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NEED FOR RECOGNITION OF MARITAL RAPE AS CRIME IN INDIA**Abstract**

Both pillars of humanity i.e. Men and women have equal importance and role in creation and development of the humanity but the women are bound to face several humiliations in the society. Despite various safeguards and protections available at the global as well as at national level, before birth till last breath, women are discriminated. The offences against women are endless as sexual harassment, dowry-death, domestic violence, female genital mutilation and so on. Among other problems 'marital rape' is very crucial as it is not recognized, till date, in our Indian legal system as a crime, which needs immediate attention of the Legislature.

Introduction

It's 2020 and India remains one among 36 countries where it's not a criminal offense for a person to rape a woman — as long as they're married.

This asterisked exception features in Section 375 of the Indian legal code that defines rape as a criminal offense. A man commits rape if he has sexual activity with a lady against or without her consent, or if she may be a minor. (The majority of valid consent is eighteen in India). However, Exception 2 to Section 375 exempts unwilling sexual activity with a wife over fifteen years aged from this definition of rape, thus making it legal for men to rape women — who happen to be their wives — aged 15 and above.

Most countries within the world recognize that rape is rape, which rape may be a crime. So, what's holding India, a burgeoning 'superpower,' back? A careful analysis points to many factors: an outdated IPC dating back to the Victorian era; a rigidly patriarchal

society, across India's myriad religions, that suppresses women's voices and agency; and, a culture where marriage and family, within the dated sense of the words, still hold utmost significance because the building blocks of society. But arguably, the foremost stubborn obstacle within the way of India criminalizing marital rape is none aside from the Union Government itself. Despite the very fact that at any given point, there are several writ petitions before the Supreme Court and therefore the various high courts, filed by individuals and civil society organizations challenging the marital rape exemption to Section 375 — the government has continued to shield men who rape their wives by citing an equivalent few reasons repeatedly. One critical glance is all it takes to interrupt the explanations right down to their barebones: misogyny and misconceptions.

What is Marital Rape?

'Marital rape' occurs in all types of marriages regardless of age, social class, race or ethnicity. The expression 'marital rape' refers to 'unwanted intercourse' by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. The term 'unwanted intercourse' includes all sorts of penetration (whether oral, vaginal or anal) perpetrated against her will or without her consent. Marital rape, broadly, may be classified in three parts as-

1. *Battering rape*- In this form, both physical and sexual violence are present. The majority of marital rape victims fall under this category. In it, women are battered and raped by their husbands.
2. *Force-only rape*- In this form, husband uses only the amount of force necessarily to coerce his wife.
3. *Compulsive/ Obsessive Rape*- In this form, assault involves torture, and/or 'perverse' sexual acts and are often physically violent.

Marital Rape in India

In Indian legal system, Indian Penal Code 1860 is substantive criminal law which lays down the components of offences and punishment. In IPC, provisions relating to rape are provided in sections 375-376. In this context, there is only one exception in section 375 which talks about rape of wife by her husband as:

'Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.'

The intention of this exception of section 375 IPC is to protect the health of wife. In other words, if the age of wife is below fifteen years and her husband sexually intercourse with her, it is rape but if the wife's age is above fifteen years the Law has authorized to husband to rape his wife without any interference of State. This provision is totally unreasonable and unfair as in case of sexual intercourse with consent, it is rape if the girl is not the wife of the man involved and is below sixteen years. On the other hand, it is not rape if the girl is fifteen years and does not consent but is married to the man. If the wife has been married with a person, her all rights have been assigned to her husband and the wife is helpless because she is married.

Taking into account the discrepancy in laws of rape, the Law Commission of India in its 172nd report made the following recommendations –

1. 'Rape' should be replaced by the term 'sexual assault'.
2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the light of *Sakshi v. Union of India and Others*¹, 'sexual assault on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
7. Marital rape: exception of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376A was to be deleted.

Violation of various articles of the Indian Constitution

Violation of Article 14

¹ *Sakshi v. Union of India and Others* [2004 (5) SCC 518] (India)

Article 14 of the Indian Constitution ensures that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Although the Constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husbands.

