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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

THE CRIMINALISATION OF MARITAL RAPE IN INDIA AND ITS IMPLICATIONS

AUTHORED BY - TUSHITA BANERJEE

Abstract

Exclusion of marital rape from Indian law's definition of rape signifies an enduring social and legal assumption of marriage that conceives of marital rights as superior to a wife's bodily autonomy and integrity. This paper interrogates the historical and legal predecessors of marital rape in the Indian law in order to trace the arguments for and against its criminalisation as a distinct offence. While it draws on the examples of jurisdictions that have modified their statutes against either the culture of impunity or state inaction, it also highlights the constitutional, social and human rights implications of retaining the marital rape exception.

The research adopts a doctrinal legal approach, using case law, law reforms, legislative debates and international human rights frameworks to assess the possible implications of criminalising marital rape in relation to norms of societal behaviour, law enforcement, as well as survivors' access to justice, or possible retributions in criminal justice. Findings indicate that the criminalisation of marital rape needs to be integral to strengthen the constitutional guarantees of equality and dignity, but that socio legal change is vexed in terms of both societal attitudes towards the family as well as implementation challenges among enforcement actors.

The paper concludes with recommendations for limited aspects of law reforms and legal support that may allow women to negotiate rights within the family and criminal justice process, identifying that the criminalisation of marital rape is a first step towards gender justice and the protection of fundamental rights in India.

Keywords: Rape, Marital Rape, Criminalisation, Human Rights, Legal Reforms

Introduction

Marital rape is defined as non-consensual sexual intercourse by a husband with his wife. Although it is acknowledged to violate bodily autonomy and fundamentally human rights, Indian law allows husbands an exemption from being prosecuted for rape in marriage. This exemption in Indian law stems from Exception 2 of Section 375 of the Indian Penal Code (IPC) which states that sexual intercourse by a man with his own wife, provided that she is not below a certain age, is not rape. The recently promulgated Bhartiya Nyaya Sanhita (BNS) continues the exemption from prosecution, with the only change being the age from 15 to 18, but the immunity remains the same. Accordingly, marital rape is uniquely not criminal in India, as it is in more than 100 countries throughout the world.

The legal position of marital rape in India has been the subject of scrutiny and endless deliberation. While there are civil remedies for sexual abuse in a marriage under the Protection of Women from Domestic Violence Act, 2005, this is not criminalisation. Currently, the Supreme Court of India is hearing petitions challenging the constitutionality of the exception of marital rape, with activists stating that it is not consistent with basic rights to equality, dignity, and bodily autonomy under Articles 14 and 21 of the Constitution. While there is increasing advocacy and judicial scrutiny, the government has officially rejected criminalisation of marital rape, citing issues related to the institution of marriage and the adequacy of protection laws.

This paper intends to:

- Investigate the historical and legal bases of the exemption of marital rape in India.
- Review the constitutional, social and human rights developments for and against its criminalisation.
- Explore the implications, both legal and social, of the criminalisation of marital rape in India.

The relevance of this research is its application in providing a basis for legal reforms and contributing to the broader debates on gender justice, bodily autonomy, and the safeguarding of women's rights in India.

Historical and Legal Background

Progression of the Marital Rape Exception in Indian Jurisprudence

The marital rape exception implemented in Indian law is inherited from colonial statutes. The Indian Penal Code (IPC), enacted in 1860, adopted principles consistent with English common law that presumed that a wife provided irrevocable consent to sexual intercourse at the point of marriage. These tenets were codified as Exception No. 2 to Section 375 of the IPC, which indicated that sexual intercourse by a man with his own wife, as long as she had not reached a certain age, would not be classified as rape. Initially, that age was ten years old, which was representative of both the social implications and the practice of child marriages that were commonplace during that time. In 1940, the minimum age of the exception was raised to fifteen years, and despite growing opposition to the exception on the grounds that it placed wives in positions of subordination and stripped them of bodily autonomy, the legal framework became more explicit about recognising the bodily autonomy of women over that period.

