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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

IS MARITAL RAPE A NON CRIMINALIZED OFFENCE?

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Abstract

Marital rape is one of the most evil acts which exist in India. Marital rape is no lesser than the offence of rape rather it is the species of rape. Married women are generally the victims of marital rape. It is one of the biggest threats to gender justice in India. It is one such social evil which has existed in India since ancient times and still continues to raise havoc in the country. Indian society has never considered marital rape as a problem. It is rarely opposed by anyone in the Indian society due to a variety of reasons. The attitude of Indian legislature is no different in this regard. Indian legislature has been given the most onerous task of enacting laws for the safety, security and development of the country by the Indian Constitution. But the legislature is not interested at all in eliminating the evil of marital rape from the country. Indian judiciary gives a ray of hope in this regard but its hands are tied as drafting of laws is the prerogative of legislature and not the judiciary. There are no effective laws in India as far as marital rape is concerned. Whatever laws are there in India they are not good enough to contain something as evil as marital rape. There is need to bring some strong laws to bell the cat of marital rape in India.

Introduction

In India, there have always been a variety of social ills. Among those social evils are Sati Pratha, Child Marriage, Forced Marriage, Devdasi system, Purdah system, and so on. With time, many of these social ills have vanished from India, but some of them are still very much present and cause problems for the country.

All that marriage is a legal agreement between two people that permits sexual activity. One may refer to a marriage as a contractual or sacramental relationship. Given that the definition of marriage states

that it legalizes sexual relations, it follows that any sexual act performed during a marriage is acceptable and lawful. This serves as the justification for the perpetrators' act of marital rape. Sexual activity between married couples without the wife's consent is known as marital rape. This blatantly states that a husband's use of the marriage ceremony as a springboard to obtain permission to sexually abuse his spouse is his own prerogative. Marital rape is one such social evil that has existed in India for a very long time and is still common there today. That is one such severe social ill that has persisted throughout India's history and is still a common occurrence there. The threat of marital rape is also met with a degree of indifference from Indian society and the Indian legislature. On the other hand, as is clear from its numerous historic rulings, the Indian judiciary is not so much apathetic toward the evil of marital rape as it is supportive of its eradication from the nation. In India, there is no legal prohibition against marital rape, unlike in most other countries across the world, where it is considered an offense. There are no laws in India that effectively address the problem of marital rape.

Rape that occurs when the perpetrator is the victim's spouse is referred to as marital rape. The definition of sexual intercourse or sexual penetration that occurs without consent is still considered rape. Thus, demonstrating the absence of consent is a crucial component in proving the crime of rape. It is frequently the victim's responsibility to demonstrate the absence of consent. In certain situations, such as when a minor is involved, it is assumed that no consent has been given because the law assumes that minors are incapable of giving consent for such sexual acts. However, there are also situations in which consent is taken for granted. Although Article 14 of the Constitution discusses equality, it does not grant a woman's sexual desire equal rights in the case of marital rape. In general, it is regarded as rape and is a criminal offense when a man engages in sexual activity with a woman against her will. One of the most crucial elements in determining whether something is sexual activity or a rape is the word consent. Thus, the question of how a husband's rape after marriage can occur without consent remains unanswered. Ironically, India places a greater emphasis on rape, as evidenced by the numerous laws that are passed, updated, and implemented to combat the crime. However, despite these efforts, marital rape has not received the criminal attention it deserves and is still largely unreported.

The Verma committee recommended that marital rape be made a crime under Section 375 of the Indian Penal Code even after the Delhi gang-rape case. Numerous NGOs, organizations, and studies have demonstrated that married rape of Indian women occurs, but the government is slow to express

concern about this problem. Although marital rape receives little attention, a number of research studies have categorized this unreported crime as compulsive or obsessive rape, force-only rape, battering rape, or rape.

