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## NEED FOR CRIMINALISATION OF MARITAL RAPE

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Madhusneha Barman & Tanya Sharma, Manipal University Jaipur

### Introduction

When we think of rape and sexual violence, occurring under normal circumstances, we would refer these crimes as heinous. But there is this other form of crime which is not even considered as a crime but a family matter. This crime is Marital Rape. According to the National Crime Records Bureau (NCRB), in 2019, about 70% of women in India are victims of domestic violence, and one such manifestation of domestic violence is Marital Rape.

The act of Marital rape involves forcing the spouse to get into sexual intercourse with having proper consent. Marital rape has been impeached in more than 100 countries. 36 countries in the world have not criminalized marital rape yet and India is one of them. This is one aspect that says why the women of the country are not safe. While many marital rape cases get documented in hospitals, but very rare cases like this actually get registered. There are many NGO's that have founded cases of sexual violence from the emergency room of hospitals. When cases like these are reported in the police station, it is considered to be a matter between husband and wife. An analysis of National Family Health Survey (NFHS) 2015-16 data indicates that an estimated 99.1 % sexual violence cases go unreported.

Needless to say there has been recent amendments in the criminal law, out of which various laws meant to protect women from domestic violence and sexual assault have largely remained ineffective. It is high time that marital rape gets criminalized so that the culprits are not safeguarded and the victims are not endangered.

### History

Marital rape is the act of sexual intercourse that occurs between spouses without the consent of one of the partners. It has been recognized as a crime in most parts of the world, but this was not always the case.

Historically, the idea that a husband could rape his wife was not recognized by law, as marriage

was seen as a contract in which the woman was obliged to provide sexual access to her husband. This notion was known as the "marital exemption," which exempted husbands from being charged with rape if the victim was their wife.

The recognition of marital rape as a crime has been a slow and gradual process. In the United States, the first state to criminalize marital rape was South Dakota in 1975. However, it was not until the 1990s that all 50 states criminalized the act.

Similarly, in the United Kingdom, marital rape was not considered a crime until 1991, when the House of Lords ruled that a husband could be charged with raping his wife.

Even today, marital rape is not recognized as a crime in all parts of the world, and in some countries, it may be legal or only considered a crime under certain circumstances. The recognition and criminalization of marital rape are ongoing efforts in the fight for gender equality and the protection of human rights.

### **Laws related to marital rape in India**

Marital rape was not considered a criminal offense in India until recently. However, the laws regarding marital rape have evolved over time.

The Indian Penal Code (IPC) did not criminalize marital rape until 2013, when Section 375 of the IPC was amended to recognize that non-consensual sexual intercourse with one's spouse is a criminal offense. However, an exception was made in Section 375(2) of the IPC which stated that sexual intercourse by a man with his own wife, who is over 18 years of age, is not rape, if the wife consents to it. This exception was criticized by many as being discriminatory against women and denying them the right to bodily autonomy within their own marriages.

In 2017, a petition was filed in the Delhi High Court challenging the exception to Section 375(2) of the IPC. The Court asked the central government to clarify its stand on the issue. The government stated that marital rape cannot be criminalized in India as it could be misused by women. This statement was met with widespread criticism.

Currently, India does not have a specific law that criminalizes marital rape. However, under the Protection of Women from Domestic Violence Act, 2005, a wife can seek protection and

relief from the court if she is subjected to any form of physical, sexual, emotional, or economic abuse by her husband.

The issue of marital rape remains a highly debated and contested topic in India, with many women's rights activists and organizations advocating for the criminalization of marital rape.

### **What do these laws violate**

#### **Dignity of the women**

Marital rape is the act of non-consensual sexual intercourse by a spouse with their partner. It is a form of sexual violence that violates the autonomy, dignity, and bodily integrity of the victim. Many countries have laws that criminalize marital rape, but unfortunately, there are still many countries where such laws either do not exist or have significant limitations.

The right to live with human dignity is a fundamental human right that is protected by international human rights law. It encompasses the right to bodily integrity, privacy, and autonomy. When laws related to marital rape are inadequate or nonexistent, it can result in the violation of this right.

In situations where marital rape is not criminalized, victims may be forced to endure sexual violence within their marriage without any legal protection or recourse. This can lead to physical and psychological harm, trauma, and a loss of dignity. Victims may also be forced to remain in an abusive marriage, which can further perpetuate the violation of their human rights.

Even in countries where marital rape is criminalized, laws may have significant limitations, such as narrow definitions of rape, exceptions for marital relationships, or inadequate penalties for perpetrators. These limitations can also lead to the violation of the right to live with human dignity for victims of marital rape.

Overall, laws related to marital rape are crucial in protecting the human rights of victims and upholding the right to live with human dignity.

#### **Sexual privacy of the women**

Laws related to marital rape, or lack thereof, can violate the sexual privacy of a woman in several ways.

Firstly, in many countries, marital rape is not recognized as a crime or is not criminalized to the same degree as other forms of rape. This means that women may not have legal recourse if their spouse forces them to engage in sexual activity against their will. This lack of legal protection can leave women feeling helpless, violated, and without control over their own bodies.

