

“Criminalizing Marital Rape: A Comparative Analysis of Indian and US Laws”

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ABSTRACT

‘Implied Consent’ is a paragon of the concept of Marital Rape in India. The solemnization of marriage of two people is taken as an implied consent to sexual intercourse between them. Marital Rape is the act of sexual intercourse by husband without the wife’s consent, the act in itself is a heinous and a barbaric act towards the women. The status of the existence of Marital Rape in India is *de facto* and not *de jure* as this can be understood by the Exception in Section 375² of the Indian Penal Code (herein after we call as “IPC”). Section 375 of IPC criminalizes Rape, but Exception 2 to Section 375 considers forced sexual violence in a marriage as a crime only when the wife is below the age of 15 years. However, the Supreme Court in the case of *Independent Thought V. Union of India*³ laid down that the forced sexual violence in marriage is a crime when the wife is below the age of 18 years. Neither the legislature nor the judiciary in India recognizes marital rape as an offence and thus immunizes and normalize marital sexual violence. On the other hand, the reforms for criminalizing marital rape in the U.S. began in the mid 1970s and by 1993, marital rape has been criminalized in the laws of all the 50 States of USA. In this paper, the researchers will be analyzing the rationale behind why the marital sexual violence has been accepted as a normal practice, the laws it violates, the emerging need of criminalizing such act, a comparative study between the laws of US and India and a final viewpoint on the suggestions and outcome of the research.

Keywords: Implied Consent, Marital Rape, sexual violence, criminalize.

INTRODUCTION

“A women with a voice is by definition is a strong woman. But the search to find that voice can be remarkably difficult.”

- Melinda Gates⁴

The concept of marriage in India is considered as the sacrosanct union of two souls. Once the marriage is solemnized it’s assumed that there is an implied consent to have sexual

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² Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

³ Independent thought v. Union of India, (2017) 10 SCC 800.

⁴ Melinda Gates, an American philanthropist.

intercourse between them. This concept of marriage has been taken as a shield to cover the ugly truths of marriage such as domestic violence, marital rape, cruelty and other such gruesome and heinous crimes which are perpetrated against the women. There are laws to protect the women of the country from a barbaric crime like rape but what has never been protected is the rape that happens within marriage. In India, since the ancient times it's the man who goes out of the house and earns money for the living of his family and the woman manages all the household chores. Hence, it has developed an illusion of universality male dominance. We are surrounded by male chauvinist ideologies, where the man believes that they are supposed to rule their wives in all the matters be it their professional, personal or sexual matters. And this patriarchy is one of the major hurdles in curbing the discrimination that is faced against women.

Our Preamble enshrines the idea of Equality, but the societal pressure on women has proved to be greater than that on men. It's assumed that the women will fulfill the desires of the family and will keep it intact; so when such women go to the police to report a crime against her husband she is not accepted by her family or the society. The women live in the constant fear of being rejected by the family or by society. This social pariah has suppressed the women of our nation. Women are scared to come out of their houses and fight for their basic human rights. The Right to live with Dignity is our Fundamental Right⁵ but due to the fear of rejection the women often choose to survive and accept such gruesome act as her fate. Women have been treated as an object of pleasure by men and their consent is just assumed on the basis of mutual matrimonial ceremony. They are supposed to surrender to the sexual desires of their husband disregarding the fact that they have an equal right to refuse. Lack of awareness regarding their rights on the part of women and lack of moral education on the part of men is a big contributing factor to such heinous crimes.

MARITAL RAPE

Meaning

Marital Rape is the act of sexual intercourse by husband without the wife's consent which can be obtained by way of force, threat of physical violence and mental torture.⁶ Marriage as discussed above is sacrosanct union of two souls where the implied consent to lawfully consummate their marriage is considered as a requisite of this ceremony. But nothing allows the husband to force his wife against her will to have sexual intercourse. In India, mutual matrimonial ceremony is taken as a permit to have sexual intercourse. And thus, this heinous and gruesome act hasn't been criminalized in India.

