A Study on Marital Rape in the Indian Legal Scenario

G.V. Akshaya and M. Kannappan

1Saveetha School of Law,
Saveetha Institute of Medical and Technical Sciences,
Saveetha University, Chennai.
gvakshaya98@gmail.com

2Saveetha School of Law,
Saveetha Institute of Medical and Technical Sciences,
Saveetha University, Chennai.
kannappanm.ssl@saveetha.com

Abstract

In spite of the increased recognition of various Penal laws in India, the Marital Rape has generated in the past two to three decades. There is a need for a special law on marital rape in India, which should also be accepted with international norms on this particular issue. Women have been given with the right to fight for protection, but her own husband, who she married with full belief, tries to hurt and torture her by having a forceful sex without her consent which ultimately spoils her health and well being. There is no justification or applicability of the notion of all the marital exemption in the current times. This paper talks about criminalizing the marital rape and it should be recognized by law that, whatever form the rape may be analysed. Any forceful sex without the spouse consent will amount to Rape. This paper also discusses about the identification of marital rape as different from Rape and a comparative study between two different countries have been analysed.

Key Words: Criminalization, forceful sex, international norms, marital rape, penal laws.
1. Introduction

The Marital Rape has been increased in few years. The major elements of marital rape include the mental agony of being raped, the trauma of being victimised by her own husband and helplessness of being quiet and unforgettable scars of these incidents. People in India are free from crimes committed in the streets but the women have not been safe from crimes inside their own home which gets unnoticed by anyone. Indiana University Press, 1990 had reported that, “more than 1 in every 7 women who have been married has been raped in their marriage” According to United Nation population fund more than two-thirds of Marital women aged between 15-50 in India have been subjected to forced sex, beaten, tortured along with a demand for dowry.

Many countries have enacted marital rape laws, repealed marital rape exceptions. Recently Indonesia and Turkey have criminalized the marital rape in 2005 and Mauritius and Thailand in 2007. Criminalization of marital rape denotes that it is now recognized as a violation of human rights.

It has been estimated that, marital rape is a punishable offence in at least 100 countries where India is not one of them. Plenty of legislations and enactments regarding dowry, cruelty, domestic violence female infanticide have been regarded as violence against the women.

Criminalizing the Marital rape was the suggestion made by the Verma Committee, which had suggested amendments to India’s sexual assault laws. The Protection of women from Domestic Violence Act, 2005 has created a good remedy for various victims but the Act has failed to criminalize the Marital Rape. The law had ignored a huge violation of fundamental right of freedom for any married women, the right to her body or to protect her from any abuse. Various legal framework and different perceptions on the Marital Rape have been analysed further. The main aim of the study is to analyse why the Marital Rape in India have not been Criminalized.

2. Research Problem

RESEARCH QUESTION - What are the Punishments for the Act of Sexual Intercourse amounting to Marital Rape?

PROBLEM: Due to the Act of Sexual Intercourse with one’s spouse without the spouse’s consent.

INTERVENTION: Penal laws which provides as a Boon for the innocent women.

COMPARISON: Comparative study between India and USA.

OUTCOMES: To bring awareness among married women in the country.
3. Review of Literature

Jennifer Keshan [2017]. This paper analyses the Judicial treatment of marital rape in Canada from 1983 until 2013. It is the first comprehensive review of marital rape decisions in Canada since Criminalization allows an assessment. This marital rape is focusing on issues related to consent, mistake, belief in consent, evidence and sentencing. This paper concludes by highlighting overall trends in the case law and identifying potential responses. (“Introduction: Marital Rape and Law Reform: A Comparative Analysis of the Right to Say No,” n.d.). Jermsittiparsert and Kasemsukphaisit [2016]. This paper explores Bangkok men’s understanding of Section 276 of the Criminal Code. It also examines the attitude of Marital Rape as perceived by men. A study on the observed attitudes using various demographic assessment factors and investigating correlations between the level of understanding of law. (Jermsittiparsert and Kasemsukphaisit 2016)

Nancy Kaymar Stafford [2008]. On 22 February, 2007, the Ghanaian Parliament passed the long awaited domestic violence act. The Marital Rape constitutes a violation of Women’s Human Rights. The consent to marriage is the equivalent of consent to sex in Ghanaian custom and law. The Marital Rape expression is a throwback from British common Law. (“The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combating Marital Rape Myths,” n.d.). Torres MG [2016]. In the 1980’s Judges held or opined in dicta what must be incontrovertible to the feminist community. The Marital Rape exemption denies the married women protection against the violent crime. The endurance of Marital rape exemptions results from the dominant understanding of meaning of equality. It also re-examines contrasting understanding of the meaning of equal protection. (Torres and Gabriela Torres 2016)

