
BEHIND THE DOORS, LEGAL BATTLE AGAINST MARITAL RAPE

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ABSTARCT:

Marital rape, also known as Spousal rape refers to non-consensual sexual intercourse done by the perpetrator to their spouse (victim). It involves the use of abusive language, physical force, and threats, to involve in sexual activity. There are more than 100 countries that criminalized marital rape whereas India is one among the few which didn't criminalize it yet. In India, there is no separate provision relating to marital rape whereas Sec 375 of IPC provides an exceptional clause, which states that "sexual intercourse by a man with his wife and wife not being under 15 years of age, is not a rape". Criminalizing marital rape in India has been facing lots of challenges since it is done within the institution of marriage and claiming it to be sacred and it is considered to provide implied consent for sexual intercourse. However, the Supreme Court and Law Commission of India asserts to criminalize marital rape and struck down the exceptional clause of Sec 375 of IPC¹. Marital rape not only constitutes a crime but also infringes upon the fundamental rights of married women under Articles 14, 15, 19, and 21 of the Constitution. Although there is protection enshrined in our constitution for women facing domestic violence, assaults, and sexual offenses. The sexual act without the consent of the woman (rape) under the institution of marriage is not properly aligned in the legal frame, as per the current law it is presumed that the wife gives her perpetual consent to sexual intercourse by entering into the marital relations. The National Family Health Survey² found that between 2019-21, 32% of married women experienced physical, sexual, or emotional violence by their current husbands. However, there is the occurrence of marital rape beyond this report major people who have been a victim of marital rape is not ready to voice their opinion due to many factors. Thus, this has not been seen as a serious issue in front of the media or the general public. However, the denied right should be reimbursed and safeguarded. This paper devolves into the legal framework for marital rape, and how existing provisions support it. In this discussion, we are also going

¹ Replaced by Clause 63 of Bharatiya Nyaya Sanhita ,2023.

² NFHS-5_Phase-II_0.pdf, (125-127) available at https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf

to view the historic context of marital rape in India, and the judicial activism in this area, the major criticism and challenges faced by the group who argue for the criminalization of marital rape.

1. LEGAL AND PARLIAMENT FRAME IN INDIA AND MARITAL RAPE.

Marital rape is when there is the occurrence of non-consensual sexual intercourse between the institution of marriage. So, in India as per the current legal framework Sec 375 of IPC³ deals with rape which states that a man is said to be committed a rape if he penetrates to any extent his penis or any object or manipulates any part of her body as to cause penetration into vagina, urethra, anal, mouth. Whereas the exception clause to this section provides two stands at first, a medical procedure or medical intervention does not constitute rape and the second part states that *“sexual intercourse by a man with his wife and wife not being under 15 years of age, is not a rape”*⁴. Thus, it is clear that a man would involve his wife in nonconsensual sexual intercourse, and still he would not be subjected to rape. Whereas marital rape is considered as one form of domestic violence. Our country's legal framework provides various protection for women to claim civil remedies against marital rape and separation from their husbands for the cruelty through the DOMESTIC VIOLENCE ACT, 2005 Another provision in IPC i.e. section 376B⁵ recognizes the husband's nonconsensual act from the separated wife as rape and provides penal provisions. However, the issue of marital rape isn't covered in any of the amendments or any statute, while Justice JS Verma's committee suggestions shaped the criminal law (amendment) act passed in 2013 including the suggestions on marital rape which were not acted upon by the parliament. In 2015, this matter has been brought to parliament also, it dismissed this petition and held that “marital rape cannot be criminalized since marriage in India is considered to be sacrament. And this matter is brought to the judiciary and a petition has been received in the Delhi high court which consists of two benches regarding marital rape and it delivered a split verdict⁶ in 2022. Whereas in the supreme court, its ruling regarding the medical termination of pregnancy regardless of the marital status, it was observed that rape should include marital rape.

³ Replaced by Clause 63 of Bharatiya Nyaya Sanhita ,2023.

⁴ It has been changed to 18 years by BNS, act 2023

⁵ Replaced by clause 66 of BNS, Act, 2023

⁶ Available at <https://www.livelaw.in/top-stories/delhi-high-court-passes-split-verdict-on-criminalizing-marital-rapejustice-rajiv-shakdher-holds-exception-2-of-section-375ipc-unconstitutional-198832#:~:text=The%20Delhi%20High%20Court%20on,from%20the%20offence%20of%20rape.>

