



CRIMINALISATION OF MARITAL RAPE

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Abstract-- Marriage is a sacred ritual that unites two families as well as two individuals. However, this marriage could fail if it was carried out without the consent of either party or if neither party was satisfied with the relationship. Our culture has a strong tendency to imitate our ancestors' hunting and gathering practices, which were based on a patriarchal system. As a consequence of this, it is reasonable to anticipate that men will exhibit feelings of dominance because this trait is ingrained in their biological makeup.

It is evident that law and order play a significant role in regulating and managing acceptable levels of human behaviour when the entire world is considered. The laws have been enacted and the associated penalties have been imposed in accordance with the Indian Penal Code, which was drafted in 1860. However, vast majority of people are unaware that the British first established these guidelines a very long time ago.

Rape in a marriage was not considered a criminal offense at the time, which is likely one of the factors that contributed to its exclusion from the relevant legal codes. This thesis focuses solely on the development of female's rights, particularly the effects of marital rape and its violation of the Indian Constitution. The sole topic of this research paper is the subject of this research study.

Keywords: Martial, Rape, Female, Section 375, Dowry, Harassment, Legality, Domestic, Violence, Spouse.

INTRODUCTION

People used to think that a woman's job in a marriage was to take care of her husband, have kids, take care of the house, cook, and meet her husband's emotional and sexual needs. The ancient legal text known as Manu smriti, which served as the foundation for the development of Hindu law, was the first source of this information.

A man, regardless of his physical condition, is obligated to defend his wife at all costs, according to the same scripture. Males frequently assume an excessive amount of dominance as a result of society's responsibility for creating this stigma¹. Women were regarded as the property of their spouse after marriage, whereas before marriage, they were regarded as the property of their fathers. It was conceivable that the dad would offer his little girl to anyone he believed was appropriate.

Regardless of whether the woman agreed to the arrangement or not, she was forced to have sexual relations with her husband. This was done to ensure the continuation of the family line. As a result, the woman came to believe that whenever her husband asked for her sexual favours, she could never say "no" and that she had to always be sexually available to her husband. However, these regulations date back hundreds of years, to a time when all of these actions were regarded as socially acceptable.

¹ "Bureau of Democracy, Human Rights and Labour (2017). "Andorra, Section 6. § Women". Country Reports on Human Rights Practices" for 2017. U.S. Department of State. Retrieved 9 October 2018.



Prior to Raja Ram Mohan Roy's efforts, it was commonly believed that men owned women, and abhorrent practices like Sati and child marriage were common. On the other hand, the country's situation changed as a result of his efforts. Women participated in the Indian Independence Struggle on an equal footing with men for the first time in history, and even Mahatma Gandhi took significant steps to enhance women's social conditions.

As a result of these efforts, a constitution was drafted that granted women equality and almost all of the rights enjoyed by a male, including the right to vote and an opportunity to run for public office. In almost every field, advances and new discoveries were made after the nation declared independence; Women's quality of life improved as a result. Because they were female, they were met with a lot of hostility. Female have fought for the rights they are entitled to since the beginning of time. One of the main reasons the Indian Constitution² made men and women equal was because of this. Following the nation's independence, a number of legislative initiatives were implemented with the end goal of eliminating discrimination against women and giving women more power and status within the country.

Since the creation of the Constitution, women have enjoyed the same political, social, and legal rights as men. For ladies to have a voice in deciding the course that our country will take, the constitution has given them full opportunity and made it simpler for them to do as such. Because the majority of the team members who worked on the most recent case, Mangalyaan, were women with prior experience in the field, it is important to highlight it.

There are still many areas in which our nation lags behind other nations, despite the fact that women have made significant progress and are flourishing in virtually all fields, including education, law enforcement, and science and technology. This is the situation notwithstanding the way that ladies have arrived at extraordinary levels and are flourishing in these fields.