Meaning

All that is involved in marital rape is rape. Apart from the fact that the spouse is the only person who can commit marital rape, there aren't many differences between the two. Marital rape occurs when a husband engages in non-consensual sexual activity with his spouse. Marital rape also occurs when a wife engages in non-consensual sexual activity with her husband. Therefore, although marital rape is a gender-neutral offense, the husband is typically the one who commits the crime rather than the wife. While it is not uncommon for a wife to rape her husband, there are very few documented cases of this happening worldwide. Undoubtedly, having sexual relations during a marriage is essential, but rape during a marriage is wholly opposed to the idea of marriage.

History

Sexual activity between married couples without the wife's consent is known as marital rape. This blatantly states that a husband's use of the marriage ceremony as a springboard to obtain permission to sexually abuse his spouse is his own prerogative.

Women had very few rights during that time, and those that they did have were unaware of them since there were no strong laws protecting them in India. In addition, women were entirely reliant on their husbands and were forced to comply with their wishes regardless of whether they were morally correct or not. Each of these elements also played a part in the rise of marital rape in India. Therefore, the evil of marital rape has a long history that spans India's ancient, medieval, and modern periods. In the past, rape has been regarded as a criminal offense; however, marital rape is not. This is a result of the idea that a woman is a man's property. If a man is married to a woman, he can rape her 'n' times without her consent without facing consequences because it is not regarded as a criminal offense. Furthermore, society believes that a man has a legitimate right to rape his wife. This can be inferred from the remarks made by England's chief justice in the 17th century, Sir Mathew Hale. He declared that: "The husband cannot be guilty of raping his lawful wife on his own because, by their mutual agreement and contract, the lawful wife has given herself up to her husband in a way that she cannot

take back."

This is a result of patriarchal society, conventional marriage norms, and men's dominance, which violated women's individual rights. However, during the 1960s and 1970s, these attitudes toward marriage and sexuality were contested in the majority of western nations, particularly by the second wave of feminism. This resulted in the recognition and identification of a woman's personal rights.

Situation In Indian Society

Because he is a social creature, man cannot exist alone. For him to survive, society is necessary. The society provides for a lot of his needs, including companionship, safety, security, income, and leisure. However, every society also faces a number of social ills that each and every member of that society must deal with. Thus, a society has both advantages and disadvantages. Since its inception, Indian society has been patriarchal, or dominated by men. Due to the fact that women are more likely than men to become victims of marital rape, this is the exact reason why it is typically not seen as a crime in Indian society. In India, marital rape would have been illegal long ago if men had been the victims. There aren't many voices in India advocating for the outlawing and criminalization of marital rape.

The most crucial factor in the eradication of any social evil is society. A society cannot completely eradicate a social evil unless its members reject it as well. Regarding India, Because Indian society has not rejected marital rape, it has continued to flourish there. India is renowned for its culture and heritage, as was previously mentioned. When one visualizes the route taken by India, one finds that it preserved its cultural customs and instilled the same ardor in the following generation. India's decision to make marital rape a crime is a result of the same ideology. When a case of marital rape comes before the court, the government is still unsure of what to accept as proof and whether making the act illegal will lead to other issues like harassing men, etc. According to social scientists, making marital rape a crime would upset the foundations of the marriage institution.

Notwithstanding all of these circumstances, the law prohibiting marital rape continues to exist as an unwritten rule. The courts in India have established an order known as the "right to say no for sexual intercourse" in order to uphold this condition and dispel any doubt regarding the rights of married couples. Either perspective on this has an impact on the other side. When this is broken, it becomes illegal, and the punishment for such crimes is still being decided. The same circumstance could be interpreted as harassment of men if it is seen from a different angle. Making such behavior illegal

cannot protect one gender by taking it away from another. From the foregoing, it is evident that although marital rape is not yet illegal in India, the process is still in its early stages. This does not imply that marital rape is not illegal; rather, it simply persists as a custom that has not yet been formalized.

