

MARITAL RAPE IN INDIA: THE CONSEQUENCES OF ITS CRIMINALISATION, SOCIAL AND CULTURAL IMPACT

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ABSTRACT

In India marriage is considered to be a sacred union of two people. The institution of marriage is sacramental, but under the disguise of this sacred institution, an evil of Marital rape is committed. Marital rape means forceful sex by the husband without the consent of the wife. The Indian penal code 1860 does not recognise marital rape as a crime because of many reasons one of the grounds given by the Indian legislature while trying not to criminalise marital rape would be an irrefutable implied consent given when the spouse has entered in to institute of marriage and non-interference of criminal laws in to the sphere of personal laws. A marital rape victim undergoes physical agony such as damage of private parts as well as psychological which includes suicidal thoughts and depression. Marital rape is violation of article 14 and 21 of a woman, due to non-criminalisation of marital rape it violates F.R of a woman and the woman does not have any remedy to look for when she is raped by her husband. The exception of sec 375 IPC wherein “sexual intercourse of man on his own wife, the wife not being under 15 years is not rape”, The 42nd report of law commission was also against this exception as it discriminates women and also it is not in conformity with law. The 172-law commission report also was in support of removal of this exception to criminalize marital rape. In this paper we will discuss the arguments given by the Indian legislature for non-criminalisation of marital rape are completely baseless. We will also discuss through constitutional provisions that the exception of sec 375 in IPC is unconstitutional, we will also emphasize that there is no remedy available to women if she falls victim to this evil

Introduction

For quite a while, individuals accepted that a lady's obligation in her wedded life is to care for her husband, bear youngsters, deal with family matters, cook and give profound and sexual needs to her significant other. This was first illustrated in Manu smriti which is viewed as an ancient legitimate text and has been utilized to codify the Hindu Law.

Marital rape is a rape in which the assaulter is the victim's husband. The definition as given in the code continues to be same which is sexual intercourse without any consent¹. Hence a prerequisite for proving rape is to demonstrate the absence of consent. The burden of proof frequently lays on the person in question, i.e. the victim. In certain occasions as on account of minors the presumption is that consent doesn't exist as they are incapable to give consent to such kind of act².

In Bodhisattwa

In Bodhisattwa Gautam v. Subhra Chakraborty justice Ahmad expressed, "this kind of cruel act will in turn destroy psychology of women and push her in to deep emotional crisis"³

In almost around 150 countries marital rape is considered an offence, some of the countries have made changes to their already existing laws or have made new laws. United states have criminalised marital rape in 50 states, The United Kingdom has made life imprisonment as punishment for the crime of marital rape. Fiji and United Kingdom made marital rape a criminal because of judgements given by the courts. In certain nations like Bangladesh marital rape as a crime is not recognised. In India, Recently The Delhi high court gave a split judgement on the legal validity of marital rape and the constitutionality of section 375 exception was challenged⁴

Many legislations have been passed in the country to control brutality against women such as Domestic violence act, Dowry prohibition act. However, among them marital rape isn't recognised as a crime. Marital rape is vicious and the women realizes that she has to live her entire existence with the wrongdoer which has an unsatisfactory physical and mental impact on her. It is extremely under reported in the light of fact that many women believe that going

¹ Indian Penal Code, 1860 § 325

² The protection of children from sexual offences Act, 2012 §3

³ Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1SCC 490

⁴ RIT Foundation v. The Union of India WP (c)284/2015

to the designated authorities is worthless due to lack of regulations for marital rape and they may likely face social backlash

42nd and 172nd Law commission Report

The 42nd law commission report dealt with two issues one is in the case when husband and wife doesn't live together the exception of sec 375IPC shouldn't be applicable⁵. The report didn't mention the reason for the suggestion given. "It mentioned in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right". The suggestion meant the presumption must exist when both the wife and husband stay together and this presumption shouldn't be applicable when they are not living together. The second recommendation given by the report is about women aged between 12 to 15 regarding sexual intercourse without consent⁶. It mentioned that These offences should be allotted a different section for the punishment and the offence must not be called as rape.

172nd law commission report dealt with the issue of legality of exception clause⁷. Many arguments were in favour of removal of the exception. It was advocated that even though majority of the cases of cruelty against women was made an offence, there was not a glaring obvious explanation for marital rape solely to be safeguarded from the bounds of law⁸. This discussion was not accepted by the law commission as it was worried that this would prompt "excessive interference with the institute of marriage".

Based on reasons given by the Indian legislature and the suggestions given by reports of law commission it has narrowed down to three arguments for not criminalising marital rape

one is not to meddle with the sanctity of marriage to preserve its sacredness. The second one is other remedies available for women to resort like cruelty in Indian penal code, 1860 domestic violence act and other personal laws. Third one is damaging the social structure and moral code in India.

