

CHAPTER 13

INDIA'S GENDER BIASED APPROACH TOWARDS MARITAL RAPE

VINAYAKA RAINA, Dr. RAMESH KUMAR

PhD Research Scholar

Christ (Deemed to be University)

vinayaka.raina@res.christuniversity.in

Dr. RAMESH KUMAR (Co- Author)

Designation: Associate Professor, CHRIST (Deemed to be University)

ABSTRACT

"Marital Rape" the term itself shows the violence of marital rights and duties. It violates the right the dignity of a married woman. Even then, it is not criminalised as rape in India. Marital Rape is non-consensual sex in which the perpetrator is the victim's spouse.

Marriage is an institution which admits men and women to family life. It generates love and trust. , But it raises a question, "Is married women being considered an object or the husband's property". It also raises the question of the right of a married woman to save her body from her husband's lust. It is unexpected that a lady can ensure her entitlement to life and freedom; however, it is not her body inside her marriage. It is absolutely against the Women's Right to live with human dignity and the right to sexual privacy. This paper point outs whether "The right to have sex with her wife can be coupled with will or consent of wife". It is a well-known fact that India is a male-dominated society, but today we are talking about Women's Empowerment, where many rights have been provided to women. But would women be empowered in a real sense without criminalising marital rape?The methodology of this paper relies on secondary sources like government data and data collected by various organisations working in this field, case laws, and views expressed by multiple authors inresearch articles and journals. So in this paper, we are going to discuss:

1. Need forthe criminalisation of marital rape
2. I am findingwhether sex without the wife's consent should be equivalent to rape.
3. Prevalence of this problem in society.
4. Marital Rape and violation of Human Rights.

Key Words: Marital Rape, Gender Biasness, India, Violation, Human Rights, Non-Consensual

INTRODUCTION:

MARITAL RAPE: SEXUAL ABUSE OF WIVES

Rape is a crime that deprives a woman of her dignity, which she will have to live with for the rest of her life. When one thinks of rape, the first person who comes to mind is a stranger, a malicious person. In the context of marriage, rape is rarely considered. Even women struggle to accept that a husband can rape his wife. After all, if a man exercises his conjugal rights, how can he be charged with rape? It implies that a woman has no right to her own body and that her will must be subservient to her husband's. As a result, marital rape is a common flaw in society; it is well hidden behind the sacrament of marriage. Marital rape, on the other hand, can be defined as intercourse or penetration obtained through force, threat, or when the wife is unable to consent. Due to marital exemption, despite the prevalence of marital rape, the problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and society. In India, social practices and legal codes reinforce the denial of women's sexual agency and bodily integrity, which are central to their identity. To protect the family institution, the law does not consider marital rape a crime, thereby excluding the possibility of false, fabricated, and motivated complaints of rape by a wife against her husband and the practical procedural difficulties that might arise in such a case.

Marriage is a family institution that accepts both men and women. It evokes feelings of love and trust. It is a long-term relationship in which a man and a woman are socially permitted to have children, implying the right to sexual relations. The institution of marriage allows a male and a female to live together under both customary and statutory law. It is a bond formed by two souls who married after promising to be together for the rest of their lives. It is the physical, mental, and spiritual union of two souls. When a man marries a woman, he owes it to her dignity to treat her with respect. The question now is whether marriage gives the husband the right to have sex with his wife forcefully or whether marriage takes away a woman's right to refuse to have sex with her husband. It is a contentious issue in India at the moment. Marriage instils in the wife the confidence that her husband will protect her and respect her dignity. When he engages in unwanted/forced intercourse with his wife, this confidence is shattered, and the wife's trust is violated. What protects the husband from committing rape on his wife in such circumstances?