Examination of Section 375 of the Indian Penal Code (IPC) and its Exception

Sec 375 of IPC defines rape as sexual intercourse with a woman against her will, without her consent, by coercing, falsely representing, or fraudulently obtaining her consent, or when she is drunk, deceived, or of unsound mind. Also, the statute makes it clear that any sexual intercourse by a man with a woman under the age of 18 is rape, irrespective of consent. However, Exception 2 to Sec 375 states: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape". This statutory exemption, exempting men from criminal prosecution for any non-consensual sex with their wives, is retained in the new Bhartiya Nyaya Sanhita, with the age burden raised from 15 years to 18 years to comply with the age of consent. Exception 2 decriminalises non-consensual sex with wives and grants husbands de facto immunity from rape charges against their wives. The inapplicability of Sec 375 when a husband has sexual intercourse with his wife helps to maintain the social and domestic status of wives, where they have no right to withhold sex from their husbands, or to say no to their husbands to sexual advances.

Important Judicial and Legislative Events

- Law Commission Reports: The Justice J.S. Verma Committee (2013) was formed after the Nirbhaya case, and it recommended deleting the exception for marital rape, arguing that it is regressive and violative of women's rights.

- **Judicial Decisions:** Courts have challenged the marital rape exception in recent years. For example, the Karnataka High Court (2022) denied a husband's plea to drop rape charges, ruling that the marital rape exception was regressive and infringed on the right to equality¹. The Delhi High Court ruled on the marital rape exception in a 2022 split verdict, highlighting the judicial debate around this exception.
- **Parliamentary Debates:** Despite the recommendations to reform the law to criminalise marital rape, parliament has not amended the law as yet. The government has cited the sanctified institution of marriage and potential misuse of the law as the reasons for its opposition to amending the law.

The above developments illustrate the persistence of these colonial origins to the marital rape exception in Indian law, and the continued legal and social efforts to challenge it and reframe it.

Current Legal Framework: Marital Rape in India

IPC Provisions

- Section 375 of the Indian Penal Code (IPC) indicates rape as sex with a woman against her consent, or without her consent, or under coercive circumstances.
- Exception 2 to Section 375 states that sexual intercourse by a man with his own wife not below the age of 15 years (which has been increased to 18 years in the Bhartiya Nyaya Sanhita 2023) is not considered rape.
- This provision on marital rape is a blanket exception for husbands from liabilities with reference to non-consensual sex and legally subtracts married women from being protected in law from non-consensual sex in a marriage as there would be no evidence of a lack of consent or coercive situations prevailing at the time of the sexual experience.
- Section 377 IPC, which previously criminalised 'unnatural offences', has also been interpreted by courts to not be unlawful in regards to non-consensual acts being completed between married partners using the same immunity under Section 375 IPC.

Protection of Women from Domestic Violence Act, 2005 (PWDVA)

- Though the PWDVA gives women civil remedies when abused in marriage, namely protection orders, residence orders and monetary relief, it does not criminalise marital rape. It merely recognises sexual abuse as domestic violence for the purposes of protection and civil relief, and not criminal prosecution.

Judicial Pronouncements and Recent Cases

- In *Independent Thought v. Union of India* (2017), the Supreme Court read down the exception for marital rape and raised the minimum age of consent within marriage to 18, replacing the provision that excluded women from the definition of other women for the age of 18. The judgment did not touch upon marital rape for women above 18, keeping the exception as it is.
- In May 2022, the Delhi High Court delivered a split verdict on the constitutionality of the definition of marital rape exception in the IPC. Justice Rajiv Shakdher held the marital rape exception unconstitutional and Justice C Hari Shankar held it constitutional, which was then forwarded to the Supreme Court.
- The Supreme Court is hearing a number of public interest litigations on the constitutionality of the exception for marital rape. The arguments being made are violations of Articles 14 (equality) and 21 (right to life and dignity) of the Constitution.
- High Court decisions made recently, such as the decisions made by the Madhya Pradesh and Chhattisgarh High Courts, have reiterated that marital rape is not recognised in the IPC as an offence, including for non-consensual “unnatural” acts under Section 377.

