

MARITAL RAPE: A DECRIMINALIZED CRIME IN INDIAN CRIMINAL LAW

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INTRODUCTION

“Raptus” a general term for rape, was once used to describe a serious burglary involving both goods and people. It was associated with snatching and a women's kidnapping or sexual assault, and it was just a robbery of a lady with the consent of her gatekeeper or those who had proper responsibility for her. Women being entirely possessed backups; the wrongdoing was punished with as a wrong against her parent or spouse. Chief Justice Sir Matthew Hale put forth the reasons against the criminalisation of “marital rape” in his book “The History of the Pleas of the Crown” published in 1736. He argued that “*The husband can't be blameworthy of a rape committed against his legal wife without anybody else,*” he declared, “*since the wife hath presented herself in this manner unto her husband by their joint marital consent and acquire, which she can't withdraw.*”ⁱ This suggested ‘Consent Theory’ was later incorporated into the legal framework of all British colonies that had accepted the precedent-based legal framework.

Marital Rape as a concept in India is being discussed for over a decade but is indigestible by most. It means Rape in a Matrimonial Relationship i.e., a husband raping his wife. Several developed nations have recognized it as a punishable crime, but the special exception is given under “section 375 of the Indian Penal Code, 1860, (hereinafter referred to as ‘IPC’) which provides men, a bypass from the offense of rape of his wife above the age of 18 years, recently elevated from 15 yearsⁱⁱ. Law Commission in its 172nd Report has recommended deletion of this exception. Marital Rape is a heinous crime and should be penalized but, the question is whether mere deleting the exception from sec 375 IPC will work? The framework of Section 375 defining Rape is that to corroborate the offense of rape two primary questions (if the identity of the accused is not in question) are to be ascertained. First, was there even sexual intercourse, and second, if there was sexual intercourse was it consensual or not. Answers to these questions according to the followed practice in India are ascertained by a two-finger test

(which is highly criticized by courts) and by observing body injuries. When it comes to proving Marital Rape, these mechanisms will completely fail as if the victim is habitual of having sexual intercourse which in married women's case the probability of victim being in this category is very high the two-finger test will become useless, secondly injuries on the body of the victim are not a conclusive proof as there are several other means by which rape can be committed without body injuries.

The question is how the law will be able to prove the conduct of Marital Rape under the current system. If no change is made and the same practise is followed, either the courts will be liberal and justice will be denied, or the courts will become literal and apply section 114A of the Indian Evidence Act, 1872, (hereinafter referred to as 'IEA') which provides that "if sexual intercourse by the accused is proven and the question is whether it was done without the permission of the lady alleged to have been raped, the Court shall infer that she did not consent if she indicates in her evidence before the Court that she did not consent."

Firstly, the author shall discuss the status of women in society with the help of historical texts and incidents. Secondly, the author shall substantiate how certain provisions of IPC disregard the constitutional guarantees of the women. Thirdly, the author shall analyse the government's failed attempts at women's rights. Lastly, the authors shall propose changes for the way forward and conclude the discussion by highlighting the urgent need for reforms.

WOMEN AS AN OBJECT

In initial times a woman was considered as an entity and not as a human being, this can be seen through the fact as to when an unmarried girl was raped in those times it was not considered as a crime against the girl rather it was considered a crime against the father of the girl similarly if a crime was committed against married women the crime was considered to be committed against the husband and not the wife. The husband's control over his wife can be better understood by observing the offense of adultery, where a man gets into sexual intercourse with the wife of another man.ⁱⁱⁱ Here the crime is considered to be committed against the husband and not the woman irrespective the relationship made was consensual or not. The act of a man having sexual contact with another man's wife was regarded as "the utmost invasion of property" by English Lord Chief Justice John Holt in 1707.^{iv}

Therefore, it can be said that an unmarried girl was considered as the property of her father, and a married woman was considered as the property of her husband. In fact, in present scenarios in some parts of India, it can be observed that a girl's virginity in the name of purity and sacredness is considered to be property as her father is considered as a guardian to it before the girl's marriage and a right of the husband post her marriage. Be that as it may, if a man raped someone's wife, this was taking property (a women's sexuality).^v Under standard law in specific parts of Africa, constrained sex in marriage was not precluded, albeit some explicit conditions, for example, amid cutting edge pregnancy, following labor, amid feminine cycle, or amid grieving for an expired close relative, were perceived as giving the wife the privilege to decline sex. Justice Singh in *Smt. Sudesh Jhaku vs. K.C.J. & Others*^{vi} expressed that "*before, the law of rape was worried about the robbery of virginity and was there fundamentally to ensure property rights.*"^{vii} As per Bracton,^{viii} even in the "thirteenth century when punitive assents for rape forced by the King's Court should have replaced monetary pay, and, budgetary pay kept on being paid. Indeed, even today the reason does not appear to be unequivocal to be the female's entitlement to her substantial honesty. The way that marital rape is ensured, whatever be the contemplations, is a pointer towards that."^{ix}