Until the twentieth century, American and English law followed the Covertures doctrine, which stated that a woman's legal rights and obligations were subsumed by her husband's. A married woman does not have the right to her property or enter into contracts in her name as an unmarried woman does. Marriage was viewed as an institution in which a husband exercised control over his wife's life, with control over her sexuality only being a subset of the greater control he exercised over all other aspects of her life. The construction of adultery between a wife and another man reflected a husband's control over his wife's body. In 1707, English Lord Chief Justice John Holt described the act of a man having sexual relations with another man's wife as "the highest invasion of property." Until the twentieth century, American and English law followed the Covertures doctrine, which stated that a woman's legal rights and obligations were subsumed by her husband's. A married woman does not have the right to own property or enter into contracts in her name as an unmarried woman does. Marriage was viewed as an institution in which a husband exercised control over his wife's life, with control over her sexuality only being a subset of the greater control he exercised over all other aspects of her life. The construction of adultery between a wife and another man reflected a husband's

control over his wife's body. In 1707, English Lord Chief Justice John Holt described the act of a man having sexual relations with another man's wife as "the highest invasion of property." The wife is regarded as the husband's property, and as a result, many cultures conflated the crimes of rape and adultery because both were seen as a violation of the husband's rights. The majority of significant jurisdictions have now withdrawn the immunity above. The House of Lords in England and Wales declared in 1991 that the status of married women had changed beyond recognition since Hale's proposal. Most importantly, speaking for the Court, Lord Keith stated that "marriage is now regarded as a partnership of equals, rather than one in which the wife must be the husband's subservient chattel." Marital rape is classified as violence against women. Changes are also needed in Indian criminal law, such as the inclusion of marital rape in Section 375 of the Indian Penal Code. Husband and wife are separate legal entities in the current Indian legal system. Women in India contribute significantly at home and outside the home. Marital rape erodes her trust in her husband. Women must also break free from social constraints and fight for justice. They must refuse to conform to the standards imposed on them as the inferior sex.

The law has adequately addressed the crime of marital rape. Rape within marriage is not punishable if the woman is over fifteen years. Non-consensual

Sexual intercourse with a person's wife who is separated or otherwise living separately is an offence under the IPC in terms of the acts mentioned in section 375. It should also be noted that marital rape occurs within the confines of the home, which is why there are often no witnesses.

RAPE:

One of the most heinous crimes against women is rape. It is one of the world's most horrific crimes. It is a violation of a woman's constitutional right to life. Except for marital rape, rape is a crime under the Indian Penal Code. Section 375 of the Indian Penal Code defines rape as penile-urethral, penile-oral, or penile-anal penetration (ii) object-vaginal, object-urethral, or object-anal insertion (iii) insertion of a part of the body other than the penis, in the vagina, urethra, or anus of a woman (iv) manipulation of any part of the body of a woman for causing.

Nonetheless, the concept of coercive non-consensual sexual intercourse in an extended form between a man and a woman in specified circumstances remains central to the crime of rape. Its essence is the slight penetration of the penis, the insertion of any object or part of the body, or the manipulation of any part of a woman's body for penetration into a woman's vagina, urethra, or anus.

The following are the essential elements of the rape offence: (i) there must be sexual intercourse with a woman by a man, as defined in Section 375(a) to (d): (ii) such sexual intercourse must occur under any of the seven circumstances: (a) against her will, (ii) without her consent, (c) with consent obtained under fear of death or harm, (d) consent given under the mistaken belief that the man is her husband, (e) consent given. According to this definition, consent or will play a significant role in determining sexual intercourse as rape. It is the most critical factor in determining the accused's liability in rape. Section 375 eliminates the

possibility of marital rape when the wife is over fifteen. If, on the other hand, the girl is not the man's wife and is under the age of 18, the sexual intercourse, even with the girl's consent, amounts to rape. Unwanted intercourse with an unmarried lady or married lady, except by her husband, is rape under Section 375, but what about a married lady if her husband does the unwanted intercourse?

CONCEPT OF MARITAL RAPE

The term "rape" is derived from the Latin term "rapio," which means "to seize." Rape is thus defined as the forcible seizure or ravishment of a woman without her consent, whether through force, fear, or deception. It entails coercive, non-consensual sexual contact with a woman. Rape is an act of violence against a woman, and it is an outrage in every way. It is the ultimate violation of a woman's self-esteem. The Supreme Court of India appropriately described it as "deathless shame" and "the gravest crime against human dignity." Marital rape, on the other hand, is forced sexual intercourse by one partner against the will of the other partner. It can also refer to any unwanted intercourse or penetration (vaginal, anal, or oral) obtained through force, the threat of force, or when the wife cannot consent.

CLASSIFICATIONS OF RAPE:

Marital rapes are classified into three types:

1. Rapes committed with only enough force to coerce the wife into intercourse are force rapes.
2. Battering rapes - Women are raped and battered by their husbands, who beat, slap, push, and use other physical and sexual violence forms.
3. Obsessive rape, like torture and other preserved sexual acts, is a form of obsessive rape. They are even putting pressure on her to watch pornography or forcing her to act like a porn star.