Law Commission Reports and Parliamentary Debates

- Law Commission reports have historically cautioned against the criminalisation of marital rape for reasons of sanctity of marriage and arguments about future misuse, but reform in this area has been increasingly advocated in the last couple of years.
- Parliamentary debates have similarly illustrated a split; certain members and ministries of Parliament expressed reservations to criminalisation for cultural and social reasons, while others reminded Parliament that they have obligations to ensure the constitutional rights and international human rights commitments are assured to all citizens.

India's current legal framework allows husbands immunity for rape within marriage, unless the wife is under the age of 18 years. The husband will not be prosecuted criminally for the act of marital rape no matter the circumstances. Civil remedies exist through the PWDVA, but there are no existing criminal sanctions for marital rape. Emerging judicial pronouncements and Supreme Court hearings signal the ongoing (and evolving) discussions, but for the moment at least, marital rape continues to be excluded from the reach of criminal law.

Arguments Against Criminalisation of Marital Rape

Sanctity of Marriage and Implied Consent

A significant reason for retaining the marital rape exception is that marriage is viewed as sacred. Supporters of the exception argue that marriage is sacred in Indian culture and that any state interference in the intimate area of marriage, such as to declare spousal rape a crime, would carry serious repercussions for the institution of marriage. Indeed, the law assumes that marriage is all about implied and irrevocable consent to sexual intercourse, so the idea that marriage could be a criminalised event - spousal rape- runs counter to the very notion of marriage ought to be, following tradition. The work of [Osman, idea of marriage, colonialism as a legal tradition, assumptions of gender, seeblinds moral framework, still alive today] makes the point.

Cultural and Traditional Values

Marriage in Indian society is often viewed as a sacrament rather than a contract, and many cultural and religious values are attached to marriage. Cultural and traditional beliefs reinforce the link between marital issues, including sexual relations, as private matters not suitable for regulation through criminal law. The government has highlighted the incompatibility between international notions of marital rape and Indian social realities, and indicated that punishing marital rape would be inconsistent with social norms.

Worries About Abuse and Changing Family Structures

Those who oppose criminalisation often raise concerns about abuse of the criminal law. Comparing it with Section 498A of the IPC (the anti-dowry law), which has also faced allegations of abuse, critics contend that criminalising marital rape could result in false accusations and legal harassment of husbands. Additionally, critics worry that criminalising marital rape would destabilise families, threaten marital harmony, and foster frivolous litigation, thereby undermining marriage itself.

Current Alternative Remedies

Another contention is the argument that women already have remedies by way of the alternative law of abuse against a woman in marriage, as a result of advantages such as Section 498A of the IPC (cruelty by husband or relatives) and the Protection of Women from Domestic Violence Act, 2005 (PWDVA). These competing remedies offer civil as well as criminal recourse for

women experiencing violence or cruelty, including sexual abuse, thereby not specifically criminalising lifelong marital rape in India. This is where this argument states that additional criminalisation through the serial addition of code in legislation might be redundant and burden the legal profession beyond capacity or reason.

Arguments for Criminalisation of Marital Rape

Constitutional Analysis: Violation of Fundamental Rights

The marital rape exception clearly contravenes the right to equality (Article 14), dignity, and bodily autonomy (Article 21) under the Indian Constitution. By allowing husbands an exemption from prosecution for rape, this law denies married women equal protection of the law or access to public justice by distinguishing them as a separate class from unmarried women. The marital rape exception also ignores a woman's autonomy over her own body and undermines her dignity as a partner in marriage.