LEGAL STATUS OF MARITAL RAPE IN INDIA

"*Exception 2 shall be omitted*"^x – These were the only words used in Section 2(b) of the "Women's Sexual, Reproductive and Menstrual Rights Bill, 2018" introduced by Hon'ble Member of Parliament Dr. Shashi Tharoor introduced an amendment in the Lok Sabha to remove the Exemption 2 of Section 375 of IPC which exempts, regardless of her permission, sexual contact between a husband and his major wife.^{xi} The proposed amendment makes no mention of the consequences for the country if this provision is deleted. The purpose of this article is not to argue against the criminalization of the horrible act of Marital Rape; rather, it is an attempt to identify the problems in the Indian criminal justice system that would lead to the criminalised law's failure to be implemented. The Indian legal system is not yet sophisticated enough to make an act like marital rape a crime.^{xii}

Marital rape is defined as "forceful sexual intercourse without consent by a spouse with his or her partner", which in India is defined as non-consensual sexual intercourse by a man with his

wife under India penal code Section 375, which limits the crime of rape to being committed by a man against a woman only.^{xiii} If marital relation is exempted from the definition of rape as the exception of Section 375 where a husband can never be charged for the non-consensual intercourse of his wife above the age of 18 years it can be interpreted as a binding agreement of a wife with her husband to commute in a sexual relationship whenever and wherever the husband wishes irrespective of the comfort or will of the wife.^{xiv}

Justice J.B. Pardiwala of the Hon'ble Gujrat High Court explained Marital rape as “unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion committed by a husband against his wife, in which she is physically and sexually mistreated.”^{xv}

Those seeking to run are women who have become potential targets for domestic rape. Various crimes, including intimate contact with the mouth or rear-end, or the insertion of objects into the vagina, can result in criminal accusations of sexual assault if done without the agreement of the individual in question. It is an intentional method of frightening and announcing men's supremacy over women, similar to Domestic Violence Prohibition Statutes.^{xvi} According to estimates^{xvii}, a young married woman is burned or beaten to death regularly or is on the point of suicide as a result of psychological torment by her significant other. “More than two-thirds of married women in India between the ages of 15 and 49 had been beaten, raped, or forced to engage in sexual activity.”^{xviii}

Section 375 of IPC with its Exception 2 states that “sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years” (Increased to 18 years)^{xix} of age, is not rape explains that any married women above 18 years of age if subjected to such acts have no remedy under this law.

The significance of permission in every choice cannot be emphasised. It's ironic that a woman may ensure her “right to life and liberty” within her marriage, but not her “right to her body”. Women can file a case under section 498-A of IPC, that talks about the cruelty, to defend themselves from 'unreasonable sexual direct by the spouse' thus far. However, where is the court's standard of assessment or clarity in terms of 'depravity' or 'unnatural' definitions within intimate spousal relationships? Is having an extreme urge for sex acceptable? Isn't assent a requirement? Is marriage a licence to rape? There has been no response because the legal and legislative entities have been deafeningly mute.

In rape cases, mainly there are two things in question. First, that the person who committed the crime, and second, was whether the sexual intercourse was consensual or not. However, in Marital rape cases, the first question is not needed to be answered as the accused is the husband of the victim.^{xx} When it comes to the question of consent, unfortunately, the question is unanswered by the laws of our country as the above-stated section is silent about the test of consent. Though a test famously known as the ‘two-finger’ test has been in practice for ages that examines the hymen of the female. In cases of sexual assault, doctors insert their fingers into the vaginal entrance to examine if it admits one, two, or more fingers. Based on the results of the tests, they determine if the victim is used to sexual intercourse. The technique is demeaning and scientifically and medically ineffective. However, the said test was declared unconstitutional and held as a grave invasion of the right to privacy by the Supreme Court.^{xxi} Moreover, there is still no other procedure defined by the court to answer the question of consent hence in many parts of India, especially in rural areas where there is a lack of knowledge and resources this practice is widely followed.

The above test is only worthy to trust if there are injuries related to the crime committed but fails to ascertain the question of consent as in cases of marital rape the victim for the test is habitual to sexual intercourse making it impossible to prove the rape via the two-finger test. There is another side of the story too. If exception 2 is repealed it will be a loophole for the women with mala fide intention as they will convert a case of Domestic Violence into a case of rape as for a liberal judge who is even a bit sensitive to women would sympathize and will hold the accused guilty. It would only take a few injuries on the body of the victim and few signs of resistance towards it. Here, the author is not stating that the violence done by the husband is excusable, it is an offence worth a strict punishment but legally it will be incorrect to convict him of an offence he never committed. Keeping the same in their mind, the 172nd Law Commission has made the following recommendations to make stringent legislation regarding the offence of marital rape: -

- “Exception 2 of Section 375 should be removed. Forced sexual intercourse by a husband with his wife should be recognised as a crime in the same way that any physical assault by a husband against his wife is. Section 376 A was to be repealed for the same reason.”

