

Implications Of Marital Rape For Women: Uncovering Dominant Socio-Legal Discourses

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Abstract

The paper will deal with the sociolegal implications of the Marital Rape Exception, (MRE) clause in Indian law. In India, the MRE, clause 2 in Section 375 of the Indian Penal Code (IPC) presumes that by entering a marriage, women automatically give their consent to sexual intercourse to their husbands. Hence, according to this clause, in a marriage contract, there is no concept of a woman getting raped by her husband. This law comes from the traditional British law of marital rape, which considered it the right of a husband to have sexual intercourse with his wife, irrespective of her opinion or willingness. This theory was based on the traditional understanding of women as chattel and as property of their husbands. Once married, a woman would supposedly become the sole property of her male partner, and hence, her sexuality too would be regulated according to his will rather than hers. Despite the popular discourses of democracy and socioeconomic progress in India, this archaic, patriarchal exception clause has remained, despite several legal instances that provided the judiciary and the legislature with the scope to eliminate the clause and criminalize marital rape. This paper will delve into the dominant societal discourses that underlie this paradoxical phenomenon.

Keywords: *Marital Rape Exception clause, Indian law, consent, sexual intercourse, socio-legal implications, societal discourses*

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I. Introduction

The Marital Rape Exemption (MRE) in Indian law traces its legal and practical origins to the common law in the West, where the sociolegal identity of women was traditionally considered non-existent⁵. This study will focus on MRE in India in a global backdrop.

Coverture was a legal doctrine in the West that believed that the agency of women was subsumed by that of their husbands⁶. Section 375 in the former Indian Penal Code (IPC) dealt with the offense of rape. Since July 2024, when the IPC has been replaced in operation by the Bharatiya Nyaya Sanhita (BNS), the MRE has remained unchanged and has come under Section 63 of the BNS⁷.

It provides immunity to husbands from rape charges who have sex with their wives against their will, the latter not being below 18 years. In the IPC it was 15 years⁸. This legal phenomenon has been based on the ancient ideological premise of women being the property of men, and consequently, having no agency or rights to call their own. This article sheds light on the moral and legal controversy that the MRE constructs, specifically in the legal and societal context of India. The MRE controversy has evolved over time, by bringing subtler arguments in favour of marital rape⁹. As a response to it, a counter discourse of resistance has developed across various quarters of the society¹⁰.

The paper has some broad aims, and objectives as steps to achieving those aims. One broad aim of this paper is to trace the ideological roots of MRE. Another adjoining aim is to trace the difficult path of resistance to it. First, these aims would be reached with the help of general analysis of the sociolegal realities that I shall elaborate. Secondly, with the help of Feminist Critical Discourse Analysis (FCDA)¹¹, I shall analyze legal case studies, media articles and academic articles, to trace the evolution of the MRE debates. Thirdly, I shall provide my own opinions and recommendations to pave the ideological path towards effectuating the criminalization of marital rape. All this will include the analysis of implications that MRE holds for women in India.

Legal Discourse Based on Two Legal Cases Surrounding MRE

Nimeshbhai Bharatbhai Desai vs State of Gujarat, 2 April, 2018

First, I will provide a brief description of the case and then will go on to elaborate on the analysis¹². This particular judgment was taken in the Gujarat High Court. A First Information Report (FIR) was lodged from Idar police station on 30/08/2017 for offences under Sections 376 (a) amended as 376 B, 498 A, & 114 under IPC. Nikita, the complainant, got married to the accused Nimeshbhai, on 20/05/2014. After marriage the complainant at first stayed with her in-laws, and then started living alone with her husband.

From the time she started living alone with her husband in Surat, the alleged sexual violence and perverted demands began. The complainant claimed that after marriage, for the first six months, her husband behaved kindly. Then, he started demanding unnatural sexual intercourse and perversions which included compelling the wife to have oral sex with him and he too had oral sex with her against her will, besides other forms of unnatural sex.