⁵ Law commission of India, *Indian penal code*, Report no 42(june 1971) available at <https://lawcommissionofindia.nic.in/1-50/Report42.pdf> (last visited on June 2nd 2022)

⁶ Id

⁷ Law commission of India, *Indian Penal code*, Report no 172 (March 2000) available at <https://lawcommissionofindia.nic.in/rapelaws.htm> (last visited on june 3rd 2022)

⁸ Id

In this Article we will rebut the justifications given by the government against criminalisation of marital rape with the help of fundamental rights of the constitution, personal and criminal laws.

Marital Rape as Violation of Fundamental Rights

Article 14 of the constitution provides for “equality before law and equal protection of laws”⁹. Which means likes should be treated a like, unequal’s must be treated unequally.

The classification must be based on intelligible differentia and should have rational nexus with the object sought to be achieved¹⁰

section 375 IPC saves women from sexual acts which are done against her consent and will. subsequently section 375 IPC gives protection against sexual assault on the bodily integrity and represents state interference in punishing those who infringe on integrity of an woman. on that case, it is safe to say that sec 375 safeguards woman’s autonomy.

But in contrast, there is an exception to section 375 which doesn’t offer protection to sexual act by force without consent for a married woman and doesn’t classify it as rape. This classification and separate treatment to a married woman is based on presumption that irrevocable consent is given to the husband when has entered in to the institute of marriage. This presumption does not have any intelligible differentia.

Section 375 excludes the rape done by the husband on his wife. Denial of protection of an women based on marital status is discriminatory and infringes article 14, of the constitution. There isn’t much difference between both of them. The only difference is women being married This is very difficult for married women because they have to live with the assaulter for the whole life and they are reliant on them. This gives the assaulter the opportunity to commit marital having the knowledge that it does not amount to rape. Therefore, marital rape is an infringement of Article 14, and it doesn’t satisfy the test for classification.

If we examine the judgement of cases with reference to restitution of conjugal rights herein referred to as (RCR) because of the issues which has arisen in the constitutional law with regard to RCR are similar to the discussion of marital rape. RCR is a procedure in which a decree is passed by the court persuading the couple to live with each other if either of them doesn’t with

⁹ CONSTITUTION OF INDIA, ARTICLE 14

¹⁰ State of west Bengal v. Anwar ali Sarkar, AIR 1952 SC 75

other spouse ‘without reasonable excuse¹¹’. In *T.Sareetha v. T. Venkata subbaiah*¹² high court of AP struck down the constitutionality of RCR and held that sec 9 of RCR is unconstitutional as it took away the right of woman to choose and indulge in sexual relations and shifted that right to the state which would infringe woman’s control over the body , self-expression and violates article 21¹³. In *harvender kaur v. harmander singh choudhary*¹⁴ contrast to sareetha case this court was in conformity with the constitutionality of RCR. The court held that

“The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in relationships which should be obviously as far as possible protected from possibilities of that kind. The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces ‘two in-one-ship’”

In the judgement of Harvinder Kaur in which the court disagreed to have a discussion about infringement of Article 21 because of ‘private sphere’. However, the state in the issue of decriminalising sec 377¹⁵ and striking down sec 497 of IPC has intervened in to private sphere. Which means state has selectively choose to enter in to private sphere and has set boundaries in accordance to it.

Therefore, the justification given by Indian legislature against criminalisation of marital rape saying excessive interference in the institute of marriage is baseless.

ALTERNATIVE REMEDIES

With regard to the discussion of alternate remedies available to women. The most famous remedy is section 498Aipc i.e., cruelty. this cannot be accepted as a recourse because cruelty and rape are different and there is no particular definition for cruelty.

To be convicted under cruelty the intensity has to be more. The perpetrator has to cause her grave harm to her health and limbs to come under cruelty. Another reason would be to be convicted under cruelty is the action has to be done several times¹⁶. Therefore, it becomes difficult to convict the husband if forceful sexual intercourse is done one or two times.

¹¹ The Hindu Marriage act, 1956 §9

¹² T. Sareetha v. T. Venkata Subbaiah , 1983SCC OnLine AP 90 :AIR 1983 AP 356

¹³ Id

¹⁴ Harvender kaur v. Harmander singh Choudhary AIR 1984 Del 66

¹⁵ Navtej singh johar v. union of India, AIR 2018 SC 4321

¹⁶ Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511

Similarly civil laws only include cruelty as a ground for divorce but not cruelty of sexual intercourse.

Thus, there is a need for criminalisation of marital rape as alternative remedies doesnot prove effective for convicting a person under marital rape.

Proving lack of consent

One of most difficult things which stands against criminalisation of marital rape is the evidence to prove the lack of consent. Even though using force and causing physical injuries may be one factor to consider it. It should not be the only sole factor in the case of marital rape. Therefore, testimony of wife should be used as evidence, in addition to it any reported cases of DVact should be used to corroborate evidence.

Conclusion

Criminalisation of marital rape is the need of the hour in the recent era of increasing violence against women. Therefore, the exception clause of sec 375 should be removed and presumption of husband and wife engaging in sexual intercourse should be removed with little changes in the evidence act for the challenges that arise to prove marital rape.