The Domestic Violence Act of 2005 (DVA) has granted common remedies against cruelty while preserving the position of marital rape in the process of neglect.^{xxii} Section 3 of the Domestic Violence Act has incorporated, in addition to other elements in the definition of domestic violence, any act inflicting harm, damage, or placing one's health, life, or other possessions in danger, whether mental, physical, or sexual.^{xxiii}

Sexual abuse in a domestic arrangement, such as a marriage or a live-in, is not considered unless it is hazardous or horrifyingly destructive.^{xxiv} It's not about a woman's capacity to make her own decisions. It's about the fundamental outline of the marital organisation that she preserves her place although being married, which implies she doesn't have to bow to every bodily suggestion, even if it comes from her significant other.^{xxv} Regardless of marital status, a person retains respect and pride. Apart from when one married accomplice is being prosecuted for an offence against the other, Section 122 of the IEA^{xxvi} prevents communication between married partners from being revealed in court. Since marital rape isn't a crime, confirmation isn't required until a charge of battery or any other form of physical or mental abuse under the pretence of cruelty has been filed. It will be nearly hard to prove the crime of marital rape in court by combining the requirements of the DVA and the IPC.

Marriage does not grow with sexual intercourse, and the fear of a needless lawsuit should not prohibit individuals caught in repressive traps, where they are slandered to the position of the property or from receiving security. Separated shape legal stimulating; the age of consciousness is essentially required. The perpetrators of this atrocity are men.^{xxvii} It is equally necessary as taking legislative actions to preserve women's human rights to teach young men and women to view women as vital partners in everyday life, in the advancement of society, and the achievement of peace. Man has a “social, economic, moral, political, religious, and cultural responsibility” to reject all forms of sexual orientation segregation.^{xxviii}

Determining what constitutes marital rape would need a wide societal consensus. What may appear to an individual wife to be marital rape may not appear to other individuals to be such. Before deciding whether or not to criminalise marital rape, it is necessary to define what constitutes marital rape and what could demonstrate marital non-rape. If a man's sexual exhibition with his wife fits all of the conditions for marital rape, the woman will be the only judge of whether it is or is not marital rape.^{xxix}

Rape is defined as forcing or against the person's will to engage in sexual intercourse between unmarried persons. Rape has long been a criminal offence. Prior to 1975, however, every state had a marital exception that allowed a “husband to threaten his wife and engage in non-consensual sexual contact with her”. Since 1993, nearly all fifty states and the District of Columbia have given their consent to legislation prohibiting marital rape.^{xxx} The few states recognized marital rape as a crime. Whereas, some states provide only marital exemption as for statutory rape.

RECENT DEBATE AROUND MARITAL RAPE

Recently, a Non-Governmental Organisation ‘*RIT Foundation*’ filed a writ petition^{xxxix} before the Hon’ble Delhi High Court challenging the “constitutional validity of exception 2 of sec. 375 of IPC”. The central government, on the other hand, argued that marital rape is not specified in any legislation. Furthermore, defining marital rape would need a broad consensus in society since “what seems to be marital rape to one wife may not appear to others.” The government further argued that before criminalising marital rape, there is a need to precisely define the definition and ingredients of marital rape.

The stand taken by the central government lacks the basic reasoning as Sec. 375 of the IPC exhaustively deals with the definition of Rape and since exception 2 of the same section gives safeguard to marital rape then the definition and ingredients provided in that section must be taken into consideration for defining marital rape. Apart from the central government, the Delhi government also submitted before the court that “Rape is an offence of cruelty and the provisions like section 498A of IPC and DV Act have their applicability on the crimes of cruelty”. Nonetheless, it has been already argued by the author above that how the DV Act is not sufficient enough for criminalising the offence of marital rape.

On the other hand, “Senior Advocate Rajshekhar Rao”, who was appointed as the *amicus curiae*, has argued in the favour of deletion of exception 2 of section 375 of IPC making marital rape an offence under the provision of rape.^{xxxix} Interestingly, the Delhi High Court after a conclusive hearing of the matter reserved its judgment while refusing the Centre more time to clear its stand on the issue observing that “it is not possible to defer an ongoing matter endlessly.”^{xxxix}

CONCLUDING REMARKS

Marital Rape is a heinous crime and should be penalized but, the question is whether mere deleting the exception from sec 375 IPC will work? The framework of Section 375 defining Rape is that to corroborate the offence of rape two primary questions (if the identity of the accused is not in question) are to be ascertained. First, was there even sexual intercourse, and second, if there was sexual intercourse was it consensual or not. Answers to these questions according to the followed practice in India are ascertained by a two-finger test (which is highly criticized by courts) and by observing body injuries. When it comes to proving Marital Rape, these mechanisms will completely fail as if the victim is habitual of having sexual intercourse which in married women's case the probability of victim being in this category is very high the two-finger test will become useless, secondly injuries on the body of the victim are not a conclusive proof as there are several other means by which rape can be committed without body injuries.