DEFINITION OF RAPE

According to Section 375 of the Penal Code, a man is guilty of rape if he-

- Causes his penis to penetrate a woman's vagina, mouth, urethra, or anus in any way
- Forces a woman to engage in such conduct with him or another man.
- Inserts any item or body part, other than the penis, into the vagina, urethra, or anus of a woman, or forces her to do so with him or another person
- Forces her to do so with him or another person.
- Applies his mouth to a woman's vagina, urethra, or anus, or makes her do so with him or another person, or coerces her to engage in such activity

² War rick, "Catherine. (2009). *Law in the service of legitimacy: Gender and politics in Jordan*. Farnham, Surrey, England; Burlington, Vt.: Ashgate"



HISTORY OF MARITAL RAPE

According to section 375 of the IPC, "sexual contacts between a man and his wife who are at least 15 to 18 years old are not considered rapes." If we investigate the Indian legal system, we find that "sexual contacts between a man and his wife who are at least 15 to 18 years old are not considered rapes." This provision stipulates that sexual relations between a man and his wife who are at least 15 to 18 years old are not considered rapes. The penalties for breaking the law are specified in Article 376 of the Indian Criminal Code.

According to this provision, the perpetrator of a rape must be punished with any combination of the following: imprisonment for a minimum of seven years, a fine, or both, with the potential of life imprisonment for a maximum of ten years. In **Saretha v. T. Venkata Subbiah**, it was determined that the rights and duties of a marriage are more comparable to the formation and dissolution of a marriage than to the duration of a private contract between two parties. This decision was made in light of the similarities between a marriage's freedoms and restrictions and its formation and dissolution.

The Spousal Association does not in any way violate the right to privacy. Because of this, rape that takes place within a marriage is not punishable. As a result, the solution is to prevent it from occurring in the first place. The role of the Indian judiciary in the country³. A new piece of legislation was needed to deal with the problem of sexual assault. Prior to this law, the various types of sexual assault were neither defined nor reflected. In *Sakshi v. Union of India*, the Supreme Court of India noted that the statute that dealt with the violation had some flaws and urged the legislature to make the necessary adjustments.

The offense that took place in 2013 was reclassified as the most heinous after the measure to change the criminal law was approved. By equating oral and anal actions with rape through an amendment, the parliament sought to broaden the scope and perception of the violation. The violation was reclassified as the most heinous as a result. Despite the fact that the rate of spousal rape is rising, legislators are unaware of the need to make marital rape a criminal offense. The

Indian penal code's rules meant to protect women are ignored by women, as is the reality of the situation.

In *Empress Queen v. Hari Mythi*, the court determined that the rape laws do not apply because his wife was older than 15 years old⁴. The case was dismissed because his wife was older than 15 years old. The husband was disciplined in this particular instance due to his wife's young age.

MARITAL RAPE POSITION IN INDIA

Even though it is against the law in India, rape of a married couple still occurs. In specific nations, the regulation has made it a wrongdoing to assault a mate during a marriage, while in others, the

³ "U.S. Department of State. Bureau Of Democracy", Human Rights, And Labour. 20 April 2018. "Archived from the original on 22 April 2018. Retrieved 17 October 2018"

⁴ "Article 27, Geneva Convention Relative to the Protection of Civilian Persons in Time of War", 12 August 1949



legal framework has effectively taken part in making this a criminal offense. On the other hand, the Indian judiciary appears to be working toward opposing objectives.

The case of *Bodhisattva Gautam v. Shubhra Chakraborty*, the Supreme Court came to the conclusion that "rape is a crime against fundamental human rights and a breach of the victim's most cherished fundamental rights." The court was specifically referring to a violation of the victim's right to life, which is guaranteed by Article 21 of the Constitution. In other words, the court found that rape is a violation of the victim's most cherished. On the other hand, he claims that there is no such thing as rape in marriages, which is an argument that runs against to this train of thought.

In spite of the significant progress that has been made in domestic violence legislation in India, the majority of these advancements have only dealt with physical assault and not sexual abuse. There is a wide exception for conjugal assault in the Indian regulation, which might be found in Segment 375 of the Indian Punitive Code of 1860.