Dipa Dube [2006]. This paper analyses the offence of rape as one of the most gruesome and barbarous crimes perpetrated against women. Marital rape demolishes the entire physical and psychological composure of a women and reduces her as a living corpse. The legislators have turned a deaf ear to all pleas of Justice by married women and impact of victim in the Indian stand point. (Dube and Dube 2006). Michelle. J. Anderson [2003]. This paper talks about the Marital Immunity for sexual offences persists in over half of the states. All country must abolish this immunity to make the law formally neutral on the marital status of parties. This kind of Marital rape immunity has mostly infected the way this legal system treats all kinds of sexual offences among all the intimates who are not yet married. (Anderson 2003)

Shivani Garg [2012]. Marital Rape is considered to be a heinous crime, but not considered to be a criminal offence in India. The only remedy is that of a compensation. Not a ground for seeking a decree of divorce. There has been a widespread protest in India to include. (Garg 2012). P.K. Pandey [2013]. Both
the pillars of humanity i.e men and women have equal importance and role in creation of humanity. Women are bound to face several humiliations in the society. The offences against women are endless as sexual harassment. Marital Rape is very crucial as it is not recognised till date as a crime. (Pandey 2013)

Sumati Dhingra [2015]. The immediate need is to criminalize the marital rape under the Indian Penal code. The real objective of Marital Rape criminalization can only be achieved if society challenges the prevailing myth. Marital Rape has to be regarded as sexual harassment and Indian society cannot continue to trend women in the verge of promoting social cohesion. (Dhingra 2015).

Michele Goodwin [2015]. Talks about Sexual violence against women and girls. Exposes a women’s credibility to such intense hostility. This paper articulates how factors are irrelevant to sexual violence which serve as points of searching enquiry. This essay looks into more probing report about sexual violence and legal perspective. (Goodwin 2015)

Featherstone L [2017]. In 2012, Australian Supreme Court was called upon to determine for rape of a wife in 1963. Marital Rape immunity was still recognised in 1963. The court found he could be prosecuted and convicted according to current law of rape. This article analyses decision of the Supreme Court. (Featherstone 2017). Shalu Nigam [2015]. Recently the bill to criminalize the marital rape was introduced in India and turned down by parliament. The statements have been issued against criminalization on marital rape without acknowledging the marital rape. Propagated about the enactment of Penal law against marital rape. This paper concludes that this concept needs to be examined in a larger perspective. (Nigam 2015). Melanie Randall [2017]. Recent report identifies to more than half of the world’s countries. The Human Rights violations inherent in acts of violence against women. The silence in the law creates legal impunity for men who sexually assault or rape. (Randall, Koshan, and Nyauendi 2017)

Joshua Doherty [2012]. This paper talks about the married women who are further marginalized by cameron’s statutes in Article 297. Legalizes the rape of a women by her husband. It identifies the gaps and inconsistencies in cameroon’s laws with respect to marital rape. (Doherty 2012). Ryan [1995]. In this paper the arguments are supporting marital rape exemption, necessary to abolish marital rape exemption in our modern society. The marital rape with impunity has no place. International law has shed some light on the subject by indicating that marital rape giving complete solution. (Ryan 1995). Powell [2015]. This paper discusses about Criminalizing all forms of sexual violence against women in this Intimate relationships which argues for explicit criminalization of marital rape. This paper even analysis about various obligations of all International human Rights law which it demands a broader approach that calls on states. (Powell and Vázquez 2015)

Doherty [2012]. Law relating to Marital rape and contribute to the debate about the law reform in this area, to the criminal code. First reading in parliament on
January 12, 1981. Law reform in this area should display sensitivity to the special coercive. (Doherty 2012). Jennifer Koshan [2017]. Chapter analyses the Judicial treatment of Marital Rape in Canada from 1983 until 2013. Section II discusses the reported cases of marital rape in Canada focusing on issues related to consent, mistake belief in consent. (“The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study,” n.d.). Stark [2015]. Rape is simply not said to be a sexual act to which one party does not consent. It is a degrading violent act, which violates the bodily integrity of the victim and frequently causes severe, long lasting physical and psychic harm. (Stark 2015). Anderson [2016]. This article talks about Marital rape which is both a product of and even a contributing factor to all women's inequality in Canadian society. This chapter reviews the struggles surrounding the Criminalization of a Marital Rape.(Anderson 2016)

4. Objectives of the Study
   - To focus on identification of Marital Rape as different from rape.
   - To examine the legal framework and different perceptions on marital rape.
   - To suggest some measures to be taken in the existing penal laws.
   - To know about Marital Rape.
   - TO have a comparative Study between India and USA.