At the time the IPC was drafted within the 1860s, a wife wasn't considered an independent legal entity. Rather, she was considered to be the chattel of her husband.² As a result, she didn't possess many of the rights now bound to her as an independent legal entity, including the proper to file a complaint against another under her own identity. Exception to Section 375, which essentially exempts actions perpetrated by husbands against their wives from being considered acts of “rape,” is essentially influenced by and derived from this already existing doctrine of merging the woman's identity thereupon of her husband.

The roots of this doctrine are often traced to British colonial rule out the Victorian era.³ India was a British colony during the 19th century. All Indian laws enacted at this point were deeply influenced by English laws and Victorian norms. The marital exception to the IPC's definition of rape was drafted on the idea of Victorian patriarchal norms that didn't recognize men and ladies as equals, didn't allow married women to have property, and merged the identities of husband and wife under the “Doctrine of Coverture.”

But times have changed. Indian law now affords husbands and wives separate and independent legal identities, and far jurisprudence within the era is explicitly concerned with the protection of girls. This concern is clear within the plethora of statutes intended to guard women from violence and harassment that are passed since the turn of the century, including “The Protection of girls from violence Act” and therefore the “Sexual Harassment of girls at Workplace (Prevention, Prohibition and Redressal) Act.”⁴

Exception to Section 375 violates the proper to equality enshrined in Article 14 insofar because it discriminates against married women by denying them equal protection from rape and harassment. The Exception creates two classes of girls supported their legal

² *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986).

³ Jill Elain Hasday, *Consent and Contest: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373 (2000).

⁴ Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

status and immunizes actions perpetrated by men against their wives. In doing so, the Exception makes possible the victimization of married women for no reason aside from their legal status while protecting unmarried women from those self-same acts.

Exception to Section 375's distinction between married and unmarried women also violates Article 14 insofar as the classification created has no rational relation to the underlying purpose of the statute. In *Budhan Choudhary v. State of Bihar*⁵ and *State of West Bengal v. Anwar Ali Sarkar*⁶ the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test which will be passed as long as the classification has some rational nexus to the target that the act seeks to realize. But Exception to Section 375 frustrates the aim of Section 375: to guard women and punish those that engage within the inhumane activity of rape. Exempting husbands from punishment is entirely contradictory thereto objective. Put simply, the results of rape are an equivalent whether a lady is married or unmarried. Moreover, married women may very well find it harder to flee abusive conditions reception because they're legally and financially tied to their husbands.

Actually, Exception to Section 375 encourages husbands to forcefully enter into sexual activity with their wives, as they know that their acts aren't discouraged or penalized by law. Because no rational nexus is often deciphered between the classification created by the Exception and therefore the underlying objective of the Act, it doesn't satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.

Violation of Article 21

In recent years, courts have begun to acknowledge a right to abstain from sexual intercourse and to be free of unwanted sexual activity enshrined in these broader rights to life and personal liberty. In *The State of Karnataka v. Krishnappa*, the Supreme Court held that "sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female"⁷. In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence. Later, in *Suchita Srivastava v. Chandigarh Administration*, the

⁵ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India).

⁶ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

⁷ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.⁸

Additionally, Exception 2 violates Article 21's right to measure a healthy and dignified life. As mentioned above, it's well settled that the "right to life" envisaged in Article 21 isn't merely a right to exist. For instance, there are often no dispute that each citizen of India has the proper to receive healthcare or that the state is required to supply for the health of its constituents.⁹ During this vein, the courts have repeatedly held that the "right to life" encompasses a right to measure with human dignity.¹⁰ Yet the very existence of Exception 2, which fails to discourage husbands from engaging in acts of forced sexual contact with their wives, adversely affects the physical and psychological state of girls and undermines their ability to measure with dignity.

The above conclusions clearly reflect that Exception 2 to Section 375 of the IPC is an infringement of Articles 14 and 21 of the Constitution. It's time that Indian jurisprudence understands the inhumane nature of this provision of law and strikes it down.

