

ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

ON LAW & MULTIDISCIPLINARY ISSUES

VOLUME I, ISSUE IV

JULY, 2020

Website - journal.lexresearchhub.com

Email - journal@lexresearchhub.com



DISCLAIMER

All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (Lex Research Hub Journal On Law And Multidisciplinary Issues), an irrevocable, non exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known.

No part of this publication may be reproduced, stored, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non-commercial uses permitted by copyright law.

The Editorial Team of **Lex Research Hub Journal On Law And Multidisciplinary Issues** holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not necessarily reflect the views of the Editorial Team of Lex Research Hub Journal On Law And Multidisciplinary Issues.

[© Lex Research Hub Journal On Law And Multidisciplinary Issues. Any unauthorized use, circulation or reproduction shall attract suitable action under applicable law.]

EDITORIAL BOARD

Editor-in-Chief

Mr. Shaikh Taj Mohammed

Ex- Judicial Officer (West Bengal), Honorary Director, MABIJS

Senior Editors

Dr. JadavKumer Pal

Deputy Chief Executive, Indian Statistical Institute

Dr. ParthaPratimMitra

Associate Professor, VIPS. Delhi

Dr. Pijush Sarkar

Advocate, Calcutta High Court

Associate Editors

Dr. Amitra Sudan Chakraborty

Assistant Professor, Glocal Law School

Dr. Sadhna Gupta (WBES)

Assistant professor of Law, Hooghly Mohsin Govt. College

Mr. KoushikBagchi

Assistant Professor of law, NUSRL, Ranchi

Assistant Editors

Mr. Rupam Lal Howlader

Assistant Professor in Law, Dr. Ambedkar Government Law College

Mr. Lalit Kumar Roy

Assistant Professor, Department of Law, University of GourBanga

Md. AammarZaki

Advocate, Calcutta High Court

ABOUT US

Lex Research Hub Journal On Law And Multidisciplinary Issues (ISSN 2582 – 211X) is an Online Journal is quarterly, Peer Review, Academic Journal, published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essays in the field of Law and Multidisciplinary issues.

Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. **Lex Research Hub Journal On Law And Multidisciplinary Issues (ISSN 2582 – 211X)** welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

**MARITAL RAPE AND ITS IMPACT ON
WOMEN- A COMPARATIVE ANALYSIS WITH
RESPECT TO INDIAN LEGAL FRAMEWORK**

Author –

Sanjana Sapra

Student (BBA. LLB)

Symbiosis Law School, Nagpur

ABSTRACT

Equality is and always has been an important pillar of any society. However a society cannot move forward if this pillar has certain deficiencies in it. Marital Rape is an inhuman crime that the Indian Jurisprudence fails to recognize as a crime. Exception 2 of Section 375 of the Indian Penal Code gives men the right to engage into an act of sexual intercourse with his wife without her consent. The research paper will focus on the various aspects of marital rape and its legal position in India as well as in various first world countries. The paper will also be dealing with a very important of question of why is the crime of marital rape still not criminalized in India. The researcher will be drawing a relation between marriages in India and the ugly truths that lie under this idea of marriage. The researcher will be giving suggestions that can be adopted in order to prevent this crime and to maintain the dignity of woman.

KEYWORDS - Marital Rape, Types, Effects, legal positions.

INTRODUCTION

India's population is the second largest in the world. It is also one of the most diverse country with numerous religions, cultures living together peacefully. This should also include people of different genders living together. The principles of gender equality are enshrined in our constitution .However the crime rates in India show a different aspect of these principles. According to the National Crime Records Bureau a total of 34,651 cases¹ of rape were registered in the year 2015 which excluded the cases of rape of children. Rape is one of the most inhuman crime that can be committed on a woman. It is a traumatic experience that impacts the life of the victim in more than one ways. Many of the victims suffer from shame, guilt and denial. ²The astonishing actuality is that the victim herself feels that she is the one who brought this upon herself that there is something dirty or flawed in her because of which it happened. Talking or discussing about rape is a taboo in India. The victim feels shameful and feels that she has brought a disgrace upon her family. Even if a brave victim does report a

¹ Crimes against Women, 2015, National Crime Record Bureau-
https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Chapter%205-15.11.16_2015.pdf.

