

Marital Rape: A harmonised crime

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Introduction

The roots of the concept of marital rape can be founded in the deeply buried history of the colonial era. All laws at that time were influenced by Victorian laws¹. Sailing in the same boat, marital rape as an exception to the crime of rape was included based on the belief that men and women were unequal and women did not have the right to raise voices for their rights as provided under the 'Doctrine of Coverture'². Contradictorily, the society has travelled miles since then but most of the laws have not. Where at one place we have laws for the protection of women such as Protection of Women from Domestic Violence Act, 2005³ and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act⁴ on the other hand, there exists a huge void when it comes to matters such as 'marital rape'. What we describe as a heinous crime on the streets is not an offence if done within the four walls it is rather wickedly covered by the iron curtain of marriage.

Meaning of marital rape

None of the statutes in India define the meaning of 'marital rape'. While the Indian Penal Code, 1860 defines 'rape' exhaustively under section 375, there's no mention about the definition of 'marital rape'. But to put forth its meaning, it can be said that 'marital rape' is an unwanted intercourse by a man on his wife by force, threat of force or physical violence or when she's not in a position to consent for it⁵. Marital rape is not only a crime against women but also is a whetted blow at the most essential fundamental rights including the right to equality, right to privacy, right to live with dignity as enshrined in the Indian Constitution. These grounds are

¹ Sarthak Makkar, *Marital Rape: A Non-criminalized Crime in India*, HARVARD HUMAN RIGHTS JOURNAL (June 6, 2020, 2:30 PM), https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#_ftn8.

² Keri Engel, *The Law of Coverture: Why call a Woman By Her Husbands Name?*, AMAZING WOMEN IN HISTORY (June 5, 2020, 8:15 PM), <https://amazingwomeninhistory.com/law-of-coverture-why-call-a-woman-by-her-husbands-name/>.

³ Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2006 (India).

⁴ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

⁵ Asha Antony and Anusree P, *Marital Rape: Violation of Fundamental Rights*, LEAF TODAY (2018)

<http://leaftoday.com/MARITAL%20RAPE%20-%20VIOLATION%20OF%20FUNDAMENTAL%20RIGHTS.pdf>.

sufficient in themselves to call for the laws criminalizing marital rape, but the legal stance in India is not what will satisfy the thirst for justice.

Legal stance for marital rape in India

India is one of the 36 jurisdictions⁶ where marital rape is not criminalised. Moreover, the laws that are linked to marital rape are in their most ambiguous form. The legal provisions tangents to marital rape are described below:

1. Section 375 of the Indian Penal Code, 1860

Section 375 deals with rape and extensively provides for the conditions wherein an act comes under the ambit of rape. But the Exception 2 herein reads- '*sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.*' Consequently, a man can be held liable for the rape of his wife only if the wife is below fifteen years of age, thereby providing punishment under Section 376 of the Code. It provides complete protection to the wife aged below fifteen years but for those above this age are unprotected preys to their husbands, often being subjected to this harmonised crime with no legal resort.

2. Protection of Women From Domestic Violence Act, 2005

Along with dealing with the provisions of domestic violence faced by the women, the Act recognises marital rape as a ground for seeking judicial separation from husband but providing it as a ground for separation is not enough for ensuring justice to its victims. Therefore, it is unsatisfactory in terms of protection from marital rape.

3. Section 376B of the Indian Penal Code, 1860

This section describes the punishment for engaging in sexual intercourse with the wife without her consent who is living separately under the decree of judicial separation. But it does not touch upon the cases of forced sexual intercourse where the husband and wife live together under the same roof.

4. 172nd Law Commission of India Report⁷

⁶*Marital rape in India: 36 countries where marital rape is not a crime*, INDIA TODAY (Mar 12, 2016), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

The Report suggested a few changes to the IPC provisions relating to rape. It suggested that the word 'rape' should be replaced by word sexual assault that would cover all types of penetration. Moreover, suggesting marital rape to be equivalent to rape, it provided for the omission of Exception 2 of Section 375.

It is vital to ameliorating the laws to criminalize marital rape not only to protect the victims but also to protect the Fundamental Rights that are being blatantly violated.

