



A TRANSFORMATIVE STUDY OF CRIMINALIZING MARITAL RAPE AND THE LEGAL REMEDY TO PENALISE MARITAL SEXUAL VIOLENCE IN INDIA

¹Gokulakrishnan. B, ²Dr. Sharmila M.S.,

¹Research scholar, ²Associate Professor,

¹VIT School of Law,

¹Vellore Institute of Technology, Chennai, India

Abstract: Marital rape has been prevalent in many countries from time immemorial, and in some countries, considering the reproductive rights of women and its impact on the physical and mental health of women, it has been criminalised. Marital rape is a result of not recognizing the identity of women. Apart from that, marital rape violates the right to health of women under Article 21 of the Constitution from a health perspective. The marital rape exemption does not consider the vulnerability of a disabled spouse in a marriage. But in India, marital rape prevails, and this article analyses the validity of the legal principles based on which marital rape is not yet abolished in India and analyses the marital rape from different angles, like right to health, protection of disabled people. This article is studied with the doctrinal method by relying on secondary sources like Statutes, Scholarly articles from reputed journals, Judicial pronouncements, etc. This discussion article makes a comparative study of criminalization of marital rape in countries like the US, UK, etc. The results show that the marital rape exemption is based on old customary practices where women did not have individual identity and bodily privacy. The results also indicate that the marital rape exemption is in contravention of the fundamental right to health under Article 21 of the Indian Constitution, recognised by various Supreme Court judgments. The results further tell that marital rape is not considered from the perspective of the disabled spouse. Therefore, marital rape should be criminalised on the basis that it violates the right to health, protection of disabled persons against marital rape and also to recognize the identity and privacy of women inside marriage.

Index Terms - Domestic Violence, Family Conjugal rights, Marital rape, Rape during Judicial separation.

I. INTRODUCTION

Family is the rudimentary institution of the society and marriage is the institution that creates a family. Marriage has various functions like procreation, emotional support to the spouse. ¹To create a strengthen the society, it is necessary to strengthen every fabric of a family. On getting married each spouse gets some matrimonial rights. There are also several disputes on mistreatment of the spouse. ² The

¹ Saroj Rani V. SK Chadha, 1984 AIR 1562(1984)(India)

² Huhhram V Misri Bai, AIR 1979, MP 144 (1978)(India)

Husband gets conjugal rights, wife has the matrimonial right of maintenance in case the marriage dissolves, etc. But there are some instances in which the matrimonial rights are abused³. In the Indian Penal Code, 1860, Exception 2 to Section 375 provides an exception to the crime of rape if it is by a husband on a lawfully wedded wife. In the **Bharatiya Nyaya Sanhita, Chapter V** deals with **OFFENCES AGAINST WOMAN AND CHILD** and **Section 63** provides for rape. The **Exception 2** to the section deals with what is in modern times called as a marital rape. Thus, we can find that the exception 'Marital Rape' is continued even in the new act. The **Exception 2 to S. 63** provides that when a man engages in sexual intercourse with his own wife not being under eighteen years of age, it is called as marital rape and does not come under the definition of rape. The legal considerations apart from marital rape affecting the bodily autonomy of woman is that it takes away the equality and other rights of women along with right to decide on procreation when it is guaranteed by International Instruments like **CEDAW Convention**.⁴

This article deals with the legal status of marital rape in India, the relevance of legal principles in the modern era based on which marital rape in India is not criminalized and the present remedy to criminalize marital rape in India.

MATERIALS AND METHODS:

Secondary sources of materials like Statutes in India on Marital rape, matrimonial laws like Domestic Violence Act, Hindu Marriage act, scholarly articles on marital rape were utilized for this research and Doctrinal method of study is adopted by analyzing the above-mentioned secondary sources and supporting the subjective views on marital rape with scientific evidence of scholars and judicial pronouncements in India cited as reference.

CONFLICT OF INTEREST:

The author and the co-author does not have any conflict of interest for the work.

TYPES OF MARITAL RAPE

BATTERING RAPE: In this type of rape the involuntary sexual intercourse is followed by the physical violence

FORCE ONLY RAPE: In this type of marital rape, the partner exercises force to succumb the partner to get into physical relationship

OBSESSIVE RAPE: This type of marital rape is considered as a sadistic form of rape since it involves a violent form of rape⁵

LEGAL HURDLES IN CRIMINALISING MARITAL RAPE

1. ENCROACHING THE PRIVATE SPHERE!

The main issue in settling the various disputes with regard to the matrimonial rights is the hesitance of the courts to encroach into the private sphere of a family.⁶ It is important to note that once an aggrieved party knocks the door of the public either through court or police station by means of a complaint or a litigation to protect herself from cruelty, the issue is no more a private affair and the social institutions like the Police/Court can decide the dispute and it does not amount to encroaching the private sphere.⁷

2. THE CONFLICT OF RESTITUTION OF CONJUGAL RIGHTS AND MARITAL RAPE

Restitution of Conjugal rights is the power of the court to order a legally wedded couple to live together when one party has withdrawn from the society of the other. **S. 9 of the Hindu Marriage Act, 1955** in

³ Bhagyashika Saptarshi, Marital Rape and Law, Manupatra (April 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

⁴ Article 16(e), CEDAW Convention

⁵ Nimeshbhai Bharatbhai Desai vs State Of Gujarat, CrI Misc A. 26957 of 2017 (2017) (India).