This exception keeps the Indian government from giving help to ladies who need to challenge the sexual animosity of their spouses. This established that a woman cannot opt out of having sexual encounters with her partner once she is married and that she has no right to avoid having sexual relations with her partner. This is clear violation of legislation of human rights and grants husbands a "license to violate" their wives' or girlfriends' rights.

Only two distinct categories of married women are entitled to protection under the rape law those aged 15 to 18 and those who have been legally divorced from their husbands. The penalty for raping a girl under the age of 15 is less severe than the penalty for raping a girl under the age of 12, which is ten years or more in prison.

This is because the crime is less serious when the rapist is married to the victim. In 1983, the Criminal Code of India was amended to include Section 376-A⁵, which made it a crime to violate a judicially separated wife.

This was a step toward making domestic violence against his wife a crime. In 1860, the Indian Criminal Code was updated to include Section 376-A. It was an amendment that was formulated on the basis of the suggestions made by the "Legal Commission of India" as well as the recommendations made by the Joint Committee on the "Penal Code of India (Amendment Bill), 1972". The committee did not subscribe to the notion that marriage confers permission to rape.

As a result, a husband can now be accused of a crime and receive a sentence of up to two years in jail if, first, he has sex with his wife without her consent, second, or third, and she lives apart from him as a result of a court order, custom, or other means.

In order for the husband to be held accountable, these three conditions must be satisfied. However, this statute contains loopholes, necessitating a far more proactive approach by Congress to the issue of rape in marriage. It was viewed as a glimmer of hope for the future when the Legal

⁵ Geis, Gilbert (1977). "Rape-in-marriage: Law and law reform in England, the United States, and Sweden". *Adelaide Law Review*. 6;284.



Committee made the recommendation in its 42nd Report that a man's sexual interactions⁶ with his child bride should be considered a felony.

The recommendation was rejected because the committee that looked into the plan did not agree with it. The Committee argued that, regardless of her age, a spouse could not be found guilty of raping his spouse. Once a man marries a woman, he will naturally engage in sexual activity. A number of women's organizations, including the National Women's Commission, have questioned the validity of the exemption provision in section 375 of the IPC.

"A man's sexual contacts with his spouse are not considered rape if his wife is at least fifteen years old," states this exemption clause. This clause must be removed from the code, according to these organizations. On the other hand, the working group on women and children that was set up by the Indian government's department for women and children thought that there was a bigger disagreement about this issue.

The task committee was given the task of looking into all of the laws and programs that are relevant to women at the moment. The most significant of the four recommendations made by the task force that was tasked with investigating violations of the Indian Penal Code included redefining what constitutes a violation. He was a proponent of expanding the terminology of rape to include all forms of physical or sexual assault. Section 375 of the Indian Penal Code⁷ contains the current terminology of rape.

However, the report suggests that the Legal Commission's term "sexual violence," which "is wide, universal, and acceptable," could take its place. Despite this, the Task Force has decided, in agreement with the Legal Commission, to stop supporting the amended definition's inclusion of marital rape. In terms of providing women with support mechanisms that would enable them to maintain their sexual independence and bodily autonomy, India's legal system is completely inadequate at the moment.

EFFECTS OF MARITAL RAPE

The trauma of rape permanently alters a woman's life. This can manifest itself in a number of ways, including physical, psychological, and behavioural health issues that have a negative effect on a woman's emotional and physical health over time. The mental and physical health issues that a rape victim may experience during or after the assault are broadly divided into this section.

Psychological Effects: Depression, post-traumatic stress disorder⁸, fear, low self-esteem, rape trauma syndrome, and unstable, unavailable, or dysfunctional sexual interactions are more

⁶ "The first criminal law code in Soviet Russia differed from Tsarist law on rape": "although the Tsarist law explicitly excluded marital rape, the Soviet law code of 1922 did not." Rule, Wilma (1996). *Russian women in politics and society*.