The complainant said, “as I did not oppose him, he had got a free hand...he threatened me saying ‘you are my lawful wife and being your husband I have the right over all the parts of your body and you do not have any child till today and you will not have any child in the future also. I have made you my wife just to fulfill my sexual desires.’ “ The wife also claimed, “I used to bear all this harassment so that me and my parents are not defamed in the society and therefore, I did not inform my parents regarding this.”

By the dialogues of the husband certain points become clear. First, the time during which he behaved well with his wife was probably a facade that hid his actual intentions. From after some time, he started demanding sexual activities against her will. Second, he framed the fact of his wife not being able to bear a child till then, as an excuse which would make her available for forced sexual demands. After a while, when the wife started refusing to these, he first attempted to lure her by soft words, and when she refused, he would beat her and tell her that she was free to go away, that he would find much better women.

Further analysis of the words spoken by the accused is significant. The dialogue where the accused declares his right over every part of her body, from the place of lawfully wedded husband, reinforces the traditional concept that a wife is a husband’s property. All the unnatural forms of sex that the accused demanded, were clearly listed as punishable forms of rape listed in Section 376, besides Section 377 acknowledging the unnatural forced sex that was imposed.

It was reiterated in the case by the presiding judges, that the unnatural offences applicable to Section 377 here do not include consensual sex between two adults of homosexual origins. That Victorian idea of sexual intercourse against the order of nature had already been made unconstitutional in the Naz Foundation case in 2009. Here, as the case mentions, ‘Unnatural offence indicates sexual perversion which takes shape in manifold forms going by different names such as sodomy, buggary, bestiality, tribadism, sadism, masochism.’ Therefore, this case was supposed to consider the sexual demands by the husband as forced sexual perversion on his wife. Going back to what we gather from the dialogues of the complainant, she claims that at first, she used to give in to her husband’s demands to avoid being isolated and rebuked by a patriarchal society. She also made herself believe that a legally wedded husband could demand anything, irrespective of the wife’s consent.

In short, it is clear that she initially tried to adjust to the accused’s demands, It was better to adjust rather than to refuse or fight, as that would most probably land the blame of public shame on the shoulders of the bride and her parents. At last, when the complainant saw that the demands kept increasing, she informed her parents which made them initiate a conciliatory conversation with the in-laws. However, the latter claimed, “Our son will remain the same and he will not improve.” They also said that if the bride’s family wanted to lodge a police complaint, they were free to go ahead.

My claim here is, firstly, considering the serious and consistent nature of offensive demands, the complainant’s parents should have taken a sterner action against the accused and his family at the very beginning, rather than taking a lenient stance. Secondly, besides enforcing the societal belief that the husband is free to demand anything, and the wife and her parents should adjust to these, this leniency also encouraged the accused and his family to become more fearless and demanding.

Coming to the judgment, it claimed, “The husband cannot be prosecuted for the offence of rape punishable under Section 376 of the IPC at the instance of his wife as the marital rape is not covered under Section 375 of the IPC.” The judgement, in the course of examining the invalidity of Section 377 from the perspective of consensual adult homosexual sex, dedicated nearly thirty pages to it. Therefore, rather than focusing on the specific allegations made in the FIR, the judgment committed a huge portion to the issue of validity of consensual homosexuality which was in no way related with this particular case. After listing a series of previous judgments, it concluded that the FIR as far as Sections 376 B and 377 were concerned, would rather be quashed.

It further said “Having regard to the nature of the allegations and considering the fact that essentially the dispute is between the husband and wife, I see no reason why the two applicants herein, being the father-in law and mother-in law” should be considered as other accused people in this case. This was said despite the FIR

reporting that the parents of the husband actively encouraged their son to perpetrate violence against the wife, when they lived together. Further, as mentioned earlier, they showed no signs of reform when they were brought into negotiations by the complainant's parents. In that sense, it can be established that they were abettors in the crimes that their son committed. However, the court said taking queue from earlier case laws, "As usual, in a dispute between the husband and wife, the parents of the husband have been dragged into the prosecution. In such circumstances, I have no hesitation in arriving at the conclusion that the first information report in so far as the two applicants herein are concerned, deserves to be quashed."

