
CHALLENGES AND IMPERATIVES IN CRIMINALIZING MARITAL RAPE IN INDIA

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ABSTARCT:

This paper delves into the critical issue of marital rape within India's legal system, emphasizing the difficulties and contradictions stemming from its non-criminalization. Although the Constitution guarantees equality and personal freedom, marital rape is still not recognized as a crime under Indian law, thereby violating women's basic rights. The paper scrutinizes current legal measures, including the Domestic Violence Act and Section 375 of the Indian Penal Code, which do not offer sufficient protection for married women against sexual abuse. It also considers the cultural and social arguments against the criminalization of marital rape, such as the preservation of marital sanctity, concerns over false accusations, and the perceived adequacy of existing legislation. The paper ultimately calls for the establishment of a distinct and strong legal structure to criminalize marital rape, advocating for the justice and respect of all women in India.

In India, much like in other traditional societies, women have historically faced and continue to endure various forms of inhumane treatment. They are often controlled, subjected to violence, and are vulnerable to abuse and sexual assault, not only in public spaces but also within the confines of their own homes. A significant issue is that marital rape is not recognized as a criminal offense in India. This paper seeks to critically examine Indian rape laws, highlighting how the exemption of marital rape contradicts the core principles of justice and equality enshrined in the Indian Constitution. The paper advocates for the repeal of the marital rape exemption and calls for its criminalization. Additionally, it explores the stance of the Indian judiciary on the issue of criminalizing marital rape, providing insights into the legal and judicial perspectives surrounding this pressing concern.

Keywords: Marital Rape, Criminalisation of Marital Rape, Domestic Violence, Female Rights, consent, privacy, fundamental rights, Indian women

1. Introduction:

Background of Marital Rape:

The issue of marital rape has been a contentious topic in India. While Indian laws have made significant progress in addressing crimes such as rape, sexual assault, and sexual abuse, the concept of marital rape remains largely unaddressed. This is not due to its absence in society, but rather because the central government argues that recognizing it legally would undermine the family structure and harm the institution of marriage. The government also contends that criminalizing marital rape could lead to false accusations against husbands. Marital rape is defined as the act of engaging in sexual intercourse with one's spouse without their consent. In many progressive nations, marital rape is treated as a criminal offense, carrying the same legal consequences as any other form of rape. India, which is the seventh-largest country globally, is witnessing a worrying rise in crime rates, which is particularly concerning for a diverse, multi-cultural, and secular nation like ours. The issue of marital rape is not just a matter of women's rights but also a violation of several constitutional protections. It has been aptly observed that the development and progress of a country can be measured by the status and respect it accords to its women.

Statement of the Problem:

This research aims to address the issue of rape within the confines of marriage, a matter that has been legally protected under the exception clause of Section 375 of the Indian Penal Code (IPC). Currently, there is no specific legal punishment for marital rape, which is a significant issue as it assumes consent within marriage without actually considering the wife's agreement to engage in sexual activity. This research will highlight the shortcomings of Indian law in this regard and propose recommendations with the primary goal of raising awareness among women in India, encouraging them to recognize and understand marital rape as a criminal offense.

Significance of the Problem:

Marital rape stands in stark contradiction to Section 375 of the Indian Penal Code (IPC). This section is designed to protect women and penalize those who commit acts of sexual violence against them. However, by exempting husbands from prosecution, Section 375 fails

to fulfil its purpose, as the trauma and impact of rape remain the same for women, regardless of their marital status. Furthermore, marital rape violates the right to equality enshrined in Article 14 of the Indian Constitution, as it denies married women the same legal protections as others. Forced sexual relations within marriage also infringe upon the fundamental right to life and personal liberty guaranteed under Article 21. Recognizing marital rape as a crime is crucial, as it constitutes a severe violation of a woman's bodily autonomy and integrity. Criminalizing it would provide necessary legal avenues for victims to seek justice, thereby addressing a grave injustice and aligning the law with the principles of human dignity and equality.