But what needs to be realized and understood is that the right to have sexual intercourse must be consensual and should not be an act of obligation. The status of the existence of Marital

⁵ Aruna Ramchandra Shanbaug v. Union of India (2011) 4 SCC 454.

⁶ G.V. Akshaya and M. Kannappan, *A Study on Marital Rape in the Indian Legal Scenario*, 119 IJAPM, 1090 (2018), <https://acadpubl.eu/hub/2018-119-17/1/94.pdf>.

Rape in India is *de facto* and not *de jure*.⁷ To recognize the complications of Marital Rape, we need to first understand the difference between the terms Rape and Marital Rape.

Section 375 of IPC defines that man is said to commit "rape" if he has sexual intercourse or tries to perform oral sex under the following seven descriptions:

“First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

*Seventhly.—When she is unable to communicate consent.”*⁸

Apart from laying these seven circumstances to be concluded as rape, Section 375 also make it crystal clear that if any women do not physically resists to such gruesome act, it won't be interpreted as her consent to that sexual activity.⁹

The only provision in India which has been laid down against the heinous act of marital rape is under the Exception 2 of Section 375 of IPC which considers forced sexual violence in a marriage as a crime only when the wife is below the age of 15 years. This age has been increased by the judiciary from 15 to 18 years in the case of *Independent Thought V. Union of India*.¹⁰ But no protection has been provided to the wife above the age of 18 years. Thus, the legislature and the judiciary of India do not recognize marital rape as an offence of a wife above 18 years and immunizes and normalize marital sexual violence.

Effects of Marital rape

⁷ Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*, 11 NUJS L. Rev. 1 (2018), <http://docs.manupatra.in/newslines/articles/Upload/8787A55C-D93F-4589-8A68-A9A032AF0E.pdf>.

⁸ Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

⁹ *Ibid.*

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

One thing that doesn't hit the consciousness of the society is that a heinous crime like Rape can also happen within marriage, where the offender is not any stranger but the husband of the wife. And this relationship with the perpetrator i.e. husband, simply absolves him of any crime. This increases the seriousness of the crime and makes it hard to deal with. Marital rape affects the women drastically because the offender is someone whom the women knows and trusts. Such gruesome act shakes the soul to the core and the women go through various physical as well as psychological effects. The impacts of such effects that are caused due to marital rape are discussed below:

1. Physical effects - It will include injuries to private organs, fractures, bruises, fatigue etc. and if any assault has been committed against them causing darkened eyes, bleeding wounds and broken bones.¹¹
At times, due to the assault the victim also experiences certain gynecological issues such as miscarriages, infertility etc.
2. Psychological effects - The psychological effects are worse than the physical injuries. The agony that women suffer when her husband rapes her repeatedly cannot be put into words. The women not only lose her confidence but also her self-respect due to post traumatic stress. She develops suicidal tendencies, depression, eating disorders, sexual dysfunction etc.¹²

The UN Population Fund found that more than two-thirds of married women in India, between the ages of 15 to 49 have been beaten, raped, or forced to provide sex.¹³ But the matters that have been reported for such acts are very less in number as compared to the actual scenario. It's the fear of social pariah and male dominated social system that women are afraid to file a case. Also, the lack of proper laws on marital rape is one of the biggest concerns. Marital Rape isn't a crime in India; the only legal protection that women can receive is under Protection of Women from Domestic Violence Act, 2005 wherein the marital rape is considered as a form of domestic violence. The rationale behind keeping the marital rape under the blanket of domestic violence is that if marital rape is criminalized in our country, it has a potential of destroying the institution of marriage.

What needs to be understood is the difference between marital privacy and Marital Rape – The former is the sexual relationship between the spouses and the latter is a brutal act perpetrated against women which violates the fundamental rights of Right to live with Dignity, Right to consent and bodily integrity of a women. Hence, what needs to be criminalized is Marital Rape like other heinous crimes such as domestic violence, cruelty etc.

LAW AND JUDICIAL DECISION ON MARITAL RAPE IN INDIA

¹¹ Prerna Deep, *Unveiling Marital Rape in India*, 3 PA, 1 (2018), <http://www.penacclaims.com/wp-content/uploads/2018/09/Prerna-Deep.pdf>.