² Washington Coalition of Sexual Assault Programs, The effects of Sexual Assault-
<https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault>.

crime, it gains attention for a few days and people move on with their lives while the crime rate keeps on increasing. The laws in India divide women into two categories which are married and unmarried. An unmarried woman can file a complaint under section 375 of the Indian Penal Code for the crime of rape but there is no such provision for that of a married woman. The idea of the scared and unflawed institution of marriage in India hides the reality of the plight of the woman. Hidden under this, scared institution lays the limitations of marriages including marital rape, dowry deaths, and domestic violence. Marital rape is not a criminalized crime in India. India is one of the thirty six countries that still not have criminalized marital rape.³ The concept of marital rape is considered to be that of a debatable topic as many researchers believe that it degrades the idea of marriage which is prevalent in the Indian society. The researcher through this research paper will make an attempt to bring forward the problems associated with marital rape and the limitations of the judicial system in India in regards with the criminalization of the inhuman crime of Marital Rape. The paper will also be dealing with the question stand taken by the first world countries on the crime of marital rape. The researcher will further be giving reforms which could be implemented in order to reduce the rate of crime in aspects of marital rape.

MARITAL RAPE - MEANING

The phrase marital rape is a conjunctive of two words marital which means the events relating to marriage or the relations between the married couple, the latter being of importance here and Rape- a crime defined under section 375 of the Indian Penal Code 1860. So marital rape can be defined as an act of sexual intercourse with one's spouse without the spouses consent. The astonishing fact which proves that the laws in India are not gender neutral is the exception which lies within Section 375 of the Indian Penal Code. Section 375 gives the definition and the various instances in which the crime will be considered as a rape .However exception 2 of the section states- "Sexual intercourse by a man with his own wife , the wife not being under 15 years of age is not rape." ⁴In the Indian Judiciary, the legal age for marriage of a woman is 18 years, however when it comes to this exception it is very clearly stated that if a husband engages in an act of sexual intercourse with her wife who is can be older than 15 by lesser than

³ Sarthak Makkar, Marital Rape: A Non-criminalized Crime in India, Harvard Human Rights Journal, <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>.

⁴ The Indian Penal Code, 1860, Act no. 45 of 1860.

18 without her consent then that would not be constituted as rape. This exception can be attributed to the fact that IPC was drafted in the 1860's where a married woman was considered a chattel of the husband and he could do anything with her what he seemed fit. They were not considered as a separate legal entity. This can be traced to the Doctrine of Coverture which meant that upon marriage a woman's legal rights and obligations now belonged to those of her husband. This doctrine was established in the common law of England and the common laws having influence in the Indian Laws the same could be seen in IPC. The jurisprudence has now established that a man and a woman are two separate entities and thus have separate legal rights. The Supreme Court has also given various judgments wherein the provisions which were arbitrary to women were struck down. This can be manifested by the case of *Joseph Shine v. UOI*⁵ in which the Supreme Court held that section 497 of the IPC as unconstitutional. Section 497 constituted the act of adultery. However it had a similar exception as that to section 375. The exception stated that a married woman cannot bring forth a complaint under section 497 when her husband has engaged in sexual intercourse with an unmarried woman. The Supreme Court held that there cannot be a patriarchal monarchy of a husband over his wife and that there cannot be community of masculine dominance. However when it comes to Marital Rape, the Supreme Court does not want to delve in the matter. However there are various acts which have been enacted just for the protection of women but these acts doesn't protect the woman from the crime Marital Rape.

WHY IS MARITAL RAPE STILL NOT CRIMINALIZED IN INDIA?

Before understanding the various aspects of marital rape, it is important to understand the root of the problem which is why is marital rape still not criminalized by the Indian jurisprudence. India is a country with where morals and values are kept on the highest pedestal. Due to this they are unable to find any flaws in it. A similar situation can be seen in the case of marriages in India. Marriages are considered as the most important institution in the society and people are unable to find any flaws in it. But the reality is quite different than what it seems. Marital rape can be seen as an example of it. There are many reasons which can be attributed as to why it is still not criminalized. The factors are as follows-

1. CULTURE AND VALUES IN THE INDIAN SOCIETY-

⁵ Joseph Shine v. Union of India, (2018), S.C. 1676 (India).