⁷ Andrew Karmen, *Crime Victims: An Introduction to Victimology* (Wadsworth Publishing Company, 1990)

⁸ "Finkel or, David; Yllo, Kerstin (1985). License to Rape: "Sexual Abuse of Wives. *New York, NY: The Free Press*". p. 172.



common in women who have experienced marital rape. It is expected of a woman to respond sexually to her husband's demands as soon as they are married. The first time a woman was asked to do something similar without her permission, it must have come as a huge surprise.

She is aware that refusing or defying her spouse is futile, despite the fact that any subsequent events may have appeared terrible but insignificant to her. The woman is worried that her family's good name might be hurt. As a result, she is under pressure to uphold the reputation of her family. The psychologically healthy person's natural response to trauma is known as RTS⁹, and it is the medical condition for the reciprocation that the rape survivors have to the trauma of rape. The response that rapes survivors experience is known as RTS.

This might happen right away, or it might take a few months or even years. As a consequence of this, the injured might feel embarrassed or demeaning. The victims may be perplexed as to the circumstances surrounding the incident and why they were unable to help themselves. Some injured may blame themselves for not being strong enough to stop the abuse or for refusing to have physical relations despite being persuaded by their spouses.

A major psychological effect of rape is the victim's sense of helplessness, which can lead to PTSD (Post-Traumatic Stress Disorder) being unable to avoid being raped and putting blame on oneself as an excuse having a feeling of helplessness is what causes PTS. Victims may experience shame and embarrassment if they discuss their experience with anyone because this issue is not even recognized as a problem.

They believe that discussing this subject with others will raise eyebrows and raise questions, so it should not be discussed. A criminal complaint was filed in the case of *Bodhisattva Gautam v. Shubhra Chakraborty* on due to the parties' inability to get married, the basis of a consensual affair

and a questionable conclusion of rape. The couple's lack of marriage was the foundation for the rape verdict.

In addition, in a 2018 case regarding the criminalization of rape in marital relationships, the Honourable Delhi High Court stated¹⁰, "Force is not a prerequisite for rape. "She will feel compelled to engage in sexual activity with him if a man imposes a financial burden on his wife and tells her that he will not pay for the house or the children's expenses until she has sex with him.

The victim and, if the victim has children, those children experience emotional stress as a result of all of these circumstances. The children may suffer a severe mental breakdown or develop clinical depression as a result. In addition, it is evident that these actions not only harm a female and her life, but they also have serious effects on the health of the little ones, resulting in a whirlpool effect.

Health Issues: Even though the Protection of Women from Domestic Violence Act 2005 includes a section on sexual abuse, it only deals with civil liability. Despite this, there is still a provision.

⁹ "People's Union for Democratic Rights v.. State of Bihar", 1987

¹⁰ Simon, Rita James (May 2001). *A comparative perspective on major social problems*. Lexington Books. p. 25 ¹¹
Delhi Domestic Working Women's Forum v. Union of India (1995) 1 SCC 14.



By implying that they would resort to violence if they do not get what they want, the mentality that motivates someone to commit a violent act could be an attempt to establish dominance or instill terror. The majority of women continue to experience pain as a result of multiple rapes. As a direct consequence of this, they will eventually develop black eyes, stab wounds, assault-related body marks, and cracked ribs. These are just a few examples of the kinds of circumstances that women might encounter.

As symptoms of the infection, the majority of sufferers have reported experiencing discomfort and vaginal bleeding. There is bleeding because the vaginal wall has been ripped to the point of rupture. People who are forced to do anal sex may feel fatigue, rage¹¹, or blood. They may experience pain whenever the traumatic event is brought to their attention in any way. The victim's emotional and psychological burden is made even worse by the possibility of an unanticipated pregnancy. Especially when the victim is between the ages of 15 and 18.

This could cause the mother to give birth too soon, which could be disastrous for the child. Vaginal rupture carries the additional risk of preventing a woman from ever having children, in addition to being a potential cause of infertility.

This could make it extremely difficult for the victim to have a family in the future or even if they have ever considered doing so. Scar's may remain for the rest of their lives. Victims may also be encouraged to take their own lives as a result of this. The victim may begin to consider suicide as their only option because of the stigma associated with marital rape and their inability to disclose the abuse to others.

