

## **CRITICAL ANALYSIS ON VALIDITY OF CRIMINALIZATION OF MARITAL RAPE**

**R. Ammu M.L**

*Assistant Professor of Law, Government Law College, Coimbatore, India*

### **ABSTRACT**

*In India, marriage is considered as a sacred relationship between spouses built on the basic foundations of trust and consent. It is said that in a marriage the couple vows to keep each other happy, to support, respect and treat each other equally. But the Indian patriarchal system doesn't treat women as equal to men. The society presumes that women are subservient to men and thus can be treated as per the whim and fancy of their husbands. In a marriage, women are meted out to various forms of violence and marital rape is one such heart-wrenching crime negating the concept of equality and consent. The term "marital rape" refers to rape committed by the victim's spouse. The Indian Legal System excludes from its ambit rape committed by a husband with his wife, wife being more than 15 years of age. Exception 2 of Section 375 IPC shields these criminals from being punished for this heinous crime. This paper attempts to peruse the concept of marital rape and the justifications given in its support. It further explores the evolution of the marital rape exception clause along with its current status and sheds light on the legal position of marital rape in India. Stating the types and effects of this heinous crime on women, it concludes in support of the criminalization of marital rape exception clause by suggesting amendments to the criminal law for penalizing this atrocious crime.*

**KEYWORDS:** *Marital Rape, Criminalization, Marital Exemption, Consent*

---

### **Article History**

**Received: 19 Oct 2019 | Revised: 24 Oct 2019 | Accepted: 31 Oct 2019**

---

### **INTRODUCTION**

Indian society has a patriarchal structure where women are treated as chattels and numerous horrifying crimes scarring their dignity and piercing their soul are committed on a daily basis. One such crime sheltered by the India Legislative system is marital rape. It refers to "unwanted sexual intercourse committed by a man with his wife through force, threat of force, or physical violence, or when she is unable to consent." It is a non-consensual act of violent perversion committed by a husband against his wife in which she is physically and sexually abused. Exception 2 of Section 375 of Indian Penal Code, 1860 states- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. It gives immunity to a man having forceful sexual intercourse with his wife, when she is not below fifteen years of age. The basis of this exception is to protect the institution of marriage which appears to be arbitrary in nature as this is a despicable crime that disrupts the basic pillars of trust, confidence and respect in the institution of marriage. The non-criminalization of this offence has disproportionately impacted women. Although many countries have criminalised marital rape, India is one among those 36 countries which hasn't penalised this atrocious crime yet. India along with other 35 countries base its philosophy for non-criminalization of marital rape on the grounds of implied consent, potential for misuse and excessive interference with marital relationship. It is presumed that after marriage there is an irrevocable

consent between the husband and the wife leaving no ground for the wife to seek remedy for this shameful act committed upon her. Further, it is said that criminalisation of marital rape would lead to interference in the matrimonial relationship between the husband and the wife and would further tarnish the sanctity of marriage. Criminalization of marital rape is further looked upon as a tool for misuse by the women as there are no grounds which proves the innocence of the husbands when they are falsely implicated.<sup>1</sup>

### **ORIGIN OF MARITAL RAPE**

In 1860, when the IPC was being drafted, married women were not accorded equal rights as compared to their partner. India being a colony of the British, all the laws enacted during the British colonial rule were deeply persuaded by Victorian norms. One such law was the marital exception clause which did not punish a husband who committed rape with his own wife, wife not being less than 10 years of age. This marital exception clause was drafted based on the Victorian patriarchal norms that neither gave equal rights to men and women nor allowed married women to own property. In 1890, a brutal incident took place in the Eastern region of India. Phulmoni Dasi, an 11 years old girl died on the first night after her marriage to a 30-year-old man called Hari Mohan Mait. The cause of her death was excessive bleeding due to ruptured vagina. Her husband was charged under sections 304, 304A, 325 and 338 IPC. The accused was convicted under Section 338 and sentenced to 1 year imprisonment and was acquitted from the other three charges. The jury stated that as his minor wife was of legal age and wedded to her husband, this case fell under Exception 2 of Section 375 IPC and hence cannot be treated as rape.<sup>2</sup>