The challenge is to how in the present system will the law be able to prove the act of Marital Rape. If nothing changes and the same practise continues, the courts will either be liberal and justice will be denied, or they will be literal and apply section 114A of the IEA, which stipulates that if the accused has sexual intercourse and the question is whether it was done without the “permission of the lady alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall conclude she did not consent.”

ENDNOTES

ⁱ Matthew Hale, William A. Stokes, *et.al.*, “*Historia Placitorum Coronae. The History of the Pleas of the Crown*”. (Philadelphia: R.H. Small, 1847).

ⁱⁱ *Independent thought v Union of India*, (2017) 10 SCC 800.

ⁱⁱⁱ Nageshwar Singh, *Psychology & Crime* 168 (RbsA Publishers, 1st edn., 2012).

^{iv} Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter*, (New York University Press, 1998).

^v Kersti Yllö Bergen, Raquel Kennedy, *et.al. (eds.)*, “*Marital Rape: Consent, Marriage and Social Change in Global Context*”, 17-26 (Oxford University Press, 2016).

^{vi} 1998 CriLJ 2428.

^{vii} Susan Brownmiller. *Against Our Will: Man, Woman, and Rape*, 23-30 (Ballantine Books, 1993); *See also*, Henry de Bracton, *The Laws, and Customs of England*, (Harvard University Press, Vol. II, 1968).

^{viii} *Ibid.*

^{ix} *Supra* note 6.

^x Women's Sexual, Reproductive and Menstrual Rights Bill, 2018 (Bill No. 255 of 2018).

^{xi} *Independent thought v. Union of India*, (2017) 10 SCC 800.

- xii Peta Bowden and Jane Munnery, *Understanding Feminism* 365 (Routledge, 1st ed., 2014).
- xiii T. Bhattacharya, *Indian Penal Code* 343 (Central Law Agency, 9th ed., 2017)
- xiv Jonathan Herring, *Family Law: A Very Short Introduction* 35 (Oxford University Press, 2014).
- xv *Nimeshbhai Bharatbhai Desai vs. State of Gujarat*, 2018 SCC OnLine Guj 732.
- xvi Priyanka Rath, “Marital Rape and the Indian Legal Scenario” 2 *India Law Journal* available at: - http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html
- xvii Vijaykumar Harbishettar and Suresh Bada Math, “Violence against women in India: comprehensive care for survivors” 140 *The Indian Journal of Medical Research* 157 (2014).
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- xix *Independent Thought vs. Union of India and Anr.*, AIR 2017 SC 4904.
- xx Ahmad Siddiqui, *Criminology and Penology* 465 (Eastern Book Company, 7th ed., 2009).
- xxi *Lilu@Rajesh and Anr. v. State of Haryana*, (2013) 14. SCC 643.
- xxii Dr. G.B. Reddy, *Women and the Law* 127 (Gogia Law Agency, 10th ed., 2021)
- xxiii The Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), s. 3
- xxiv Ravneet Kaur and Suneela Garg. “Addressing Domestic Violence Against Women: An Unfinished Agenda.” *Indian journal of community medicine* 33,2 (2008) 73.
- xxv Mamta Rao, *Law Relating to Women and Children* 86 (Eastern Book Company, 4th ed., 2005).
- xxvi The Indian Evidence Act, 1872 (Act 1 of 1872), s. 122.
- xxvii Navin Kumar, *Criminal Psychology* 136 (LexisNexis, 1st ed., 2015).
- xxviii Dr. Ishita Chatterjee, *Law of Forensic Science* 116 (Central Law Publication, 1st ed., 2017).
- xxix Dr. Samia Tabassum, *Women and Law* 79 (Satyam Law International, 1st ed., 2016).
- xxx Jasbir Jain, *Women in Patriarchy: Cross-Cultural Readings* 48 (Rawat, 1st ed., 2007).
- xxxi *RIT Foundation vs. Union of India*, Writ Petition (C) no. 284 of 2015.
- xxxii Utkarsh Anand, “‘Can’t make marital rape an offence until talks end’: Centre to Delhi HC”, *The Hindustan Times*, Available at - <https://www.hindustantimes.com/india-news/cant-make-marital-rape-an-offence-until-talks-end-centre-to-delhi-hc-101642211484263.html>
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