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Criminalisation of Marital Rape: An Exigency in the Age of Gender Equality

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ABSTRACT

Women are the beacon of a mature and thriving civilisation. The flourishment of a civilisation lies in the dignified and respectable position of women in the society. However, they have been fighting for their rights since the very inception of humanity. Beginning with primitive age till today, women have been constantly subjugated by the male section of the society. However, with the coming of 21st century, the scenario has transformed significantly and now women are competing at par with their male counterparts in almost every arena of social existence. Be it economy, medical, arts, politics, governance or any other field women are leading and sometimes even outperforming their male counterparts. Ironically, in the age of gender equality, gender inequality persists in the most derogatory form, that puts question on the very standing of women in the society. One such source of gender inequality, is the draconian provision of Marital Rape Exception in the criminal laws of India. This article aims to explore various dimensions pertaining to the issue of Criminalisation of Marital Rape in India. The article has been divided into various parts to provide a comprehensive insight into the issue of marital rape and the necessity of criminalising it.

***Keywords**: Marital Rape, Criminalisation, Gender Discrimination, Women rights, Equality.*

I. INTRODUCTION

In India, women constitute a major chunk of the nation's workforce and contribute immensely to the country's development. Our constitution provides equality before the law, equal opportunities to all, and prohibits discrimination based on religion, race, caste, sex, or place of birth. As has been observed in the case of Shayara Bano v/s Union of India[3] that – *"Gender equality, gender equity, and gender justice are the values intrinsically entwined in the guarantee of equality, under Article 14".* As per NCRBs' Crime in India 2022' report, the total of 4,45,256 cases of 'Crime Against Women' were registered during 2022, marking a rise of

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[3] Shayara Bano v/s Union of India, (2017) 9 SCC 1.

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4% as compared to 2021 report. Out of these cases, the offence of rape alone constituted 7.8%.[4] That shows how unsafe women are in our society despite having many safeguarding laws and statutes for protection of women. Thus, in order to promote gender equality and ensure women's safety, the offense of Rape[5] exists in the Indian Penal Code. However, the offense of Rape, under Section 375, has two exceptions, one exempting medical procedure[6] from the offense of rape and the other exempting a man doing sexual intercourse with his wife provided that his wife is not below fifteen years of age. It is from Exception 2 of the offense of rape that the controversial issue of marital rape sprawls. Thus, marital rape is an unwanted sexual intercourse by a husband with his wife, not below fifteen years of age, without her consent. Besides, the prospective act of Bharatiya Nyaya Sanhita, 2023, aims to increase the age limit from 15 years to 18 years. However, the position of women still remains vulnerable to the vagaries of their male partners. Ironically, Exception 2 to Section 375[7] lacks to provide any rationale behind the decriminalisation of non-consensual sexual intercourse by a man with his wife, while on the other side, it criminalises unwanted sexual intercourse between husband and wife living separately on account of judicial separation or otherwise under Section 376B of IPC[8]. So, it can be inferred that in Marital Rape (Exception Clause) consent is presumed, which is not there in the case of Section 376B as husband and wife are living separately and the law takes notice of consent.

II. ORIGIN OF MARITAL RAPE: HISTORICAL CONTEXT AND CONTEMPORARY DEVELOPMENTS

The Marital Rape Exception sprawls from nineteenth century, when many of the matrimonial rules operated along with the common law principle of coverture. The Doctrine of Coverture[9], chalked out the proposition that a married women's civil identity gets subsumed with that of her husband and she is subordinate to him. The tremors of this archaic idea of legal relationship between husbands and wives has been felt throughout the nineteenth-century jurisprudence.

The nineteenth century legislations, fails to provide the slightest indication that a husband could be prosecuted for raping his wife. Rape laws specifically stated what a "male person" could not

[4] Bismee Taskin, NCRB data shows 4% rise in crimes against women in India, (Dec. 04, 2023 02:50 pm) https://theprint.in/india/ncrb-data-shows-4-rise-in-crimes-against-women-in-india-up-has-most-rape-posco-cases/1871133/
[5] The Indian Penal Code, 1860, Section 375.
[6] The Indian Penal Code, 1860, Section 375, Exception 1.
[7] The Indian Penal Code, 1860, Section 375, Exception 2.
[8] The Indian Penal Code, 1860, Section 376 B.
[9] Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941 (1995).

