
INDIA: ON ITS WAY TO CRIMINALIZE MARITAL RAPE

Rashi Semwal, Law College Dehradun, Uttarakhand University Dehradun

ABSTRACT

Marital Rape has not been defined in Indian law till now. It is a form of rape but the only difference is that it is done between spouses. There is forced sex done by the husband without the consent of her wife. Consent is very important in any relationship. These kinds of the act have a very bad effect on women's physical as well as their mental health. Once a woman is married she has been treated as property by her husband and there are a lot of violations of women's right that has been discussed in the paper. According to an NCRB report, there are about 70% of married women to face this kind of forceful intercourse. It also discusses the reports of the Law Commission which were related to marital rape and talked about the protection of women. The main aim and purpose of this paper are to provide a comprehensive view of what is the current status of Marital Rape in India as compared to other countries and also highlight the seriousness of marital rape. The paper also urged the need to make law regarding the offense of marital rape and criminalize it.

Keywords: Marital Rape, Sexual Intercourse, Violence, Consent, Unnatural Sex

Introduction

Marital Rape is defined as forced sexual intercourse which is to be done with one's spouse without taking her consent with whom he is married. Sexual violence is the most private form of violence in any relationship [1]. In emerging societies, women face a lot of problems and challenges in their day-to-day life all around the world. The patriarchal mindset has not been changed yet. One major issue of those is forced sexual intercourse with their husband without their consent. They are forced by their husbands into sexual intercourse to get sexual pleasure without their consent which is called 'Marital Rape' [2]. More than 100 countries have criminalized marital rape but India is not on the list yet, to deal with this increase in this problem there should be laws made for the safety of women and should strictly be implemented.

It is a patriarchal culture in that women's bodies, sexuality, and capacity to reproduce are controlled by men. In the United States, the women had no right to say no to their husbands as they were married, so it was assumed that the consent is given by her [3]. Earlier sexual intercourse in the marriage was regarded as the husband's right, but now sexual intercourse without the consent of the wife is classified as rape in societies all around the world and is now also being criminalized [4]. It refers to sexual intercourse which is done between a man and a woman, who are lawfully married in the eyes of law and also accept to be husband and wife, where the consent of the wife is mainly not present. Just marrying someone does not give a man permission to have sex with her forcefully; it must be the consent of both the husband and wife and not only one. But even today marital rape is not recognized to be a crime in India. There are still no laws or specific provisions which could deal with the crime of marital rape it does not treat it to be a crime [5]. The legal system must force the rape committed within marriage to be accepted as a crime. If the consent which is obtained by the husband, is by "coercion or is causing hurt or death, or sexual intercourse done with her wife who is unable to give the consent from free will, then it will also amount to rape. The women who are raped by their husbands suffer various psychological consequences; this even has the potential to damage the lives of the victims of marital rape. The common victims are generally the wives than the husband. Women who undergo these kinds of situations also experience depression, stress, anxiety, fear, and many more things. Marital rape results in serious consequences for the victims which adversely affect their mental, emotional, and medical health [6]. They also experience multiple numbers of traumatic experiences by putting them in severe distress. If the woman is above the age of fifteen years and is married then the law does not punish the husband if the sexual intercourse is obtained by force and without the consent of the wife. The women

themselves should fight for justice and also shall try to expose the discrimination and shortcomings of the legal system in India with regard to marital rape [7].

Historical Background

The term Marital Rape was viewed by the law in U.S history. Till the year 1970's the rape laws that were made also included an exemption if the rapist and victim, at last, were husband and wife. Finally, in 1993, 50 states eliminated the 'exception of Marital Rape'. It was generally been illegal all the time that a man forces sex upon a woman who is not his wife, but now it is also illegal if a man forces sex upon his own wife. It was assumed that at the time of marriage the wife has given her consent to the husband and therefore, need not ask for engaging sexually [8]. Earlier, the word Marital Rape was completely new in legal terms and therefore no laws were made to deal with it as; it was assumed that consent is inbuilt in marriage.

In 2013, the UN committee on "Elimination of Discrimination against Women" (CEDAW), recommends Government of India criminalize marital rape in the country [2]. The JS Verma committee after the protest across the nation on December 16, 2012, against the gang rape done with the girl, had also recommended the same. The committee also recommended removing the exception of Marital Rape which is defined under section 357 of the Indian Penal Code and taking cognizance of the issues related to Marital Rape [10]. Unless and until it has been specifically stated, it is to be assumed that, the history relating to the offense of marital rape does not exist between the husband and the wife. The experiences of sexual violence against women have shown a different angle on the concept of marital rape. It also indicates that marital rape or forced sex does not only confined to any age, social class, or location. A study also revealed that there are almost 20%-70% of women have faced sexual violence or are sexually assaulted at least once by their husbands [11].