⁶ Raveena Rao Kallakuru and Pradyumna Soni, CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT, NUJS Law Review, 11 NUJS L.Rev. 1 (2018), P. 131,132, 133

⁷ Harvinder Kaur V. Harminder Singh, AIR 1984DELHI66 (1984) (India)

simple terms defines Restitution of Conjugal rights as the withdrawal of the spouse from the other's society and provides the remedy for such person by granting the decree of conjugal rights.⁸

Since the HMA provides power for the family courts to order two legally wedded person to live together which includes the right to cohabit, it becomes difficult to criminalise marital rape as the other spouse has the legal right to restitution of conjugal rights in case the spouse withdraws from the society of other or does not consent to have sexual relationship with the spouse. However, when we trace the origin of the Restitution of Conjugal rights it originated from the times of the feudal England where the wife is regarded as a Chattel.

2.1 DOCTRINE OF COVERTURE AND ITS DERECOGNITION IN INDIA

Doctrine of Coverture means that a women is incapable of having a separate identity and her identity follows with the identity of a married husband.⁹ Apart from the fact that marital rape affects the privacy of women, it also affects the identical status of women.¹⁰ This doctrine eclipses the identity of a woman with that of her husband which is contrary to the existing human rights legislations.¹¹ This legal principle is invalid in the modern as dignity is not only regarded as human rights but also fundamental rights.¹² The lack of identity for a women whether social or legal prevents a women from accessing other rights and material resources of the community which she can fight if denied only if she has a legal identity. Without granting identity to women it becomes difficult to grant legal capacity to women which must be granted for women as per the provisions of CEDAW conventio.¹³ In the case of **Joseph Shine V UOI**,¹⁴ which criminalized adultery by a women has observed that women is not a chattel of a husband which furthers asserts that women has a individual identity distinct from a man and cannot be subjugated by a man. This judgment analysed **S. 497 OF IPC**. The Hon'ble Supreme Court observed that S. 497 provides for two types of classification and observed that it in the ancient times it was believed that women are the property of a husband and if adultery is committed with that women, it is like the women who is identified as property has been stolen and the women is no way connected with the adultery committed and hence cannot be held liable. So it is crucial to think that in the current evolution of the family Jurisprudence, it is possible to withhold this rights.¹⁵ And it is pertinent to think whether any third party like court can force a person to cohabit with the spouse even if it is a legally wedded husband. Moreover, it questions the reproductive rights of a woman. In many DVC Cases, there are several instances of sexual violence, which is against the reproductive rights of a woman physically, emotionally and mentally. It creates a situation where the woman cannot resist Conjugal rights of husband or go against it since because she is married.¹⁶

Restitution of conjugal rights originated in feudal England where women is said to be the property of the Husband and it is outdated in the modern legal and social developments. It also encroaches the right to bodily privacy of women. Therefore, RCR must be abolished to create a family structure where both parties act for each other welfare which should acknowledging the rights, identity of both male and female. RCR doesn't have any logical basis and was a practice in the olden times where women cannot express or exhibit any rights against the male, which is a practice of the patriarchal society.¹⁷ The current domestic laws are weak to prevent the injustice inside marriage.¹⁸ Apart from the above arguments RCR

⁸ The Hindu Marriage Act, 1955, S. 9

⁹ Agnidipto Tarafder and Adrija Ghosh, The Unconstitutionality of the Marital Rape Exemption in India, ohrh.law.ox,2020, P. 206

¹⁰ T. Saritha Vengata Subbiah V State, AIR 1983 AP 356 (1983) (India)

¹¹ The Protection of Human rights act, 1993, S. 2(d)

¹² Maneka Gandhi V. UOI, 1978 AIR 597 (1978) (India)

¹³ Article 15(2), Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979

¹⁴ Joseph Shine V **UOI**, AIR 2018 SUPREME COURT 4898 (2018) (India)

¹⁵ Warren V State, 255 Ga. 151 (1985) (US)

¹⁶ Commonwealth V. Fogerty, 74 Mass, 489 (1857) (US)

¹⁷ Shayara Bano V. UOI, AIR 2017 SUPREME COURT 4609, 2017 (India)

