

LEGAL EYE PARTNERS

ARTICLE

Criminalisation of Marital Rape

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Abstract

This article analyses the unconstitutionality of marital rape and the lack of remedies to the victims of this filthy act. The concept of marital rape has been neglected and undermined for centuries due to the outdated notions of the society and gender biasness. In India, currently there aren't any suffice remedies or methods to protect a married women from the cruelty of her husband concerning any sexual acts or intercourses. Lack of acknowledgment provokes the perpetrators aka the husbands and suppresses the voices of their spouses.

In this research paper, different perspectives and ideologies have been considered and have been portrayed in an intelligible manner. It's high time to recognize the importance of condemning marital rape and rectifying the immoral societal norms which have been shaping the decisions and protecting the perpetrators.

Keywords – gender equality, societal norms, private sphere, harassment, lack of consent, outdated notions, tools for harassment.

Introduction

Section 375 of Indian penal code, 1860; defines rape as:¹

A man is said to commit "rape" if he--

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or²

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

¹ Subs. by Act 43 of 1983, s. 3, for the heading "*Of rape*" and ss. 375 and 376.

² *ibid*

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person

Under the falling circumstances;

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 eighteen years of age.
7. When she is unable to communicate consent.³

What is Consent?

Consent means an unequivocal voluntary agreement when the woman, by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.⁴

The above definition clarifies the subject of rape and subsequently the importance of consent in sexual intercourses or sexual acts. It is thoroughly in the hands of the victim to prove the lack of consent withdrawn while performing the sexual act. But the actual problem begins with the exception in the definition of rape.

³ Subs. by Act 43 of 1983, s. 3, for the heading "*Of rape*" and ss. 375 and 376

⁴ *ibid*

The IPC states an exception for rape which is stated in Exception clause 2 of Sec 375; “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”.⁵ This clause in full view of people recognizes forced sex as legitimate and sees no crime in it. This particular exception is the root cause of justifying rape and providing defense on a mere marital relation between the victim and the perpetrator.

The World’s purview on Marital rape

Marital rape is considered as a repulsive offence in many places with the rise of women empowerment movements in the western part of the world. Women gradually acquired positions equal to men and demanded for their rights and dignity to live at par with the previously called “master gender” the men. The women began to live with equal responsibilities and opportunities in life. Snapping back, Nearly 150 countries have condemned marital rape and supposes penalties and grave punishment for such acts.⁶ Women in these countries are provided with adequate relief and law to tackle such instances beforehand.

India’s Current situation in dealing with marital rape

In India, Marriage is seen as a sacrament, a sacred ritual and a duty towards the society. And marriage creates a private sphere within which the couples are protected from the interference of law in personal matters until decided to escort through the gates of the court. If there arises issues of consent in marriage no such provisions are given to a women to impede her husband from forcing any sexual acts towards her. It is a fabricated statement that a legal marriage presupposes consent for sexual intercourse or acts.

Sexual acts between a married couples are considered to be in a private domain and therefore the crimes committed in such private domain are shielded by the “PRIVATE” term protected layer formed by the societal forum. Which eventually deprives the victims from ascertaining remedies and suppresses their voice. And due to such instances not being highlighted at forefront people deliberately commit such heinous crimes and escape from the eyes of the law using the ‘marital play card’. This results in increase of marital rape in the country. In

⁵ Subs. by Act 13 of 2013, s. 9, for sections 375, 376, 376A, 376B, 376C and 376D (w.e.f. 03-02-2013).

⁶ <https://www.legalserviceindia.com/legal/article-7872-marital-rape-laws-an-international-overview.html>

India, there are no such provisions protecting the rights of the women from this filthy crime, as other crimes in marriage are protected by the Protection of Women from Domestic Violence Act (PWDVA) 2005 and other such acts. But there are no specific remedies for rape within the boundaries of a marriage.

Notions that legitimized Marital Rape

1. The woman is subservient to her husband.

Women were considered to be subordinate in authority in front of men. And this ideology created this immoral notion of men being masters over women in earlier times.⁷

2. Women are considered to merge with husbands after marriage.

These notions are outdated and barely exist in today's time but made an explicit impact during then. Women were considered to be mere assistance to men and have no individuality.