do to "any woman, other than his wife".[10] It was based on the ideology that a man cannot become guilty of rape by forcing his wife for sexual gratification. Although the archaic laws, made no indication of prosecuting a husband for spousal rape, leading treatises reviewed the contrasting rights of prostitutes and criminalised the act of someone committing rape with a prostitute.[11]

The post-independence development that brought about a paradigm shift in the laws of women's rights, is the arrival of the 42nd Law Commission Report[12], which recommended the criminalisation of marital rape. The subject was revisited by the 172nd Law Commission[13] (2000) which stated that criminalisation of Marital Rape will result in excessive interference with the "Institution of Marriage", thereby providing a glimpse into the interplay between the Exemption Clause and the public policy. In 2012, Justice Verma Committee's Report[14] brought about a tectonic shift in the field of women protection in India by advocating the cause of criminalisation of spousal rape. The committee came as a response to the nationwide agitations to increase the efficacy of criminal laws in matters that deal with heinous sexual assault against women.

III. THE CONSTITUTIONAL GUARANTEE FOR PROTECTION OF WOMEN RIGHTS AND MARITAL RAPE

The constitution of India seeks to foster gender equality in tandem with fulfilling other basic rights. The Article 14[15] and Article 21[16] of the Indian Constitution stand shoulder to shoulder with the aim of protecting and preserving the fundamental rights. The Article 14 seeks to provide equality before the law for all by ensuring that they are not discriminated against based on gender, race, religion, place of birth, or caste. Any disparate discrimination must be justified by an *"intelligible differentia"* that is proportional to achieving the state's goal.

However, the 2nd Exception provided under Section 375 of IPC distorts the very provision of equality as has been enshrined under the constitution. Section 375 of the IPC engages in discrimination by penalising unmarried men who engage in rape, at the same time, setting free those who rape their own wives. The very exception seems to intend that the wife's position in

[10] Ibid.
[11] Ibid.
[12] Law Commission of India, Indian Penal Code, Report No. 42 (Jun 1971) https://lawcommissionofindia.nic.in/cat_Indian_Penal_Code/
[13] Law Commission of India, Indian Penal Code, Report No. 172 (2000) https://lawcommissionofindia.nic.in/cat_Indian_Penal_Code/
[14] JUSTICE. J.S VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law, (January 23, 2013).
[15] The Constitution of India, 1950, Article 14.
[16] The Constitution of India, 1950, Article 21.

a legal marriage is subordinate to that of her husband[17]. Any deviation from the law of equality demands a reasonable nexus, however the test for relationship in the exception for rape fails to have the same. The principle of Article 15[18] is blind-sided by the exception too, as it goes against what is provided in Article 15(3)[19] by taking away a woman's bodily sovereignty, autonomy, and legal safeguards.[20]

In tandem to that, the Article 21 of the Indian constitution aims to protect the right to life of a person. The right to life is a broad power bestowed by the Constitution which includes, the right to dignity and bodily autonomy. This means that a woman's right to bodily autonomy includes aspects of physical, and mental wellbeing. A woman has the right to decide her sexual choices and also contemplate her choices regarding reproduction and any other aspect which falls under personal liberty.[21] However, the marital rape exception overtly deprives women of her basic right of physical autonomy and privacy. The exception also provides a way for the perpetrators to oppress their victims. It could also be argued that the loophole for marital rape runs contrary to Article 19[22] of the Constitution as well. As intimate relations are also part and parcel of freedom of expression provided to Indian citizens.[23] The continued existence of Marital Rape exception vanquishes the very purpose of having the aforementioned constitutional provisions.

IV. CALL FOR CRIMINALISATION- THE DUAL PERSPECTIVE

A. Present Outlook- The Endorsing Argument

The 5th round of National Family Health Survey (NFHS), 2019-20, reveals a grim picture, according to which "*82% of married men were sexually violent with their wives, as were 13.7% of former husbands.*" This shows the urgent need for a legal provision to prevent spousal sexual violence. The more concerning matter to be addressed is the fact that 90% of the survivors of such violence choose to refrain from taking action. Social stigma due to sacred nature of marriage and the negative light on female activism in recent times seem to be the most pressing cause of such restraint on action[24].