2. LEGAL PRECEDENTS AND MARITAL RAPE

Initially, in the case of *Independent Thought v UOI*⁷, an NGO filed a petition before the honorable Supreme Court to hold the exceptional clause of Sec 375 of IPC as unconstitutional as it is violative of the rights of the married girl whose age is between 15-18 the judgment in this case it was held that the sexual intercourse by a man with this wife whose age is of 15-18 years. In the case of *Shakshi V UOI*⁸, 2004 a petition was filed, seeking directions to interpret the term “sexual violence” and it also had references to marital rape, but Supreme Court rejected the petition on the principle of *stare decisis*. In the landmark case of *RTI Foundation V UOI*⁹, the observation made by Justice Rajiv Shakhder throws light on the unconstitutionality of exception 2 which held that the exception is violative of ARTICLE 14 (right to equality) because it reprieves nearly one-half the population of equal protection of laws, ARTICLE 15 which provides there is discrimination within the same genders (between married women and unmarried women), ARTICLE 19 (freedom of speech), where the married women cannot express her will for the sexual activity within the institution of marriage, ARTICLE 21 (right to life and personal liberty) where the women have a choice to have a sexual activity which is guaranteed under ARTICLE 21. Thus, he held that this exception should be struck down. Unfortunately, this case was held by a two-bench judge who delivered a split verdict in 2022. And explanation 2 of ARTICLE 2 of the MTP (Medical Termination of Pregnancy) Act, highlights how exception 2 of sec 375¹⁰ is arbitrary, which states that abortion can be permitted if the pregnancy is caused by rape and which can cause grave injury to the mental health of the women however this was applied to the case also, but it is unfair to see that parliament recognizes marital rape causes incalculable harm under MTP act but refuses to criminalize under IPC.

3. STATUS OF MARITAL RAPE AMONG DIFFERENT JURISDICTION.

Marital rape has been considered rape since, it is said to be committed by a husband with his wife, being tied up within the institution of marriage without the consent of the wife. Many countries even with similar social-economic factors have criminalized this offense in their respective countries. As discussed, earlier India hasn't criminalized marital rape. However, it

⁷ AIR 2017 SUPREME COURT 4904

⁸ 2004 Supp(2) SCR 723

⁹ 2022 SCC OnLine Del 1404.

¹⁰ Replaced by Clause 63 of Bharatiya Nyaya Sanhita, 2023

recognizes rape under sec 375 of IPC¹¹ other civil remedies are available under DVA, act. In the USA, marital rape has been criminalized since 1993 it is illegal in 50 all states whereas in many states marital rape is considered as same as non-marital rape and in some states, it treats differently. Whereas in countries like Bhutan, Brazil, Canada, France, Greece, Georgia, Nepal and many other countries Marital rape has been explicitly criminalized where it held imprisonment for up to 8 years. All countries have recognized marital rape as a criminal offense that infringes upon the fundamental rights of married women.

MARITAL RAPE IN ENGLAND

However, India has adopted its penal code from England, in UK marital rape has been considered a sexual assault under the sexual offenses act, of 2003. In the case, R V R¹² (1991) marital rape got criminalized in England, where the facts of this case are the wife has filed a divorce and she is been living in her mother's house, meanwhile, the husband entered into the house and forced her to have sexual intercourse against her will and continued to assault her against her denial. Both the court of appeal and court of records upheld the rape conviction and declared that this exception did not exist in English law. Followed by this case in the case of R V Clarke¹³ a husband was found guilty of raping his wife. Also, the sexual offenses act provides that status is not a defense under this charge.

Yet, there are some countries that haven't criminalized marital rape as an offense such countries are UAE (united Arab Emirates), Indonesia, Iraq, and Iran. some countries follow their customary law and some countries explicitly decriminalized.

4. INTERNATIONAL LAW AND MARITAL RAPE

The convention on the elimination of all forms of discrimination against women suggested that India should end its marital immunity since this committee is the international body that aims to corrupt discriminatory practices, sexual abuse, assault, and violence against women. However, according to ARTICLE 1 of CEDAW "Discrimination Against Women" includes "any distinction...made based on sex which has the effect of impairing...the exercise by women, irrespective of their marital status...of human rights and fundamental freedoms in the...social,

¹¹ Now replaced by clause 63 of BNS,2023

¹² [1992] 1 AC 599

¹³ (1927) 40 CLR 227

cultural, civil or any other field". The exception in India violates the provisions of CEDAW. However, India has not signed the optional protocol with CEDAW, which enables the committee to monitor the state compliance with the CEDAW principles. But under ARTICLE 2 (f) India is obliged to protect and enhance measures relating to women. In addition to CEDAW, India violates other human rights conventions like the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