Hypothesis

H0: Marital rape is not considered to be an offence under the Indian Penal code.

Ha: Marital rape is considered to be an offence under the Indian Penal code.

5. Research Methodology

Doctrinal Research has been attempted in this paper.

Secondary Sources have been used in this paper.

Reference books and E-sources have been considered for research purpose.

6. Study Design

- MARITAL RAPE IN INDIA
- COMPARATIVE STUDY BETWEEN INDIA AND USA
- ROLE OF JUDICIARY IN INDIA

Marital Rape in India

The word ‘rape’ is derived from the Latin term rapio, means ‘to seize’. Rape literally means a forcible seizure. It means the ravishment of women against her will or without her consent or with her consent obtained by force, fear or fraud or the carnal knowledge of a women by force against her will.  

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Section 375 of the Indian Penal Code defines rape. It means, rape is an unlawful sexual intercourse between a man and a woman without the consent of women or against her will under any of the circumstances enumerated under the section will amount to rape.\

The committee headed by Justice J S Verma was asked to look into possible amendments to criminal law for ensuring quicker trial of and harsher punishments to, person accused of committing sexual assault of extreme nature on women. The committee was mandated to submit its report within thirty days from the date of Notification. The committee in its Report proposed revision and substitution of sections 375, 376 and 376 A to 376 D if the Indian Penal code for making the law relating to sexual assault on women and girls more effective and deterrent. Most of these recommendations were given legislative effect.\

Section 375 of the Indian Penal Code, defines ‘Rape’ and Section 376 provides for punishment for the offence of ‘Rape’. But, the Act has failed to protect the married women who are subjected to rape by their own husband.\

**Marital Rape—An Exception to Rape**

An intercourse between a man and his wife without the consent of his own wife obtained by force, threat of physical violence and mental torture where the women is unable to give her own consent is said to be considered as a marital rape. Considered as the violence of perversion by her own husband against his wife amounting to physical and sexual abuse. The statistics have clearly mentioned that, in every 6 hours a young married women has been burned or beaten to death and even commits a suicide due to the emotional abuse from her husband.

The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years, does not amount to rape. It thus keeps outside the ambit of rape a coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of age and thereby allows a husband to exercise with impunity, his marital right of non-consensual or undesired intercourse with his wife.\

It is believed that the husband’s immunity for marital rape is premised on the sexual intercourse. Her husband has the right to have sexual intercourse with her, whether she is willing or not, and she is under obligation to surrender or submit to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false, fabricated and motivated complaints of rape by wife against her husband and the pragmatic procedural difficulties that might arise in such a legal proceeding.

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3 Gazette of India, Extraordinary, Part II, s 3, sub-s (ii), dated 24 December 2012.
However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage amounts to rape. 5

Further non-consensual sexual intercourse in terms of the acts mentioned in Section 375 (a) to (d) under the Indian Penal code, by a person with his own wife who is under a decree of separation or otherwise, is living separately is made an offence under the Indian Penal Code. 6 The punishment provided for non-consensual sexual intercourse by a man with his wife living separately is however compared to that is provided for consensual or non-consensual sexual intercourse with his own wife when she is below the age of fifteen years of age, which by virtue of exception to section 375 amount to rape is very mild.

No court is empowered to take cognizance of the offence of sexual intercourse by husband upon his Prima facie satisfaction of the facts which constitutes the offence upon a complaint having been filed or made by the wife against the husband.

**Comparative Study between India and USA**

The United Nation population fund states that more than 2/3rd of the married women in India, who are aged between 15 to 50, have been beaten, raped or forced to provide sex with him. In the year 2005 nearly more than 6500 cases were recorded where women were murdered by their husbands or by their husband’s family.