Gender Based Violence

[17] Hrishikesh Sahoo v. State of Karnataka 2022 SCC OnLine Kar 371: (2022) 2 KCCR 145: (2022) 2 KCCR (SN 109) 145.
[18] The Constitution of India, 1950, Article 15.
[19] The Constitution of India, 1950, Article 15(3).
[20] *sup*ra note 15.
[21] Suchita Shrivastava v. Public Information Officer, 2013 SCC OnLine CIC 16971.
[22] The Constitution of India, 1950, Article 19.
[23] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[24] National Family Health Survey (NFHS-5), (2019-21) https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf

INDIA KEY INDICATORS[25]					
S. no	Indicators	NFHS 5 (2019-2021)		NFHS-4 (2015-2016)	
		Urban	Rural	Total	Total
1.	Ever-married women age 18-49 years who have ever experienced spousal violence (%)	24.2	31.6	29.3	31.2
2.	Ever-married women age 18-49 years who have experienced physical violence during any pregnancy (%)	2.5	3.4	3.1	3.9
3.	Young women age 18-29 years who experienced sexual violence by age 18 (%)	1.1	1.6	1.5	1.5

Despite the strenuous situation, marital rape in India is still viewed akin to an act of domestic violence. Therefore, the remedies available to a victim of spousal violence are civil in nature and are limited to "protection orders, monetary compensation and judicial separation" as per the Protection of Women from Domestic Violence Act, 2005.[26]

Several inconsistencies exist within Indian laws, one such provision is the ground for divorce in section 10(2) of Indian Divorce Act, 1869[27], where it is provided that spousal rape by a husband is a valid ground for divorce. This provision raises a few questions, chief among them being the fact that non-consensual sex by a husband is classified as 'rape'. Such classification sheds light on the fact that although Indian lawmakers consider marital rape to be detrimental to marriage and grouped in with acts such as bestiality, it is left out of the context of traditional crimes.

In the recent supreme court case of X v. Principal Secretary, Health and Family Welfare Department, 2022[28], the court brought a new perspective to previously existing provisions of the Medical Termination of Pregnancy (Amendment) Act, 2021, by allowing *"for termination of pregnancy on grounds of 'non-consensual sex' by husband."* This contrasts with the intended purpose of the termination due to rape being deleterious to a woman's mental health. If 'non-consensual' sex by husband is considered on par with rape as a valid ground, then it is time we consider the effect of marital rape on wife's psyche.

[25] Ibid.
[26] The Protection of Women from Domestic Violence, 2005.
[27] The Indian Divorce Act, 1869, Section 10(2).
[28] X Vs. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors. Civil Appeal No. 5802 of 2022 (Arising out of SLP (C) No. 12612 of 2022)

It is also pertinent to note that the new proposed crime bill, The Bhartiya Nyaya Sanhita, 2023, although has removed the provision of 'unnatural sex' and 'adultery' which were weakened and diluted by judicial action, it has failed to address the ever-burning question of marital rape. There is a lacuna in the proposed bill, that needs to be filled by a reasonable law on marital rape. The current legislature has declined to address the issue due to fears of inclusion of such provision destabilizing the institution of marriage, as it could be used as a machine for frivolous suits. However, a reasonable law on the subject, could ensure that any individual who institutes an erroneous and mala-fide claim, shall be held accountable in the court of law.[29]

B. The Obstructive Argument- Block on Criminalisation

It is vital to our understanding to look at all the possible consequences that could emanate from the criminalisation of marital rape. The primary debate around the problem revolves around the fact that a new marital rape law would be used as a tool by wives, seeking to harm the reputation of their partners. Thus, it has the potential to detrimentally effect certain class of men. One could always argue for the fact that the criminal justice system could ensure a fair process and also allow for a counter suit in case of malicious proceedings, however it is the truth that when wife wrongfully accuses her husband it destroys his reputation and standing in the society. It is to the general public's understanding that right to reputation is central to Article 21 of the Indian constitution, and reputation once destroyed can lead to deleterious consequences. There is well, a possibility that an innocent husband would be ostracised by his community.

However, this argument cannot be a sole defence against criminalisation of marital rape, as it is evident that the same case can be made with regards to the crime of rape, wherein there is a chance of an innocent man being accused of false charges but rape still persists as a criminal offence. Thus, it is evident that legislation provides different standards for the class of married women when there is no intelligible differentia to do the same. Ultimately, the purpose of law is to ensure that justice is served.

