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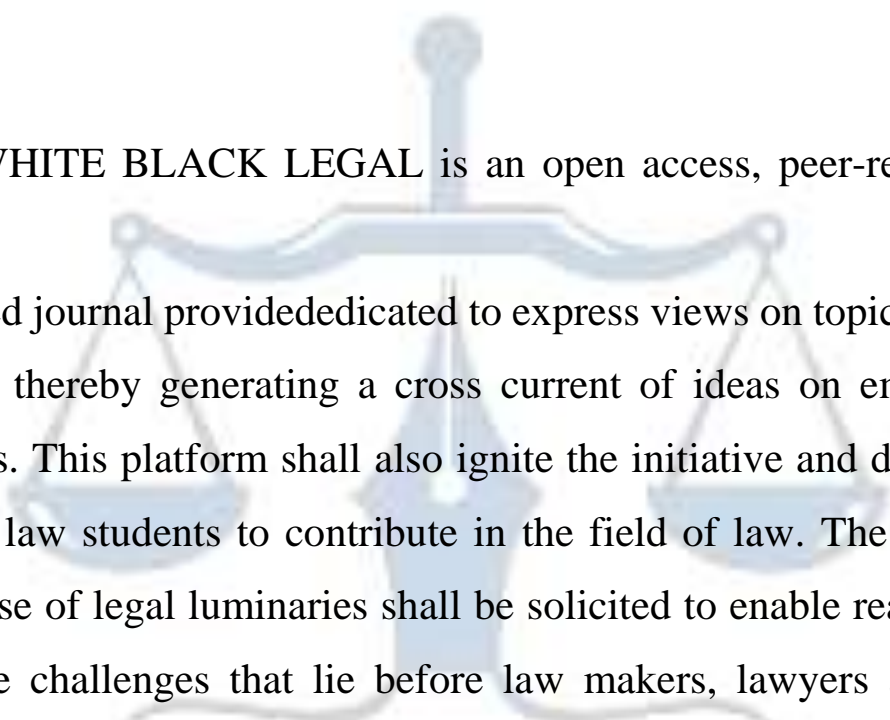


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With this thought, we hereby present to you

MARITAL RAPE: A QUESTION OF CONSENT OR A CRIME CONFINED WITHIN THE NO-GO ZONE OF THE LAW?

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Keywords: Marital rape, consent, rape, privacy of marriage, false cases

ABSTRACT

Marital rape is a heinous crime which is protected under the veil of implied consent and within the confines of 'no-go zone' in the realm of privacy. These two arguments have protected this abominable act of crime from being punishable under the Indian Penal Code 1860. With an overhaul of the new criminal laws, it was expected from the parliament to criminalize marital rape, but to our disappointment it was not criminalised in the *Bharatiya Nyaya Sanhita* 2023. However, the constitutionality of marital rape has once again been challenged in the Apex Court¹. As we have moved past among many misogynistic and erroneous arguments such as a woman being the property of men² women being subservient to men³, the main two arguments which prevails and thus prevents criminalising this heinous crime is the veil of consent; confines of privacy. These two arguments cannot be considered relevant in modern India. In this paper we closely examine these spurious arguments and hopefully provide a remedy for women who are victims of this despicable crime.

INTRODUCTION

Marital rape can be defined as sexual violence against the wife by her husband. The concept of criminalising marital rape in India began with the advent of feminism in the 1970's and has been a debate ever since. This topic of debate is a true example of blurred boundaries where the states duty to protect individuals right collides with the individual's right to privacy. This

¹ Manuraj (2024) 'Marital Rape needs to be recognised' *Hindustan Times* Oct 23

² Anne Daily (1986) 'To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment', 99(6) *Harvard Law Review*, 1256

³ Rebecca M. Ryan (1996) *The Sex Right: A Legal History of Marital Rape Exemption*, 20 *Law and Social Enquiry*,

blurred boundary is one of the barriers which prevents the criminalisation of marital rape. The Exemption of marital law as a crime can be found at the roots of common law⁴ that wife has mutually consented to give herself to the husband and this contract cannot be retracted.⁵ This age-old argument was upheld by the Delhi High Court in 2015 in the case of RIT Foundation v. Union of India⁶. This was the first case which challenged the constitutionality of marital rape in India. After this we got to see a flurry of cases coming right out of the gate which challenged the constitutionality of marital rape in India. However, those cases dealt with issues such as marital rape if the wife is a minor,⁷ unnatural sex⁸, abortion⁹ etc. But, none of these cases went into the thick of the subject and attempted to tackle the issue and clear out the line of privacy and role of implied consent in the marriage.