2. Historical Background:

Marital Rape in the 19th Century

In the 19th century, women faced significant challenges in their struggle for equality, particularly within marriage. At that time, marital rape was rarely discussed, and women had little said in sexual relations within their marriages. Although the movement for women's empowerment was beginning to take shape, much of the focus was on achieving gender equality in broader societal contexts rather than within the private sphere of marriage. Women lacked rights within marriage and were often expected to comply with societal norms and their husbands' demands without question. During this era, while women were making strides in politics and other public arenas, they continued to suffer from the harsh realities of marital rape, which was an unacknowledged yet pervasive issue. The lack of control women had over their own bodies within marriage fundamentally undermined the meaning of a marital union. Women were traditionally seen as caregivers for their children, but many began to demand a voice in the sexual aspects of their marriages, arguing that they should not be obligated to engage in sexual acts against their will. Despite the difficulty in proving marital rape, particularly in an era where awareness and legal protections were minimal, the issue remained significant. Opponents of criminalizing marital rape argued that such a law would restrict husbands' freedom and instil fear in them when expressing their desires. As a result, marital rape was not recognized as a crime, and the debate surrounding it was largely dismissed by the legal and societal authorities of the time. The debate often centred on whether a woman could have control over sexual matters within her marriage, without considering why she should not be granted such rights. In some cases, women could use the issue of marital rape as a defence during divorce proceedings, but it was not widely recognized as a valid ground for divorce due

to the challenges in providing evidence. The notion that consent could be revoked only sporadically, rather than consistently, further complicated the issue. Ultimately, the concept of consent became a focal point, yet it was insufficient to address the broader injustices women faced in their marital relationships.

Marital Rape in India

Marital rape is one of the ways in which a wife can be subjected to abuse by her husband. It occurs when a husband forces his wife to engage in sexual intercourse without her consent. Traditionally, after marriage, a wife's identity was often seen as being merged with that of her husband, reducing her to the status of his property. Ideally, once a marriage takes place, both partners should be treated as equals. However, historically, women have been regarded as little more than their husbands' possessions, with husbands exerting control over them as they saw fit. This male-dominated cultural mindset was often reinforced by society and even by the woman's own family. While feminist movements around the world have challenged these deeply ingrained attitudes, significant change has been slow, and many women in India continue to be treated as mere chattels. The enactment of laws criminalizing marital rape has been delayed, with the justification that such laws could undermine the sanctity of marriage. The government has offered various reasons for not criminalizing marital rape, often citing concerns about protecting the institution of marriage. Indian law explicitly criminalizes "rape" under Section 375 of the Indian Penal Code (IPC). This section defines rape as an offense and includes a broad scope of actions, such as sexual intercourse and penetration, as punishable under the law, with penalties ranging from life imprisonment to, in some cases, death. However, marital rape is not recognized as a crime under this law. Instead, an exception is made in Section 375, stating that sexual intercourse by a man with his own wife, provided she is not under fifteen years of age, does not constitute rape. This means that a husband is legally permitted to force sexual intercourse upon his wife as long as she is over the age of fifteen, without fear of prosecution. The exception effectively grants husbands the liberty to impose their will upon their wives in this regard, leaving women vulnerable to marital rape without any legal recourse.

3. Indian Legal Provisions and Marital Rape:

In India's patriarchal society, women have traditionally been viewed as little more than child-bearing machines, expected to care for children and provide sex to their husbands on

demand, regardless of their own willingness. This deeply ingrained mindset has influenced the legal system, where marital rape is not recognized as an offense. The rationale behind this is often cited as the need to protect the sanctity of the marital relationship. Consequently, women in this society are deprived of control over their own bodies, with their sexuality effectively treated as the property of their husbands—a situation that begins with the act of marriage itself. Rape is not solely defined by physical brutality; it is a violation of an individual's fundamental rights, which should be protected in any democratic society. To tie the victim and the perpetrator together in marriage and thereby strip a person of her right to bodily autonomy is a gross injustice. Marriage should not grant a husband the privilege to force sexual intercourse upon his wife without her consent. While sexual intimacy is an important aspect of marriage, necessary for maintaining the relationship, it should never imply that one spouse has the right to impose sex upon the other whenever he desires. In India, the situation for women is dire, as victims of marital rape often face more social stigma than the perpetrators of such acts. Women are frequently dependent on men for financial stability and other forms of support, which places them in a subordinate position. This dependence contributes to the perception of women as objects or property to be used at will. It has been observed that nearly all women in the country experience some form of sexual abuse within their marriages. Although the severity may vary, the underlying issue remains the same: wives are not treated with the respect and equality they deserve. This abuse has long-lasting impacts on women, both emotionally and physically, damaging their sense of self-worth and their capacity to lead fulfilling lives.