According to the Central Government, factors such as an illiterate and conservative population are instrumental in not criminalizing the act of marital rape. The government further argues that even if the act is criminalized, many women who were till now not aware of their right will be seeking a legal recourse for justice and protection. It can be inferred that what the government is trying to say if marital rape is criminalized, it will lead to many marriages which will be destroyed. But this cannot be given as an excuse for the men to continue raping their wives. Crimes such as dowry or domestic violence do not undermine the institution of marriage, then how marital rape can do it. It is important to understand that in order to maintain the sanctity women should be given the dignity and respect they deserve.

2. MARRIAGE- A WOMAN'S PERPETUAL CONSENT-

According to the Indian society, when a woman is married, she hands her perpetual consent for sexual intercourse. This idea is deeply embedded in the minds of the people for generations. However now is the time to bring about a change in this mindset. The evidence of this statement can be seen in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*.⁶ The court held that the act of marital rape is a disgraceful offence that has scarred the trust and confidence of women. The court also said that a law which does not give equal protection to a married and an unmarried woman leads to marital rape. The court even goes a step further and says that the total statutory abolition of the exemption of marital rape is the first necessary step in teaching societies that the dehumanized treatment of woman cannot be tolerated and that marital rape is not a husband's privilege but rather a violent act and injustice which needs to be criminalized. So, if the court understands that marital rape is a social evil, then why not criminalize it?

FUNDAMENTAL RIGHTS AND MARITAL RAPE

Fundamental rights are the pillars of the Indian Constitution. These fundamental rights are the basic rights that are guaranteed to every citizen in India. The law does not differentiate if the citizen is a male or a female. These fundamental rights include two important rights that are enshrined in our constitution. Right to equality which is included under Article 14 and the right

⁶ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, SCC (2018), GUJ (732).

to life and personal liberty, included under Article 21. The researcher submits that the exception under section 375 violates both the above mentioned rights and hence should be struck down.

Article 14 - Article 14 of the Indian Constitution ensures that “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”⁷ So it can be inferred that in the eyes of the law everyone is equal and that everyone will have an equal protection of law. Exception 2 is violative of Article 14 as it does not provide any protection to a married woman who has been raped by her husband. Instead it gives a perpetual consent to a man to rape his wife. According to the landmark judgment of *State of West Bengal v Anwar Ali Sarkar*.⁸ the Supreme Court held that if any classification is to be made under Article 14, such a classification is a subject to a test of reasonableness that can only be passed if the classification has some rational consecution that the act in question seeks to achieve. The objective of Section 375 of IPC is to protect women and punish those who engage in the cruel crime of rape. However exception 2 contradicts the purpose for which the section was enacted. The classifications created under the exception are artificial in nature as they are creating two classes of women which are married and unmarried. The objective of the act in its plain reading is to punish those who engage in the act of sexual intercourse without the female’s consent, but the section creates an artificial distinction between an unmarried and a married woman. The said artificial distinction is contrary to the philosophy and ethos of article 14. Rather, this exception encourages husbands to forcefully enter into an act of sexual intercourse without the wives consent because there is no such law which restricts them to do so. In the case of *Independent Thought v. Union of India* ⁹a recent case of 2017 the question before the bench of Justice Madan Lokur and Justice Deepak was the constitutional validity of exception 2 of the IPC and held that Sexual intercourse with a girl below the age of 18 years is rape regardless whether she is married or not. The court also held that the exception 2 of the IPC creates a distinction between a married girl child and unmarried girl child. This distinction is contradicting the purpose of both Article 15 (3) and Article 21 of the constitution. The court also directed for the parliament to increase both the age of marriage and age of consent from time to time. Following this a girl child is neither eligible to marry nor give consent before 18 years. However the court did not deal with the wider issue of marital rape as that it should be read down as that a husband having sexual intercourse or sexual activity with her wife is not

⁷ INDIA CONST. art 14.

⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

⁹ *Independent Thought v. Union of India*, A.I.R.,(2017) S.C,(4904).

commencing the crime of rape. The jurisprudence in India still fails to take cognizance that marital rape is a crime which should be a punishable crime.

Article 21- Article 21 in its plain reading can be read as - “No person shall be deprived of his life or personal liberty except according to the procedure established by law. There have been many cases in which the courts have interpreted this clause in various judgments to extend beyond literal guarantee and liberty. It includes right to live with dignity, right to privacy and safe environment and many more. In the case of *Suchita Srivastava v. Chandigarh University* of 2009 The Supreme Court noted that a woman’s right to make reproductive choices is a dimension of ‘personal liberty’ under Article 21 and that the right to make choices related to sexual activity with rights to personal liberty , dignity and bodily integrity. ¹⁰However exception 2 is the exact opposite of what the Supreme Court held. The acts of forced sexual intercourse affect the mental, physical health of the woman because of which a women cannot continue living her life with dignity.