### **IMPACTS OF MARITAL RAPE**

Contrary to the general belief, marital rape has long term implications on the victim. It scares not only the body of the victim but also her soul, shattering it into millions of pieces over and over again. Marital rape has numerous emotional, physical and psychological impacts on the victim. The psychological impacts include self-guilt, depression, lower self-esteem, self-hatred, hatred towards opposite gender, improper diet, lack of sleep, bad eating habits, PTSD, fear of intimate relationship and rape trauma syndrome. Rape trauma syndrome (RTS) is a type of PTSD that affects victims of rape (PTSD). In this, victims of sexual assault exhibit predictable and consistent behaviours, thoughts, and feelings. Sexual assault victims may feel one, some, or all of the RTS symptoms, which can last for months or years after the rape or assault. In the days, weeks, and months following a traumatic experience, a set of feelings, thoughts, and behaviours emerge. Anxiety, mood swings, shame, nightmares, withdrawal, and disorientation are some of the most exhibited symptoms of RTS.<sup>3</sup>

The most traumatizing truth about marital rape is that it is not even looked upon as an offence. The lawmakers need to understand that forced sexual intercourse resulting in physical injury is not the only form of rape but sexual intercourse under the pretext of threat is also a form of rape. In the case of RTI Foundation v Union of India, the court stated that: "Force is not a pre-condition for rape. A man can put his wife under financial duress to force her to have sex. It further stated that marriage does not always imply that the wife consents to physical relations with her husband." These incidents have a negative impact on the mental well-being of the victim thereby causing psychological trauma.

<sup>1</sup> Shaju Philip, Marital rape a good ground to claim divorce, says Kerala HC, INDIAN EXPRESS <https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/>.

<sup>2</sup> Manasvita Tejsi & Mridull Thaplu, Marital Rape: Need for its Criminalisation in India, 2.1 VSLR 242, 247

Marital rape has severe physical impacts. Painful intercourse, vaginal pain during intercourse, bruising, bladder infections, vaginal haemorrhage, menstrual cycle delays, miscarriages, stillbirths, and sexually transmitted infections are all occurrences of this offence. Thus, there are a lot of negative impacts on the physical and mental well-being of women when they are raped by their spouses and still have to live under the same roof as them. It scares them for lifetime and non-criminalisation of such a disgraceful offence forces women to accept such inhuman treatment as their fate and submit themselves to the desires of their husbands.<sup>4</sup>

### **Legal Perspective of Marital Rape in India**

Marital rape has yet not been criminalized in India. Perpetrators of this immoral act, commit this heinous crime in the garb of implied consent due to matrimonial relationship and roam scot free. Section 375 IPC, 1860 mentions marital rape as an exception. It reads: Marital rape is considered as rape and is penalised either when the wife is below 15 years of age or in cases where the spouses have been judicially separated and the husband commits the offence of raping his wife. However, the Indian Penal Code, 1860 does not provide any security or remedy in cases where the wife is above 15 years of age.

According to Section 376AB, IPC, when the wife is below 12 years of age, the offence is punishable with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life imprisonment with fine or death penalty. As per Section 376(3), IPC, when the wife is between 12 to 16 years of age, the offence is punishable with rigorous imprisonment for not less than twenty years, but which may extend to imprisonment for life, and shall also be liable to fine and Section 376B, IPC, punishes the spouse(husband) for raping his judicially separated wife with imprisonment for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. So far, the only remedy available to women is under Section 498A of Indian Penal Code, 1860 which talks about cruelty meted out to women by her husband or his relative. Such offenders are punished with imprisonment for a term which may extend to three years and fine.<sup>5</sup>

### **Landmark Decisions on Marital Rape**

- Independent Thought v Union of India

Sexual intercourse with a girl below 18 years is rape regardless of whether she is married or not. The exception carved out in IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child.

- Nimeshbhai Bharatbhai Desai v State of Gujarat

While examining the laws related to sexual offences, it was noted that husbands need to be reminded that marriage is not a licence to rape their wives. By virtue of marriage, a husband does not own his wife's body, and she does not become an object of ownership in any way. She does not give up her human right to exclusive autonomy over her own body by marrying, and she is therefore perfectly within her rights to give or withhold her permission to marital coitus at any time. Marital rape is a heinous crime that has entirely shattered people's trust and belief in the institution of marriage.

---

<sup>4</sup> ShambhaviPandey, Marital Rape: A crime, not criminalised, 1 IJLMH 1, 6 (2018).

<sup>5</sup> ArianeResnick, What is Rape Trauma Syndrome?, VERY WELL MIND

- State of Haryana v. Janak Singh

Rape is an affront to womanhood. It violates a woman's dignity, diminishes her honour, dwarfs her personality and undermines her self-esteem. It is a violation of her right to life as guaranteed by Article 21 of the Indian Constitution.

