it has turned a blind eye to the idea of marital rape. Not that there aren't any cases of marital rape in India, but the federal government believes that it would be a slap in the face of marriage institutions, as well as a breach of family values. Marital rape has been criminalised in many forward-thinking countries, and it now has the same legal penalties and statutory standing as rape against anybody else. It is the need of the hour in a country like India to have mandatory legislative criminalization of Spousal Rape with the same statutory status and repercussions as rape.

India being the seventh largest, thriving, multi-cultural, secular country is focusing on the prevention and protection of crime against women but fails badly to protect a married woman from her husband, who apparently in this case, is her rapist. Also, the pace at which the crime rates in India are growing up is highly embarrassing and alarming. It is high time that the judicial system in India makes stringent laws for criminalizing Marital Rape to preserve the dignity of the women. So far the only step taken to control it has been its declaration as a ground for divorce by the Kerala High Court where the bench said, *"Treating wife's body as something owing to husband and committing a sexual act against her will is nothing but marital rape. Right to respect for his or her physical and mental integrity encompass bodily integrity, any disrespect or violation of bodily integrity is a violation of individual autonomy"*¹³⁷. According to the ruling, the framework of divorce legislation must be designed to assist individuals in making decisions about their personal affairs. This framework must provide a platform at many levels that allows people to exercise their freedom of choice. It is past time for our Indian

¹³⁷ Shaju Phillip, Marital Rape a good ground to claim divorce, says Kerala HC, (Aug. 7, 2021 12:41:20 pm), <https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-he-7442347/>

legislators to recognise that marriage is not a licence for the husband to mercilessly rape his wife. The apex court in the case of *Nareshbhai Bharatbhai Desai v. State of Gujarat*¹³⁸, observed that marital rape has not yet been criminalised in our country because the Parliament is concerned that it may undermine the institution of marriage. By submitting fraudulent and frivolous accusations against her husband, an unprincipled wife may use it as a formidable tool or weapon to punish him. The criminal court system, on the other hand, has safeguards in place to detect and investigate fabricated as fraudulent marital claims, and anyone who makes false and malicious accusations can face legal consequences. Because of this anxiety, marital rape cannot be disregarded. Within her marriage, Indian laws grant the right to life for women and liberty, but not to their bodies. Because there is a lawful marriage, Under the Indian Penal Code, a husband who assaults his wife is guilty of a crime but not of rape. Nevertheless, if the same husband pressures his lady to have sexual intercourse, he is guilty of assault but not of rape.

According to Sec.375 of the Indian Penal Code, rape is defined as "sexual intercourse with a woman against her will, without her consent, by compulsion, misrepresentation, or deception, or while she is drunk or deceived, or is of impaired mental state, and in any instance if she is less than 18 years of age." Moreover, Sec.375 of the Indian Penal Code, which defines rape, makes an exception for marital rape by stating, "Sexual Intercourse by a man with his own wife, the wife not being under fifteen years of age, is not a rape." In a country where a woman gets raped in every 16 minutes and the odds of suffering sexual violence of the married women is much higher, the Indian judiciary should take active interest in legalisation and criminalisation of Marital Rape under the Indian Penal Code. In spite of the identity or the age of the victim, the fact that rape has been committed will not change.

*"An analysis of National Family Health Survey (NFHS) 2015-16 data indicates that an estimated 99.1 per cent of sexual violence cases go unreported and that the average Indian women is 17 times more likely to face sexual offence from her husband than from others. In spite of the recent amendments in the criminal law, various laws meant to protect women from domestic violence and sexual assault has largely remained ineffective."*¹³⁹ According to the aforementioned the data and average Indian Married women faces 17 times more sexual torture from her husband than any other person. In India 99.1 per cent of the sexual abuse go unreported.

*"Physically forced her to have sexual intercourse with him even when she did not want to." This is a category of spousal violence which the Indian government records data for. And according to the latest National Family Health Survey (NFHS-4) for 2015-16, 5.4% women have experienced marital rape, under this category.*¹⁴⁰ The form of sexual violence most commonly reported by women was that their husband used physical force to have sexual intercourse when they did not want to," says the survey. As stated above, the data shows the spousal violence recorded by the Indian government in the year 2015-16 which indicates marital rape experienced by women. According to the most recent National Family Health Survey (NFHS-4) for 2015-16, 5.4 percent of women had been victims of marital rape which is the most common kind of sexual abuse.

Even though we commemorate our country's 74th anniversary of independence, our country's women are still not entirely free and autonomous, and they live in constant fear. While the country is celebrating some glorious legal decisions from the Hon'ble Supreme Court, such as the "Aadhaar Card Case" and "Triple

¹³⁹ Anirudh Pratap Singh, The impunity of marital rape, (Dec. 20, 2020 10:37:09 pm), <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>

¹⁴⁰ Anoo Bhuyan, Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims, (Jan.12, 2018), <https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims>

¹³⁸ *Nareshbhai Bharatbhai Desai v. State of Gujarat*, 732 SCC 2018 (India)

Talaq," to name a few, which have laid new foundations for the judiciary, it is a source of concern that the Central Government has expressed its opposition to criminalising marital rape, claiming that doing so would "destabilize the institution of marriage."

INTERNATIONAL ASPECT:

In the International setting, the concept of marital rape has evolved over time. It's the same as in India. Initially, most of the countries around the world did not accept this concept. Earlier Sexual offences were seen as a private crime, a crime against the spouse and father of a woman's property. As a result, the notion that a man can also rape his wife was debunked. When rape was initially constituted a crime against society in the 17th century, it was depicted as a crime that damages a woman's fidelity, which is impossible to reach in a marriage.