Gender Equality under the Indian Constitution

The 2013 report by the Committee on Amendments to Criminal Law, chaired by Justice J.S. Verma, commonly referred to as the Justice J.S. Verma Report, highlights the crucial role of gender equality in preventing sexual harassment against women as envisioned by the Indian Constitution. The report underscores that the Constitution's preamble guarantees social, economic, and political justice, which the committee interprets as including gender justice. It also guarantees liberty of thought, expression, belief, faith, and worship, while emphasizing equality of status and opportunity. This principle of equality reinforces the need to treat all citizens, regardless of gender, with respect and dignity, as enjoined by the concept of fraternity. The report further asserts that the right to be protected from sexual harassment and assault is a constitutional guarantee, forming a foundational element of gender justice. This protection is essential to uphold the principles of equality and dignity for all, ensuring that gender justice is

not merely an ideal but a practical reality enshrined in the very fabric of India's legal and social systems.

4. The Constitution of India on Marital Rape:

The law that seemingly permits marital rape in India can be challenged on several constitutional grounds. According to the Indian Constitution, all laws enacted by the legislature must adhere to the basic structure doctrine of the Constitution. If any law contradicts this doctrine, it can be declared unconstitutional by the courts. Therefore, any provision or law that favours marital rape must align with the core principles of the Constitution.

A. Article 14

Article 14 of the Indian Constitution guarantees the fundamental right to equality before the law and equal protection of the laws within the territory of India. However, criminal law remains silent on the discrimination faced by victims of marital rape. The exception to Section 375 of the Indian Penal Code (IPC) is discriminatory against married women, as it creates a separate category of women who are not protected by the law if they are sexually harassed by their husbands. This lack of protection does not satisfy the test of intelligible differentia, as it is arbitrary, artificial, and evasive. Section 375 does not classify rape committed by a husband against his wife as an offense. Exempting husbands from this section based solely on marital status is discriminatory and violates Article 14 of the Constitution. Rape is rape, regardless of the marital status of the victim; the only difference in marital rape is that the victim is married to the perpetrator. This makes the situation more difficult for the victim, as she must continue living with the perpetrator, often depending on him for financial and social stability. This exemption, therefore, encourages husbands to commit forced sexual intercourse, knowing that they will not face legal consequences. Consequently, marital rape violates Article 14, as it denies equal protection to female victims and fails the twin test of intelligible differentia and reasonable nexus laid down in the Constitution.

B. Article 21

Article 21 of the Indian Constitution states: "No person shall be deprived of his life or personal liberty except according to a procedure established by law." In the case of **Kharak**

Singh v. State of Uttar Pradesh¹, the Supreme Court held that the term "life" refers to more than mere animal existence, encompassing a broader range of human rights. Various cases have expanded the interpretation of Article 21, recognizing rights such as the right to health, dignity, a safe environment, sexual privacy, and human dignity. In **State of Karnataka v. Krishnappa**², the Supreme Court held that sexual violence is not only a dehumanizing act but also an unlawful intrusion into a woman's right to privacy and sanctity. Rape is a serious violation of a woman's self-esteem and dignity, leaving her with a traumatic experience that degrades her sense of self.

i. Right to a Healthy and Dignified Life

In **C.E.S.C. Ltd. v. Subhash Chandra**, the Supreme Court ruled that the right to life includes the right to live a healthy and dignified life. The exemption to Section 375 violates a married woman's right to good health, as marital rape can cause emotional, psychological, and physical harm, potentially leading to depression and the transmission of sexually transmitted diseases (STDs). Numerous Supreme Court cases have described rape as a crime against society and a violation of Article 21. Therefore, the exemption to Section 375 contradicts a woman's right to a healthy and dignified life, as non-consensual sexual intercourse undermines her dignity and health, making the exemption unconstitutional.

ii. Right to Sexual Privacy

The Supreme Court has repeatedly upheld the right to privacy under Article 21. Any forced sexual act violates a woman's privacy, as she has the right to control her own body and to give or withhold consent to sexual intercourse. In **State of Maharashtra v. Madhkar Narayan**³, the Supreme Court stated that "every woman is entitled to her sexual privacy, and the same is not open for any and every person to violate her privacy." The marital rape exemption in the IPC violates a married woman's right to sexual privacy, as no one should be forced into sexual intercourse against her will. Therefore, this exemption is inconsistent with the right to privacy and should be deemed unconstitutional.