3. The third notion stated that when a man and a woman tie knots, a civil contract is born out of it which supposes consent to sexual intercourse as its defining element. And is taken into account as soon as the marriage is done.⁸

4. The last notion says that the law must not enter in the marital relationships as it is a private sphere.

Decision of the Body

In the year 2000, The Law Commission rejected an argument stating there was “no reason for marital rape to be shielded alone when other instances of violence were already criminalized”. The commission stated that criminalizing marital rape would be “excessive interference with the institution of marriage”.⁹

⁷ <https://docs.manupatra.in/newslines/articles/Upload/8787A55C-D93F-4589-8A68-A9A032AFAF0E.pdf>

⁸ ibid

⁹ <https://www.theindiaforum.in/law/criminalising-marital-rape-india#>

The narrative was then brought up in 2012, a committee formed by J.S. Verma, a retired Judge of the Supreme. The Verma committee opposed the outdated notion of married women being the property of their husbands which automated the latter's sexual needs. And recommended the Criminalisation of marital rape. Stating that "marital relationship is not a valid defense to register consent of a women". But the Criminal Law [Amendment] Bill 2012, which came after the committee's report did not have any provision to criminalize marital rape. The body declined any added provisions justifying that "the entire family system will be under great stress". And claimed there to be enough remedies to protect the rights of the women.

Then, the Delhi High Court in a judgement stated "forced sex within a marriage could not be considered rape". The IPC does not recognize that it is a crime for a husband to rape his wife.

On October 17 2017, The Supreme Court of India, in [Independent thought V. Union of India](#) stated that sexual intercourse between a man and his wife aged between 15 to 18 years is rape. The apex body drove pass the exception and refrained from making any comments instead it highlighted the ill effects of the practice of child marriage.¹⁰

In May 2022, the Delhi High Court in [RTI Foundation V. Union of India](#) gave a split verdict on criminalizing marital rape. Justice Rajiv Shakder rendered existing law as unconstitutional. He stated that "Right to consent forms the core right of women's right to life and liberty". While, Justice C. Harishanker rejected the plea to criminalise marital rape stating "requires consideration of various aspects including social, cultural and legal". The dissent was made on the narrative of protecting the sanctity of marriage and claims of already existing remedies which are adequate to work in favor of women.¹¹

Marital Rape as a Tool of Harassment

The Delhi High Court in a case stated that criminalizing marital rape could become a potential tool for harassing innocent individuals. As it is solely on the part of the victim to prove the withdrawal of consent, the husband in this case would be helpless if the fact is

¹⁰ <https://indiankanoon.org/doc/87705010/> [independent thought v Union of India]
Citation: WRIT PETITION (CIVIL) NO. 382 OF 2013

¹¹ <https://indiankanoon.org/doc/102185307/> [RTI Foundation V Union Of India]
W.P.(C) 284/2015 & CM Nos.54525-26/2018

fabricated by the spouse. It would result in multiplicity in legal proceedings and cause distress to the innocent party. There are pros and cons of everything and similarly in this case too, the body stated that it required a more 'holistic view' while reviewing marital rape. The husband could be falsely depicted as a perpetrator for egoistic interest. This could be a tool to coerce the husband to agree in any terms or threaten to accuse him of the following in a matter of disagreement.

Conclusion

India, a country of a billion people, a country that is full of diversities, a country that proves its existence beyond the realms, a country of profound knowledge keepers, the birthplace of mighty warriors and peacekeepers, and a country whose history is eternal. But also a country which is failing to protect the right and dignity of women in order to protect the mere sanctity of marriage and to uphold outdated societal norms. It's an alarming time to resurface the issue of marital rape and provide with sufficient provision and remedies for the victims and laws to prevent the perpetration of such heinous acts. The law which would be enacted should also safeguard innocent men being framed falsely by their spouses. There should be an intelligible law regarding this cause so that no further ambiguity is created, the law should prevail over all odd societal norms.

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