STATUS OF MARITAL RAPE IN OTHER COUNTRIES:

According to the Oxford Dictionary, marital rape is sexual intercourse forced on a woman by her husband intentionally against her will. Even one state statute, California, defines spousal rape as an act of sexual intercourse with a person who is the perpetrator's spouse and will be held accountable under any of the following circumstances:

1. This is spousal rape, which is committed against a person's will by imposing force, violence, coercion, threat, or, in some cases, fear of immediate and unlawful bodily harm on the person or another.
2. A person is intoxicated, or the accused intentionally or knowingly uses any anaesthetic or controlled substance.
3. In a situation where a person is incapable of resisting or is unconscious at the time, such as when a person is unconscious, asleep, or unaware that an act has occurred.

4. Where the perpetrator threatens to retaliate against the victim or any other person in the future by kidnapping or inflicting severe bodily harm or pain
5. The act is committed under the influence of threats made against the victim's will by a public official using their authority to incarcerate, arrest, or deport the victim or another. The victim has a reasonable belief that the perpetrator is a public official.

So, in a nutshell, marital rape is any unwanted sexual activity performed by a spouse against the desire or will of another person. Here, sexual act refers to intercourse, anal or oral sex that is done forcibly and without the consent of another, and activities that the victim regards as degrading, humiliating, painful, and unwanted.

NEED FOR CRIMINALISATION OF MARITAL RAPE:

Marital rape has a variety of physical and psychological consequences, including injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue, and vomiting, as well as broken bones, black eyes, bloody noses, and knife wounds that occur during sexual violence. Miscarriages, stillbirths, bladder infections, infertility, and the potential transmission of sexually transmitted diseases such as HIV are all gynaecological consequences of marital rape. Women whose partners have been raped are more likely to suffer severe psychological consequences. Similarly, some psychological effects of spousal rape include anxiety, shock, intense fear, depression, and suicidal ideation. In contrast, long-term effects frequently include disordered eating, sleep problems, difficulties in establishing trusting relationships, and victims begin to develop negative feelings about themselves.

INDIAN SCENARIO:

According to the United Nations Population Fund, more than two-thirds of married women in India between 15 and 49 have been beaten or forced to provide sex. According to the International Men and Gender Equality Survey, one in every five men has forced their wife or partner to have sex. According to a report published by the United Nations, 69 per cent of Indian women believe that occasional violence is justified, such as when a meal is not prepared on time or when sex is refused. According to additional statistical research, 9 to 15% of married women are raped by their husbands. Marital rape is a common but largely unreported crime. According to a study conducted by the Joint Women Programme, an NGO, one out of every seven married women has been raped by her husband. Such non-governmental organisations (NGOs) do not frequently report rape cases because the law does not support them.

When we look at the Indian constitution, we find equality before the law for women, or we can say that all are equal before the law. The Constitution also instructs states not to discriminate against any citizen based on religion, race, caste, sex, place of birth, or any combination of these factors. However, when it comes to marital rape, women in India are not treated equally.

Victims of marital rape do not receive equal legal treatment. Section 375 of the Code, when it comes to rape protection, the Indian Penal Code, 1860, discriminates against a wife. The Indian Constitution guarantees the right to live in dignity. Don't you believe a wife has the right to live with dignity? But, in the author's

opinion, marital rape violates a married woman's right to live with dignity, or we can emphasise section 375 of the IPC, which contravenes Article 21 of the Constitution about marital rape. Many states have enacted marital rape laws, repealed marital rape exceptions, or have rules that do not distinguish between marital rape and ordinary rape. How does one divide a rape based on the victim's marital status? What is the difference between the rape of an unmarried woman and a rape of a woman married to the man who rapes her? Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and, most recently, Indonesia are among the countries mentioned above.

In Turkey, marital rape was criminalised in 2005, Mauritius and Thailand followed suit in 2007. The criminalisation of marital rape in these Asian and global countries indicates that marital rape is now recognised as a violation of human rights. The year was 2006.

It is estimated that marital rape is a criminal offence in at least 100 countries, but India is not one of them. Even today, marital rape is common in India, concealed behind the iron curtain of marriage.