In the case *Sakshi V Union of India* [12], the court directed that the Law Commission of India shall look for the amendment to the various provisions of the Indian Penal Code which are related to the 'sexual abuse as in the petition submitted by Sakshi. The Law Commission records the request made by Sakshi in her petition for the deletion of the exception to Marital Rape. However, the court was not 'satisfied' with the deletion of the exception and later it was concluded the same may amount to excessive interference. It is widely accepted, as India follows the patriarchal system, where the husbands are assumed to be the decision takers in the house. But in the new phenomenon, the mindset has changed and now both men and women are considered to be equal [13].

The 'Report of Committee on Amendment to Criminal Law' which was chaired by Justice J.S Verma (Rtd) [in short] had taken cognizance of the issue of the offense relating to marital rape and has also recommended removing the exception of marital rape which is given under section 375. They also stated that marital or other relationship status is not a valid defense against the crime of rape or sexual violation nor a valid ground to reduce the punishment of the crime [14].

Status of Marital Rape in India

The term rape has been defined in the Indian Penal Code (IPC) under section 375, as it includes all the forms of sexual assault, faced by women throughout their life. As we all know, Marital Rape is yet not criminalized in India, but thus falls under "exception 2 of section 375" [15]. It exempts the "unwilling and forceful intercourse" done between husband and wife but only if the wife is under the age of fifteen years, denotes if the wife is over fifteen years, it does not amount to rape. Since there is no word as marital rape used in this section and no specific provisions, laws, or acts is made has been made to deal with this offense against women. Punishment for rape is mentioned under section 376 of the Indian Penal Code (IPC), which states that the rapist should be punished with imprisonment not less than 7 years or extended up to 10 years and shall be liable for the fines unless the woman who is under the age of 12 years and is rape by her husband, in such cases, he shall be held guilty for the offense of rape and shall be punished for the imprisonment of 2 years with fine or both [16].

Before being aware of the concept of Marital Rape, after legally entering into a marital relationship, the consent to engaging sexually is automatically transferred to the husband, this is what we call 'implied consent. It was the husband's right over the body of the wife after their marriage, and the concept of refusal of sex by the wife was not widely accepted [9]. As per the current law, it is to be presumed necessary for a wife to deliver her consent to the husband for sexual intercourse between the two [17]. Recently, on 6th August 2021, Kerala High Court held that Marital Rape could become good ground, and shall be available to all the wives to claim divorce who are sexually forced to get intimate with their husbands [18]. The victims of domestic violence in India are nearly about 70% of married women.

According to the National Crime Record Bureau's (NCRB) report, the victims of domestic violence in India are nearly about 70% of married women. One of the manifestations is that domestic violence is Marital Rape [19]. Today, more than 100 countries have impeded Marital Rape but, unfortunately, India is among 36 countries that have not criminalized it. Although there are many legal amendments done for the protection of women under criminal law, the

non-criminalization of Marital Rape has degraded the rights and dignity of women. Though there are few cases of rape that have been registered, the percentage of registered cases of Marital Rape is very low [20]. The reasons are family loyalty or the fear of the husband, there is also a lack of support from the members of the family, the women have societal pressure and also think to safeguard the future of their children. In olden times, women are financially dependent on their husbands as the earning rate of women was very low, therefore she agrees to live with an abusive husband rather than living independently or separately. The idea of single women's life is hard to accept in India [21].

There is still no legal provision in India which can define the term 'marital rape'. There were many petitions which have been filed relating to the offence of marital rape and also challenging the exception which is mentioned under section 375 of Indian Penal Code (IPC), by NGO RIT Foundation, "All India Democratic Women's Association and a marital rape victim".

The arguments raised in the petition were that there was forced sexual intercourse between a husband and wife and it shall not be treated as parallel with a non-marital relationship. The 1st petition was filed in Delhi High Court in 2015 seeking to criminalize marital rape. In 2017 Central Government has filed an affidavit regarding the criminalization of marital rape in India that "may destabilize the institution of marriage". On 7th January 2022, the hearing of the matter began. On 13th January 2022, the Centre then filed an affidavit which was additional and it stated that after consulting all the stakeholders and also including State Government, it can only assist the High Court in such matters. Later on, the High Court asks the Centre to clarify its position on this matter on 17th January 2022. On 1st February 2022, the Centre tells High Court that it is 'relooking' on its earlier stand that has been mentioned in the old affidavit. The High Court grants two weeks' time to the government to clarify its stand. Later, the Centre requested the Court to grant them some time to make its stand clear but was rejected by the court. On 11th May 2022 Delhi High Court splits its verdict on decriminalizing marital rape in the country. It took 7 years for the court to hear the petitions and seek to criminalize marital rape [22].