Marital rape as a violation of Fundamental Rights

Fundamental rights became a part of the Constitution of India considering their importance in developing the personality of every individual and preserving human dignity. But the presence of the acts such as marital rape puts a question mark on the very existence of these rights. Marital rape vehemently discriminates married women from the unmarried ones and also violates her right to live with dignity. Marital rape is primarily at odds with the following articles of the Constitution of India:

1. Article 14⁸

It deals with equality before the law and equal protection of laws. Contrary to this, marital rape not being criminalised, on the face of it chalks out the ground for discrimination between the married and unmarried women. The unmarried women are entirely shielded by the law provided for the punishment of rape, but married women are devoid of any such justice when they are victimised by their husbands through marital rape. Such distinction between the married and unmarried women opens up the space for violation of Article 14⁹. The Supreme Court through its judgement in the case of *State of Bombay v. FN Balsara*¹⁰ had already mentioned that a distinction will not be a violation of Article 14 only if it passes the test of reasonableness. Meaning, a differentiation will not be against Article 14 only if the differentiation has a rational nexus with the object to be achieved. With regards to marital rape, there is no object that can be achieved by

⁷ LAW COMMISSION OF INDIA, ONE HUNDRED AND SEVENTY SECOND REPORT ON THE REVIEW OF RAPE LAWS, D.O. No. 6(3)(36)/2000_LC(LS) (2000).

⁸ INDIA CONST. art 14.

⁹ Aishwarya Mishra, *India: Law On Marital Rape- A Much Needed Reform In Our Legal System*, MONDAQ (June 5, 2020, 9:30 AM), <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

¹⁰ *State of Bombay v. FN Balsara*, (1951) 2 SCR 682 (India).

discriminating married and unmarried women in the said manner; it rather submits greater miseries to the marital rape victims. Also, concerning Exception 2 of section 375¹¹, the Supreme Court in the case of *Independent Thought v. Union of India and Anr.*¹², had held that striking down Exception 2 of section 375 would not create a new offence as the offence already exists in the main part of section 375. Striking down the said part is necessary to bring it in consonance with Article 14 of the Constitution of India.

2. Article 21¹³

This article focuses on the protection of life and personal liberty. As previously held in a catena of judgements by the honourable Supreme Court of India the ambit of Article 21 is wider than what it appears to be. In *Maneka Gandhi v. Union of India*¹⁴, the widest possible interpretation was given to the expression, ‘personal liberty’. It was held that the expression refers to the inclusion of many other rights within itself such as ‘Right to live with human dignity’, ‘Right to Privacy’, etc. Currently, the scenario of marital rape vehemently violates the Right to live with human dignity and Right to privacy¹⁵. In the landmark case of *The Chairman, Railway Board v. Chandrima Das*¹⁶, the Court held that rape is not only a crime against the woman but also a crime against society. It chides away the dignity of the woman and is besmirch on the well crafted legal framework of the country. For Right to (sexual) Privacy, in the case of *State of Maharashtra v. Madhukar Narayan*¹⁷, it has been held that it is a fundamental right of a woman to preserve her sexual privacy and is not open for any or every person to violate her privacy at his wish.

Conclusion

Marital rape, the ‘harmonised crime’ has for a long time, dragged a lot of women into the well of misery where their echoes for justice are left unheard. Women not only are victims of rape but

¹¹ Indian Penal Code, No. 45 of 1860, INDIA CODE (1993).

¹² *Independent Thought v. Union of India & Anr.*, (2013) Writ Petition (Civil) No. 382 (India).

¹³ INDIA CONST. art 21.

¹⁴ *Maneka Gandhi v. Union of India*, (1978) AIR SC 597 (India).

¹⁵ Sarthak Makkar, *Marital Rape: A Non-criminalized Crime in India*, HARVARD HUMAN RIGHTS JOURNAL (June 5, 2020, 4:30 PM), https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#_ftn8.

¹⁶ *The Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465 (India).

¹⁷ *State of Maharashtra v. Madhkar Narayan*, (1991), AIR SC 207 (India).

also are forced to continue to thrive in a place that they do not deserve and belong to. Marrying a man certainly does not mean giving consent for physical and mental torture to one's own self. Like unmarried women, it is the need of the hour to protect dignity and right to (sexual) privacy of married women against the torturous acts of their husbands. Moreover, because of not being criminalised, data collection of such cases has not been possible yet and the miscreants wander around freely without the fear of being accounted for their heinous acts. While we have in the recent past welcomed a number of legislations for protecting the interests of women, there is now a need to amend law with respect to marital rape. The misery of marital rape is worthy enough to call for the attention of the Parliament of India for bringing about necessary amendments to the Indian legal framework to recognise marital rape as a crime and also for making provisions for punishing these offenders.