In the paragraphs above, the attitude of the judiciary towards this case is reflected. First, after going over the events in the FIR which were of an unimaginable perversion, the judgment calls it merely a "dispute" that is between the husband and wife. Here, rather than dispute, 'crimes' would be a fairer specification. The judges have relegated the matter to an insignificant sphere where the parents are certainly not involved, despite their clear abetment to violence.

Also, the judgment established that the case did not deserve to be handed over to top special investigative agencies like the CBI and CID as requested by the complainant, and that the police investigation that was taken up was enough, despite the clear and consistent nature of the crimes. The terms "As usual" and "dragged" specify the judges' personal perspective towards cases, where the families of the accused have also been roped in. This judgment was far from the principle of impartiality that the judiciary is often adjointed by.

The judges did not take the allegations seriously, and at the most, passed it ultimately to the Superintendent of Police to examine any existing gap in the FIR. An examination of the language and the contents of the judgment lead to the conclusion, that, even after presenting a series of cases from India and abroad, where the autonomy of a woman over her body was highlighted, the judgment concluded that the MRE overruled all allegations of rape in this case. The judgment suggested the addition of Section 354 in the FIR, and inclusion of Section 498 A, understood as efforts to outrage a woman's modesty and cruelty by in-laws respectively to be added as maximum possible FIR charges in this case

Independent Thought vs Union of India, 11 October, 2017

This case was launched by a child rights non-governmental organization (NGO), under Article 32 (a fundamental right in itself), to be applied to a case of child sexual assault by a husband on his minor wife¹³. The wife was between the ages of 15-18 years, (a minor) as considered by a number of national and international conventions. As the case summarized, "The issue before us is limited but of considerable public importance, whether sexual intercourse between a man and his wife being a girl between 15-18 years of age is rape?"

Here, the judgment was focused on the age range of the wife and ruled that as defined by the Protection Of Children from Sexual Offences (POCSO) Act, a girl below 18 was a child who could not consent to sexual intercourse. Thus, the judgment modified Exception 2 to Section 375, by mentioning the wife to be anyone below 18 years rather than 15 years to be considered a child, sexual intercourse with whom would be a crime even if done by her husband. In this case, the Supreme Court ruled that the MRE was not applicable, and the POCSO overruled it. The case gathered a range of references of case laws and relevant reports on child marriage to prove its argument that every study on child marriage concluded that sexual intercourse with a minor was a crime. The marital status of the girl child did not provide the husband with the license to rape her.

The judgment analyzed the case in the following manner: 'The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child...It goes against Article 15 (3), Article 21, and commitments in international conventions. The judgment further claimed that the MRE encouraged girl child trafficking.' Going by the rights of a girl child below eighteen, this was a landmark judgment that, with references to a series of case laws and reports on child marriage, claimed that a girl between the ages of fifteen and eighteen would be considered a child, irrespective of her marital status.

Nevertheless, the court very clearly stated, 'We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above.' Here, the Court visibly avoided making any comment on the MRE as a topic in itself. To put it very clearly, the Court stood staunchly against the rape of a minor girl below eighteen, even if by her husband, but at the same time refrained from touching the topic of MRE as a legal provision, supposedly as an echo in support of the conservative state that did not want to bring family and marriage under the legal radar. The Court refrained from recognizing the effects of the MRE on married women in general in India.

The Court claimed : 'The key consequences of child marriage of girls may include early pregnancy, maternal and neonatal mortality; child health problems...limited agency of girls to influence decisions about their lives.' It further claimed, 'A 15 or 16 years old girl, when forcibly subjected to sexual intercourse by her "husband", undergoes a trauma, which her body and mind are not ready to face.' It makes an essential point here, in noting that child marriages and forced sexual intercourse with a child leaves significant scars in their emotional and social lives. This last sentence here is of an empathetic stance towards minor girls, which marks a

significant shift in the legal perspective of a country where child marriage was a common reality in earlier times. Thus, the judgment took a strong stance against sexual intercourse with minor girls, and described the various problems that child marriage and early pregnancy resulted in, concluding that more underage girls died every year due to problems while giving birth. While this judgment stood against the breach of child rights, it refrained from antagonizing traditional patriarchy by letting the MRE provision remain untouched.

