
IS IT TIME TO CRIMINALIZE MARITAL RAPE IN INDIA?

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ABSTRACT

'He used to rape her every day, she used to lie there shattered, but just because he was her husband, she couldn't do anything'.

Marital rape is a serious and ongoing socio-legal topic which is being discussed widely in different fields. While some people are raising their voice to make marital rape criminalized in India, others are of the opinion that it should not be criminalized as there are already provisions of it in civil and criminal laws in India and also it will be misused a lot by women against their husbands. The topic which I have chosen is, 'Is it time to criminalize marital rape?' This paper seeks to provide an insight into the current debate on marital rape going on in the country. This paper is organized into three parts. The first part tries to examine what constitutes marital rape and the present statistics of rape and domestic violence in India. The second part explains the prevalent laws and sections where marital rape is a part of. It will also include the case of marital rape going on in the Delhi High Court and what are the pros and cons of criminalizing marital rape in India. This part will also include the recommendation given by Justice J.S. Verma Committee. The third and last part answers the question on whether marital rape should be criminalized from my perspective. It will also include several questions which remains to be unanswered till date.

INTRODUCTION

‘Rape by someone is punishable but rape by one’s husband is acceptable.’ Why? According to a report, In India, one woman is raped every 16 minutes. Considering marital rape as a form of domestic violence, a report by National Crime Records Bureau by Ministry of Home Affairs, 70% women in India face domestic violence. Looking at such horrifying statistics, we can predict the condition of woman in India.

Marital rape can be understood by splitting into two words ‘Marital’ meaning being married and ‘Rape’ means forceful sexual intercourse with one’s partner. It is a very variegated issue. The term ‘marital’ when used as a prefix with rape is the worst form of violation of any woman’s human rights that damages the purity of her body as well as soul. Still, under the Indian laws, husbands have been granted exemption from any liability from charges of raping one’s wife above fifteen years of age.

As of now, there are only seven countries in the world namely United Arab Emirates, Pakistan, Iran, China, Bangladesh, Saudi Arabia and India where rape convicts are punished with death penalty. But, in contrast, according to a report by World Bank, more than 150 countries in the world have criminalized marital rape, but India is included in those 32 countries which have not yet criminalised marital rape. When public take out candle march rallies for rape victims, then why people are silent on the issue of marital rape?

ANALYSIS

One of the most horrifying and repressive issues in India is that marital rape is perfectly legal. Since time immemorial, women has been considered as a property of their husbands and it was a belief that they cannot rape them. When Section 375 of Indian Penal Code, 1860 was formed, it didn’t recognize marital rape within its ambit. Exception 2 of Section 375 creates an exception to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is of 15 years of age or above. This means, if a man married to a girl between 12 to 15 years rapes her, then it is a criminal offence, but if a man is married to a girl of 18 years or above and rapes her, it is not criminalized in India. The issue of criminalizing marital rape was raised in 2004 with the case of *Sakshi v. Union of India*.¹ In this case, honourable Supreme

¹ Vageshwari Deswal, Marital Rape: Ubiquitous yet obscure, Times of India, 12th February 2022

Court of India upheld the existing definition of rape within Section 375 of the Indian Penal Code, 1860 and declined not to alter or amend it further.

After the horrific Nirbhaya Case, Justice V.S. Verma committee recommended to criminalize marital rape, but parliamentary standing committee replied that this would make the family system in India weak and stressed and so the recommendations given by Verma committee were strike down. A senior member of congress, Dr. Shashi Tharoor introduced a private bill in Lok Sabha in 2019 named as 'The Women's sexual, reproductive and menstrual rights bill, 2018' which emphasized several important issues related to woman. One of it was to amend Section 375 of Indian Penal Code, 1860 and criminalize rape of woman by her husband. But the bill lapsed due to lack of support by the members in parliament. The Chhattisgarh High Court's judge Justice N.K. Chandravanshi, while hearing a criminal revision plea moved by husband and his family members challenging the charges filed against him by his wife, recently ruled that sexual intercourse or sexual acts by a man with his own wife would not constitute an offence of rape, even if it was by force or against her wish using exception 2.

The issue of marital rape once again rose up when a case was filed in Delhi High Court challenging Exception 2 in the section of rape which protects men who have forced sexual intercourse with their wives above 15 years of age. It is challenged by RIT Foundation, All India Democratic Women Association and two other individuals. Opposing the strike down of this exception are the Delhi Government, NGO Hridaya Foundation, Amit Lakhani and Ritwik Bisara of Men Welfare Trust.² The case is being heard before division bench of Justice Rajiv Shakhder and Justice C Hari Shankar.

Like every coin has two sides, in the same way, the process of criminalizing marital rape also has two sides and that is to say, one is the positive side and another is the negative side.