¹² *Ibid.*

¹³ Simran Kaur, *Marital Rape in India*, CFFP (Nov. 13, 2020, 10:00 AM), <https://centreforfeministforeignpolicy.org/journal/2017/10/13/marital-rape-in-india>.

Neither the Indian Penal Code, 1860 (herein after called IPC)¹⁴ nor there are any other criminal laws on marital rape in India. Moreover, there is no judicial decision which criminalizes the act of sexual intercourse with one's spouse without spouse's consent.

Section 375 criminalizes the offence of rape and Section 376 provides the punishment for rape; section 375 exception 2 considers sexual intercourse with wife as rape only if she is below the age of 16 years. Also as per, Sec 198(6) Criminal procedure code¹⁵ (herein after CrPc) says that no court shall take cognizance of the offence v/s 376 IPC, where such offence consists of sexual intercourse by a man with own wife, the wife being under 15 years of age, if more than 1 years has elapsed from the date of commission of the offence. The section was amended by 2006 amendment act and the words '15 years' were substituted with "18 years". But the IPC was not amended simultaneously. This led to a conflict between the CrPc and IPC. The conflict was resolved by the Supreme Court in the judgment of "*Independent thought v. Union of India*"¹⁶. In the judgment, the Supreme Court took notice of ill consequences of the child marriages and the ill effects on the health of the girl and child born in the child marriages. Revolving the conflict the five judge's bench held that '15 years' in Section.375 of IPC has to be substituted by 18 years. Now, it is a settled law that sexual intercourse with wife who is under the age of 18 years is rape.

Almost all the developed nations have criminalized marital rape but neither this judgment nor any other judgment or law discusses about or criminalizes the sexual intercourse with spouse without his/her consent in India.

India is one of the 36 nations who have not criminalized marital rape. Because of which the High court and the Supreme Court are flooded with writs challenging the constitutionality of the exception.

Exception 2 of S.375 of IPC and the Article 14, and 21 of Constitution of India

Article 14 Constitution of India, 1950 (herein after we call COI) ensures that the "state shall not deny to any person equality before law and equal protection of the laws within the territory of India."

When a girl is raped by a man it would constitute an offence under Section 375 of IPC but if the man turns out to be the husband of the girl it would not amount to an offence under Section 375 of IPC. Isn't this violative of Article 14 of the constitution of India? Exception 2 violates Article 14 by denying married women equal protection. When the IPC was drafted, women were not treated equal to the men, they were not given rights. Under the 'Doctrine of coverture', it was considered that post marriage the identities of man and the woman merge into one. Thus, marital rape was not considered as an offence. But now the times have changed and the woman has a separate identity. And India has many laws arising for the

¹⁴ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

¹⁵ Criminal Procedure Code, 1973, § Sec 198(6), No.2, Acts of Parliament, 1973(India).

¹⁶ *Independent thought v. Union of India*, (2017) 10 SCC 800.

protection of women. Exception 2 discriminates b/w a married and an unmarried woman and hence it is violative of Article 14 of COI as there is no reasonable classification.

In *State of West Bengal V. Anwar Ali Sarkar*¹⁷, the Supreme Court has held that any classification to be reasonable as per Article 14 of the COI should be based on Intelligent Differentia and by not criminalizing Marital Rape, the state is violating the equality guaranteed under Article 14. Exception 2 frustrates the very purpose of Section 375 of IPC. It then encourages the husband to enter into sexual intercourse with their wife against her will and without her consent and their act is not made punishable under the IPC. Therefore, what can be concluded by the researchers is:

1. Section 375 of IPC Exception 2 discriminates between a married woman and unmarried woman.
2. This classification has no reasonable nexus with the object of Section 375 of IPC exception 2 as it is violative of Article 14 of COI.

Exception 2 of S.375 of IPC and Article 21

Article 21 of the Constitution protects the life and personal liberty of an Individual. Article 21 states that ‘no person shall be denied his life and personal liberty expects the procedure established by law’. Various judgment have broaden the scope of Article.21 and have tried to interpret as to what all will be included in ‘personal liberty’.

