

AN ANALYSIS OF CRIMINALISATION OF MARITAL RAPE

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Abstract

The law in India doesn't condemn conjugal assault, for example the Indian Penal Code, 1860 doesn't perceive that it is a wrongdoing for a spouse to assault his significant other. The explanations behind this are complex and can be found in different reports of the Law Commission, Parliamentary discussions and legal choices. The reasons range from safeguarding the sacredness of the establishment of union with the all around existing elective cures in regulation. In this paper, we portray how these contentions progressed to not condemn conjugal assault are incorrect. Through an investigation of Article 14 of the Constitution of India, we contend that the marital rape special case statement tracked down in the Indian Penal Code, 1860 is completely unlawful. Further we note the absence of existing elective solutions for a lady to look for change under in the event that she is assaulted by her significant other. We finish up on the note that criminalisation of conjugal assault is completely fundamental. We propose a model for something very similar by recommending corrections to criminal regulation as well as taking note of the progressions expected in common regulation, especially the law connecting with separate.

Keywords

Marital, rape, conjugal, assault, criminal, Indian Penal Code, 1860

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Introduction

Rape is the unlawful coercion by a man of a sexual act without the woman's permission, either through physical or emotional urges, or through delusional thoughts or feelings of the perpetrator. Rape is a crime in India under Sections 375 and 376 of the Indian Penal Code, 1860. Spousal rape or marital rape is the act of having sexual intercourse without the consent of the spouse. "Lack of consent is an important factor and need not involve physical violence. Spousal rape is considered a form of domestic violence and sexual abuse."² To date, only 52 countries have legislation that recognizes spouse rape as a crime. "In many parts of the world, including India, marital rape is not recognized as legal and social misconduct. In any case, if the State considers rape to be illegal and recommends appropriate penalties, or if there is a marital relationship between the victim and the perpetrator, the State excludes this clause. This is often referred to as the "special case of marital rape." In these areas, there are four major justifications developed to not blame spouse rape. The two underlying justifications are obsolete in today's environment due to advances in orientation support."³ The main justification came from understanding that

the wife is submissive to her husband. A woman was the property of her spouse and this meant that women had no marital privileges. "In such circumstances, it is inconceivable that a spouse would attack a significant other because her husband was an expert on the subject and was pleased with the honor of her body. In addition, there was also the solidarity hypothesis. This hypothesis posited the possibility that a woman's personality converges with that of her husband after marriage."⁴

Literature Review

"Vijay P singh (2021)"⁵

"It talks about how in India, as in various conventional societies, ladies have been despite everything are treated in various coldhearted ways. They are controlled, inclined to attack and manhandle and take a chance with assault outside as well as inside their own homes. Besides, marital rape isn't viewed as a wrongdoing in India. The article endeavors to investigate Indian assault regulations and to show that exception for conjugal assault doesn't line up with the essential standards of equity and correspondence, which is the fundamental component of the Indian Constitution. The

² Dhingra, S., 2015. Criminalisation of Marital Rape in India. Available at SSRN 2604919.

³ Kallakuru, R.R. and Soni, P., 2018. *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*.

⁴ Kallakuru, R.R. and Soni, P., 2018. *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*.

⁵ Singh, V. P. (2022) 'Judicial Approaches to the Criminalisation of Marital Rape', *Indian Journal of Gender Studies*, 29(1), pp. 10–32. doi: 10.1177/09715215211056791.

article contends that the exception provision ought to be cancelled, and conjugal assault be condemned. The article further talks about the methodology of the Indian legal executive towards the issue of criminalisation of marital rape.⁶⁶

Cultures in Indian Society

India is probably the only country where her husband enjoys the status of God. The idea of Pati Parmeshwar (which means husband is equal to God) appears unfairly in mechanics between a man and his wife. Acceptance and endurance by women is a part of this Indian culture which includes husband's extreme cruelty. India boasts about its lowest divorce rate in the world but the real reason is divorce is optional primarily for women who are financially independent or who receive support from her family. Studies show that marital rape often has serious and long-term consequences on woman. The physical effects of marital rape include damage to internal organs, pain, bruises, lacerations of muscles, fatigue, vomiting. Woman raped by her husband suffers various other physical effects, such as broken bones, black eyes, and bloody nose. "Specific results of marital rape include the possibility of miscarriage, stillbirth, bladder infections, and infertility,

and uterine contractions, sexually transmitted diseases including HIV. Women who are raped by their partners are likely to suffer serious psychological consequences such as anxiety, shock, extreme anxiety, depression, suicidal ideation, and post-traumatic stress. Long-term effects include eating disorders, sleep disturbances, depression, and malnutrition.⁷⁷

Why marital law is not criminalized

There are many reasons why marital rape is not a crime under *Indian Penal Code, 1860*. The most important of all is the idea of marriage. The reasons for these are briefly explained below.