- State of Punjab v. Ramdev Singh

Sexual violence is an illegal invasion on the right to privacy and sanctity of a female. It is a serious affront to her supreme honour, as well as an insult to her self-esteem and dignity. It degrades and humiliates the victim, destroys a woman's entire psychology, and sends her into a deep emotional crisis.<sup>6</sup>

### **TYPES OF MARITAL RAPE**

The following three kinds of marital rape, generally prevalent in the society;

- Battering rape: Women in this type of marital rape are subjected to physical and sexual violence in a variety of ways. Some cases involve the wife being battered during the sexual violence, or the rape occurring after a physical violent episode in which the husband wants to make amends and coerces his wife to have sex against her
- Force only rape: Husbands employ only as much force as is necessary to coerce their women in this sort of marital rape. Battering may not be a trait in such instances, and women who refuse sexual intercourse are more likely to be
- Obsessive rape: Assaults involving horrific torture and/or deviant sexual practises are the most typical form of obsessive rape. Sadistic rape is another term for this form of.

### **Way Forward**

Following changes should be made in order to eradicate this menace of marital rape:

- Marital rape should be penalised under Indian Penal Code,
- Gender neutral laws should be enacted in order to prevent women from misusing the
- The marital rape exception clause should be deleted and marital rape should be treated at par with the offence of rape. Hence, it should be covered under S. 376, IPC, 1860 imposing similar punishments to either of the offences.
- Women must be educated to raise their voices against this atrocious crime rather than submitting to it due to societal
- Marital rape should be made a valid ground for divorce under all personal

In a hearing for an appeal of a husband against divorce, the Hon'ble Kerala High Court in 2021 held that: "Marital rape is a valid reason for divorce. If the law does not recognise marital rape as a criminal offence, that does not prevent the court from recognising it as a form of cruelty for granting divorce. The court went on to say that treating a wife's body as though it belonged to her husband and performing sexual acts against her will constitute marital rape."

---

<sup>6</sup> INDIAN PENAL CODE, 1860, S. 376AB, No. 45, Acts of Parliament, 1860 (India).

## CONCLUSION

Despite the fact that India is expanding in all spheres and establishing itself on a global scale, the laws that govern the Indian people are outdated. The laws fail to provide adequate protection for women, and as previously stated, women are still treated as the property of their husbands, with full rights to exploit her and no recourse available to her. Although, a wife may bring a criminal assault or matrimonial relief action against her husband's non-consensual act of sexual intercourse, the need of the hour is the incorporation of the principle of marital rape liability into our penal laws. All wives, not just child brides, require legal protection from rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person must be recognized. It has to be understood that a wife is not a chattel and a husband having sexual intercourse with his wife is not merely using a property, he is fulfilling a marital duty with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing his wife to engage in a sexual act without her full and free consent. Total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized.

## REFERENCES

1. *INDIAN PENAL CODE, 1860, No. 45, Acts of parliament, 1860 (India).*
2. *Law Commission of India, Indian Penal Code, Report No.42, 2, (June 1971), available at <https://lawcommissionofindia.nic.in/1-50/Report42.pdf>*
3. *The daily star, <https://www.thedailystar.net/opinion/news/rape-child-bride-laws-locked-time-warp-1996057>.*
4. *The asia dialogue, <https://theasiadialogue.com/2020/03/08/marital-rape-no-excuse-for-the-inexcusable/>*
5. *Age of Consent Bill, 1891*
6. *Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013).*
7. *Mageshwari Deswal, Marital Rape: Ubiquitous yet obscure, TIMES OF INDIA <https://timesofindia.indiatimes.com/blogs/legally-speaking/marital-rape-ubiquitous-yet-obscure/>.*
8. *Tanish Gupta, Marital Rape as a ground for divorce, 4 INT. J. LAW MANAG 793, 796-797*
9. *Writ Petition (Civil) 284 of 2015*
10. *Akshita Saxena, Marital Rape- Striking off exception to S. 375 IPC won't amount to court creating a new offence: Amicus to Delhi HC, LIVE LAW*
11. *Dr. Ramesh Kumar & Vinayaka Raina, Societal issues relating to marital rape in India: An overview, 32(3)*
12. *Janelle N. Robinson, Marital Rape perception and impact of force, CUNY ACADEMIC WORKS <https://academicworks.cuny.edu>*