Furthermore, a right to privacy has also been acknowledged as a fundamental Right in Article 21 in the K.Puttaswamy¹⁸ judgment. The court heard that ‘life in Article 21 includes within itself a dignified life. Life and personal liberty are created and not conferred by the constitution. Rather they have always existed in an individual. Article 21 merely declares and protects that right. In the Puttaswamy judgment, the court held that privacy is about an individual's autonomy i.e. an individual control upon his own self there shall be a complete independence of the individual upon his physical and mental space. An individual autonomy clears establish a person to realize life to the fullest. Our Honorable Supreme Court has given such a broad meaning to the word ‘personal liberty’ and ‘life’. In light of the Puttaswamy judgment if we look at the exception 2, it is a clear violation of the right to life and personal liberty of the woman who is subject forcefully to sexual intercourse by her husband. It results in violation of her independence upon her physical and mental state.

In the case of *State of Karnataka V. Krishnappa*¹⁹ the Supreme Court held that “sexual violence apart from being a decriminalizing act is an unlawful intrusion of the right to privacy and sanity of a female”. The doctrine of coverture itself would be unconstitutional in light of the fundamental right to privacy.

¹⁷ State of West Bengal v. Anwar Ali Sarkar, (1952) 75 SCR 284.

¹⁸ Justice K. S Puttaswamy v. Union of India, (2017) 10 SCC 1.

¹⁹ State of Karnataka v. Krishnappa, (2000) 4 SCC 75.

In *Suchita Srivastava V. Chandigarh Administration*²⁰ the Supreme Court held the right to make choices related to sexual activities in personal liberty. The Supreme Court has recognized time and again the right to abstain from any kind of sexual activity, interceptive if they are married or unmarried, as a fundamental Right under Article 21. Honorable Justice DY.Chandrachud while delivering the Joseph shine judgment²¹ has held that man is not the owner' of the sexuality of wife.

The above conclusions from the judgments clearly depicts that exception 2 of Section 375 of IPC is violative of Article 14 and Article 21 of COI and hence, Marital Rape also should be covered under Section 375 of IPC and be criminalized.

COMPARISON BETWEEN INDIA AND USA

Marital rape has been a major issue since many decades. Earlier, the society as a whole was not aware of it as a barbaric practice which was followed within the four walls of the house. And now, people are aware about their rights and such heinous acts like marital rape which not only attacks the mentality of the victim but also a sense of fear for the people living in the society. Marital Rape is horrifying as it causes an immeasurable pain which cannot be described by anyone except the ones who have unfortunately been the victim of it. Even after criminalizing child marriage in India there is no such legislation for criminalizing marital rape. Indian legislature doesn't seem to be concerned about the reality that marital rape is a very real threat & is needed to be criminalized as soon as possible.

The reason the researchers concluded that the Indian legislature stills hold an old mentality is very clear from the legal provisions of IPC. Section 375 of IPC defines what constitutes as rape and this section is pretty clear and a correct definition except of "Exception 2"²² which says that if the husband commits a forceful intercourse with his wife and if she is younger than 15 years of age then only it will be considered as a crime of rape. Now this means that if the girl is above 15 years her consent is not required or it presumed that she gave her consent because according to the old beliefs the mutual matrimonial ceremony is taken as a permit to have sexual intercourse by man and what is not taken into consideration is the "Consent" of the wife. Also Article 21²³ of the Indian constitution guarantees Right to Life and Liberty along with Right to Privacy but still the courts and the legislature tends to forget or ignore about these fundamental rights when it comes to prescribing the laws from criminalizing marital rape.

In USA, marital rape is a crime in all the 50 states. It has been a crime since a couple of decades now. There is not any national law in USA for the crime as such but all the states have their separate laws regarding marital rape and in some states they have differentiated between rape and marital rape in different sections. The important fact to look upon is that

²⁰ Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

²¹ Joseph Shine v. Union of India, (2018) SC 1676.

²² Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

²³ India Const. art. 21.