CONSTITUTION OF INDIA ON MARITAL RAPE

There are numerous grounds for challenging this act, which appears to condone marital rape, some of which are listed below. The poor writing of the statute is one of the reasons. Any and all laws enacted by the legislature in India must adhere to the Constitution's fundamental structure principles, according to its requirements. The courts have the authority to declare that a provision of a statute to be illegal if it contravenes this clause. In order for a law or provision that encourages rape during marriage to be implemented, it would need to adhere to the fundamental principles outlined in the Constitution.

Article 14: Article 14 of the Indian Constitution ensures equality before the law and equal protection under Indian law. However, the criminal code does not address the discrimination that marital rape victims face¹¹. The Exemption for Segment 375 of the Indian Reformatory Code is a standard that oppresses wedded ladies since it lays out another class of ladies who are not qualified for lawful security if they are exposed to lewd behaviour because of their spouses. This

¹¹ Atlas of Gender and Development: How Social Norms Affect Gender Equality in non-OECD Countries. OECD Publishing. p. 91.



stratum does not meet the criteria for discernible differentiation because it is arbitrary, artificial, and evasive:

Section 375 isn't applicable to spouses who commit a felony against their wives. It is discriminatory and in violation of Article 14 of the Indian Constitution to exempt a person from the application of Section 375 of the Indian Penal Code based on their marital status. The fact that the victim in marital rape is married is the only thing that sets it apart from rape; other than that, everything else is the same as what happens in rape.

Both rape and marital rape are the same thing. Because she and her children are dependent on their father, a married woman faces additional obstacles because she is compelled to spend the rest of her life with the offender. Husbands are encouraged to engage in such behaviour because they are aware that it is not illegal for them to have sexual relations with their wives against their will. Since female survivors of conjugal assault are not managed the cost of equivalent security, and since it bombs the twin trial of coherent differentia and sensible linkage laid out by Article 14 of the Indian Constitution, we can infer that conjugal assault is an unmistakable infringement of Article 14 of the Indian Constitution.

Article 21: According to Article 21 of the Indian Constitution, it is up to the Supreme Court of India to declare whether or not "by the term "life" as defined here, anything beyond simple animal existence is intended." This ruling was reached in the matter of *Kharak Singh v. State of Uttar Pradesh*. This page has been given a completely new appearance as a direct result of the many interpretations that the Supreme Court has given in a variety of instances.

Article 21 bestows upon citizens a wide variety of rights, including the rights to health, dignity, a secure environment, sexual privacy, and human dignity, to name just a few of the many rights. In the case *State of Karnataka v. Krishnappa*¹², the Supreme Court came to the conclusion that "sexual assault is an unlawful breach of the right to privacy and sanctity of a female" and that "rape is a major blow to the victim's self-esteem and dignity, leaving her with a painful experience." Both of these statements were made in light of the fact that "sexual assault is an unlawful breach of the right to privacy and sanctity of a female."

The topic of discussion for both of these statements was the judgement made by the Supreme Court in which it was stated that "sexual assault is an unlawful infringement of the right to private and sanctity of a female."

ARGUMENTS AGAINST CRIMINALISING MARITAL RAPE

The Sanctity of Matrimonial Institution: The most powerful argument in favour of making marital rape a criminal offense is that doing so would jeopardize the sacredness of marriage and the family unit. As a result, the sacred relationship that exists between a man and his wife would be severed, and marriage would lose its significance.

¹² Bernice, et al., *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology, Violence and Victims*, 2003 February; 18 vol 1, p. 87



The state would have to cross the line between the home and the legal system in order to criminalize marital rape, which would put the legal system in a stalemate. Legislation in this vein would be viewed as an infringement on the limits and authority of the state. You should anticipate receiving strong criticism for your actions and hatred if you make a decision that crosses this line.