Arguments in contradiction to making Marital Rape Legal

Argument 1: It's against Indian culture

In August 2019, former judge of India Dipak Misra said that marital rape shouldn't be made a criminal offense in India, the days of India reported, "because it'll create absolute anarchy in families and our country is sustaining itself owing to the family platform which upholds family values," Deccan Herald quoted Misra as saying.

Here, the idea of this argument is that marital rape cannot add India because it works within the West thanks to stark cultural and socio-economic differences between the 2 regions. The argument is that social customs and non-secular beliefs, combined with staggering illiteracy create an environment wherein marital rape can't be criminalized seemingly because people aren't ready for it.

The Indian government has suggested that those seeking to prevent women being raped by their husbands were "blindly" following Western customs, the days of India reported:

⁸ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

⁹ *Regional Director ESI Corpn. v. Francis de Costa*, 1993 Supp (4) SCC 100; 5 D.D. Basu, Commentary on the Constitution of India, 4711 (LexisNexis 2015).

¹⁰ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).

“This country has its own unique problems thanks to various factors like literacy, lack of monetary empowerment of the bulk of females, the mind-set of the society, vast diversity, poverty, etc. and these should be considered carefully before criminalizing marital rape.”

Translation? the government is arguing that since a majority of individuals in India are illiterate, uneducated, poor, conservative and non-secular — unlike in America — they believe that a husband cannot rape his wife because an honest Indian wife will dutifully consent to her husband forever. This, the government submits, may be a unique obstacle India faces in criminalizing marital rape — by the admission of which it acknowledges that lakhs of men are violating their wives’ sexual consent on a day to day supported this mind-set which what they’re doing is, in fact, the crime of rape. Then the government argues that if in such circumstances, they criminalize marital rape, a majority of marriages will disintegrate presumably because women will get up to their rapist husbands (who will then become criminals within the eyes of law) and avail of the legal recourse they need to hunt justice and protection.

But if it's actually the fear of marriages falling apart that's stopping the government from criminalizing marital rape, then, in a way, it acknowledges that given the legal recourse and protection, women will want to finish sexual violence they face day-after-day within their marriages. At which point it becomes important to ask: by placing such a lot value on marriages and family and pushing for established order, whose rights is that the government protecting? The husbands raping or the wives being raped?

None aside from the Supreme Court agrees that criminalizing marital rape doesn't threaten marriages in any way. In *Independent Thought v. Union of India*¹¹, the Court specifically explained that marriage is personal and zip in need of the Indian State criminalizing marriage itself can destroy the institution of marriage. It said if divorce and legal separation haven't destroyed the institution of marriage, criminalizing marital rape certainly can't either. Interestingly, the supreme court of Gujarat also recently ruled that the non-consensual act of marital rape violates the trust and confidence within a wedding which marital rape is what has damaged the institution of marriage.

If criminalizing the violent rape of two-third of married Indian women destabilizes the institute of marriage and family, then so be it.

¹¹ *Independent thought v. Union of India* (2017) 10 SCC 800 (India)

Argument 2: Once married, women's perpetual consent is implied

The idea that when a lady is married, she hands over never-ending, continuous sexual consent to her husband may be a deeply embedded one in our society, as evidenced by a cringe-worthy and worrying public opinion Scoop Whoop conducted recently on the streets of Delhi about marital rape. But the laws are alleged to be ahead and above people's prejudices, the moderator of private base emotions.

Instead, Indian laws still go back to the 1700s, when Matthew Hale of England had declared that "the husband can't be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up during this kind unto her husband which she cannot retract." Another dated justification for not recognizing marital rape comes from William Blackstone in 1753 when he defended the common law doctrine of coverture (the status of a wife as her husband's property). Blackstone contended that "By marriage, the husband and wife are one person in law: that's, the very being or legal existence of the lady is suspended during the wedding ..."

Even as British law moved in in England Wales in 1991, when Lord Keith communicated on behalf of the Court that modern marriage may be a "partnership of equals and therefore the wife is not any longer considered the subservient chattel of the husband," Indian laws remain an equivalent concerning marital rape.