IMPLIED CONSENT THEORY: AN IFFY ARGUMENT

The implied consent theory is a modern adaptation of Hales theory¹⁰. That once a woman is married to her husband the consent to have sex is once and forever bound. In RIT Foundation v Union of India¹¹ it was held that in this case by a split decision that marital rape cannot be criminalized and “*marriage inherently means consent*”. This is the best possible example of allowing a crime under the confines of implied consent. The consent here is to be married and create a family and not to be raped by hew own husband. Rape by anybody is a rape, the fact that it was done by a sexual partner does not make it any less of a crime from the perspective of a female.¹² We suggest to look this in the light of lashings of literature to grasp the depth of its psychological and physical impact.

Is there any difference between rape and marital rape?

Plentitude of research has been carried on to assess the impact of marital rape on women for a past decade¹³, and shockingly no major difference was found between the victims of marital

⁴ Ibid 1

⁵ M. HALE, (1977 ‘THE HISTORY OF THE PLEAS OF THE CROWN ‘629 (S. Emlyn ed. 1778); see Note, The Marital Rape Exemption, 52 N.Y.U. L. REV. 306, 307)

⁶ 2022 SCC Online Del 1404

⁷ Independent Thought v Union of India AIR 2018 SC (CRIMINAL) 229

⁸ Navtej Singh Johar v Union of India AIR 2018 SUPREME COURT 4321

⁹ X vs The Principal Secretary Health and Family Welfare Department, Govt of NCT of Delhi & Anr 2022 SCC OnLine SC 1321

¹⁰ Ibid 1

¹¹ Ibid 5

¹² Bennice JA, Resick PA, Mechanic M, Astin M.(2018) ‘ The relative effects of intimate partner physical and sexual violence on post-traumatic stress disorder symptomatology’

¹³ Kilpatrick DG, Best CL, Saunders BE, Veronen LJ.(1988) ‘Rape in marriage and in dating relationships: How bad is it for mental health?’ *Annals of the New York Academy of Sciences*

rape and victims of rape by a stranger.¹⁴ All these victims suffered similar disorders such as depression and Post Traumatic Stress Disorder (PTSD). This suggests that marital rape is equally heinous and detrimental to the victims. Undermining such an impact under the guise of consent causes tribulation to justice.

This Concept of “*marriage inherently means consent*” is nothing but a mishap of jurisprudence. Rape inherently implies an absence of consent and must be treated as such. One could argue that marital rape is much more heinous and devastating because of the possibility that it can reoccur for a lifetime. The perpetrator should be punished whether it is a stranger or a partner, because the in the contract of marriage does not alleviate the impact of rape.

ENCROACHMENT ON PRIVACY OF MARRIAGE

Another argument against criminalising marital rape was that it would constitute undue interference upon the institution of marriage, as we had demonstrated in the preceding section. It is believed that marriage is a sacred establishment that serves as the foundation of our community. It is thought to be profoundly personal, and the government is reluctant to encroach on this sensitive area and this is generally categorized as a No-Go Zone, to protect citizens privacy, and government interference in this area would interfere with this privacy. Even though the law regulates the institution of marriage and different facets such as divorce, alimony, registration etc. The government however cannot force any two people to get married or get divorced. While this seems as a healthy boundary the State's refusal to access this private area can be troublesome even in some particular situations.

According to Articles 14 and 21 of the Indian Constitution marital rape is also a violation of a woman's fundamental rights. This section makes the case that by refusing to criminalize marital rape, a woman's fundamental rights are being violated. The women still remain human even after marriage. Despite the fact that this is a crime whether the marital rape takes place in a marriage's private environment, or not and it is argued that the state has every responsibility to protect an individual even within their private space. If the government doesn't breach this private space, a woman who is raped is left without recourse. by her spouse.