PROS OF CRIMINALIZING MARITAL RAPE:

- Exception 2 violates Article 14 of the Indian Constitution i.e., equality before law as it discriminates between married and unmarried women.
- The Prevention of Children from Sexual Offences (POCSO) Act, 2012 and Indian Penal Code (IPC), 1860 recognizes 18 years as a legal age and age of majority for giving consent, but the age mentioned in the section of rape is only fifteen years, why?

² Deepika Bhardwaj, Marital Rape Law: The misuse that has already begun, Bar and Bench, 25th January 2022

- The opposers of criminalizing marital rape often say that marital rape can be dealt under Section 498A which deals with cruelty. But this section doesn't specifically cover marital rape and so it should be dealt with in a different provision.
- Exception 2 violates a woman's right to autonomy under Article 21 of Indian Constitution.

CONS OF CRIMINALIZING MARITAL RAPE:

- If a married man commits rape of his wife, she can file a criminal case under Section 498A and a quasi-criminal case under Domestic Violence Act, 2005.
- Implied consent of a woman is considered to indulge in sexual intercourse after marriage.
- If it is criminalized, the chances of misusing this law will be on the higher side and will be used as a tool of harassment against men.
- It will defeat the purpose of Exception 2 of Section 375 of Indian Penal Code, 1860.

Countering to cons of criminalizing marital rape, I am of the opinion that implied consent of a woman cannot be considered for involving into sexual intercourse with a woman, express consent has to be there. Saying that a woman will misuse this law is a very misogynistic mindset. Lastly, no law is perfect, there will always be loopholes, but greater good of the society must always prevail.

The Delhi High Court in this case appointed a senior advocate, Rebecca John as an amicus curie who is also seeking to criminalize marital rape in India.³ One of the two judges of the bench which is hearing the matter, Justice Rajiv Shaktiher gave a statement in favour of criminalizing marital rape. The Central government and Delhi government is taking a lot of time filling their response before High Court, the supporters of criminalizing marital rape are of the opinion that both the governments are playing a delayed tactic. The two landmark judgements of Supreme Court which are *Puttuswamy v. Union of India* and *The state of Maharashtra v. Madhukar Narayan* ruled that sexual privacy is a fundamental right of all the citizens of India and sexual intercourse without express consent is a clear violation of fundamental right of privacy as per Section 21 of the Indian Constitution.⁴ Now, the question

³ Express News Service, Plea to criminalize marital rape, The Indian Express, January 20, 2022

⁴ Astha Bhattacharya, Supreme court recognizes sexual right of all women. So how is marital rape still legal, The Print, 1st September 2022

arises that when Supreme Court i.e. the apex court of India recognizes sexual rights of all woman, why is marital rape still not criminalized?

The central government has argued that criminalizing marital rape will destabilise the institution of marriage. Don't you think that a marriage where consent of a woman is not taken by her husband before indulging into sexual intercourse, there the sanctity of marriage is already lost. Marital rape should also be included as a ground of divorce in all the acts namely The Hindu Marriage Act, The Muslim Marriage Act and The Special Marriage Act. There is absolutely no justification for rape. It is high time that this obscure offence should be criminalized. Marriage does not give anyone licence to rape her wife.

When the person whom you trust the most defiles her soul and causes harm to her, it not only causes harm to her body but also betrays her trust and faith. This is humiliating for a person and it can also lead to mental disorders like anxiety, depression and bipolar disorders. ***Imagine a woman living with one's rapist and pretending that everything is normal just because raising one's voice entails a stigma.***

People who are against criminalization of marital rape should realize that marriage does not mean implied consent for sexual intercourse. One, not as her husband but as a human should respect a person's dignity. The ideology of not recognizing marital rape creates an outrage among feminine society as a numerous women gets exploited by their husband. Consent for sexual intercourse is of prime importance despite the relationship of the victim with the rapist. Marriage should be considered as an institution that develops the idea of a man and a woman living together in peace and harmony and both of them having equal rights of their own and both the partners should respect each other.

CONCLUSION

One needs to unlearn somethings to learn greater things and one of this is that few societies consider it to be an oxymoron that if you are married, how can sexual intercourse be considered as rape?

As the cases of marital rape are truly high in India, there is obviously a dire need for criminalization of the offence of marital rape. Criminalizing marital rape is not just a woman's right, it should be considered as a human right.

One in three woman face some form of domestic violence in our country. How long can we ignore these numbers? How long can we consider marriages as a permanent consent for sexual relations? These questions need to be pondered upon.

Understand 'Rape is not normal, be it in any relationship'.

"Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything , but inside she was seethed, she wanted to take a knife to their faces."- F.H. Batacan