Critique of the Implied Consent Doctrine

The notion of implied consent, which assumes that marriage means an indefinite and continuing consent to sexual activity, is out of compliance with modern legal principles and constitutional values. Current understandings of consent view consent as ongoing, as revocable, and as necessary for all sexual activity (either during marriage or not). The implied consent doctrine relies upon antiquated norms, reinforces patriarchal beliefs, and eliminates women's agency in marriage, meaning the law is obsolete and heterosexist.

Social and Psychological Effects on Survivors

Survivors of marital rape experience extreme psychological trauma in the form of depression, anxiety, and post-traumatic stress disorder as well as the associated stigma and lack of legal remedy. As a consequence of the lack of criminalisation, there is discouragement to report or disclose instances of marital rape, allowing continued silence about the issue, and therefore normalising the violence. Indications from surveys and studies show that a disturbingly high percentage of married women in India face sexual violence by their husbands, which demonstrates the pressing need for legal protection.

International Human Rights Obligations and Comparative Perspectives

India is a party to several international instruments, including the Convention on the

Elimination of All Forms of Discrimination Against Women (CEDAW) that legally obligate the state to ensure that women are protected from all forms of violence including marital rape. Over one hundred countries, including all fifty U.S. states, the U.K. and South Africa, have made marital rape a crime in their countries because they recognise it as a human rights violation and as a violation of gender equality. India's continued failure to criminalise marital rape situates India within a shrinking category of countries that do not provide this essential protection.

In conclusion, marital rape should be a law in order to affirm constitutional rights, ensure bodily autonomy, acknowledge the extreme suffering of survivors, and finally ensure that the state can uphold international human rights obligations.

Comparative and International Perspectives on Marital Rape Laws

Status of Marital Rape Laws Worldwide

- 77 of 185 countries have laws that specifically criminalise marital rape, while 34 of those countries legally exempt marital rape from prosecution.
- As of recent counts, only 36 of the nations have no laws criminalising marital rape, India included.
- Marital rape is considered illegal in all 50 states in the US, Canada, New Zealand, three states in Australia, and many European nations including (France, Sweden and Denmark).

Countries That Criminalised Marital Rape Recently

- United Kingdom: In *R v R* (1991), the House of Lords removed the marital rape exemption, upholding the assertion that there is no irrevocable consent in marriage. The Sexual Offences Act 2003 further clarified that relationship status cannot be used as a defence against rape charges.
- Turkey: Criminalised marital rape in 2005 providing penalties of between 2 and 10 years in cases of sexual assault and a minimum of 12 years for rape.
- Tunisia: In 2017, enacted a comprehensive law to address all forms of gender-based violence including marital rape.
- Thailand: In 2007, marital rape was criminalised following significant public debate and controversy.

- Zimbabwe: Criminalised marital rape in 2004 but prosecution needs written authority from the Attorney-General and enforcement is limited.
- Vietnam: Expressly criminalised marital rape in 2002 via legislation aimed at the prevention of domestic violence.

Consequences of Legal Change

- Reporting and prosecution: In countries where marital rape is a crime, there have generally been increased reporting, though rates are still lower than other forms of sexual violence, because of continuing stigma and societal views. Legal reforms have enabled prosecution; however, challenges with proof, victim protections, and sensitivity of the judges and police remain.
- Societal Perspectives: Criminalisation has contributed to shifting public dialogue, indicating that marriage does not imply consent, and has contributed to the view of women's agency and rights. However, for many societies, deep-rooted cultural beliefs prevent these rights from being fully actualised.
- Enforcement: Even in countries where there are laws, enforcement varies. In some countries in Africa and the Caribbean there are laws against marital rape. Still, these are not enforced because of a lack of awareness and police reluctance in favour of cultural beliefs and societal demands. In the UK and the US, legal reforms were accompanied by public education and support services; these reforms supported a gradual change in perspectives and enabled women to access support when they experienced sexual violence.