The court in the case of *State of Maharashtra v. Madhkar Narayan* ¹¹held that every woman is empowered to her sexual privacy and that it is not open for any and every person to violate her privacy whenever he wished. However when it comes to Marital Rape, the Judiciary takes a different stand and does not take up the issue of marital rape.

JUSTICE VERMA COMMITTEE ON MARITAL RAPE-

In 2013, a three member panel was constituted to recommend amendments to criminal laws after the Nirbhaya Incident. The other three members of the committee were Justice Leila Seth, former Judge of the High Court and Gopal Subramanian, former Solicitor General of India. This committee was headed by the former Chief Justice of India, Justice J.S. Verma. The committee in its report said that, the IPC differentiates between rape within and outside marriage. However under the IPC sexual intercourse without consent is prohibited. The committee advocated that the exception relating to marital rape should be removed. The committee also said that marriage is not to be considered as an irrevocable consent to sexual intercourse. The report said that the relationship between the accused and the victim is not

¹⁰ [Suchita Srivastava v. Chandigarh University, SCC, \(2009\), S.C, \(9\).](#)

¹¹ *State of Maharashtra v Madhkar Narayan*, AIR (1991), SC, (207).

relevant to the enquiry. However it is also important to bring in awareness of women's rights to autonomy and physical integrity regardless of marriage or any other intimate relationship. The report also mentioned that it is important to bring a change in the mindset of the prosecutors, judges and other members of the legal fraternity in understanding crimes of rape and other sexual offences in a gender-sensitive manner.¹²

The report aimed to make an amendment in the IPC by removing the exception. However the then Government rejected the report. Many people in the legal fraternity rejected the report saying that it will bring a lot of stress on the Indian family system. This was due to the fact that the entire onus of proving the charge lies upon the woman in the marriage and that the woman has given her consent for sexual intercourse whenever the man seemed fit. Once again woman's right came to a standstill.

TYPES OF MARITAL RAPE-

The report published by Indiana Coalition against Sexual Assault has identified three types of marital Rape. The three types are as follows-

1. Force Only Rape-

This type of rape occurs when the husband uses threats and violence to coerce his wife to engage in sexual intercourse. The husband uses this violence only to the degree necessary to coerce his wife. This is usually seen in relationships where violence is a predominately verbal.

2. Battering Rape-

When beatings and rape are combined it is known as battering rape. In this rape often occurs as a continuation of the physical assault. The sexual abuse is a pattern of verbal, physical and economic abuse.

3. Obsessive Rape-

¹² Report of the committee- Amendments to Criminal Law, 2013, <https://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

The most openly sadistic form of rape is called obsessive rape. These assaults involve torture or perverse acts which are often physically violent¹³

EFFECTS OF MARITAL RAPE ON THE VICTIM

Many people believe that the effects of rape on a married woman are far less than that of an unmarried woman. This is far from reality; moreover it is imperative to understand that a married woman is usually financially dependent on her husband and therefore finds it difficult to escape from the shackles of marriage. However the psychological and physical consequences cannot be differentiated between a married and an unmarried woman. The effects of marital rape can be broadly divided into two categories-

A. Physical Outcomes-

It has been found out that the victim suffered from vaginal bleeding, unwanted pregnancies, miscarriages and still births. The victim also suffered from other complications which included broken bones, blackened eyes and various other kinds of wounds they suffered because of the assault. Many women contract Sexually Transmitted diseases which further destroys the life of the victim.

B. Psychological consequences-

Psychological Consequences of rape include anxiety, depression, and lack of sleep, eating disorders, lack of interest in sex, fear of men, other social phobias, substance abuse, suicidal ideation, and PTSD. Furthermore there has been evidence to prove that the psychological consequences for marital rape are more severe.¹⁴ This is so because the victim cannot believe the fact that the person with whom they are supposed to spend their life with perpetrates such an inhumane act on them.

¹³ Indiana Coalition Against Sexual Assault, 2006, Types of Marital Rape-https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Issues/Marital_Rape.pdf.