Implied consent and contract theory:

"The most common justification for marital rape whereas the exception is Hale's idea that marriage is a contract. According to him there is unspoken consent and contract between the couple. The terms of this agreement is woman's irrevocable consent to sexual intercourse with her husband, according to his will. According to implicit consensus theory, marital rape can never occur because all sexual contact within the marriage is assumed to be consensus-based."⁸⁸ Regardless of what wife feels she is

⁶⁶ Singh, V. P. (2022) 'Judicial Approaches to the Criminalisation of Marital Rape', *Indian Journal of Gender Studies*, 29(1), pp. 10–32. doi: 10.1177/09715215211056791.

⁷⁷ LawTeacher. November 2013. Marital Rape. [online]. Available from: <https://www.lawteacher.net/free-law-essays/family-law/marital-rape.php?vref=1> [Accessed 1 August 2022].

⁸⁸ M J, I. and Benjamin, M., 2022. *A Critical Analysis of Laws Relating To Marital Rape in India*. 5th ed. [ebook]

bound to obey husband's suggestion and expression and is bound to have sex on the will of the husband. Here, the wife's consent is of no use as the marriage itself shows implicit consent.

Women as Property: Another origin of common law is the basis for the marital rape exemption was the idea that her husband owned his wife as a property. Husband couldn't stand and couldn't rape his wife as he already owns it and is in possession of it. Customary law dealt with rape because women were considered as property and not as a crime against women, but as an infringement of men's property rights.

Marital unity: Marital unity generally speaks quickly about the absence of women. How a woman gets married and her identity is lost after her marriage, a new identity will be transferred to her which is of the existence of husband. This is called the doctrine of marital unity.

“Public-Private Division: Marital rape is not considered real rape because public law cannot break into the bedroom area. There is a distinction between public and private life, the law cannot intervene in someone's private life. It is not logical to think that the law respects the division of the public and

private sectors only with respect to the regulation of abortion, and not a marital rape. It is said to be a very serious crime.”⁹

Why marital law should be criminalized

The *Indian Penal Code, 1860* has made it clear that marital rape and subsequent rapes are not criminal, the amendment was unsuccessful, and the court's decision was that the parameters for which rape was found can also be used for ease of discussion by criminalizing marital rape. As mentioned earlier, there are two main reasons:

The criminal offense is that it is too difficult to prove rape during marriage. Criminalizing rape between spouses would adversely affect the sacred system of marriage. “Concerning the previous point, a few court choices in the late twentieth century have systematical diminished the weight on assault casualties to demonstrate their attack. As that is the situation, there is n justification for why comparative scope ought not be applied to cases in conjugal assault in this way making the wrongdoing somewhat more straightforward to demonstrate.”¹⁰

Moreover, the part of conjugal sacredness in

⁹ M J, I. and Benjamin, M., 2022. *A Critical Analysis Of Laws Relating To Marital Rape In India*. 5th ed. [ebook] The Law Brigade Publishers, p.2. Available at: <https://thelawbrigade.com/wp-content/uploads/2021/11/AJMRR_INDUMATHI-M-J-Dr.-M.-Suresh-Benjamin.pdf> [Accessed 1 August 2022].

¹⁰ Dhingra, S., 2015. *Criminalisation of Marital Rape in India*. Available at SSRN 2604919.

The Law Brigade Publishers, p.2. Available at: <https://thelawbrigade.com/wp-content/uploads/2021/11/AJMRR_INDUMATHI-M-J-Dr.-M.-Suresh-Benjamin.pdf> [Accessed 1 August 2022].

the 21st 100 years has developed and the utilization of it as motivation to not condemn conjugal assault ought to be truly addressed. The reasons why similar tolerances should not be applied to marital rape cases-

Proving a crime is a little easier as there is also the sacred side of the couple in the 21st century evolving and its use as a reason not to criminalize marital rape. The main question courts decide in rape cases is whether the woman gave her consent or not. A major factor in the past prohibiting all rape victims from having sex was the case law which was in her favor was the fact that the burden of proof was on the plaintiff. As victims, their testimony should not be equated as suspicion similar to the perpetrator.

Currently, rape is one of the few crimes where the responsibility of burden of proof lies with the defendant, and the woman can actually consent to sexual activity because the burden on all unmarried rape victims has changed whereas the same is not true for married victims. One of the problems that continue to exist for all rape victims, despite the tension is that the proof that falls on her husband is to believe in her wife's testimony rather than her own husband. This principle is the basis of the idea that married women cannot be raped. "Sexual relationships with her husband are no longer valid", this

statement is invalid in itself as rape must be determined based on the specific facts of the case.