**Marital Rape in the United States**

In the year 2006 United Nations Secretary General analysed in-depth study on all forms of violence against women which is the marital rape. It stated that in at least 53 countries rape by husband is not considered to be an offence. In the United States, Marital rape has become much more criminalized. In many countries the marital rape laws is ambiguous and they are not clear that the person can be prosecuted for a marital rape or not. where in the absence of the law it may be possible to bring prosecution for acts of forced sexual intercourse. In countries where the laws on rape exclude husband where the countries have inherited the Penal Code which states that the sexual intercourse by a man with his own wife is not rape.

**Marital Rape in India**

If we look into the judicial aspects of India it clearly states that “sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape” under section 375 of the Indian Penal Code. Section 376 of the Indian Penal Code provides punishment for rape. According to this section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term

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6 Bishnu Dayal V. State of Bihar AIR 1981 SC 39
extending up to 10 years and shall also be liable to find or both. In Saretha V. T. Venkata Subbaih case, it was held that, rights and duties in a marriage, is like a creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by marital Association. hence there is no punishment for marital rape and the remedy lies with her.

Role of Judiciary in India

The need for a new law on sexual assault was felt. The earlier law which prevailed did not define and reflect the various kinds of sexual assault. In Sakshi v. Union of India, the Supreme court had recognised the inadequacies regarding the law relating to rape and had suggested that the legislature should bring about changes in the law.

After passing the criminal law amendment bill, 2013 rape was redefined as the most horrific events where the parliament by an amendment tried to enlarge the ambit of rape and the perception by making oral and anal acts as amounting to rape.

The Domestic Violence Act, 2005 has provided various civil remedies and various provisions such as the cruelty and other matters are dealt under. There are large number of victims under the marital rape scenario is being increased but the legislature is ignorant to criminalize such an offence. The women are ignorant of what the actual scenario is and the laws which are prevailing in the Indian penal code for them.

The Judicial decision of Queen Empress v. Haree Mythee, it was held that, the wife over the age is of 15, then the rape law does not apply in that situation. In this case the husband was punished because wife was of 11 years only.

In the Kerala High Court, Sree Kumar v. Pearly Karun, it was observed that, the wife does not live separately with the husband under the Judicial separation and being subject to sexual intercourse without her will the act does not amount to a rape. Hence, it was said that, the husband was not found to be guilty of raping his wife though he was de facto guilty of doing or committing the act.

As per the Constitution of India, every law which is passed must be in conformance with the principles and ideas which are enshrined in the constitution. Any law which has been made failed to meet its required standards are considered to be ultra vires and it can be struck down or to be declared unconstitutional. Here, the exemption of Section 375 withdraws the protection of married women on basis of her marital status.

7 AIR 1983 AP 356  
8 AIR 2004 SC 3566, 2004 (2) ALD Cri 504.  
9 (1890) 18 Cal 49  
10 1999 (2) ALT Cri 77, II (1999) DMC 174
Recently, the Supreme Court took another opportunity to inform the subordinate Court and high court that despite stringent provisions for rape, many courts in the past have taken a softer view while awarding punishment to perpetrators of such a heinous crime. The judicial trend, the court stressed, exhibits stark insensitivity to the need for proportionate punishment for perpetrators of rape.\(^\text{11}\) This has warned them to be cautious as false charges of rape, motivated by personal or economic gains, are not uncommon. Persons accused of these kinds of sexual assault also need protection from the false or engineered accusation of rape loaded with ill-motives or designs.\(^\text{12}\) False allegations of rape, like a rape victim, causes a great distress, humiliates and damages to the accused.\(^\text{13}\) Rape, being a monstrous burial of dignity of a woman in the darkness and a crime form the court and the courts are bound to respond, within the legal parameters, to the demand. It is a demand for justice and award of punishment has to be in consonance with the legislative command and the discretion vested in the court.\(^\text{14}\)

7. Conclusion

It has been concluded that Indian laws have failed to provide a proper protection to women as earlier. As the women are still treated as the property of husband and he has all the rights to exploit her and no remedies have been provided. Though a husband’s violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, the incorporation of the principal of liability for marital rape in our penal laws is not present. This prima facie violates Article 14 and 21 of the Indian Constitution. Non-criminalization of marital rape is the major concern in the Indian legal system. In order to protect the women, the Judiciary should take initiatives to safeguard them. Married women should be taken proper care and they should not be subjected to sexual assault or violence. Hence this section has a very narrow view in dealing with sexual assault and as such till now there is no legal provision which protects the married women.

References

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