

DOMESTIC VIOLENCE REFORMS IN INDIA: PAST AND FUTURE

Written by *Paras Jindal*

Student, Rajiv Gandhi National University of Law, Patiala, Punjab

ABSTRACT

Women are always enthusiastic to take care of all people in the family and society. Being a human being, we must support her in decisions and help her augment and swing ahead in life. Even the world can never be complete without women. From the beginning, women are treated as weaker sections of society. They are the victims of a range of crimes like dowry death, cruelty, and heinous crime akin to rape. In India, various laws and regulations are being made to protect and secure the lives of women from violence. Basically, the law is a rule of conduct developed by the government over a territory and strict laws to be made to provide the rights of which they own. This paper covers the diverse legal reforms implemented in the recent past for the protection of women. Further, it shows the dire need for the criminalisation of marital rape and reforming laws to make them gender-neutral in pursuit of justice.

INTRODUCTION

Society has seen innumerable conflicts over different eras but the conflict between men and women is common in each epoch always leading to marginalisation of women. Men being physically stronger and backed with the narrative of a patriarchal society have always subjugated women in every aspect of life. In modern times this conflict has fashioned its image as domestic violence in almost every household. Domestic violence means aggressive, cruel, or harmful behaviour in a household typically abuses of a spouse by another. Since the victims are predominantly women the preventive laws have been made gender-biased. These laws have tried to improve the condition of women but it has done a little good as the dynamic society has always put forth new barriers. 2020 saw one of the worst pandemics in human history forcing governments to take extreme measures like public lockdown. Right from WhatsApp forwards up till the messages of the political leaders, it was an established and accepted fact that the home was the safest place. The incidents of domestic violence amidst this pandemic showed that the home was not the safest place and on the contrary, it was the most intimate

sight of violence. During such lockdowns, the victims of domestic abuse throughout the world became more vulnerable than ever and experienced a greater degree of brutality. There has been a general increase in the cases of domestic violence during these lockdowns but the situation in India is far more wretched. The National Commission for Women (NCW) reported a massive surge in the complaints and urged for urgent action. According to the National Legal Services Authority (NALSA), India witnessed 1,477 complaints in a short span of 68 days taking the tally to a 10 year high. The situation is aggravated as about 86% of women never endeavour to seek help and of these women, 77% do not even mention the incident(s) to anyone.ⁱ To add salt to injury, the police authorities and law agencies denied help, focusing their actions to tackle the pandemic. This pandemic manifests the dire need for reforms in the Indian legal system. There are many legal, organizational, and logistical changes required; and criminalization of marital rape is one of the most significant amendment sought by the Indian society.

MARITAL RAPE

In India marriage is considered a sacramental union of two families giving rise to a loving, pure, and happy relationship between the couple. It is considered a lifelong commitment to protect and provide for each other even in the hardships of life. But ironically, behind the protective and loving veil of marriage lies the gruesome crime of marital rape. Marital rape means an unwilling act of sexual intercourse on the pretext of marriage without the spouse's consent. It is a ghastly act of rape legitimized by a meaningless marriage which has no sacramental or secure facet to it. Rape is the most horrendous crime one could suffer and marital rape is even more horrendous for a lady as she is expected to live happily with her aggressor. The situation is made worse by the society when she is made an accused, from the victim, for accusing her husband of rape as consent to marriage is considered a lifelong consent to sex rather than a commitment to a warm and supportive union. Its legitimization is supported by a rudimentary thought, of a woman's dependency on man and is no less a crime than marrying a rape victim to its rapist.

Most countries have criminalized marital rape but sadly India is amongst the thirty-six countries where this criminal act is not punished under the law.ⁱⁱ It is considered an exception to section 375 of India Penal Code which states "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."ⁱⁱⁱ

Indian law is glaringly influenced by the English law and the Victorian patriarchal society. The conceptualization of the idea of marital rape as an exception can be associated with the historical idea of the term “*Raptus*”, which implied a violent theft of both person and property. It was synonymous with any sexual molestation or abduction of a woman; which was considered merely a theft from her father or husband or a guardian who had legal power over her. The exception was the result of a patriarchal society where the identity of the woman was merged with her husband under the “*Doctrine of Coverture*”.^{iv} Women were considered a wholly-owned subsidiary of her husband including his right over her physical body and this emerged as the concept of implied consent to have sex along with the consent to marry.^v However, as society progressed and new jurisprudence emerged giving women equal footing with men, new laws are enacted but the concept of marital rape still needs to be in the spirit of these new laws giving women a free world to live in.