Also, you cannot rely on the testimony of a married woman. It can be tainted with malicious intent, and is simply not possible. Rape case, hard cross the exam and general shame of publicly admitting to being raped is an ordeal most women would not willingly put themselves through, infact it will be a lot more difficult to prove the lie that a woman was raped.

The second problem faced by victims of marital rape is that they are generally not injured and they show their resistance. One reason is that they feel overwhelmed to submit them to human authority and his will without engaging in physical combat. Earlier court precedents ruled that injuries were an important part of the judgment and wife agreed. "Indeed, in Mathura's case, the fact that she was not injured in fact she was treated as one of the conclusive evidence that she did not resist, therefore it was assumed that she consented to sex. However, the Supreme Court changed its mind and it turns out that injuries are not an essential sign of resistance. In fact, its lack of resistance cannot be interpreted if the accused is a authorized person."¹¹ This case

¹¹ LawTeacher. November 2013. Marital Rape. [online]. Available from: <https://www.lawteacher.net/free-law-essays/family-law/marital-rape.php?vref=1> [Accessed 1 August 2022].

was especially about the police officer, the reason it was used was that the officer had as much authority over women it makes those physical resistances unnecessary. Using the same principles, men in Indian society, on average, dominated the authority or authority of one man. Marriage is so overwhelming that it forces women to physically resist sexual progress disputation. "Finally, a previously forbidden question about the authenticity of testimony and the lack of violations the underlying problem may have changed slightly in favor of marital rape victims detecting gender without consent remains difficult. However, this issue is not limited to married woman. The presence of consent is often involved in the case of rape by others. It is difficult to prove by either method. This is more of a problem for married women because they tend to "agree" or at least not resist, based on socio-economic conditions. In particular, the woman is alone, so she submits to the will of her husband being physically weak, but overall it feels weak. I thought so perpetuated by social conditions in most rural areas of India like a single rape married women also submit to victims to protect themselves from physical violence. But if this is a married woman they usually expose themselves to domestic violence in the past and knows what her husband is doing. Finally, married women tend to "agree" to

have sex because they feel they deserve it. You feel responsible for all the evil temperament or marital discord that may have caused rape."¹² They also feel like they own the responsibility to have sex with husband even if she doesn't want to. That neither perpetrators nor victims understand that human and constitutional rights of women are being violated is not a valid excuse for legislation. Do not report the act as a crime

Indian Precedents

"The Andhra Pradesh High Court on account of *T. Sareetha v. T. Venkata Subbaiah* ('Sareetha') was the principal case to strike down the defendability of the RCR as given in the Hindu Marriage Act. The contention under the watchful eye of the Court was that the Sec. 9 of the Hindu Marriage Act disregarded Articles 14, 19 and 21 of the Constitution. The Court concurred with this contention. The Court held that the RCR cure was unlawful since it moved the right of decision to enjoy sex from the lady to the State. This would disregard Article 21 of the Constitution since it encroaches upon the individual independence of an individual. Moreover, the Court acknowledged that ladies would be wounded by this arrangement and takes note of the significance of sexual independence for a

¹² Kallakuru, R.R. and Soni, P., 2018. *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*.

woman. It is likewise here that the Court concurs that "no certain demonstration of sex can be constrained upon the reluctant people, since nothing can possibly be more corrupting to human nobility and tremendous to human soul than to subject an individual by the uncompromising influence of law and order to a positive sex Act". Interestingly and it is exceptionally interesting for the Court to do as such - it takes note of that even inside the domain of marriage, the idea of constrained sex can exist. In any case, the Court held that the idea of RCR isn't couple with the idea of the 'marital circle'.¹³

"In *Harvinder Kaur v. Harmander Singh*, the Delhi High Court was likewise stood up to with a request testing the defend ability of the RCR. Withdrawing from Sareetha, the Court maintained the defend ability of Sec. 9 of the Hindu Marriage Act. For this situation, the Court expressed that the motivation behind RCR was not to constrain somebody to remain with their accomplice but instead to "safeguard the establishment of marriage". It additionally will not acknowledge that a pronouncement of RCR would bring about ladies being compelled to continue intimate connections with their significant other. At one piece of the judgment, the Court takes an ever-evolving position by referencing that sexual

connections are not by any means the only sort of relationship that incorporates a marriage. Once more, be that as it may, the Court utilizes this 'moderate' comprehension of union with disregard the way that when a lady is compelled to live with her significant other, there is an exceptionally high likelihood that these ladies would be constrained into sexual connections also. The Court choosen to disregard this type of misuse ladies would look by buying into the hypothesis of 'marital protection'.¹⁴ That's what the Court declared:

"The presentation of established regulation into the conventional home-grown relationship of a couple will strike at the actual foundation of that relationship and will be a productive wellspring of disagreement and quarrelling. It will make the way for limitless prosecution in connections which ought to be clearly quite far safeguarded from conceivable outcomes of that sort. The home-grown local area doesn't lay on agreements fixed with seals and fixing wax. It lies on that sort of moral concrete which joins together and produces 'two-in-one-transport'.¹⁵

Quandary of Under- reporting

¹³ [1978] 1979 AIR 185 1979 SCR (1) 810 1979 SCC (2) 143 (Supreme Court of India), p.1.