Another argument stems from the perspective of a marital rape law, being contrary to public policy. There is some truth in the argument, as most of the Indian population see consummation of marriage as a conjugal right. Therefore, majority of Indians being rooted in strong traditional roots would naturally view the right to sexual intercourse as an extension of traditional rights. Thus, we see that the legislation lacks public force and has the capacity to hurt religious and cultural sentiments. However, it is often seen that when customary right fails to keep up with

[29] Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

the nation's constitutional spirit, it is overridden by a law that seeks to ensure justice to the stakeholders involved. Hence, there is a duty on the government's end to use the positive force of law to bring about change in the society.

We see that both the above-mentioned consequences have a possibility to negatively affect a group of people, however such an impact could be cushioned by a law which covers for the loss suffered by a party due to the act of another. The state could very well see that the victim in either of the cases could be well compensated for their troubles. It is the purpose of law to show negative aspects of an act, and criminalising marital rape would further discourage such acts in the future by way of deterrence. The courts, could also contribute by way of reasoned decision making considering the facts in each circumstance.

In tandem with the above arguments, one of the most crucial factors while determining criminalisation of marital rape is the establishment of evidence. In RIT Foundation v. Union of India, 2015,[30] the Centre submitted to the Delhi High Court that- "*The question is what evidences the courts will rely upon in such circumstances as there can be no lasting evidence in case of sexual acts between a man and his wife".* This stands testimony to the mounting concern with regards to the evidence in the offence of marital rape.

V. CONSEQUENCES OF CRIMINALISING MARITAL RAPE

A. False Charges and Detrimental Effect of Punitive Action-

There always exists the possibility of false marital rape allegations which is exactly the problem within the criminal justice system – Even with solid safeguards against perjury, false accusations, and wrongful incarceration, it is often seen that the public and justice institutions side with victims and women who do indeed file malicious rape cases seldom get prosecuted. It is unfortunate to see that most people look at the issue of marital rape from a single angle. These problems are supplemented additionally by already existing issues within the criminal justice system, such as –

a. The principle of *'Bail as the Rule and Jail as the Exception'* is rarely followed in criminal matters of grave nature such as rape. Further, classifying non-consensual spousal sex as a criminal offence has the potential for great misuse and could see the institution of court devolve into a mechanism of injustice when used for malicious purpose.[31]

[30] RIT Foundation v. Union of India, 2015, 2022 SCC OnLine Del 1404.
[31] Law Commission of India, Indian Penal Code, Report No. 277 (Aug 2018) https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081613.pdf

b. Adverse effect of punitive action- The nature of marriage is a complex one, on one flank there exists the problem of marriage in itself implying consent and on the other is the difficulty to prove non-consensual sex in a marriage. Thus, the institution of marriage could be destabilized by punitive action. Criminalising marital rape could deter the partners from having sexual intercourse due to fear of litigation and rather go through lengthy paperwork that would expressly provide for consent. Thus, punitive action may very well make the whole process more complex and violate right to privacy of the citizens.

C. The Religious Perspective

It has to be noted that India is a salad bowl of various cultures and religions with unique customs and traditions. Therefore, it is crucial to understand the religious perspective on marital rape. There is no legal provision for marital rape in the major religions of India. The religions of Hinduism, Sikhism, Jainism and Buddhism provide for a law on rape but none such on the idea of marital rape. It is of the view of these religions that a woman has the right to choose a husband of her choice and also the 'sexual autonomy', and therefore one has no right to interfere in the union of couples. It is however, vital to note that India's neighbour, Nepal, is although officially a Hindu country, marital rape has been recognized as a criminal offence.[32] Islam considers it the wife's duty to provide for the sexual needs of the husband as the Muslim law requires it so, whereas the Christian law although provides for divorce due to cruelty but does not criminalise the act in itself.[33]

Thus, to legislate a law on marital rape treads the domain of various religions, thus one must consider the various stakeholders and the consequences of the law on them. It is safe to assume that many religions would be averse to change thereby influencing public policy. However, there is a duty on legislators to change what is contrary to constitutional spirit and herald social change by way of revolutionary laws. To take the few examples of eliminating caste discrimination and triple talaq which was closely tied to the religion, and ensuring the basic rights for the mistreated groups, the government has the power to lower the rate of marital rape by way of deterrence to the law.