Media based Discourses on MRE

The media constitutes a strong counter discourse to the patriarchal atmosphere on marital rape in India. In this section I have selected a three media articles some of the key highlights of which and key dialogues provided by which are on behalf of individual people. These will be provided and analyzed critically. These articles discussed are from different online news resources, and develop a critical feminist counter discourse to the MRE provision. This is developed through two key methods, namely awareness creation through information and evaluation of various realities around the concerned subject.

Two news articles from two different news channels developed on the debates surrounding marital rape of a woman who died within a few hours of the incident, and in her dying declaration stated that she died from succumbing to the injuries caused from the marital rape. In 2019, the accused had been held guilty of unnatural sex and culpable homicide not amounting to murder of his wife by a trial court. However, in February 2025, the Chhattisgarh High Court acquitted the accused by declaring that the IPC did not recognize marital rape¹⁵. A feminist activist and lawyer, Sukriti Chauhan said, as BBC news reported, “A lot of people say the constitution cannot enter your bedroom.” “In my experience, women are not trusted when they complain, everyone says it must be fake. The only time such cases are taken seriously is when a woman dies or the assault is particularly gruesome,” said Priyanka Shukla, a lawyer. Two realities are reflected in her words. First, that women as a category are usually not heard, or trusted. Second, a case is taken seriously only if and when it reaches some extreme point causing death of the victim.

Natasha Bharadwaj, a scholar on gender-based issues said on the incident, “It’s bizarre. The view of marriage that gives a man unlimited access to his wife’s body undercuts their empowerment. It contradicts the government’s slogan of ‘nari shakti’, or ‘woman power’ that it keeps invoking”. The BBC reported, ‘The court documents make for a grim reading.’ Both BBC and NDTV reported that the victim had died of particular injuries in her abdomen and rectum. A number of people including activists and lawyers held campaigns showing solidarity with the victims. The campaigners also said that not only was the dying declaration not considered by the High Court, but there was not a single sympathetic comment from the presiding judge on the incident.

In another case of marital rape, NDTV reported, the Rajasthan High Court quashed the accusation¹⁶. It stated, “Marriage is considered as a sacred union between two individuals, transcending physical, emotional and spiritual bonds.” It also reportedly underlined the importance of marriage in the Hindu laws where sexual relations constituted an important duty. All three articles reflect once more that the judiciary is anything but impartial. The judiciary appears to be nothing more than another institution based on the rules of the patriarchal majority. Laws interpreted by such an institution are far from being egalitarian. It is starkly visible in these articles that law in reality is regulated by the strong at the expense of the weak.

Academic Discourses on MRE

The academia has been a platform of strong resistance to the patriarchal discourses around marital rape. A number of points are covered by the academia in this respect, including an informative and critical examination of the history of MRE as a sociolegal concept in India and abroad. Also included has been the sociolegal status of women in the subject of rape as a crime. It has been observed by the academia that there is a strong interconnection between women as a category, and the concept of rape. In this sense, the sociolegal construct of the feminine gender is an essential factor of analysis.

The term rape comes from the Latin term, *rapere* which broadly means to abduct or seize¹⁷. Traditionally, women were looked upon as dependent property of their male guardians, namely fathers until before marriage, and husbands after marriage. As their own agency as individual human beings was missing, their rape was looked upon as the violation of one man’s property by another¹⁸. Rape of a woman was a crime, not because it violated the bodily and overall autonomy of a person, but because it was considered to be the violation of sexuality of one man’s daughter or wife, by another. Historical documents from around the world provide instances where, if a virgin girl was raped by a man, he was either asked to pay a sum of money to her male guardian, or marry her, or do both¹⁹. Consequently, the idea of a man being able to rape his own lawfully wedded wife, was looked upon as invalid.