Without a doubt, the Hindu religion and marital life in India grant the right to have sex with a wife. Even though Hindu religion and literature emphasise purity, cleanliness, and good faith behaviour in marital life, it cannot be said that Hindu religion and traditions exempt the heinous act of raping to wife. In married life, sexual intercourse is an ordinary course of behaviour based on consent. No religion will ever accept it as a law because the goal of good faith is not to cause hatred or loss to anyone.

- In its 172nd Report on 'Review of Rape Laws,' the Law Commission of India and the National Commission for Women have both recommended harsh punishment for rape. According to the report, sexual intercourse between a man and his wife who is not under sixteen is not considered sexual assault. The commission was also opposed to removing the exception to Section 375.
- The Protection of Women from Domestic Violence Act of 2005 only established a civil remedy for marital rape rather than criminalising it.
- The Indian government established the Justice Verma Committee on Anti-Rape Law to strengthen anti-rape legislation after the rape of a twenty-three-year-old student in Delhi on December 23, 2012; a committee comprised of retired Justice J.S. Verma, retired Justice Leila Seth, and Solicitor General Gopal Subramanian was formed to investigate potential changes to criminal laws relating to sexual violence against women. Given the importance and urgency of the task, the committee agreed to complete it within 30 days, which it did. The Committee is aware of the recommendations made by the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) in February 2007 regarding India. The CEDAW Committee has recommended that the country "expand the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and eliminate the exception of marital rape from the definition of rape."

- According to the Verma Committee report, 18.8 per cent of women have been raped by their partners on one or more occasions. According to reports, marital rape has become a myth, with many people believing that it is not rape. This recommendation of the Justice Verma Committee to delete the exception for marital rape was not included in the Criminal Law Amendment Bill, 2013, which the Lok Sabha passed on March 19, 2013, and by the Rajya Sabha on March 21, 2013. The Bill received Presidential assent on April 2, 2013, and is slated to effect on February 3, 2013. In Section 375, the word rape has been replaced with sexual assault.
- The UN Special Reporter on Violence Against Women, Rashid Manjoo, stated that the Justice Verma committee's recommendation and subsequent legislation was a "golden moment for India." Still, the legislation did not include recommendations on marital rape, age of consent for sex, and other issues.
- The government is hesitant to criminalise marital rape because it would necessitate changing laws based on religious practices, such as the Hindu Marriage Act 1955, which states that a wife is obligated to have sex with her husband.
- According to the parliamentary committee examining the Criminal Law (Amendment) Bill, 2012, "For centuries, the family system in India has evolved. Family is capable of resolving (marital) issues, and there is also a provision in the law for cruelty to women. As a result, it was concluded that if marital rape is made illegal, the entire family system will be put under great strain, and the committee may end up doing even more injustice and breaking the Indian marriage system.
- According to the Research Institute for Compassionate Economics, 98 per cent of rapes against women are committed by their husbands. Independent Thought filed a writ petition in 2013 claiming that Section 375 is a flagrant violation of Articles 14, 15, and 21 of the Indian Constitution. The age of consent for any sexual relationship should be eighteen regardless of the girl child's marital status.
- Furthermore, the Criminal Law (Amendment) Act of 2013 examined the current situation and raised the age of consent for sexual intercourse by girls from 16 to 18 years. However, the age of consent for a married girl is still listed as 15 years.
- This begs whether marriage in India is, among other things, a contract for legal sex in which a man does not need to ask permission and is free to impose himself on the wife. "I once got an alarming case where the woman was so traumatised that the child born out of wedlock reminded her of the brutality of her bedroom," Anuja Shah, an online senior family therapist at e-Psy-Clinic, explains. She continues, "When a man marries, he believes that any type of sex he has with his wife is customary. He believes that even if he coerces his wife into having sex, it is not rape. And in most of these cases, I've noticed that there is some form of torture or physical abuse in the marriage. Marital rape means that the husband is insensitive to his wife. According to the data, 8.5% of the surveyed women (one in every twelve) have experienced sexual violence. Almost 93% of these women reported being sexually abused by their current or former husbands, while only 1% said being sexually abused by a stranger.