5. REASONS WHY IT SHOULD BE CRIMINALISED.

Despite the various protections enshrined in our constitution for the women facing violence. The major reasons why marital rape should be criminalized are as follows, firstly it violates the fundamental rights to bodily integrity and personal autonomy of the married women. Secondly, it violates the principle of equality before the law whereas marital exemption deprives the rights of married women which are available to others. Thirdly, consent in marriage should not be considered as implied consent to sexual activity, just as consent is required in other places, it should also be respected within marriage. Fourthly health and well-being of the spouse whereas nonconsensual activity within marriage can cause many injuries physically as well as mentally such as anxiety, stress, and depression. Fifthly criminalizing marital rape would serve as a deterrence to potential offenders and gives an impression that this offense is punishable under the law.. In conclusion, criminalizing marital rape is a necessary step toward ensuring justice, equality, and dignity for all women. It rectifies a significant legal disparity, affirming that consent is fundamental in every sexual relationship, including marriage. By protecting women's health and well-being and deterring potential offenders, it creates a safer society.

6. CHALLENGES AND CRITICISM FACED IN MARITAL RAPE

The major challenge in criminalizing marital rape is the patriarchal view that marriage gives the husband the right to ownership of their wives' body, discussing matters with the marriage, especially sexual matters, women face a lot of taboos and stigma thus they go unreported thus silence of them adds up to this issue. Considering the nature of the act it is difficult to obtain the evidence to prove that it is a marital rape. In addition to this, there is fear of misusing this whereas the husbands can be easily harassed. On the part of the political side, the leaders are not ready to address this issue due to its controversial nature. Thus, the lack of political will from the political leaders affects the legislative process. Wives are more financially dependent on the husband within the institution of marriage thus it is difficult for them to report.

7. CURRENT CASE HISTORY REGARDING MARITAL RAPE

In 2017 a woman filed a petition against her husband Mr. Hrishikesh Shahoo before the sessions court under IPC for many offenses like cruelty, making threats including rape, he was also charged with sexual assault against his daughter under the POSCO act, 2012 (HRISHIKESH SHAHOO V STATE OF KARNATAKA). During this case, Mr. Shahoo filed a petition in Karnataka high court invoking the marital rape exception, whereas the court rejected the plea relying upon the 2013 report of Justice JS Verma's committee. The SLP (Special leave petition) was filed by Mr. Shahoo in the Supreme Court challenging the high court decision. This case was held by a 3-bench judge who passed an interim stay on the high court judgment in 2022. However, the high court filed an affidavit to support its order. In the meantime, in Delhi high court a petition was filed by the RTI Foundation challenging the marital rape exception. In May 2022, this case was held by Justice Rajiv Shakdher and Justice C. Hari Shankar and they delivered a split verdict. However, both the judges allowed an appeal to the Supreme Court and the appeal for this was filed in the Supreme Court, in January 2023. In late 2022, Ms. Ruth Manorama filed a petition in front of the Supreme Court. In January 2022 bench comprising Justice D.Y. Chandrachud and Justice P.S. Narasimha clubbed these petitions and listed them all for hearing on March 2023.

8. CONCLUSION

Marital rape is one of the most pressing and overlooked issues within the framework of gender-based violence in India. Despite conditions seeking criminalization of marital rape India continues to exempt marital rape. it remains an unrecognized issue due to deep-rooted cultural and societal challenges. However marital rape in India requires a multi-facet approach where amendments that are made to current law should include all women including married women and in a societal way comprehensive education should be provided and help to put a halt to the cultural norms that are unreasonable to women and spite of the women empowerment group's help and many other legal aids it is necessary to make people aware about this issue and create knowledge about their rights under enshrined under our constitution. In the purview of judicial systems, to handle this issue it requires separate training for judicial officers to approach the evidence witnesses. however, the gap between the current legal issue and the existing law fails to protect married women's rights. The criminalization of marital rape in India symbolizes more than a legal reform; it signifies a profound societal transformation where the rights and dignity

of women are upheld unequivocally. This change is integral to fostering a society where all individuals, irrespective of their marital status, can live free from violence and with full autonomy over their bodies. As India progresses towards this goal, it must do so with the understanding that true equality and justice are achieved only when the most vulnerable are protected and empowered. Ending the legal impunity for marital rape is a critical step toward realizing this vision of a just and equitable society. The criminalization of marital rape is not merely a legal necessity but a moral imperative. It is crucial for the protection of women's rights and dignity within marriage. India must take definitive steps towards recognizing marital rape as a crime, ensuring justice for survivors, and fostering a society that respects and upholds the autonomy and safety of all individuals, irrespective of their marital status.

The current law BNS, 2023 retains marital rape exception but added many offenses but still leaves a gap in this issue. Thus to have compliance with international standards with foreign countries India is required to criminalize marital rape and provide a safe, free, secure country for all women.