Indian Legislature

An important part of reducing marital rape in India can be played by the legislature. In regards to making marital rape a crime in India, however, the Indian legislature is very reluctant. Numerous attempts to make marital rape a crime in India have repeatedly failed. Several bills to make marital rape a crime in India have been introduced in parliament, but none of them have been able to become law. The Indian legislature has the authority to make marital rape a crime in India, but it has not acted quickly enough in this regard. The Indian legislature essentially believes that making marital rape a crime would negatively impact the nation's highly valued marriage institution and increase the number of failed marriages.

Indian Executive

The Indian executive is opposed to making marital rape a crime in the nation, as is the Indian legislature and society. Successive Indian governments have been approached on a number of occasions to make marital rape illegal in the nation, but none of them have shown the courage or the will to do so. The feeble justification offered for the lack of criminalization of marital rape in the nation is that doing so would undermine the institution of marriage and increase the number of divorces that occur there. Thus, in this regard, the attitude of Indian executives is also quite disappointing.

Indian Judiciary

Unlike the Indian legislature, the Indian judiciary has not been as reticent and reserved in its response to the evil of marital rape. The Indian judiciary has adopted a far more proactive approach in addressing the issue of marital rape. The Indian Supreme Court has ruled in a number of significant cases criticizing the widespread practice of marital rape in the country and repeatedly calling for its outlawing. In a similar vein, a number of Indian High Court rulings have advocated for the national criminalization of marital rape. However, the Indian judiciary plays a very small part in this. The

Indian legislature, not the Indian judiciary, is responsible for making marital rape illegal in the nation.

Situation in India

India is renowned for its culture and heritage, as was previously mentioned. When one visualizes the route taken by India, one finds that it preserved its cultural customs and instilled the same ardor in the following generation. India's decision to make marital rape a crime is a result of the same ideology. When a case of marital rape comes before the court, the government is still unsure of what to accept as proof and whether making the act illegal will lead to other issues like harassing men, etc. According to social scientists, making marital rape a crime would upset the foundations of the marriage institution.

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Interpretation of Section 375 of Indian Penal

CodeSection 375 – Rape

“A man is said to commit “rape” if he:

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or
2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman, or makes her do so with him or any other person; or
3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus, or any of the body of such woman or makes her do so with him or any other person; or
4. applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person,
5. Under the circumstances falling under any of the following seven

descriptions:—

Firstly -not in her favor.

Second- Without her permission

Thirdly-with her consent, if that consent was acquired by making her or any other interested party fearful of harm or death.

Fourthly-when the man has her consent even though he is aware that she does not consider him to be her husband and that she is only giving her consent because she thinks she is legally married to another man.

Fifthly - With her consent if, at the time of giving it, she is incapable of understanding the nature and ramifications of the thing to which she is giving consent due to intoxication, mental instability, or the administration of any stupefying or unwholesome substance by him or through another.

Sixthly-when she is younger than eighteen, with or without her permission. Seventhly-when she can't express her consent.

Explanation 1: The term "vagina" in this section also refers to the labia majora.

Explanation 2: Consent is defined as a woman's clear and voluntary agreement to engage in a specific sexual act expressed by words, gestures, or any other verbal or nonverbal communication:

As long as she doesn't physically resist the act of penetration, a woman won't be deemed to have given her consent for the sexual activity alone.

Exception 1: A medical operation or treatment is not considered rape.

Exception 2: When a man engages in sexual activity with his spouse and the woman is not younger than fifteen, it is not considered rape.

The Indian Penal Code defines rape as when a man engages in sexual activity with a person against that person's will or consent (section 375). Section 375 defines rape and defines when an act qualifies as rape. Additionally, it specifies that two things are not considered rape: first, a medical procedure; and second, a husband's sexual relations with his wife who is not 15 years old or younger are not regarded as rape. However, it is not considered rape if the wife is over the age of 18 and the husband engages in sexual activity with her against her will.