¹⁴ Patricia Mahoney and Linda M. Williams, Sexual Assault in Marriage: Prevalence, Consequences, and treatment of Wife Rape, University of New Hampshire, http://www.ncdsv.org/images/nnfr_partnerviolence_a20-yearliteraturereviewandsynthesis.pdf.

The crime of marital rape has dire and long standing consequences. In a study conducted by the University of New Hampshire it was found out that the victims of marital rape felt betrayal, anger, humiliation and guilt. India has always had a patriarchal society. Even when a perpetrator commits the crime of rape, the victim is the one who is the receiving end of the shame by the family rather than the person who actually committed it.

LEGAL POSITION IN OTHER COUNTRIES

The Sacrosanct institution of marriage In India identifies that there is a perpetual consent of the wife to give into sexual intercourse whenever the man pleases to do so. Many researchers therefore believe that there can be no rape which can occur between a husband and his wife. However this is not the case in many countries. As stated above India is one of the thirty six countries which have still not criminalized the idea of marital rape. The positions in regards to the criminalization of Marital Rape in other countries are as follows-

1. England-

Under the laws of England marital rape is considered as a form of domestic violence and may also include allegations of assault .Not only this, the spouse has to determine that the consent given by her wife was free. Only giving implied consent is not acceptable under the laws .If the husband has been found guilty of marital rape then the sentence is likely between 4-19 year depending on the specifics of the case. A life Imprisonment can also be sentenced. Compared this to India, instead of marital rape being a crime the jurisprudence protects the husband instead the wife.¹⁵

2. United States of America-

Until the 1975's the position in USA was similar to what it is in India. In USA all the states had a rape law which included an exemption of marital rape that gave protection to the husband if he rapes his wife. However in 1993 there were a women's right women which lead to states passing laws in order to protect women from marital rape. Since then all 50 states in the United

¹⁵Nick Titchener, Marital Rape Law in the UK: what is it? Lawtons Solicitors-
<https://www.lawtonslaw.co.uk/resources/what-are-the-legal-penalties-for-marital-rape/>.

States have enacted laws against marital rape. The only marital exemption that still exists is statutory rape.¹⁶

It can be inferred that majority of the countries have criminalized the crime of Marital Rape. The countries have done this either by court order or it expressly mentioned in their criminal jurisprudence. Apart from the above countries, 49 countries including Canada, Australia, France and many others have criminalized the act of marital rape. These countries act as evidence that marital rape is a crime and should have the same or rather more degree of punishment as that of the crime of rape of an unmarried woman. If not then certainly more as if a wife is financially dependent on her husband, he may use this as a validation to do whatever he seems fit. The responsibility of criminalizing this callous act of marital Rape lies on the Judiciary as well as the legislation of the country. However this seems as an improbable idea as the judiciary was unwilling to try on the idea of Marital Rape in as recent as 2017.

CONCLUSION AND SUGGESTIONS

Marital Rape is a heinous crime which is needed to be recognized by the Judiciary or the Legislature. It is important to understand that the distinction present in the Indian Judiciary should be amended at the earliest. The fact that a woman is being coerced to engage in sexual activities with her husband without her consent is disturbing. The woman cannot break out of the shackles of her marriage because of the dependency she has on her husband. Instead of protecting the sanctity of the marriage marital rape disgraces it. It can be seen that various jurisdictions around the world have either criminalized marital rape or passed laws in relation to it, however India still lags behind. It is important to understand that the society is slowly changing and the laws which violate the dignity of the woman should also change. It is appalling for a woman to live with her husband while being raped by him for the rest of her life. Therefore it is important to make appropriate changes in the matrimonial laws so that woman can have the right they deserve. In this Modern time it is important that the judicial system in India understand that criminalizing marital rape is the need of the hour. With respect to the above discussion, the researcher has made the following suggestions-

¹⁶Monica Stenier, Marital Rape Laws, Criminal Defense Lawyer-
<https://www.criminaldefenselawyer.com/marital-rape-laws>.

1. At this juncture, the first step to criminalize the act of marital rape would be amending the Indian Penal Code in order to remove the exception. This can be done by either the Honorable Supreme Court or by the Parliament.
2. If the exception is amended, the punishment should include supporting the wife as she is financially dependent on her husband. Section 376 should be followed for sentencing and fine.
3. The women especially in the rural areas should be made aware about their rights and that they can approach the Courts for justice.
4. The cases of marital can be tried in Mahila Courts which specifically deal with the cases relating to the marital issues.