Secondly, even in countries where marital rape is criminalized, the enforcement of these laws can be weak or non-existent. This can result in a situation where women are aware of their legal rights but are unable to exercise them due to societal and cultural pressures, lack of support from law enforcement agencies or family members, and fear of retaliation from their spouse.

Finally, the existence of laws that allow for marital rape can send a message to society that it is acceptable for men to exert control over their wives' bodies and that women do not have a right to sexual privacy within marriage. This can perpetuate harmful gender norms and contribute to a culture of violence against women.

In all of these ways, laws related to marital rape can violate a woman's sexual privacy and undermine her fundamental human rights.

### **Bodily self-determination**

Marital rape violates a woman's right to bodily self-determination because it involves non-consensual sexual intercourse between spouses. Bodily self-determination refers to the right of an individual to control their own body and make decisions about what happens to it. In the case of marital rape, the woman is not given the opportunity to exercise this right, as her body is being used without her consent.

Marriage is not a license for a husband to have sex with his wife without her consent. Consent is a fundamental principle of sexual autonomy and bodily self-determination. When a woman is forced or coerced into sexual activity by her husband, her right to make decisions about her own body is being violated.

Furthermore, marital rape can also have serious physical and emotional consequences for the woman, including injury, trauma, and a loss of trust in her spouse. These consequences further limit her ability to exercise her right to bodily self-determination.

In conclusion, marital rape violates a woman's fundamental human right to bodily self-determination, as it denies her the ability to control what happens to her body and make decisions about her own sexuality.

### **Why is Marital rape still not a crime in India**

Despite the existence of laws against rape in India, marital rape is still not recognized as a crime.

There are several reasons why marital rape is not criminalized in India. One of the main reasons is the patriarchal mindset that prevails in Indian society, where women are often seen as subordinate to men and their consent is not given much importance. This mindset extends to the legal system, where laws have traditionally favored men and marriage has been considered to be a sacred institution.

Another reason is the lack of awareness and understanding of the issue. Many people in India still believe that a wife is duty-bound to have sex with her husband, regardless of whether she consents or not. This makes it difficult to create laws and policies that address the issue of marital rape.

There have been efforts to criminalize marital rape in India, but progress has been slow. The government and the legal system need to recognize that marital rape is a violation of human rights and take steps to ensure that perpetrators are punished. This will require changes in attitudes and mindsets, as well as a commitment to justice for all victims of sexual violence, regardless of their marital status.

### **Judicial Interpretation**

In India, there is no specific law that criminalizes marital rape. However, there have been several judicial interpretations and judgments that have recognized that non-consensual sexual intercourse within marriage is a form of violence and is a violation of a woman's fundamental right to life and personal liberty.

In 2017, the Delhi High Court observed that the exception to Section 375 of the Indian Penal Code (IPC), which provides that sexual intercourse by a man with his own wife, who is not

under 18 years of age, is not rape, violates a woman's fundamental right to life and personal liberty. The court held that the exception is unconstitutional and should be read down.

Similarly, in 2019, the Rajasthan High Court observed that the law should be changed to include marital rape as a criminal offense. The court held that the right to bodily integrity and autonomy includes the right to make decisions about one's own sexual life, and that a woman cannot be forced to have sexual intercourse against her will, even if she is married.

These judgments reflect a growing recognition of the need to protect women from all forms of sexual violence, including within marriage. While there is still a long way to go in terms of legal reform and changing societal attitudes, these judicial interpretations represent important steps towards recognizing and addressing the issue of marital rape in India.

### **Status of marital rape in different countries**

The legal status of marital rape varies widely across different countries. Here is a brief overview:

- In some countries, marital rape is explicitly criminalized and is treated as a serious offense. These countries include Canada, Australia, New Zealand, Israel, Sweden, Norway, Denmark, France, Germany, and the United States, among others.
- In other countries, marital rape is not explicitly criminalized, but may be prosecuted under other laws, such as domestic violence or assault. These countries include the United Kingdom, Spain, Italy, Portugal, Belgium, the Netherlands, Greece, and Ireland, among others.
- In some countries, marital rape is not recognized as a crime at all. These countries include India, Pakistan, Nigeria, Egypt, Saudi Arabia, and many other countries in the Middle East and Africa.

It is important to note that even in countries where marital rape is criminalized, there may still be significant cultural and social barriers to reporting and prosecuting these crimes. As a result, many cases of marital rape go unreported and unpunished.

## Developments related to marital rape

For many years, the legal system in various countries did not recognize marital rape as a crime, as the traditional view was that a spouse could not legally rape their partner.

However, in recent years, there has been a growing recognition of the harm and trauma caused by marital rape. Many countries have taken steps to update their laws to criminalize marital rape and provide legal protection to victims.