VI. RECOMMENDATIONS AND SOLUTIONS

The primary recommended action for reducing marital rape is to criminalise the act. The

[32] Muluki Criminal Code, 2074, Section 219 (1,4,5).

[33] Ankita Upadhyay, Religion and Marital Rape, a tricky territory, THE NEW INDIAN EXPRESS, (Feb. 14, 2022, 08:03 AM),https://www.newindianexpress.com/cities/delhi/2022/Feb/14/religionand-marital-rapea-tricky-territory-2419141.html

exception to section 375 of the IPC, encourages the legal fiction of restricting the female's bodily autonomy. "*A woman's autonomy and bodily integrity are concepts that have developed over the years, thus making rape an offence unless there is true consent — not merely consent by legal fiction*."[34] Therefore, it is vital to understand that sexual intercourse works on the principle of explicit consent on the part of both the partners, and mere implied consent from the act of marriage in itself, cannot be assumed.

Subsequently, there should be a change in the laws that relate to matrimony[35] and child custody. The existence of children in a marriage is a complex issue that the parliament should be careful to legislate on, however the act of marital rape should affect the victim's rights with regards to child custody. The law should also provide for maintenance by the perpetrator of the crime. Also, though the religious law regarding marriage provides for different grounds of divorce, the law should amend these laws so as to make the act of marital rape an absolute ground of divorce.

So, as to prevent the false charges and to discourage the filing of cases that seeks to maliciously prosecute a person, there needs to be some modification to Section 499 of IPC.[36] Although, the law shouldn't deter those who act on truth, the criminalisation of spousal rape has the capability to affect the society and lead to a breakdown of the institution of marriage. It is with this consideration that there should be a modification which specifies additional methods of punishment on those who seek to maliciously destroy the reputation of a person.

The argument that evidence would be exceedingly difficult to prove in the case of Marital Rape, stands untenable in the present scenario. The act of spousal sexual violence stills holds ground under the Domestic Violence Act as a criminal offence, despite the difficulty of evidence in the same. Concomitantly, possibility stills exists when it comes to procuring evidence in Marital Rape. If a woman falls prey to marital rape, there is a probability that there will be a history of sexual violence that can be proved with the aid of forensic evidence. Even if medical examination fails, there are other means to procure evidence like- witness testimony, recordings through electronic transmission and many others.

Additionally, the setting up of centres for survivors of rape, should be encouraged. The care centres for the rape survivors are seen lacking in India, and such centre have the potential to reduce marital rape crimes. These centres can provide the survivors with adequate emotional, mental and financial support. They can support the survivors on how to proceed with regards

[34] Seth, L., *Talking of justice: People's rights in modern India* (Aleph Book Company, 2014).
[35] Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 NUJS L. REV. 121 (2018).
[36] Indian Penal Code,1860 § 499

to crime and help guide them to the right people. Such centres can be provided on a subsidized basis so as to encourage even those of lower economic parity to report such crimes.

VII. Conclusion

The truth is universally acknowledged but not spoken out loud. The truth is that the exemption of marital rape is a product of archaic thinking. Patriarchy has its roots deep in the heart of the country, as is clear when no action can be taken by a married woman against her husband who rapes her. Criminalising marital rape is like stepping into a complex web of cultural diversity and religious sentiments.

Rape creates fear in the minds of the victim and disables their sense of autonomy and security. Married women need to be given the same due benefits that are allowed for the rest of society, as rape is a crime against society at large. A country where equality, liberty, and justice are put on a scale cannot ignore the scream of a thousand women across its breast who seek the very idea upon which the country was built, 'Freedom'.

The way forward is to undertake a structural reworking of the system, this can be attained by formally abolishing Exception 2 of Section 375 of IPC by the parliament. In the absence of legislative action, the courts can take the initiative by declaring marital rape as an offense under section 376(c) of IPC and removing the exception. There also needs to be an amendment with regards to section 498 of IPC to cover marital rape and other forms of sexual abuse, a married woman suffers under the guise of matrimonial obligation. We must open the eyes of the legal hive-mind to the truth of things.

"The law can protect only what it can see not what it is blind to."

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