Lord Matthew Hale, a British lawyer, emphasized on the importance of assent explicitly in 1736, asserting here which, "*The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*"¹⁴¹. This philosophy has widespread sensation, not because Lord Hale subconsciously influenced on different parts of the globe, but because prejudice is modelled on the control of women's bodies through marriage. Because marital rape laws are pretty recent in most parts of the world, many individuals are unaware of their existence. Numerous different issues stem from the fact that many people are ignorant of the standards and rules, even in countries where marital rape is forbidden. Traditional views about marriage are strongly ingrained in the spiritual awareness of many cultures, and few people are aware that compelling a spouse to have sex is unlawful.

At a period when the country was witnessing the second wave of feminism in the 1970s, Australia was the first common law jurisdiction to pass legislative action in 1976 designating rape in marital relationships a crime against humanity. In 1963, rape was a crime in South Australia, but was not defined by law. Analyzing an important Australian decision, *PGA v. Queen*¹⁴², a man who claimed he couldn't be found guilty of raping his wife since there was no such crime in 1963, lost his appeal to the High Court. In 2012, the South Australian individual, who argued in front of the court, was convicted of raping his wife, with whom he shared a home at the time, in 1963.

Numerous common law countries have eradicated marital rape immunity via legislation since the 1980s. Canada, the United States, New Zealand, Malaysia, Ghana, South Africa, Ireland, and Israel are among these countries. Norway, Sweden, Denmark, the former Soviet Union, and Czechoslovakia are among the Scandinavian and Communist bloc countries that have enacted laws making spouse rape punishable. In 1932, Poland became the first nation to enact legislation making it a punishable offence.

Supreme Court stated that, "*The classification of the law that an act committed against an unmarried girl to become an offence and the same act committed against a married woman not to become an offence is not a reasonable classification.*"¹⁴³ Getting married does not negate the condition of consent, and any non-consensual sexual connection constitutes rape, according to the Court's landmark ruling.

As we examine the United Kingdom, it made marital rape illegal in 1991 after undermining the 'Implied Consent Doctrine'. Because the 'House of Lords' and "The Court of Appeal" both sanctioned the husband for raping his wife and deemed the marriage exemption

¹⁴¹ Kersti Yllo, Marital rape in a global context from 17th century to today, (Nov.13 2017). <https://blog.oup.com/2017/11/marital-rape-global-context/>

¹⁴² 245 C.L.R. 355 (Austl. 2012)

¹⁴³ Shalini Nair, Marital rape a crime in many countries, an exception in many more, (Aug 31 2017, 09:39:06 am), <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>

unenforceable, the notable case of *R v. R of 1991*¹⁴⁴ marked a turning point in United Kingdom rape laws. The aforementioned case is a House of Lords ruling that proclaimed that it is criminal for a husband to rape his wife under English law.

In 1993, the United States of America, as a powerful nation, made marital rape outlawed, and all 50 states followed suit. Prior to that, their laws regarded it as an exemption to the definition of rape, with *Oregon v. Rideout of 1978* becoming the first trial to consider spousal rape as a crime. Lord Matthew Hale's view of the United States as a British colony was adopted at first, but it was successfully discarded later. The maximum penalty is a ten-year prison sentence in the US. Even in Canada, we can find similar legislation against marital rape, since the Canadian Sexual Assault Statute was revised in 1983 to include the criminality of sexual assault against spouse, indicating that marital rape was criminalised in Canada before it was criminalised in the United States.

In Indonesia, where Islamic law applies, marital rape is a contentious issue. For the majority of Indonesians, rape in the marriage institution is inconceivable, yet many others believe it may happen. Since it is already considered a form of rape, those who readily accept the concept demand that the Indonesian government should classify marital rape as a crime because the husband is bound by the need to treat his wife well, it is impossible to envisage marital rape occurring in Muslim families. In India, the question of marital rape has been a topic of academic debate among Muslim jurists.

It is common knowledge that Western countries are by far the most affluent in the world. The developing countries of Asia, Africa, and the Middle East look to these countries for guidance in their growth, with India's constitution drawing heavily on the constitutions of these countries. The constitution, as well as other pieces of the legislation, are based on modern-day laws. As a result, we can see the impact of the Western

world on the surviving population, which is a good sign if we return to our original topic because most Western countries have strong regulations protecting women's rights, including outright restrictions on spousal rape.

CONCLUSION:

The provision for marital rape establishes an odd contrast amongst rape of a married and unmarried girl. It is past time for the Legislature to explore whether or not non-consensual sexual intercourse between husband and wife can be considered rape. This horrendous act must not be neglected solely because it poses a threat to the institution of marriage. Matrimony is a holy and mystical tie between two individuals, which is why one believes his or her partner to be his or her better half. It's a nightmare to contemplate how traumatic a marriage may be if a female is accustomed to such abusive behaviour. Even in marriage, a female should be able to defend her bodily integrity. Even if he is the spouse of the lady he has raped, a rapist should indeed be treated as a rapist only.

In India, we have legislation such as The Protection of Women from Domestic Violence Act, 2005; The Immoral Traffic (Prevention) Act, 1956; The Sexual Harassment of Women at Workplace (PREVENTION, PROHIBITION, and REDRESSAL) Act, 2013; The Dowry Prohibition Act, 1961 (Amended in 1986); The Criminal Law (Amendment) Act, 2013; The Indecent Representation of Women (Prohibition) Act, 1986; The Commission of Sati (Prevention) Act, 1987 (3 of 1988); Protection of Women from Domestic Violence Act, 2005 to name a few, are premised on women and have had some significant progress in reducing violence against them, but not completely, and hence have a lot of room for improvement. However after enacting several laws to address specific issues, we still have not done enough, as this is what sets us especially when it comes to women's safeguarding. It is not only essential to validate laws, but also to assure that they are properly implemented.

¹⁴⁴ RVR, 12, UKHL, (1991)