In India, many argue that marital rape is assumed to be subsumed under domestic violence as it is a form of cruelty and other concurrent crimes like battery and violence are already covered in it. However, it is incorrect to assume so as it will overlook marital rape as a distinct crime and simply encourage the faulty notion of consent to sex implied with the consent marriage. It is imperative to criminalize marital rape as for many women the sexual violence is traumatic and devastating. It is illogical to assume that all victims of marital rape are physically battered as in reality many women do not experience physical violence but their body is violated and they are left with no legal recourse. Furthermore, these women may not experience any physical injury but the psychological sufferings require special relief by expert service providers. It is backed by various researches that husbands may use limited force only to coerce their spouses and physical force may not be a characteristic in these relationships. According to Finkelhor and Yllo, it is called ‘force only rape’ and is experienced by 40 percent of the women.^{vi} Hence, to subsume marital rape as cruelty under domestic violence is incorrect and it should be unequivocally termed as a crime against society.

INDIAN JURISPRUDENCE ON MARITAL RAPE

Indian jurisprudence is a highly enriched subject valuing equality and personal freedom at the highest pedestal. It has compiled some of the best concepts from around the world to make the most democratic constitution in the world. Article 14 and 21 of the Indian constitution truly make India a state of equal opportunities where each person has personal liberty. Francis

Corallie Muin v. Union Territory of Delhi^{vii} highlights Article 21^{viii} as the right to life and to live with human dignity rather than mere animal existence. The Supreme Court of India through various cases has opined that the act of rape violates the right to life and right to live with human dignity as it leaves behind haunting scars of this animalistic behaviour. Supreme Court observed, “It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.”^{ix} However, the ironic situation of the Indian legal system is that it justifies rape just because the violator is the spouse of the victim. In 2017 the Supreme Court incorporated the right to privacy under Article 21 further expanding its scope.^x It has been defined as the right to be unbothered and not aggravated. In the case of *State of Maharashtra v. Madhukar Narayan*,^{xi} the right to sexual privacy was given to women and the Supreme Court held that no man can violate her privacy as and when he wished. Any type of non-consensual sex even though between married couples abridges the women’s right to sexual privacy. Although society expects cordial sexual relations between the couples after marriage, it does not give the right to demand sex or any other incidental acts which violate the sexual privacy of the women and are harmful to her physical or mental health. It contravenes the married woman’s right to protection by forcing her into a non-voluntary act which could be detrimental to her mental state. Forced sex is a sadistic act that shreds away the trust and divinity of marriage that holds it together making it a hollow relationship just for erotic pleasure. Hence, the legitimization of marital rape is not only bad in law but also morally wrong.

The constitution also guarantees, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”^{xii}. It prohibits discrimination, contrarily the exception of marriage rape discriminates married women as against unmarried women by breaching her right to protection and sexual privacy. Though the government can give some special rights to the marginalized or vulnerable groups of the society, the Supreme Court clearly states that there must be a rationale nexus to the objective sought for the greater good of the society for such special classifications.^{xiii} The exception of marital rape cannot be considered a reasonable classification as it frustrates the objective of Section 375 and there is no rationale nexus linking it to the objective of saving marriages as they are as good as dissolved when a man forces himself over his wife. Thus, exception 2 of Section 375 cannot be a reasonable classification and is in crosshairs with Article 14 of the supreme legal document of the country.

Some legal scholars believe Indian law already provides for the prohibition of marital rape. They believe Section 498A of IPC^{xiv} and the Domestic Violence Act^{xv} already have the requisite remedies for cruelty against a wife and marital rape can be considered cruelty. However, the abhorrent crime of marital rape requires specific prohibition with requisite punishment as a deterrent and the domestic violence act only provides for grounds of divorce and no penal recourse.