There is a growing international trend towards criminalisation of marital rape, with law reform usually being followed by increases in reporting and gradual changes in individual social norms. Effective enforcement is always a concern, and legal changes must be accompanied by social and institutional reforms in order to provide absolute protection for survivors.

Social, Cultural, and Practical Implications of Criminalising Marital Rape in India

Women's Rights and Bodily Autonomy

- Criminalising marital rape also protects women's right to bodily autonomy and sexual agency inside of marriage. It forces society to confront the profoundly unfair

assumption that wives must submit to their husbands' sexual demands without their consent.

- It addresses the systemic power imbalance in intimate marriages by recognising that sexual violence in marriage is a serious crime. Addressing these acts of violence against marriage will help promote gender justice and equality for women.
- The lack of legal recourse reaffirms women's bodies as marital property. It has made it much harder to advocate for gender equality, as we still have patriarchal ownership of women's bodies.
- The psychological impact of being victimised by marital rape can wreck havoc on a woman's mental health, and can cause depression, anxiety, and post-traumatic stress disorder. Criminalisation provides legal and human services support for those who have endured marital rape, and crime laws can go along way to address and provide recourse for these victims.

Effects on Marriage and Family

- Opponents- Criminalising marital rape would disturb the sanctity of marriage and undermine the family unit, which have traditionally been afforded a special status and are deemed to constitute the foundation of Indian society.
- But this paradigm reinforces patriarchal values that revere the preservation of family norms before addressing individuals' rights and dignity.
- Criminalising marital rape breaks gender stereotypes that subordinate women's rights to their matrimonial responsibilities, and might even help build better marriages based on mutual consent.
- Recognising marital rape as a crime may change people's perceptions around marriage over time, and encourage open discussion around consent and violence, leading to social change.

Implementation Difficulties and Access to Justice

- The social stigma related to the discussion of sexual violence in marriage leads to under-reporting and silencing of victims.
- Cultural stigmas and fear of family honour deter women from seeking legal assistance for marital violence, making enforcement difficult even if laws are changed.

- There is a general absence of knowledge around marital rape and those with the knowledge include law enforcement, judiciary and medical professions, and they need to be sensitised and trained in response to this sexual violence.
- Practical challenges include the difficulty in proving non-consent when in a marital context, and concerns about misusing the law, as well as protecting the woman in the domestic setting, require responsive legislation and victim-led procedures.
- The establishment of dedicated crisis centres and integrated support services (i.e. legal aid, therapy, healthcare) is critical for effective implementation and survivor safety.

Criminalising marital rape in India would be a landmark decision in protecting women's bodily autonomy and rights, and give a political, legal and social challenge to patriarchal norms treating women as subordinate to men within marriage. While acknowledging this right may challenge the traditional views about marriage and family, promoting gender equality and human dignity requires, ultimately. Successful implementation requires addressing the social stigma of discussing sexual violence in marriage, raising awareness of marital rape as a crime, and growing institutional capacity through responsible education, training and support to allow survivors access to justice.

Recommendations and the Way Forward

Policy and Legal Reforms

- Amend Section 375 of the Indian Penal Code (IPC) to strike Exception II, making marital rape explicitly criminal in all situations, and recognise spousal consent as a legal requirement, to eliminate confusion about the necessity of spousal consent in sexual relations.
- Recognize marital rape under the Protection of Women from Domestic Violence Act, 2005 (PWDVA) to ensure that victims/survivors, can access both protection and punitive remedies as necessary.
- Ensure rape laws are not gendered so that any and all victims, which includes individuals from LGBTQ+, are protected.
- To ensure compliance with women's rights protected under human rights (See CEDAW), make it clear that consent is a requirement for any and all ties of sexual relationships before and following marriage.
- Establish a fast-track court for cases of sexual violence, when such cases may include: marital rape. This step will allow timely justice to be afforded to victims/survivors.