This, despite a contradiction as incriminating as a 2017 Gujarat supreme court ruling which clearly says: "It has long been time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, regardless of their legal status."

Argument 3: Women will misuse any law against marital rape

In an affidavit submitted to the Delhi supreme court, the union government said a law criminalizing marital rape can become an "easy tool to harass the husbands," absurdly arguing "if all sexual acts between a husband and his own wife qualify to be marital rape then the judgment whether it's marital rape or not will singularly rest with the wife." (As it should.)

This argument — that ladies will falsely accuse their husbands left, right and center — has been used time and time again for various violence laws enacted to guard women in India including the Protection of Women from Violence Act, the Dowry Prohibition Act and Section

498A of the IPC, which criminalizes physical and mental cruelty against a lady by her husband or his family. There's never any direct empirical evidence for the misuse claim except the low rate of convictions in dowry and cruelty cases, but what we do know is 2 out of each five women in India are victims of physical, sexual or emotional violence. Choosing the amount of convictions because the parameter to measure the truth of things is additionally problematic because low conviction rates in India are actually because of poor investigations, improperly collected or no evidence, and omissions of witness statements, and not because women are bent get men.

And albeit some women misuse the law, that's what the judiciary is there for — to comb out the false cases and dismiss them with an appropriate penalty! To quote the Gujarat supreme court judgment again, Justice J.B. Padriwala says: “Let it's stressed that the safeguards within the criminal justice system are in situ to identify and scrutinize fabricated or false marital complaints, and a person who institutes untrue and malicious charges, are often made answerable in accordance with the law.”

The misuse argument is additionally faulty therein it ignores how disadvantaged women are even to use the marital rape law if it exists, including misuse it. a scarcity of resources, access to legal help and stigma all provide resistance to women actually achieving justice under these laws, as are often seen from rape and violence laws.

Interestingly, the cultural argument that criminalizing marital rape won't add India because women are illiterate, uneducated and poor directly contradicts the argument that criminalization of marital rape would cause misuse. If women aren't educated enough to properly use the law, it follows that they might be even as unable to misuse the law.

Reforms from my end

The debate of marital rape is crucial in establishing substantive equality for married women who are otherwise relegated publicly and legal discourse to the confines of their homes. It's crucial to acknowledge that this is often a serious lacuna in legal code at the present defeating the constitutional provisions that grant women equality and autonomy. As we've continually illustrated, there are stiff political, legal, and cultural arguments against criminalization.

We have carefully analysed the validity of those arguments which are coated with notions of the family, marriage, and therefore the role of women in society. We've established how all the arguments against criminalization don't have any legal standing. We've argued that the

exemption clause in section 375 of the IPC because it stands today, is unconstitutional. This is often because it fails the equality test as given in Article 14. Additionally, to the present, we've depicted how there aren't any effective alternatives in law, and further that our focus shouldn't get on alternatives but rather on criminalizing it. We also brought out how our culture not being accepting towards marital rape isn't a reason to not criminalize it. In light of all of this, we propose a model to criminalize marital rape. First, I propose that the exception clause be deleted. Second, should be specifically highlighting that the connection of husband and wife between the accused and therefore the woman won't be a defence. The third proposal is that the sentencing policy be an equivalent, and fourth I propose certain amendments within the Evidence Act to make sure that it takes under consideration the complexities of prosecution in cases of marital rape.

Conclusion

A marriage is a bond of trust, love and affection. Undoubtedly, sex is a normal commitment of marriage but use of force or violence in sexual intercourse is against bodily integrity and emotions of the concerned wife. De facto, the wife can bring a criminal case against her husband for criminal assault or injury or matrimonial relief for forcible sex, but what is needed is the incorporation of marital rape in our legal system. The wife must be honoured. Laws bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of the marital relation which is totally against basic human rights. If a woman consents to be married it does not mean that she consents to be raped by her husband. She has also her entity and the line drawn between rape within marriage and rape outside marriage is outdated and has no relevance in present scenario.