Supreme Court has recently agreed to hear all the petitions which are pending on the issues of marital rape in the month of February 2023 and has also clubbed all the matters regarding the same.

“Marriage is not a license to let go a brutal beast” the Karnataka High Court pronounced a landmark judgment against the husband accusing him of forcing his wife for a ‘sex slave’ [23].

In the case *Hrishikesh Sahoo v State of Karnataka*, the Karnataka High Court declined the plea to remove the charges framed against the man who is accused of raping his wife under section 375 of the Indian Penal Code (IPC). The court observed that no exception can be absolute, therefore the man cannot be exempted under section 373 clause 2 of the Indian Penal Code (IPC). On the single-judge bench, Justice M Nagaprasanna said that marriage is an institution and cannot be used as a pleasure by men and forcing their wives for unwanted sex. The lady stated her husband to be ‘inhuman’ as he also treated her like a slave right from the start of their marriage and also forced her to have unnatural sex, even when their daughter was in front of them [24].

The High Court said that in his view the institution of marriage cannot confer any special privilege or any license to any married man for sexually forcing his wife. The man should be punished for his acts as by just getting married no one gave him the license to sexually assault any woman, even though she is his wife [25].

Constitutional Rights of Women

The book of the constitution of any country describes the soul nature of that nation. The Indian Constitution ensures human rights, provides social and individual interest and treat them in an equal manner, gives value and respect to the culture and religion of every individual, and work for the progress of the nation [19].

There are certain laws passed in the country in support of women which give them the right to fight against the inhuman treatment done to them. It is to be considered ultra-virus and declared unconstitutional by the court of law if any law fails to meet the standard laid down by the court [26].

Let’s now see how article 14 and article 21 of the constitution of India have failed to meet the standard of the doctrine of marital exemption to rape, also failed to protect the woman from facing forced sexual intercourse without her consent, and also how her rights have been violated [27].

Equal protection under the law

Article 14 states that “Every individual who resides within the territory of India shall be treated

equally and state cannot deny it and shall be given equal protection of the laws. As everyone should be treated equally and there should be no discrimination between two individuals. Article 14 also states that there should be complete prohibition on grounds of religion, race, caste, sex or place of birth [28]. There are two valid classifications that have been laid down in year 1952, by Supreme Court: -

- a. The classification which is founded, distinguishes those which were grouped together and were different from others; and
- b. the rational relationship must be different and also the object which is sought to be achieved by the legislation [29].

Women have the right to be treated equally before the law and it is the duty and responsibility of the legislature to make laws and protect women from such kind of inhuman treatment. As we all know section 375 of the Indian Penal Code criminalises rape and protects women against a such heinous offence which is done without her consent. So, like all men and unmarried women, married women should also be protected by law [11].

Live with Human Dignity

Article 21 is the right to life, and also include the “right to live their life with human dignity” and she has the right to acquire all the necessity to live like clothing, food, nutrition etc. the Supreme Court held “That the offence of committing rape or when the rape has been committed to a woman it violates her fundamental right i.e., right to life and also right to live her life with human dignity, to all the women who are the victims of the offence which is rape” [4].

In the case *Railway Board v Chandrima Das*, Supreme Court observed: “that Rape is a crime which committed against the whole society and not an offence which is defined under Indian Penal Code (IPC)” [30]. Every married woman has this fundamental right just like the other rights as no one can harm her dignity and the wife is compelled by her husband to get sexually intimate with him, and in which no consent of her is present, then he goes against this right under article 21 of the Indian Constitution.

Rape is a crime committed against the whole society and not an offence which is defined under the Indian Penal Code (IPC). When the husband and wife have together entered into a mutual marital contract, then it was assumed that the wife has given her consent to the husband for sexual intercourse anytime he wants to [31].

Reports of Law Commission

84th Report of Law Commission “Rape and Allied Offences”

The 84th Report of Law Commission of India mainly deals with the rape committed against a girl within a specified age, the report was presided by PV Dixit, J., the report looked into all the loopholes in the rape laws and also to the consent of the girl child when it comes to sexual intercourse with her.

The Child Marriage Restrain Act, 1929 prohibits the marriage of a girl under 18 years of age, the main view behind it is that sexual intercourse should also be prohibited with a girl who is under the age of 18 years and sexual intercourse with a girl who is below the age of 18 years, it shall also be treated as an offence [32].