India is also a proud signatory of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)^{xvi}. It is an international treaty adopted by the UN's general assembly for the upliftment of the social status of women. It has viewed marital rape as discrimination against women that violates the respect for human dignity and fundamental principles of egalitarianism. Further, the fifty-first session of the Commission on Human Rights, Resolution No. 1995/85 titled 'The elimination of violence against women'^{xvii} recommends the criminalization of marital rape as a practice discriminatory and derogatory to women's privacy.

But the sad truth of the Indian legal system is that despite these proficient laws and high values marital rape is still not considered a crime and women are left on their fate. The case of Sree Kumar vs. Pearly Karun^{xviii} is one of the many heart-shattering instances, where the rights of a wife were infringed, as the Kerala High Court bound by law held the spouse is not liable for rape of his wife even though it was morally wrong and inhuman. In the instant case, the wife was living independently without a legal decree of partition and opposed to custom or use due to personal differences. As a result, she was made liable to sex by her husband for two days when she went to live with him as a result of separation proceedings undergoing between the parties. The Court made her liable for sex even without her consent and her willingness as she was not separated under any custom or declaration of partition. Subsequently, there was no rape technically under section 376A of IPC^{xix} however the body and spirit of the wife was violated.

Section 198(6) of CrPc^{xx} is yet another pitfall in the pursuit of justice as it bars the court from taking cognizance of rape if more than a year has lapsed although the wife is under fifteen years of age. It has left many victims without justice because they were unable to report their atrocities as they were held captive for years.

DELETERIOUS EFFECTS OF MARITAL RAPE

Marital rape is a detrimental crime that leaves both long term and short term injuries to the victims. It is a myth that the consequences of marital rape are less detrimental than actual rape or other forms of sexual violence. Many studies are exploring the repercussions of marital rape unveiling many traumatic injuries both mental and physical. The physical injuries include impairments in vaginal and anal areas, torn muscles, lacerations, bruising, fatigue, soreness, and vomiting. The use of physical force coincidental to rape may also result in broken bones, knife wounds, ruptured nose, black eyes, etc. which can even prove fatal. Research shows vaginal and anal stretching or tearing, miscarriages, pelvic pain, urinary and bladder infections, stillbirths, and infertility are some common gynaecological injuries suffered as a direct consequence of marital rape. Marital rape makes women more vulnerable to sexually transmitted diseases like HIV, AIDS, Syphilis, etc. and unwanted pregnancies vandalising their right to a simple and happy life. Though physical injuries may heal over time, victims suffer many long term psychological injuries and disorders. Researchers have observed a general pattern of depression in the victims of marital rape. Since the victims are raped by their spouses, someone they presumably love and trust and are expected to share one roof, they are likely to endure multiple assaults and sexual attacks. The helplessness and the fear of society augment the mental pressure on the victims resulting in depression and suicidal tendencies. The long term effects also include sleep problems, distorted body image, sexual distress, eating disorders, mistrust in relationships, and negative feelings about themselves. The constant and frequent incidents are more likely to aggravate these severe psychological consequences. Since the act of aggression is guided by someone close and personal the psychological effects may result in flashbacks and emotional pain for long years even after the violence has stopped. The Supreme Court rightly has described [marital] rape as “Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into a deep emotional crisis. Rape is, therefore, the most hated crime.”^{xxi} There are many gambits undertaken by the legal organizations and government machinery to make reforms for the plight of women suffering from the perils of marital rape leading to steady if not significant change but a lot more is required.

REFORMS

The Government of India has implemented various laws for the upliftment of women in Indian society the foremost being rights enshrined in the Indian constitution. The establishment of the National Commission for Woman in 1992 is a notable reform.^{xxii} It is a statutory body aimed at studying and monitoring matters related to the protection of women. It reviews the existing legislation and suggests amendments whenever necessary. The 73rd constitutional amendment 1992^{xxiii}, reserving one-third seats of local election bodies for women, is a huge step forward in empowering women and increasing their role in the formal political landscape of the country. Its main objective is to empower women and decrease their dependency on male counterparts. The national plan of action for the girl child is a great policy of the Indian government to ensure the existence, survival, and holistic development of girl children and discourage female foeticide.