¹⁴ [1983] 1984 Del 66 (High Court of Delhi), p.27.

¹⁵ [1983] 1984 Del 66 (High Court of Delhi), p.69.

In a moderate nation like India, conjugal assault is too precarious to even consider managing. Indian culture is a predominant variable influencing the spouse's choice to go to bat for her freedoms. 66% of the wedded ladies in our nation have been liable to assault, regardless of what their financial condition is. Conjugal assaults normally go unidentified and unreported in numerous portions of our country. There are a few explanations behind under-revealing of this the instances of conjugal assault. Conjugal assault, in lawful terms, implies a demonstration which is a consequence of pressure and which is non-consensual. The different gamble factors related with conjugal assault are early period of marriage, the absence of social and lawful help and the absence of knowledge of the husband-to-be. The review led in the conditions of west Bengal and that's what Gujarat sees somewhere in the range of 6 and 13 % of youthful wedded ladies revealed constrained sexual encounters executed by their spouses. Young ladies are not adequately developed to be hitched and comprehend the connection appropriately. "In Law Commission's 1955 report on the Hindu Marriage Act, they expressed "the embodiment of marriage is a sharing of normal life, a sharing of all the bliss that life brings to the table and all the hopelessness that must be looked throughout everyday life... Living respectively is an image of such

partaking in the entirety of its perspectives. In this day and age, studies demonstrate that somewhere in the range of 10 and 14% of hitched ladies are assaulted by their spouses. Ladies don't for a moment even report these cases for the feeling of dread toward spouse's family and home-grown brutality by them. Spouse is bound to be encouraged to serve better the sexual requirements of her spouse. Because of this predominant power given to spouse by our general public, ladies feel substandard and furthermore are sufficiently gutsy to report these cases."¹⁶ A casualty of conjugal assault is not hurt just truly yet additionally her sense of pride is hurt, particularly on the grounds that the attacker is her own significant other. "From an investigation of 6600 wedded men between the age of 15 to 65 in UP, it was found whether they had at any point had intercourse with their spouses "regardless of whether she was not willing' and whether they had ever 'actually constrained' their spouses to engage in sexual relations. Concentrate on recommended that 33% of more youthful men and one fourth of more seasoned men detailed having non-consensual sex with their spouses eventually in their wedded life. Men's report of constrained sex on their spouses highlights the probability of ladies

¹⁶ Kallakuru, R.R. and Soni, P., 2018. *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*.

under revealing conjugal assault cases.”¹⁷ Absence of experience with the spouse to be a direct result of early marriage and some of the time, marriage without the assent of the young lady can make what is going on of non-consensual nature of sex far more detestable. In a concentrate in west Bengal young ladies who had an organized marriage were as liable to report a non-consensual sexual experience contrasted with the individuals who had a 'love' marriage, another gamble factor related is the absence of lawful and social help. Reliance of young ladies on their spouses might think twice about capacity to forestall non-consensual sex. They inactively acknowledge undesirable sexual relations for the endurance of their marriage and to have monetary security. Information from the public family well-being overview shows that 62% of ladies who wedded at the times of somewhere in the range of 21 and 25 accepted that a spouse is legitimate in beating his significant other for specific reasons. The spouse's monetary freedom assumes a significant part in supporting her to safeguard her body and her poise.

Conclusion

In this research article all the facts whether in favour or in against that were related to

the rape and marital rape had been put forward. I understand that if our Indian legal system criminalises marital rape it can give an edge to the malicious intentions of the wife to use it as a tool against the husband and his family but we cannot go blind on the fact that marital rape is a crime and it is happening in our society. Considering all the facts and arguments that I have put forward in this article in my opinion marital rape should be criminalised on the conditions based on extensive research and proof and should be made sure that no culprit is left and no bona-fide person shall be punished. Our legal system should bring changes as to ease the laws for establishing rapes as most of the women don't report because of strict laws to establish the proof of rape and which further makes no one guilty according to the law and which in turns makes the women liars of the society so laws should be made in such a way and no underreporting happens.

¹⁷ Kallakuru, R.R. and Soni, P., 2018. *Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*.