¹⁴ Riggs DS, Kilpatrick DG, Resnick HS. (1992) ‘Long-term psychological distress associated with marital rape and aggravated assault: A comparison to other crime victims. Journal of Family Violence’

There are many cases in which the Judiciary encroached the privacy of bedroom to protect the individuals right and played around with the individual concept of consent. A major example is the case of Navtej Singh Johar v Union of India¹⁵ where the court questioned the constitutional validity of section 377 of the Indian Penal Code 1860 and held that consent was relevant to determine. This section was even deleted in the new criminal laws. Here the court clearly exercised its duty to protect an individual right by entering into the privacy of citizens. Such a duty can be exercised by the state in cases of marital rape as well.

Judicial Interpretations

The Andhra Pradesh High Court ruled in the case of *T Sareetha v T Venkata Subbhaiya*¹⁶ held that the idea of "marital privacy" and the idea of coerced sex were at odds. According to their interpretation of "marital privacy," the state cannot compel two people to get back together because doing so would violate their privacy. The Delhi High Court interprets "marital privacy" in *Harvender Kaur v Harminder Singh Chaudhary*¹⁷ to indicate that the Constitution does not apply in such context. In the Harvender Kaur case, the court held that the court is not allowed to encroach the marital privacy of the couple. This demonstrates the disparity in interpretations of "marital privacy" and the potential ambiguity that could result from its use. This is demonstrated by the State's contentious involvement in this area.

THE THREAT OF FALSE CASES AND A POSSIBLE SOLUTION

This country has seen multitude of false rape cases, it is known that false charges of rape have been filed more than any other charge¹⁸. The rare application of principle "*Bail is the rule Jail is exception*" the cases of rape makes it much more vulnerable towards false cases. Thus, making it harder for the accused to escape from the claws of justice. This principle causes intangible damages in the cases of falsely accused. It may even come in conflict with another cardinal principle (also known as Blackstone ration) of law that "*The law holds that it is better that 10 guilty persons escape, than that 1 innocent suffer*¹⁹". While these cardinal principles and doctrine remain reasonable a question needs to be asked that how long are we going to fear the fear the repercussions of false cases and tolerate this heinous crime?

¹⁵ AIR 2018 SUPREME COURT 4321

¹⁶ AIR1983AP356, AIR 1983 ANDHRA PRADESH 356, 1983 (2) DMC 172, (1983) 2 CIV LJ 158, (1983) 2 ANDHLT 47, 1983 HINDULR 658

¹⁷ AIR1984DELHI66, ILR1984DELHI546

¹⁸ People v. Liberta,

¹⁹ William Blackstone 'Commentaries on the laws of England'

The problem of false accusations and convictions are ever-existing because it is hard to prove consent, yet we have not decriminalised rape. In the case of marital rape this might get messier and complex as it involves spouses who are legally bound to protect and take care of each other. But these things could be mitigated by an effective procedural law and execution of such law. For example in the famous case of *Rajesh Sharma v State of UP*²⁰ to prevent the misuse of section 498A of the Indian Penal Code, 1860 (Precursor act of Bharatiya Nyaya Sanhita 2023) the supreme court issued several guidelines to be followed while arresting the accused under this section. Similar guidelines could be implemented to prevent the misuse of false charges in the marital rape.

We cannot fear a plausible threat above a conspicuous crime.

CONCLUSION

The debate is never ending and multiple arguments can be made for and against the criminalisation of the marital rape. As of we have tackled main legal arguments against the criminalising of marital rape. Blurred line of Consent, the right of state to encroach the privacy of bedroom and a threat of false cases are the major predicaments. As we have seen in the previous sections marital rape has as much worse impact on the victim as of a rape by a stranger or even worse. Thus, it is a despicable thought that such a heinous crime goes unpunished under the veil of consent. The state has previously encroached into the privacy of bedrooms to protect the rights of an individual and such a selective bias towards marital rape is misogynistic and detestable.

²⁰ AIR 2017 SUPREME COURT 3869