¹ AIR 1963 SC 1295

² (2000) 4 SCC 75 (India)

³ (1992) 1 SCC 441 (India)

iii. Right to Bodily Integrity

A woman owns her own body and has the exclusive right to make decisions regarding it, including whether or not to engage in sexual intercourse. This right should not be infringed upon by anyone, including a spouse. The IPC defines non-consensual sexual intercourse as rape, but it exempts married women from this protection. This exemption violates a married woman's right to bodily integrity, as marriage does not eliminate the need for consent. In conclusion, the marital rape exemption under Section 375 of the Indian Penal Code is a clear violation of Articles 14 and 21 of the Indian Constitution. The exemption fails the tests of "just, fair, and reasonable law" and reasonable classification, as it is discriminatory and unjust toward married women. This outdated exemption should be removed from the IPC, and India must take strict measures to protect the rights of married women. A large portion of women are victims of marital rape, yet they lack legal support; the only remedies available to them are under Section 498A of the IPC and the Domestic Violence Act. In **State of Maharashtra v. Madhukar Narayan Mandikar**⁴, the Supreme Court held that even a prostitute has the right to refuse sexual intercourse if it is forced upon her against her will; failing to respect this right constitutes rape. Despite criminalizing almost all forms of rape, Indian law still exempts marital rape, leaving a significant number of women vulnerable.

5. Arguments

Arguments for Criminalising

i. Sanctity is Distorted

When a man engages in sexual intercourse with his wife without her consent, the sanctity of matrimony is fundamentally compromised. The notion that marital rape can be exempted from legal consequences as a private matter between spouses ignores the breach of trust and respect that such acts entail. The High Court of Gujarat, in **Nimeshbhai Bharatbhai Desai v. State of Gujarat**⁵, noted that "[n]on-consensual acts of marital rape violate the trust and confidence within a marriage, and the prevalence of marital rape in India has significantly

⁴ AIR 1991 SC 207

⁵ Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2017) No. 26957

damaged the institution of marriage.” This perspective reveals that once the sanctity of marriage is violated, arguments for its exemption from legal scrutiny become ethically flawed.

ii. Consent is Important

The Prohibition of Child Marriage Act, 2006, renders child marriage voidable rather than void, meaning that minors cannot annul their marriage until they reach 18 years of age. Section 375 of the IPC, 1860, criminalizes sexual intercourse with a wife under the age of 15 but does not address those between 15 and 18 years. This creates a gap where minors might be forced into sexual activities against their will. The existing laws, reflecting outdated traditions, should be reformed to align with contemporary values and protect the rights of individuals.

iii. Changing of Culture

Cultural practices, such as those depicted in ancient texts like the Mahabharata, where women are objectified, contribute to the perception of women as property. The tradition of '**kanyadaan**,' where a bride is given away by her father, reinforces this objectification. Modern societies must challenge and evolve these outdated customs, recognizing women's rights and moving beyond traditional views that treat women as mere property.

iv. Criminal Liability

While the Hindu Marriage Act and the Domestic Violence Act offer mechanisms for women to escape threatening situations, these laws primarily provide civil remedies. The Protection of Women from Domestic Violence Act, 2005, addresses sexual abuse within a civil framework, allowing offenders to escape with compensation rather than facing criminal penalties. To effectively combat marital rape, there needs to be criminal liability, which would signal that the state is serious about addressing this crime and provide a deterrent to potential offenders.

Arguments Against Criminalizing Marital Rape

i. The Sanctity of Matrimonial Institution

Opponents argue that criminalizing marital rape would undermine the sanctity of marriage. They believe that state intervention in marital matters could disrupt the sacred bond between spouses and interfere with personal relationships. Critics worry that such legislation

would represent an overreach of state authority into private affairs, potentially damaging the institution of marriage and creating legal conflicts in what is traditionally viewed as a private domain.

ii. Marriage is Consent

Another argument against criminalizing marital rape is based on the notion that marriage itself constitutes consent to sexual relations. Some argue that by entering into marriage, individuals implicitly consent to sexual activity. This perspective posits that the woman's consent is assumed by virtue of her agreement to marry, and any lack of consent within the marriage is thus seen as an invalid concern. This view conflates the concept of marital consent with the idea that consent is perpetual and unquestionable once marriage is entered.