¹⁸ JS Verma committee, Reports of the Committee on amendments to Criminal law, (P. 68) (2013)

and marital rape encroaches the right to bodily autonomy and right of fundamental personal choices held in the landmark Privacy Judgment of India¹⁹

MARITAL RAPE AND RIGHT TO HEALTH

In **Unnikrishnan, J.P. v. State of Andhra Pradesh**,²⁰ it was held that the Court must take measures to improve the public health and it includes the duty to protect women's health against spousal violence. In **Consumer Education and Research Centre v. Union of India**, the Supreme Court held that the right to health is a fundamental right under Article 21 of the Constitution and since marital rape affects the physical, mental health, it must be criminalized from the perspective of right to health.²¹ In **Bandhua Mukti Morcha v. Union of India**, the Apex Court held that dignity, which is a important human right includes right to good health.²² In **Vincent v. Union of India**, it was held that healthy body is an important aspect of human life and the State must strive to maintain citizen's health.²³ In **CESC Ltd. v. Subash Chandra Bose**, the Supreme Court interpreting the international instruments concluded that right to health is a fundamental right and held that right to health signifies more than absence of sickness²⁴

Thus by analyzing the above judgments on right to health in India, we can conclude that the State must bring schemes and legislations, not only for maintaining good health of citizens but to improve the health and since marital rape affects the physical and mental health of the women, it must be criminalized from the perspective of right to health especially when it is recognized as a fundamental right.²⁵ More emphasis should be paid to prevent marital rape against disabled women to prevent intersectional discrimination.²⁶ The Indian legislations like the Rights of persons with disabilities act provides reproductive rights to disabled persons. This must include marital rape also.²⁷

STUDY OF MARITAL RAPE CRIMINALISATION IN OTHER JURISDICTIONS

MARITAL RAPE CRIMINALISATION IN US

i. STATUTORY ABOLISHMENT OF MARITAL RAPE EXEMPTION

In certain states like in Oregon, marital rape was criminalized by a statute and in one subsequent case in **State V. Rideout**, a husband based upon the testimony of the witnesses was charged with marital rape and but he was acquitted. Although in the above case it resulted in acquittal, it created more awareness about marital rape.²⁸

ii. JUDICIAL ABOLISHMENT OF MARITAL RAPE EXEMPTION

In US, in New York in the case of **People V. Liberta**, a husband was punished for having nonconsensual sex with his separated wife. The court in this case, held that the man is punishable for rape as his rape was out of the marriage in this case, when they were ordered by the court to be separated. This particular case distinguishes between what is lawful and unlawful marriage and in this case since the marriage was temporarily suspended, the court held that although the man is the husband of the wife, having sex with his wife out of the marriage ie. when judicially separated amounts to rape and held the man for rape. This is one instance of criminalization of marital rape by the judiciary and this case study validates the punishment of marital rape by distinguishing between lawful and unlawful marriage.

¹⁹ Justice KS Puttaswamy (Retd) V. UOI, AIR 2018 SC (SUPP) 1841, (2018) (India)

²⁰ Unnikrishnan, J.P. v. State of Andhra Pradesh, 1993 AIR 2178, (1993) (India)

²¹ Consumer Education and Research Centre v. Union of India, 1995 AIR 922, (1995) (India)

²² Bandhua Mukti Morcha v. Union of India, 1984 AIR 802, 1983 (India)

²³ Vincent v. Union of India, 1987 AIR 990 (1987)(India)

²⁴ CESC Ltd. v. Subash Chandra Bose, 1992 AIR 573 (1991) (India)

²⁵ Dr. Soumitra Kumar Chatterjee, Right to Health, Constitutional Safeguards and Role of Judiciary, odisha review, April 2016, P.88

²⁶ Sandra Fredman, Intersectional discrimination in EU gender equality and non-discrimination law, EU Publications, May 2016, P. 27

²⁷ The rights of persons with Disabilities Act, 2016, S. 10

²⁸ Lalenya Weintraub Siegel, The Marital Rape Exemption: Evolution to Extinction, Cleveland State law review, Volume 43, Clev. St. L. Rev. 352, 364 (1995).

However, in this case the court did not strike down the entire statute but only the gender discriminative provisions. This similar approach can also be used by the Indian Judiciary to strike down the exemption to marital rape.

MARITAL RAPE CRIMINALISATION IN UK

In the case of **Popkin v. Popkin**²⁹, which was held in 1794, the court while determining a divorce case observed that a man has authority over her wife but it should not affect her health which was the first instance of considering marital rape as a violation of women's autonomy.