The Supreme Court in the landmark case of *Vishakha v. State of Rajasthan*^{xxiv} extended the right of privacy in working environments encourage women to work and become self-reliant by creating a safe workplace environment. The Vishakha guidelines have been proved a great deterrent in workplace sexual harassment.

In 2009 the Supreme Court recognized the women's reproductive rights as a fundamental right stating "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21."^{xxv} This was a great step undertaken to ensure gender equality and personal liberty as another stereotype prevalent in Indian society was the implied consent to have children along with the consent to the marriage. This step helped society realise the separate identity of women from the responsibilities or obligations she is expected to do. This should be contemplated upon and sex should not be considered an obligation a wife is expected to perform. For this situation, Supreme Court declared that a prostitute also has the right to deny sex on the context that she is unwilling or does not give the consent and no customer can force her to do it.^{xxvi}

There are many helpline numbers widely advertised by various governmental and NGO's for the victims of domestic violence. They provide immediate relief and legal counselling. However, lack of proper access to technology is a big impediment as a study shows while 71% of men in India had access to a mobile phone, their female counterparts stood at a meager

percentage of 38%. Families do not allow women to access phones as it was seen as a means through which women can interact with the outside world which is considered to be taboo.

Furthermore, there have been many amendments to IPC to make the law in consonance with the modern society. Prior to 2017, the Indian Penal Code stated that if a man has sexual intercourse with a girl other than his wife below 16 years of age is rape, even if she consents.^{xxvii} However, it is not considered rape if the girl is married to the man and is older than 15. It was one of the greatly contended issues in law until the Supreme Court in *Independent Thought v. Union of India*^{xxviii} declared that any sexual intercourse between a man and his wife aged below 18 was rape as the age of consent is 18 years notwithstanding exception to section 375. 2013 marked another great initiative as the Criminal Law Amendment Act, 2013 added Section 376B^{xxix} which specifies the punishment if a man has sexual intercourse with his wife without her consent after a legal decree of separation. These reforms are great initiatives and reflect the more mature and forthcoming mindset of the Indian society and prosecution of marital rape may not be a distant dream.

However, the flipside to the criminalisation of marital rape is the argument that it would lead to a slew of fabricated accusations of marital rape. This argument derives its premises from the current misuse of gender-biased laws by women against their husbands and his relatives. According to Rajesh Vakharia, Save Indian Family Foundation, “Under the existing laws the husband is always guilty unless proven innocent. How will one prove that no rape has taken place? Then every honeymoon would be a rape”.^{xxx} He believes criminalization of marital rape should be under gender-neutral laws. Yes, there is a possibility of misuse but it should not discourage lawmakers to make laws to prevent the prevalent injustice. However, these laws should be made gender-neutral covering men, women, and even the LGBTQ community for the proper delivery of justice in society.

DOMESTIC VIOLENCE ACT, 2005

The Domestic Violence Act, 2005^{xxxi} is the most significant legislative reform in many decades brought into force on 26 October 2006 by the Indian government. It was the first instance when the Indian government defined ‘Domestic Violence’. It is a holistic definition covering emotional, verbal, economic, and sexual abuse along with the traditional approach of physical

violence. It is a very comprehensive definition made in unison with the UN's framework legislation on Domestic Violence.

The act is one of the most effective and promising legislations of the Indian government aimed to combine the criminal procedure with civil remedies for effective and immediate relief to women enduring any kind of violence within the family. Harassment of the victim and her relatives by asking unlawful dowry demands is also covered under this definition. It was the first time women's right to a safe and peaceful home environment was recognized under any law. In *V. D Bhanot's*^{xxxii} case, the Supreme Court held that the parliament intended to protect the rights of women enriched in Art. 14, 15, and 21. The women's right to reside in her matrimonial/ shared household was a big breakthrough because previously she was forced to live in her paternal home upon any dispute.^{xxxiii} Under the new law, she can seek immediate relief such as a protection order, residency or custody order, compensation, and free legal, medical, and counselling services from special Protection officers appointed by the government. The concept of 'protection officer' was introduced who was neither a lawyer nor a police personal. The act directs every state government to appoint protection officers in every district and encourage people to form voluntary associations for the protection of women. It has proved to be helpful since women feel more protective and forthcoming as against going to a police station.