According to Section 375, only the rape of a minor girl is illegal. The legal system exhibits bias and fails to provide equal protection for women. It's important to remember that, despite popular belief, section 375 does not cover marital rape. In reality, the second exception refers to "sexual intercourse by a man with his wife," which implies that the couple is lawfully married. Therefore, section 375 deals with marital rape but has age restrictions. According to this interpretation, a married woman over the age of eighteen may have sexual relations with her spouse without her consent. If two crucial components of rape are against one's will and without consent, then any incident involving a man, whether it occurs before or after marriage, qualifies as rape.

Constitutional validity

It is believed that our nation's rape laws, which do not include marital rape, violate Articles 14 and 21 of the constitution.

Violation of Article 14

In this case, not all women are afforded equal protection under Article 14, which guarantees equality before the law and equal protection under the law. When the Indian Penal Code was first written in the 1860s, married women were not recognized as separate legal entities; instead, they were always described as belonging to their husbands. This is demonstrated by the fact that Section 375's exception 2 punishes husbands for having sex with their wives who are 15 years of age or younger rather than the husband for raping his wife. It is evident from this that married women over the age of 15 and those under are treated differently by the law. Exception 2: Since there is no penalty, doing

Violation of Article 21

Article 21 of the Indian Constitution is violated by Section 375's Exception 2. The constitution's Article 21 guarantees everyone the right to life and personal freedom. It also covers rights to dignity, privacy, health, and a safe environment, among other things. The Supreme Court has declared in numerous rulings, such as *Suchita Srivastava v. Chandigarh Administration*, that the freedom to choose one's sexual activity falls under the protection of Article 21's right to personal liberty. The right to privacy was acknowledged by the Supreme Court as a fundamental right in the case of *K.S. Puttuswamy v. Union of India*. Therefore, any forced sexual desire is a violation of their fundamental right to privacy. Therefore, exception 2 infringes upon both the right to privacy and the right to lead a dignified and healthy life. The wife's physical and mental well-being is negatively impacted by her husband's forced sexual relations. Thus, Articles 14 and 21 of the Constitution are violated by the law.

Arguments for and against marital rape

Reasons in favour of marital rape

- Not making marital rape a crime puts it in violation of other Indian laws. In India, it is illegal to violate a woman's modesty or to act against her wishes.
- Similarly, although it occurs without the victim's consent, marital rape is not illegal. It violates both Article 21's right to life and personal liberty and Article 14's fundamental right to equality and equal protection under the law.
- The misconception held by society is that a married woman has an unbreakable sexual

obligation to her spouse.

- Medically speaking, it is detrimental to a wife's physical and mental well-being when she undergoes sexual activity even though she does not want to, which again violates her fundamental right to a healthier lifestyle.
- Since marital rape is not considered a crime, there are only a number of documented cases; only once it is recognized as such will we be able to pinpoint its precise incidence.

Arguments against marital rape

- The term "marital rape" is meaningless in and of itself because marriage is a mutual agreement between two people to engage in sexual relations exclusively.
- Legalizing marital rape is unnecessary because it is a rare occurrence that only affects a small number of people.
- It is impossible to determine whether this is mutual sex or rape because the evidence cannot be presented in a very authentic manner.
- The wife may accuse her innocent husband of committing this crime out of personal resentment or other motives, giving her the upper hand due to gender.
- The court is burdened with this awkward situation because it cannot be definitively proven or properly dismissed.

Marital Rape: Against Legal & Constitutional Rights

- **Doctrine of Coverture:** Non-Criminalised nature of Marital rape emanates from the British era. The Marital rape largely influenced by and derived from this doctrine of merging the woman's identity with that of her husband.
 - At the time the IPC was drafted in the 1860s, a married woman was not considered an independent legal entity.
 - The marital exception to the IPC's definition of rape was drafted on the basis of Victorian patriarchal norms that did not recognize men and women as equals, did not allow married women to own property, and merged the identities of husband and wife under the "**Doctrine of Coverture.**"