Marital Rape is a crime in all the 50 states of USA. Some of the laws of some states are stated below:

- California – California have a separate section for marital rape and a separate for rape in general in their penal code which is section 262²⁴ and section 261²⁵ is about rape in general.
- South Carolina - They also have a dedicated section for spousal rape which is Title 16, Chapter 3 and Section 615(16-3-615)²⁶ and Title 16, Chapter 3, Section 651(h) [16-3-651(h)]²⁷ of South Carolina Code of Laws²⁸ for spousal sexual battery and sexual battery respectively.
- Maryland – According to their laws on the marital rape it is explained that if two people have parted ways by the way of legal partition or by divorce then any forceful sexual intercourse between them will be considered as rape only. And also, it says that if the two spouses are living together and then coercion or forceful sexual intercourse takes place without the consent of their partner then that will be considered as rape and the accused will be prosecuted.
- Mississippi – According to their penal law, the offence of sexual battery requires the husband and wife to be living together at the time of incident and the accused must commit a coerced sexual intercourse and must penetrate the victim without their consent.
- Nevada – The defense of marriage can only be applicable if there was no threat or force at the time of the incident but if the intercourse was done with any kind of threat or force then the defense of marriage cannot be availed.²⁹

So, it can be seen that the spousal rape or marital rape is a crime in all the above mentioned states and just like these 5 states it is a crime in all the 50 states of America. Yes, many states have excluded the situation of being under the influence of drugs or other substance for the spousal rape while others consider it a crime in all the situations. No law is perfect and those loopholes are there because of lack of the cases of that nature.

SUGGESTIONS

The researchers suggest the following measures that can be taken to prevent the sexual violent act against the women:

1. Marital Rape should be criminalized and should be recognized as an offence under the IPC.
2. Gender neutral laws should be framed and any discrimination should be discarded.

²⁴ California Penal Code, 1872, § 262, United States of America.

²⁵ California Penal Code, 1872, § 261, United States of America.

²⁶ South Carolina Code, 1976, § 16-3-615, United States of America.

²⁷ South Carolina Code, 1976, § 16-3-651(h), United States of America.

²⁸ South Carolina Code, 1976, United States of America.

²⁹ Sneha Mohanty, *Marital Rape*, RG (2019),

https://www.researchgate.net/publication/336170675_Paper_on_Marital_Rape.

3. The offence of Marital Rape should be considered as a valid ground for divorce under all personal laws.
4. Section 375 of IPC should be amended so as to avoid unnecessary misuse of the section.
5. If any women do not physically resists to such gruesome act, it should not be interpreted as her consent to that sexual activity and should not be used as a defense to the charge.
6. The laws regarding Marital Rape has been crystal clear explained in the California Penal Code which can be taken as a role model to criminalize this offence.
7. General awareness of such an offence is a must among the citizens.

CONCLUSION

Marital rape violates a woman's right to privacy and her right to live with dignity. It's a disgraceful violent act committed against a women. We as the community and as a country shouldn't distinguish the offence of 'rape' for a married and unmarried women. A rape of a married woman is as atrocious and intolerable as that of an unmarried woman. In India, we have already gone through a lot of changes in Human rights of the women but the legislature still can't comprehend the seriousness of this barbaric act. The major reason behind not criminalizing marital rape in India is the conservative mentality. Even after seeing hundreds of cases of marital rape and how people use marriage as a permit to rape it's still considered by the society as a Right of husband over his wife. And this causes a major difference between the laws of USA and India because they amended their laws about marital rape not years but decades ago and here we are in India still guided by the old beliefs that this kind of heinous act is the right of husband over his wife. Also, the judiciary doesn't interfere because it is believed that by criminalizing this sexual violent act it will harm the sacred institution of marriage. Right to marriage³⁰ and Right to live with dignity are the constitutionally protected fundamental rights of a citizen but if this act of Marital Rape isn't criminalized the women loses its fundamental right to live with dignity. And, hence denying justice and protection against such acts is a total miscarriage of law. Therefore, the need of the hour is to criminalize the offence of marital rape and bring an affirmative change for the plight of women in India.

³⁰ Lata Singh v. State of Uttar Pradesh, AIR 2006 SC 2522.