Here are some examples of legal developments related to marital rape:

1. United States: In the United States, marital rape was criminalized in all 50 states by 1993. However, there are still some states that have legal loopholes that allow perpetrators to avoid prosecution for marital rape in certain circumstances.
2. India: Marital rape is not currently recognized as a criminal offense in India. There have been ongoing efforts by activists and lawmakers to change this, but progress has been slow due to cultural and social attitudes that view marital rape as a private matter.
3. United Kingdom: Marital rape was criminalized in the United Kingdom in 1991. However, there have been criticisms of the legal system's handling of marital rape cases, including low conviction rates and a lack of understanding among police and prosecutors about the nature of this crime.
4. Australia: Marital rape was criminalized in Australia in the 1980s and 1990s. However, there have been ongoing debates about the need for further legal reforms to better protect victims of domestic violence, including those who experience marital rape.

Overall, while progress has been made in many countries to recognize and criminalize marital rape, there is still much work to be done to ensure that victims of this crime receive the support and justice they deserve.

## Independent Thought v. Union of India<sup>1</sup>:

- The Supreme Court held that sexual intercourse with a minor wife, even if it is within

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<sup>1</sup> [2017] 10 SCC 800, AIR 2017 SC 4904

a marital relationship, constitutes rape under the Indian Penal Code.

- The case was brought by an organization called Independent Thought, which challenged the exception to rape under the Indian Penal Code that allowed sexual intercourse with a wife who is above the age of 15 years, even if she is a minor. The organization argued that this exception violated the fundamental rights of minor girls and was inconsistent with international conventions and Indian constitutional principles.
- The Supreme Court agreed with Independent Thought and struck down the exception to rape in the Indian Penal Code, stating that it was arbitrary and discriminatory. The court held that sexual intercourse with a minor wife, even if she is a consenting party, amounts to rape under the Indian Penal Code and is punishable by law.
- This landmark judgment marked a significant step forward in recognizing the rights of minor girls and addressing the issue of child marriage in India. It also highlighted the importance of challenging discriminatory laws and practices that perpetuate gender-based violence and discrimination.

#### **K.S. Puttaswamy v. Union of India (2017)<sup>2</sup>:**

- It is a landmark judgment by the Indian Supreme Court that recognized the right to privacy as a fundamental right under the Indian Constitution.
- The case was brought by a group of petitioners, including K. S. Puttaswamy, a former judge, who challenged the constitutionality of the Aadhaar Act, which mandated the use of a biometric-based identity system for various government services. The petitioners argued that the act violated their right to privacy, which they claimed was an inherent part of their fundamental rights under the Indian Constitution.
- The Supreme Court agreed with the petitioners and held that the right to privacy is a fundamental right under the Indian Constitution, protected by Articles 14, 19, and 21 of the Constitution. The court stated that privacy is essential for the protection of

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<sup>2</sup> (2017) 10 SCC 1, AIR 2017 SC 4161



personal dignity, autonomy, and liberty, and that it is necessary for the exercise of other fundamental rights.

- This judgment has had significant implications for various areas of law in India, including the right to privacy, data protection, and surveillance. It has also been cited in subsequent cases related to sexual violence within marital relationships, as it emphasizes the importance of protecting an individual's bodily integrity and autonomy.
- Overall, *K. S. Puttaswamy v. Union of India* (2017) is a significant judgment that has helped to strengthen the protection of fundamental rights in India and has highlighted the importance of privacy and autonomy in the context of individual dignity and liberty.

#### **State of Maharashtra v. Madhukar Narayan Mardikar<sup>3</sup> (1991):**

- It is a landmark case in India that addressed the issue of marital rape.
- In this case, the accused, Madhukar Narayan Mardikar, was charged with rape under Section 376 of the Indian Penal Code for having sexual intercourse with his wife without her consent. The accused argued that since he was married to the victim, he had the right to have sexual intercourse with her whenever he wanted.
- The Bombay High Court rejected the accused's argument and held that sexual intercourse without the wife's consent would amount to rape, even if the parties are married. The court stated that marriage does not give a husband an unconditional right to sexual intercourse with his wife and that the wife has the right to refuse sexual intercourse.
- The court also emphasized the importance of consent in sexual relationships and held that sexual intercourse without the wife's consent would constitute an offense under Section 375 of the Indian Penal Code.
- Overall, *State of Maharashtra v. Madhukar Narayan Mardikar* (1991) was a significant case that recognized the importance of consent in marital relationships and highlighted the need to address the issue of sexual violence within marital relationships in India.

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<sup>3</sup> AIR 1991 SC 207, (1991) 1 SCC 57

The judgment has been cited in subsequent cases related to marital rape and has helped to lay the groundwork for further legal reforms and advocacy efforts to address this issue in India

## **Conclusion**

In conclusion, the criminalization of marital rape is an important step towards protecting the rights and well-being of individuals in intimate relationships. Marital rape is a violation of human rights and can have serious physical, emotional, and psychological consequences for victims. By criminalizing marital rape, countries can send a clear message that all forms of sexual violence are unacceptable and will not be tolerated, regardless of the relationship between the perpetrator and victim. It is important for legal systems to recognize the harm caused by marital rape and provide legal protection to victims, while also working to address the social and cultural attitudes that perpetuate this form of violence. Overall, criminalizing marital rape is an essential step towards creating a society that is free from violence and discrimination, and where everyone can live with dignity and respect.