Marital rape has deemed a type of violence detrimental to women's health under the Protection of Women from Domestic Violence Act, 2005. Though it did not criminalize marital rape but gave women the right to file a divorce on grounds of cruelty and protect herself from further abuse. It is completely unerring as a single act of marital rape damages the trust and affection required to maintain the sacred bond of marriage.

The acts also empower a Magistrate to issue protection orders against the abuser to prevent him from committing an act of domestic violence, entering the workplace or a place frequently visited by the victim, attempting to communicate, etc.

CONCLUSION

Marital rape is a gruesome crime holed up behind the hallowed drapes of marriages in India. Indian laws against marital rape are contemporaneous to the widespread illiteracy and a complex rigid system of religious laws which brings out the collective thought that marriage is

the license to have sex. It is a well-documented observation that sexual violence is a largely under-reported crime and the victims of marital rape are even more unforthcoming in reporting their crimes due to society's perception of marital rape and her relationship with the assailant. Lack of financial security is a major reason for the under-reporting of domestic violence incidents. Married women in India do not demand divorce as it is not a solution to their problems. They do not want to leave their matrimonial house even after violence as apart from patriarchal notions, the reason is 'real money'. Women leaving their matrimonial house don't have any right to her matrimonial property. In India, divorce was like a civil death because of the stigma attached to it. They should be given financial security only then that the woman facing violence could leave their abusive partners. A final compelling reason for under-reporting is the lack of education and the perception that forced sex in a marriage is not considered rape. They believe sex as an obligation in marriage and term forced sex as a wifely duty a woman of good character is obliged to perform. Changing laws to ameliorate the fallouts of marital rape is a sensitive and strenuous task requiring great caution and contemplation.

There have been many attempts in the parliament to criminalize marital rape but have yielded no fruits. The Hon'ble Supreme Court, the last hope for reforms, has hung up its boots on the matter by simply saying the country is not ready to accept marital rape as a crime. The judiciary has given up to the belief that there can be no rape in a marriage and the ignominy of a woman's body can be erased if the offender is married to her. The lawmakers of India have an opposite view of marital rape and believe that it cannot be criminalized in the Indian society due to various factors like illiteracy, social customs, patriarchal mindset, and religious beliefs. However, the question arises for how long can we suppress the righteous demand for the criminalisation of marital rape and what are we doing to reform the above-mentioned factors.

Sex does not drive a successful marriage and possible flimsy suits should not deter the state from protecting those caught in abusive nets where they are mere chattels owned by their husbands.^{xxxiv} Laws related to sexual abuse in India are inclined to favour women over men and are gender discriminatory. Domestic violence does not affect the life of an individual but also the lives of their innocent children. It does not matter if the violence is inflicted against a male or female, it is violence and so the law must be stringent for both and everyone who commits this heinous crime must be punished. They should be gender-neutral covering the rights of men, gays, lesbians and should not deny the right to protection against marital rape.

There is dire need to criminalize this inhumane crime under the Indian Penal Code but it is not the only exhaustive step required to address the issue of domestic violence.

Society as a whole and the judiciary and the police, in particular, are required to be sensitized. The most salient reform is the introduction of sex education among children in India to change their narrow mindset towards marriage as prevention of a disease is always better than a cure. Sex education is required to inculcate better values among children and to burst the bubble they live in created by the patriarchal society. Society needs to acknowledge the fact that the relation of the perpetrator of a crime to the victim is inconsequential and rape vandalizes the life of a wife similar to any other girl and probably more adversely. There is an urgent need for more companionate police officers, advocates and counsellors, protection officers, and health care providers to address the problem comprehensively as they are the first to make a contact with the victims of domestic violence.