Sir Matthew Hale was the first Chief Justice in England to have provided the statement, “But the

husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”²⁰ This provided the first legal conceptualization of the impossibility of marital rape, which was informed and built upon by later chief justices and the society. An important point to bear in mind here, is that the marital rape existed in practice, much before the colonial times. It was in the colonial era across the world that the practice was legalized and institutionalized into a Marital Rape Exemption. Studies done on the medieval times of India bring out details where, child marriage was the norm (specifically girl child marriage), where underage wives were married off and raped by their husbands whenever the latter liked²¹. There was no concept of consent or individual opinion or agency of the wives.

The famous statement made by Sir Matthew Hale mentioned above became known across the world as the Hale doctrine, which became part of the accepted common law, and this was adopted in several regions. This doctrine was further reinforced by other legal concepts like the unities theory put forward by William Blackstone. Blackstone stated, “Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband...If a wife is injured she cannot take action without her husband’s concurrence.”²² As this theory states, the autonomy of a woman after marriage became subject to the control of her husband. This theory was further enhanced by the separate spheres theory, where men and women were relegated to the strictly separate public and private spheres respectively, and the women were expected to obey every command made by their husbands.

In 1974, advocate Laura X began her crusades against the MRE in America. In 1976, she directed public attention to the Michigan Murder trial of Judy Hartwell, during which the presiding judge upheld Hartwell’s capacity to defend herself. In 1977, the National Council on Jewish Women passed a resolution to repeal MRE. This was based on the ancient Jewish law which allowed women to refuse sexual intercourse in marriage. In March of that same year, American Civil Liberties Union stated publicly, “Language which prohibits one spouse from charging the other with sexual assault should be eliminated from the laws.” The academic discourse makes it clear that there was a time of effective resistance to the MRE concept in United States, where feminist advocates like Laura X fought against it. Unfortunately, such resistance movements have not translated into legal amendments in India.

In 2012, in the backdrop of the spine-chilling Nirbhaya gang rape case, Justice Verma Committee was formed which recommended the abolition of the MRE and hence the criminalization of marital rape²³. However, this recommendation was not accepted by the state. In 2015, a private member’s bill came up in the Parliament, challenging the constitutionality of the MRE. Here again, the state declared that the abolition of the MRE would result in undue interference in the institution of marriage and the traditional family system. Therefore, the academic discourse on marital rape, firstly evaluates the evolution of the relationship between women and rape, secondly, provides a glimpse of the sociolegal fight that has taken place against MRE outside India. However, India has retained MRE even in the latest substitution of IPC, that is the Bharatiya Nyaya Sanhita, BNS.

II. Conclusion

From archaic beliefs in favour of the MRE, the society has witnessed a shift towards more nuanced arguments. Firstly, the indigenous culture of India does not allow for the abolition of the MRE. Secondly, the idea of marital rape belongs to the private sphere of the family, which has been kept immune from legal regulations by the state. Thirdly, it has been repetitively argued that women have other legal recourses when faced with forced sexual assault by their spouses. The Section 498 A of IPC (underlying the idea of cruelty perpetrated by the in-laws on the bride), is considered as a panacea to any assault within marriage. Additionally, the Domestic Violence Act, 2005 is also underlined as a recourse for women. However, none of these arguments deny the fact that marital rape continues to not being recognized as rape.

This study has traced the evolution of the MRE discourse in India, in a global backdrop. Three discourses and counter discourses have been traced here, the legal, media, and the academic types. The legal discourses demonstrate that the law is far from being impartial. The media and academic counter discourses reflect that writing is another form of resistance to patriarchy. Journalism, research and writing constitute significant forms of resistance against the MRE. They also reflect that victims are not alone, the counter discourses stand by them in the hope of criminalizing marital rape in the near future.

A blend of civil and intellectual campaigns against marital rape would pave the way towards criminalizing it. Therefore, as this study gathered, resistance is a dynamic concept with multiple possibilities. Awareness spreading and opinion building are two critical aspects of this multipronged resistance, facilitated by the fact provision and analysis by the media and academia. Besides, activists and similar stakeholders adopt legal procedures like petitions to address the problem face on. Such forms of resistance have to be diversified and creatively used by concerned actors to facilitate the criminalization of marital rape in India.

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