Implementation Effectiveness, Awareness, and Survivor Assistance

- Establish marital rape crisis centers at hospitals, police stations, and communities with comprehensive services including legal assistance, medical services, and psychosocial counselling.
- Provide gender-sensitization and trauma-informed training to police, the judiciary, and medical practitioners to improve handling of cases and prevent victimisation.
- Develop national campaigns to deconstruct the belief in implied consent in marriage, educate communities about the criminal nature of marital rape, and reduce the stigma around survivors of this violence.
- Encourage judicial accountability and consistent interpretation of sexual violence legislation, including the Supreme Court providing judicial precedents to outline how lower courts should interpret it.
- Ensure high priority and serious consequences for witness protection and retaliatory action so survivors can pursue justice, keep their community or families, regardless of violence, free of fear.

Broader Societal Change and Sensitisation

- Build sensitivity with respect to consent, gender equality, and bodily autonomy into the school curricula and community programs, which will help with longer-term attitudinal change.
- Publicly engage religious, political, and community leaders to show solidarity with the call for reforms, fostering a culture of respect towards women's rights within marriage.
- Engage the media and civil society to share survivor stories, legal narratives, and consent in marriage, which will help recognise and normalise conversations around marital rape.
- Understand legal reform is not enough; we need sustained campaigning, public education, and changes within institutions to dilute patriarchal values to realise gender justice.

Criminalising marital rape in India will involve legal reform in the broadest sense (most notably removing the marital rape exception from the IPC), appropriate implementation measures, survivor support mechanisms, and widespread societal sensitisation to ensure women's rights are upheld, constitutional and international obligations are fulfilled. A culture that respects consent and dignity is fostered.

Conclusion

Marital rape is not a crime in India. Section 375 of the Indian Penal Code (IPC) still provides husbands a safe-haven from prosecution for rape against their wives, with the only exception being when a wife is below a certain age. Similarly, the slightly more progressive Protection of Women from Domestic Violence Act, 2005, will only provide civil remedies for sexual violence in marriage and does not include criminal penalties.

Debates in the judiciary and the parliament clearly demonstrate that there is still a strong resistance to the criminalisation of marital rape, albeit more on ideological grounds than for legal reasons. Substantively, the ideas behind those debates included the sanctity of marriage, potential misuse of the law, and options for relying on other domestic remedies. Nevertheless, those arguments were brought forward in a robust critique and presented constitutional principles of equality and dignity in vain.

Our comparative experience suggests that an increasing number of countries are criminalising marital rape as part of a broader recognition of women's rights and the importance of bodily autonomy, and as a human rights violation. When we also consider that legal reform is difficult, we can acknowledge that, while marriage has proven to be a continuing obstacle to respect women, by moving toward a position of law which includes marital rape in the definition of rape will inevitably contribute to some recognition of women's rights and perhaps eventually positive societal change.

Significance of criminalising marital rape

Criminalising marital rape is significant as it safeguards constitutional and human rights, specifically the right to equality, dignity and bodily autonomy as provided in Articles 14 and 21 of the Indian Constitution. The existing legal framework further entrenches gender discrimination. It denies justice for survivors of gender-based violence, which undermines India's commitment to upholding the human rights of all individuals, on the basis of gender equality and international human rights law. Criminalising would be a symbol of meaning, and it would send a clear signal that there is no distinction between sexual activity and sexual consent, based on marital status.

Recommendations for future research

- Empirical research on the prevalence and consequence of marital rape in India, including barriers to reporting and barriers to justice.
- Comparative research on the challenges and best practices of implementation from jurisdictions that have recently criminalised marital rape.
- Research on the intersectionalities of marital rape and other forms of gender-based violence, including caste, class, and rural-urban differentials.
- An analysis of civil remedies in the PWDVA and alternative models of criminal and civil justice.
- In conclusion, the criminalisation of marital rape is an important step towards substantive equality and the protection of women's fundamental rights in India. More research and advocacy are needed to develop paperwork evidence underpinning legal reform and real changes in law and society.

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