- **Violative of Article 14:** Marital rape violates the right to equality enshrined in Article 14 of the Indian constitution.
 - The Exception creates two classes of women based on their marital 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 other than their marital status while protecting unmarried women from those same acts.
- **Defeats the Spirit of Section 375 of IPC:** The purpose of Section 375 of IPC is to protect women and punish those who engage in the inhumane activity of rape.
 - However, exempting husbands from punishment is entirely contradictory to that objective, as the consequences of rape are the same whether a woman is married or unmarried.
 - Moreover, married women may actually find it more difficult to escape abusive conditions at home because they are legally and financially tied to their husbands.
 - **Violative of Article 21:** According to creative interpretation by the Supreme Court, rights enshrined in **Article 21** include the rights to health, privacy, dignity, safe living conditions, and safe environment, among others

JUDGEMENTS

- 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.
- In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence.
- In the Suchita Srivastava v. Chandigarh Administration, the 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.
- In [Justice K.S. Puttuswamy \(Retd.\) v. Union of India](#), the Supreme Court recognized the right to privacy as a fundamental right of all citizens.
- The right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.

- In all these judgements the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.
- Therefore, forced sexual cohabitation is a violation of the fundamental right under article 21.

Conclusion

Thus, it is safe to say that, similar to rape, marital rape poses a serious risk and impedes India's efforts to achieve gender justice. As long as there are such ills in India, it is impossible to claim that Indian women are free and independent. One of the biggest stains on Indian women's rights to equality and life is marital rape.

One of the main barriers to India's development is marital rape, which has to be eradicated entirely if the country is to become developed. However, both the Indian legislature and the Indian executive branch must abandon their archaic ways in order to realize that goal for Indian society. The criminalization of marital rape in India can only occur when the Indian government, legislature, and society take a proactive stance in this direction. Through its visionary rulings, the Indian judiciary must also exert sufficient pressure on the nation's legislature and executive branch to make marital rape a crime. Therefore, in order to completely eradicate this horrifying crime from India, the legislature, executive branch, judiciary, and general public must unite against marital rape.

Over time, the Indian government passed numerous laws and made amendments to them in order to protect women. However, it takes a long time to pass legislation prohibiting the heinous crime of marital rape, which is committed by wives against their own husbands.

India continues to be the leader in maintaining and advancing its cultural practices. Although Indian culture maintains that a married woman must submit to her husband's wishes, the same culture also speaks out in favour of women's dignity and their consent on all matters that should concern them. In order to maintain balance in the religious ceremony of marriage, women are also involved in marriage. Therefore, we can draw the conclusion that although India acknowledges marital rape as a crime, it refuses to codify the offense and pass appropriate legislation.

Suggestions

Thus, it is abundantly evident from this thorough and exhaustive discussion of every facet of marital rape that this social ill is a necessary one that has deeply affected India. The same must be eradicated from the nation immediately. The following are some essential recommendations to help accomplish that goal:

1. Marital rape must be fully criminalized in India.
2. Both minor as well as major married women must be legally protected against marital rape. There must not be any differentiation between the two in this regard.
3. The punishment for rape and marital rape must be same.
4. Marital rape must not be treated as an exception to the offence of rape and in order to do that Exception 2 of Section 375 of Indian Penal Code must be repealed.
5. The provisions of Indian Evidence Act must apply to marital rape in the same way as they apply to rape.
6. Marital rape must be made a gender neutral offence.
7. Adequate safeguards must be attached to marital rape laws so that they are not misused by anyone like the husband must not be arrested straightaway on the allegation of marital rape by his wife unless proper investigation is done in this regard, the family members of accused husband must not be harassed in such cases etc.
8. There must also be a provision of penalty on the accuser in marital rape laws for leveling false charges of marital rape.
9. Marital rape can also be made a specific ground of divorce.
10. To handle cases of marital rape, special fast track courts with female judges and staff must be established throughout India. Such a trial in the media must not be permitted.

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