iii. Cultural Boundaries

Cultural norms and values are also cited as reasons against criminalizing marital rape. Long-standing traditions often dictate that fulfilling a spouse's sexual needs is an accepted part of marital duties. These norms are deeply ingrained in society, and changing them is seen as challenging established cultural practices. Critics argue that imposing legal changes might disrupt cultural harmony and face significant resistance from those adhering to traditional values.

iv. Pseudo Cases

There is a concern that criminalizing marital rape could lead to misuse of the law, with some wives potentially using it to leverage power in marital disputes or to intimidate their partners. This concern is supported by cases like **Arnesh Kumar v. State of Bihar**⁶, where Section 498A was allegedly misused. Critics fear that introducing specific legislation for marital rape might exacerbate these issues, leading to an influx of false cases and overburdening the judicial system, which already struggles with case delays.

v. Pre-existing Legislation

⁶ (2014) 8 SCC 273 (India)

Finally, some argue that existing laws, such as the Protection of Women from Domestic Violence Act, 2005, adequately address issues related to marital rape. This Act covers various forms of abuse, including sexual abuse, and provides legal remedies for victims. Critics suggest that this existing legislation is sufficient to handle cases of marital rape without the need for a separate law, thereby avoiding potential overlaps and complications in legal frameworks.

Challenges in Enacting Marital Rape Legislation in India

The question arises as to why a distinct law is necessary when the Domestic Violence Act already addresses sexual abuse and includes provisions for cruelty against women. The Domestic Violence Act, being a civil law, focuses on providing protection and financial compensation for victims rather than addressing criminal offenses. Consequently, it falls short in delivering justice for rape victims. While it does cover cruelty towards women, it does not explicitly include marital rape.

In Kerala, for instance, there were 3,454 reported cases of domestic violence in 2016, involving perpetrators who were either husbands or relatives. Thus, if a woman seeks legal redress for marital rape, the court might offer civil remedies or grant a divorce on grounds of cruelty, but it lacks the authority to impose criminal penalties for such acts.

Some contend that enacting a law against marital rape could lead to a rise in false accusations. However, this concern does not negate the existence of genuine cases. Just as other crimes can involve false reports, a dedicated law for marital rape would facilitate proper investigation and redress for victims, helping to mitigate false claims.

Proving forced sexual intercourse can indeed be challenging, but the difficulty of proof should not prevent justice. In many rape cases, proving the crime is complex, yet circumstantial evidence and medical findings often play crucial roles in securing convictions. While medical evidence alone may not confirm force, other circumstantial details, such as a history of abuse, medical examinations, witness accounts, and possible admissions by the accused, can collectively substantiate claims of marital rape. With appropriate legal provisions, the law could hold perpetrators accountable, provided sufficient evidence of the crime exists.

6. Conclusion

Justice Krishna Aiyar's observation in **Rafiq v. State of Uttar Pradesh**—"A murderer

kills the body but a rapist kills the soul"—powerfully highlights the deep psychological harm inflicted by rape. The State's stance that marital rape is a private matter within marriage and that existing laws on dowry, infidelity, cruelty, and divorce are sufficient is insufficient. Adding marital rape to the legal framework would mark a significant step towards addressing mental health and justice for women.

Concerns that criminalizing marital rape might undermine the institution of marriage or be misused to harass husbands are not substantiated. The real issue lies in the harm caused by sexual violence, which already destabilizes a marriage. Legal action against marital rape does not exacerbate this damage but seeks to rectify it. The potential for misuse can be addressed through the establishment of fast-track courts and streamlined legal processes to handle such cases effectively.

The State's hesitation to legislate on marital rape only delays justice for victims. Establishing legal provisions to criminalize marital rape is essential for ensuring that married women have access to justice. Understanding the difference between general rape and marital rape and increasing societal awareness are crucial steps towards addressing this issue.

India's cultural emphasis on tradition often leads to the avoidance of discussing sensitive topics like marital rape. Ignoring these issues does not resolve them; instead, societal and legal awareness is needed. Even if marital rape is criminalized, clear communication and education about the new law will be necessary to ensure its effectiveness.

Statistics indicate that a significant proportion of women have faced physical or sexual violence from intimate partners, challenging the fundamental rights guaranteed by the Indian Constitution—Articles 14 and 21, which ensure equality and personal liberty. In a nation that reveres its deities, India must confront this issue directly. Failing to address marital rape would be a severe injustice and a disregard for fundamental human rights.