REFERENCES

ⁱEsha Roy, “Domestic Violence, Abuse Complaints Rise in Coronavirus lockdown: NCW”, *The Indian Express*, 3 April, 2020 available at <https://indianexpress.com/article/india/domestic-violence-abuse-complaints-rise-in-coronavirus-lockdown-ncw-6344641/> (Last accessed on 8 July, 2020).

ⁱⁱ <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12> (Last accessed on 8 July, 2020).

ⁱⁱⁱ Exception 2 of Section 375 of *The Indian Penal Code*, 1860.

^{iv} STRETTON, TIM, and KRISTA J. KESSELRING, *Married Women and the Law: Coverture in England and the Common Law World*, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 264–272. JSTOR, www.jstor.org/stable/j.ctt32b7jq.16. (Last Accessed on 9 July 2020).

^vSangamithra Loganathan, *Marital Rape*, Legal Services India, available at

<http://www.legalservicesindia.com/article/2369/Marital-Rape.html> (Last accessed on 8 July, 2020).

^{vi} David Finkelhor, Kersti Yllo, *License to Rape: Sexual Abuse of Wives*, Simon and Schuster, New York, 1987 pp. 37.

^{vii} *Francis Corallie Muin v. Union Territory of Delhi*, AIR 1981 SC 802.

^{viii} Article 21 of *The Indian Constitution*, 1950.

^{ix} *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 922 1996 SCC (1) 490

^x *K.S. Puttaswamy (RETD) v. Union of India*, 2017 10 SCC 1.

^{xi} *State of Maharashtra v. Madhukar Narayan*, AIR 1991 SC 207.

^{xii} Article 14 of *The Indian Constitution*, 1950.

^{xiii} *Budhan v. State of Bihar*, AIR 1955 SC 191.

^{xiv} Section 498A of *The Indian Penal Code*, 1860.

^{xv} *The Protection of Women from Domestic Violence Act*, 2005.

^{xvi} *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December, 1979) UNTS vol. 1249.

^{xvii} UN Commission on Human Rights, *The elimination of violence against women.*, 8 March 1995, E/CN.4/RES/1995/85.

^{xviii} *Sree Kumar vs. Pearly Karun*, 1999 (2) ALT Cri 77.

-
- ^{xix} Section 376A of *The Indian Penal Code*, 1860.
- ^{xx} Section 198(6) of *The Code of Criminal Procedure*, 1973.
- ^{xxi} *Chairman Railway Board v. Chandrima Das*, (2000) 2 SCC 465.
- ^{xxii} Tauffiqu Ahamad, Anil K. Mishra, 'Legal status and rights of women in Indian constitution' (2016) at https://www.researchgate.net/publication/290691292_Legal_status_and_rights_of_women_in_Indian_constituti_on [accessed Jul 09 2020].
- ^{xxiii} *The Constitution (Seventy Third Amendment) Act*, 1992.
- ^{xxiv} *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011.
- ^{xxv} *Suchita Srivastava & Anr v. Chandigarh Administration*, (2009) 11 SCC 409.
- ^{xxvi} *Jai Bhagwan v. State (Govt. Of NCT Delhi)*, AIR 2018 SC 5412.
- ^{xxvii} Section 375(6) of *The Indian Penal Code*, 1860.
- ^{xxviii} *Independent Thought v. Union of India*, (2017) 10 SCC 800.
- ^{xxix} Section 376B of *The Indian Penal Code*, 1860.
- ^{xxx} Namita Bhandare, 'Behind closed doors: Marital rape in India' (2015) live Mint, available at <https://www.livemint.com/Politics/b6HenmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html> (Last accessed on 9 July, 2020).
- ^{xxxi} *The Protection of Women from Domestic Violence Act*, 2005.
- ^{xxxii} *V. D. Bhanot v. Savita V. Bhanot*, (2012) 3 SCC 183.
- ^{xxxiii} Section 19(1) of *The Protection of Women from Domestic Violence Act*, 2005.
- ^{xxxiv} Sarthak Makkar, 'Marital Rape: A Non-Criminalized Crime in India' (2019) Harvard Human Rights Journal, at <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/> (Last accessed on 9 July, 2020).
- 