If marital rape is legalised, women whose husbands sexually assault have little hope of justice. The law's exception must be repealed as soon as possible, as the Justice Verma Committee recommended in 2013. According to the committee, the "relationship between the accused and the complainant is irrelevant to the inquiry into whether the complainant consented to the sexual activity." In India, the burden of proof of consent has shifted to the accused. These provisions are significant for women facing sexual violence within marriage because married women are more likely to face social repercussions for reporting violence. Furthermore, Section 498A's "definition of cruelty by husbands and in-laws" specifies only mental and physical abuse. Sexual abuse would be included in an amendment.

Human Rights Violations and Marital Rape:

As stated in the Indian constitution under Article 21, which discusses the right to life, the right to life is also granted to women. According to a recent Gujarat High Court decision, a husband who forced himself on his wife received a clean chit. The High Court decision legalises marital rape and violates a woman's right to her own body and mind. According to one WHO studies, approximately 12% of sexually abused women are abused by their husbands during pregnancy. On the other hand, a marriage does not imply that women must become enslaved. As a result, marriage does not deprive women of their human rights. As long as a person is a human being, they have the right to exercise those inalienable and natural human rights. To say that a husband can rape his wife after marriage is to deny independent existence, the right to live with dignity, and the right to self-determination. Any act that results in the non-existence of women hurts women's self-esteem and infringes on women's right to independent decision-making in the modern world; instead, it is a stone-age thought. Forcing a woman to use a body organ against her will is a serious violation of her right to live with dignity, her right to self-determination, and an abuse of her human rights. The Constitution guarantees the right to privacy. As a result, it is impossible to say that marital rape is permissible in light of those international human rights instruments.

IN INDIAN LAW, LACUNAE

- Section 375 of the IPC violates Article 21 of the Constitution and broadens the Right to Live with Dignity scope.
- Article 14 of the constitution guarantees a fundamental right that the state cannot deny. Still, the exception under Section 375 of the Indian Penal Code, 1860, discriminates against a wife regarding rape.
- According to various statements made by our judiciary that having sex with his wife is a married right of the husband, this implies that having sex with anyone, at any time, anywhere, and under any circumstances is a marital right.
- Another enigma in the IPC is how non-consensual intercourse with a wife aged 12-15 years can result in a light punishment.

CONCLUSION:

Rape is a heinous crime committed against a woman, so it makes no difference whether the women are married or unmarried. Rape is rape, whether a husband or a stranger saves it. It is such a pity that the law assumes that in a marriage, the wife has consented to provide all types of matrimonial obligations or services to her husband, including sexual intercourse, which she cannot later deny. In cases where men assault their wives, India must learn about gender equality rather than enduring the abuse in silence. There is a need to understand that marital rape is no longer a taboo subject that should be discussed behind closed doors.

Certain vows about trusting each other's dignity are exchanged during religious weddings. As a result, criminal law cannot turn a deaf ear to societal injustice and inhumanity. The lawmakers must recognise that if the sanctity of the constitution is to be preserved, the dignity and honour of women must be vindicated; otherwise, the concept of the right to equality enshrined in our form will remain a dead letter if women in our country do not have any control over their bodies and do not have the option of exercising their own choices regarding sexual relationships in marriage.

REFERENCE:

- <http://vapsoft.org/meaning-of-indian-marriage/> visited on 05-02-2018
- <http://weddings.iloveindia.com/features/what-is-marriage.html> visited on 06-02-2018.
- <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf> visited on 28.1.2018
- http://articles.timesofindia.indiatimes.com/2013-01-14/mumbai/36330662_1_husband-alumnigroup-social-group visited on 30.1.2018.
- http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=586 visited on 2.2.2018.
- <http://www.ebc-india.com/lawyer/articles/645.htm> visited on 1.2.2018.
<http://law.galgotiasuniversity.edu.in/pdf/issue2.pdf> visited on 30.5.2013
- <http://legalperspectives.blogspot.in/2009/10/marital-rape.html> visited on 3.2.2018
- International Journal in Management and Social Science <http://www.ijmr.net> visited on 6.2.2018.
- <http://www.lawcommissionofindia.nic.in/rapelaws.htm#chapter3> visited on 1.2.2018
- <http://www.thehindu.com/news/resources/full-text-of-justice-vermas-reportpdf/article4339457.ece> visited on 31.1.2018.
- <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf> visited on 31.2.2018.
- <http://www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-sayscommittee/article4351148.ece> visited on 31.2.2018.

- <http://www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-sayscommittee/article4351148.ece> visited on 31.2.2018.