CRIMINALISATION OF MARITAL RAPE WHEN CONSENT IS REVOKED IMPLIEDLY

In the case of **R V. Clarke**³⁰, the court observed that when there is judicial separation order between an husband and a wife, it is understood that the implied, irrevocable consent of the wife created through marriage is revoked, we can observed that the consent when revoked, it gives room to criminalise rape by husband.³¹ Certain However, in this case, the judge however laid a condition that it cannot be said absolutely that by mere separation, the implied consent is not revoked until there is an absolute decree like decree of divorce or judicial separation even when a divorce application is filed in the court. When there is an injunction order or restraint order from being molested or raped then it can be a good ground for criminalizing marital rape when such order is in force.³² In England, a mutual separation agreement, a judicial separation decree, a protective order, or a decree of divorce were considered as absolute orders that are exceptions to the exemption of marital rape. However, this status was revoked by English Law Commission paper '**Rape within marriage**'.³³

RESULTS:

On analyzing the current laws in India and legal principles of judicial pronouncements which support marital rape, it is found that it is inconsistent with the modern legal developments and rights of women like right to bodily privacy, giving separate identity to women by disregarding her as property. The current legislations don't consider the aspect of sexual violence against disabled people and marital rape against disabled people. Marital rape is in contravention the fundamental right to health under article 21 of the Constitution of India and hence a change in the current laws on marital rape is required to protect the liberty and dignity of women inside marriage.

CONCLUSIONS

Marital rape in essence is nothing but violence exerted on women and without consent to engage in a sexual relationship. The present legal developments of the society, the legal principles relied for upholding the exemption of marital rape have become irrelevant. Especially principles like Restitution of Conjugal rights which have become outdated in the modern context after the ruling in Joseph Shine V UOI, which states that women is not a property of husband. Although one of the purposes of marriage is procreation, the women must have equal right in deciding when to have a child as per the CEDAW convention. Marital rape at the current legal situation can be prevented via S. 3 of the Domestic Violence Act, 2005. Marital rape is an issue of identity and dignity of women. It is necessary to criminalise marital rape since it contravenes right to health, right to privacy under Article 21 of the Constitution and protection of disabled people.

²⁹ Popkin V Popkin, [1794] 1 Hag. Ecc. 765, (1794) (England)

³⁰ R v Clarke [1949] 2 All ER 448. [1, 2]

³¹ Lalenya Weintraub Siegel, The Marital Rape Exemption: Evolution to Extinction, Cleveland State law review, Volume 43, Clev. St. L. Rev. 352, 364 (1995), <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1610&context=clevstlrev>

³² Ibid

³³ Melisa J. Anderson, LAWFUL WIFE, UNLAWFUL SEX-EXAMINING THE EFFECT OF THE CRIMINALIZATION OF MARITAL RAPE IN ENGLAND AND THE REPUBLIC, Vol. 27:139, UGA, 139, P. 149, 150, 151 (1998).

REFERENCES

- [1] Bhagyashika Saptarshi, Marital Rape and Law, Manupatra (April 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>,
- [2] Raveena Rao Kallakuru and Pradyumna Soni, CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT, NUJS Law Review, 11 NUJS L.Rev. 1 (2018), P. 131,132, 133., <https://nujslawreview.org/2018/01/04/criminalisation-of-marital-rape-understanding-its-constitutional-cultural-and-legal-impact/>
- [3] (The Hindu Marriage Act, 1955)
- [4] CEDAW Convention, 1979
- [5] Agnidipto Tarafder and Adrija Ghosh, The Unconstitutionality of the Marital Rape Exemption in India, ohrh.law.ox,2020, P. 206, <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-The-Unconstitutionality-of-the-Marital-Rape-Exemption-in-India-1.pdf>
- [6] (The Protection of Human Rights act, 1993),
- [7] JS Verma committee, Reports of the Committee on amendments to Criminal law, (P. 68) (2013)
- [8] Dr. Soumitra Kumar Chatterjee, Right to Health, Constitutional Safeguards and Role of Judiciary, odisha review, April 2016, P.88
- [9] Sandra Fredman, Intersectional discrimination in EU gender equality and non-discrimination law, EU Publications, May 2016, P. 27, https://www.migpolgroup.com/_old/portfolio/intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law/
- [10] (The rights of persons with Disabilities Act, 2016),
- [11] (The Domestic Violence act, 2005),.
- [12] Lalenya Weintraub Siegel, The Marital Rape Exemption: Evolution to Extinction, Cleveland State law review, Volume 43, Clev.St.L.Rev, 352,364(1995), <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1610&context=clevstlrev>
- [13] Melisa J. Anderson, LAWFUL WIFE, UNLAWFUL SEX-EXAMINING THE EFFECT OF THE CRIMINALIZATION OF MARITAL RAPE IN ENGLAND AND THE REPUBLIC, Vol. 27:139, UGA, 139,P.149,150,151(1998)., <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1315&context=gjicl>