Marriage is Consent: The legal means by which two people can form a relationship in which both of their distinct identities are acknowledged is through marriage. Additionally, it has been argued that even though the lady may not have been aware of it at the time, she has already consented to the marriage if these individuals joined the contract voluntarily. Her parents will be considered to have given their consent if they find a suitable partner for her if she does not give her approval to the marriage.

It is common practice to not inquire about the woman's wishes or obtain her permission. When a woman marries or has her parents arrange the marriage, it is generally accepted that she gives her husband permission to have sexual relations with her. Marriage by coercion and marriage by arrangement are fundamentally distinct concepts. In an arranged marriage, both parties are open to the idea of getting married when they first meet. However, one of the parties in a forced marriage does not agree to the relationship.

Cultural Boundaries: From a very young age, people are taught to adhere to particular norms, beliefs, and traditions. Anything that deviates from these standards or does not adhere to the frequency is considered inappropriate¹³. These standards are deeply ingrained in one's psyche. Because of the propagation of these sociocultural values, people have been led to believe that it is normal for a male to anticipate that his spouse will satisfy his physical needs. The foundation of a nation's existence is its culture.

CONCLUSION

When the laws of other countries are compared to those of India, it can be seen that India is now a long way behind in the process of developing an exclusive statute for MARITAL RAPE. It is possible to construct a defence based on the provisions of the Indian Penal Code and the Indian Constitution while waiting for a new law to be established.

Because the human intellect continues to develop through time and because new information is found on a daily basis, it is important for every legislation to be amended as the times change.

This is because of the constant finding of new information.

While we wait for a new law to be passed, we can make use of the laws that are now in place. After an exhaustive examination, it might be conceivable to pass a new law specifically addressing marital rape, or relevant sections might be added to the International Criminal Code or the Domestic Violence Act.

¹³ U.S. Department of State. Bureau Of Democracy, Human Rights, And Labour. 20 April 2018.



Countries such as the United Kingdom have taken the required steps to recognize this social evil and are regularly adopting new legislation to address this form of violence against women. Other nations, such as the United States, have not taken these steps.

On the other hand, this school of thought has been met with a great number of objections, the most prominent of which being the contention that putting a stop to marital rape would constitute an assault on the institution of marriage and would therefore be subject to a great deal of abuse.

For this reason, the researcher suggests that law-making authorities evaluate and scrutinize the repercussions and outcomes prior to enacting a legislation rather than enacting it arbitrarily. This is the reason why the researcher proposes that law-making authorities evaluate and scrutinize the repercussions and outcomes prior to enacting a legislation.

A woman's right to dignity and well-being is unquestionably violated when she is subjected to rape in her marriage; hence, a legislation needs to be implemented in order for a contemporary nation to thrive.

In the case of *Rafiq v. State of Uttar Pradesh*, Justice Krishna Aiyar made the following statement: "A murderer destroys the body, but a rapist kills the spirit." The state takes the position that as this is a personal affair between the couple's husband and wife, it cannot be considered sacred. Existing laws in this state pertaining to marriage cover topics such as dowry payments, infidelity, cruelty, and divorce.

The state is of the opinion that this choice should be made independently by both the husband and the wife. The significance of the addition of spousal rape to the list for India's mental health industry cannot be overstated.

The state also stated that criminalizing rape during marriage would "destabilize the institution of marriage" and may be used to "harass men." When an action that jeopardizes the essential sanctity of marriage has already been taken, how may obtaining justice for the same behaviour generate instability in the marriage of the two parties? The marriage was already in jeopardy when one spouse attempted or committed sexual assault against the other.

The second issue, which is referred to as "harassing spouses," can be resolved through the use of fast-track courts and the expedited conduct of cases. The establishment of additional expedited courts across the nation would be of great assistance in resolving the issue of false litigation.

However, the process of making marital rape a crime may take many years if a state is absolutely opposed to taking any action in support of it. In order for married women to have access to the legal system as a means of resolving their problems, the behaviour in question needs to be made a crime. It will not be possible to classify marital rape as a criminal offense until there is a clear understanding of the distinctions between the two.

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