172nd Report of Law Commission “Review of Rape Laws”

The 172nd Report of the Law Commission of India was presented by Jeevan Reddy, on 25th March, who is also the chairman of the Law Commission of India. In the report, the law commission has widened the definition of rape which is defined under section 375 of IPC, it also recommended adding certain exemptions to section 375, that sexual intercourse between a husband and wife shall not amount to sexual assault if the wife is under the age of 16 years [33].

Countries to criminalise marital rape

USA

In the USA before the 20th century, they follow the concept of marital rape exemption where marital rape was legal in every state of the USA [2]. The concept followed by them basically means that when the husband and wife have together entered into a mutual marital contract, then it was assumed that the wife has given her consent to the husband for sexual intercourse anytime he wants to. In the case *Oregon Vs Rideout*, which was held in the Marion County Court in 1978, it was the first time in the history of the United States that the husband was being charged with marital rape against her wife. But later on, in 1975 “Nebraska became the first state to abolish marital rape”, the main turning point was the New York case of *People Vs Liberta* [34], the court stated not to see marriage as a license which is acquired by her husband for forcibly raping her [the defendant’s wife]. Currently, all 50 states have criminalized marital rape since 1993, while North Carolina and Oklahoma were the last states to criminalize it, but

the legislation varies from state to state like in South Carolina where the concept of marital rape and non-marital rape are to be treated under different law [35]. But the punishment for the offence of marital rape shall differ from state to state.

United Kingdom

Before 1992, any sexual activity forced especially by husbands on their wives was not illegal in the UK [36]. There is an earliest written legal source on marital rape by Chief Justice Sir Matthew Hale which laid down certain grounds for the immunity of 'marital rape' in the history of pleas of the crown, which was published in 1763, which was after 60 years of his death. He wrote, "The man who is married shall not be found guilty of raping if he is legally married to her, it is to be assumed that the wife has given herself to her husband by their mutual matrimonial contract and the consent given by both of them, and to which she has no right to resist her husband" [4]. But in 1991 after the case *R v R* [37] it completely changed the view of marital rape. In the case, the man was convicted as he attempted to rape his wife. There were numerous appeals made by the accused, and the case was reviewed by the House of the Lords where the members unanimously agreed and convicted the husband of rape which also overturned the common-law rule. The law criminalises rape, spouse rape, and domestic violence. If the person is found guilty of forcing his wife sexually then he is likely to be sentenced to between 4 to 19 years but it will depend upon the case [21]. The maximum sentence that can be given in the UK for marital rape is life imprisonment. The illegality of rape within marriage was laid out explicitly under the Sexual Offences Act, 2003 [38].

Australia

Australia became the first common law country which is under the influence of the second wave of feminism which is in the year the 1970s, and also approved the changes in the law by making rape an offence in marriage in the year 1976 [39].

Canada

It is before 1983, that it was lawful for a man to rape his wife in Canada without any criminal proceeding against him. All the men were protected in Canada until 1983, the main element for this offence was lack of consent which was never taken with the wife before sexual intercourse. Articles 271 and 278 of the criminal code of Canada explicitly criminalise rape of any individual which also includes spouse rape and the government must check whether the

law which is being enforced, is effective for society or not. Marital Rape was first criminalised in the year 1983 [40].

Germany

The laws made on rape in Germany have criminalised it whether it is against a man or a woman which also includes spousal rape, and also provides for punishment in which the husband can be penalised up to 15 years in prison. The laws were revised in 1997, and the “marital exemption” was then removed [41].

Marital Rape across the world

“According to the Amnesty International Data, there is about 77 out of 185 i.e., 42% of the countries have criminalized marital rape through legislation”.

There are about 10 countries that expressly allow marital rape of women by their husbands and sadly India is one of them. While 74 countries allow women to file a complaint against their husbands, there are 34 out of 185 countries that do not provide any provisions which are related to the offense of marital rape. About dozens of countries allow rapists to marry their victims to avoid prosecution. United Nations has strongly recommended that countries close all the loopholes by criminalizing marital rape, it also stated that ‘home is one of the dangerous places for women’.

Conclusion

As we all know that marital rape is still not criminalized in India to date. Marital Rape is a violation of fundamental rights as well as human rights, it also violates a married woman to live with dignity, many countries have taken a step forward to criminalize marital rape and have also recognized this as a form of violence against women. The results of marital rape are quite high in India, which is why there is an urgent need to make it illegal in India. There are many acts and laws made that talk in favour of women but do directly talk against marital rape. She is not treated adequately by the man to whom she is married, and is also forced to have unwanted sex with her husband. It further raised the question of all married women if they are considered an object to their husbands. Indian lawyers should to at the issue and the problems faced by married women and also try to improve their conditions. It is high time now, that India should follow in the footsteps that lead towards the progress of the country.

ENDNOTES

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