

Impact of Criminalization of Marital Rape on the Prospects of Marriage: A Socio-Legal Study

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Abstract- Marital rape has always been a taboo subject in India however it is gaining prominence among Indians, with a lot of them wanting it to be criminalized. Although I have argued for the criminalization of Marital Rape in India in one of my earlier papers, it would be deceiving to assume that it would come without any cost. One of the main effects it would bring is men distancing themselves from the institution of marriage because why would someone willingly expose themselves to a high probability of legal attacks which in turn would result in social attacks in this day and age where women have been witnessed to be vengeful and using legal tools to harass men such as 498-A IPC, domestic violence, and regarding the criminalization of marital rape, higher probability of an increase in cases of false accusations of rape due to some key reasons discussed in detail in the article. This article does not focus on whether Marital Rape should be criminalized or not rather it focuses on the social ramifications born out of legal ramifications the criminalization of marital rape would bring, along with a small research study among the students and faculty members of Baba Saheb Bhim Rao Ambedkar University, Lucknow, the purpose of which would be finding out whether the willingness to marry in unmarried men or women is impacted if marital rape were to be criminalized in India. Findings answer in affirmative.

Indexed Terms- Criminalization, Harassment, Marital Rape, Offence

I. INTRODUCTION

Rape is a moral and criminal wrong, and when committed against one's spouse to whom one is tied

by marriage, it is called Marital Rape. Marital rape is morally considered wrong but is not a crime yet in India due to exception 2 of section 375 of the Indian Penal code which says that 'Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.' It means that unless a married woman is below 15 years of age, sexual relations with her by her husband are not to be considered rape which would impliedly include instances where the woman did not consent. It would have ordinarily meant that sexual relations with a wife above 15 and below 18 years of age is also not marital rape, however, this position has been denied by the Hon'ble Supreme Court in 2017¹ through J. Madan Lokur when it said, 'The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion, sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not.' The Apex court prioritized POCSO, 2012 which is a special legislation over the Indian Penal Code which is an ordinary legislation.

Debates on the criminalization of marital rape have always been in the process of brewing where the people in favor want it to be criminalized on the grounds of personal autonomy of women, her right to withdraw consent even after tying the knots of marriage etc. and the people against the criminalization fearing its bad impact on the institution of marriage and harassment of husbands by their wives since its criminalization would also provide the wives legal gun to harass their husband when they wish to do so by filing false rape allegations, this is not just paranoia on the part of husbands but it rather roots in reason Those reasons

primarily constitutes the following; its criminalization increases/exposes the male spouse to a new risk of false rape allegations due to (i) the witness and the alleged victim being the same person due to the private nature of the offense, and (ii) ease of planting of incriminating evidence i.e. male semen in one's own body parts by the alleged victim in such false cases of rape (iii) no burden of proof on alleged victim of rape due to sec 114A evidence act which says:

[114A Presumption as to absence of consent in certain prosecution for rape. In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.— In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).]

In layman's language what this section says is that if a woman says that she did not give consent at the time of sexual intercourse with a man in an alleged rape case, then the court shall accept it as claimed by her and now it is upon the man to prove that there was the consent of that women when they had sexual intercourse.

This overall legal position puts the male spouse at very high risk (since the presence of semen corroborates the women's claim and on top of it, the woman under section 114-A of the Indian Evidence Act, 1872 is also dispensed with proving the absence of her consent), thereby leading him (the man) to make himself distant from the concept of legal marital relationship with the women. Take into consideration the social implications of being accused of a heinous offense such as rape such as hardships in finding a job to ensure livelihood, hardships in getting bail due to social pressure, lack

of social cooperation by others due to fear of their reputation, and this becomes a recipe for a disaster for the male spouse.

It is a good legal tool to have in actual cases of forced sexual intercourse but the woman being the sole witness in such cases also makes the male spouse prone to being accused of a false allegation in times of conflict between the two parties which in turn impacts the institution of marriage

Therefore, Even if someone opposes the criminalization of marital rape, we mustn't make a straw man of the person and declare that such a person is acting against the interest of women unless he bases his position upon such a belief. These factors must be taken into account.

Just as over-correctness in the Constitution runs the risk of destroying the basic structure of the Constitution, similarly legislations like the criminalization of marital rape with a hyper-welfare model will destroy the basic structure of the marriage. There needs to be a middle way, otherwise, there will come a time when the institution of marriage would perish among heterosexual males.

II. BACKGROUND

Since the inception of the Indian Penal Code, 1860, Marital Rape has been expressly excluded as an offense, but now at the beginning of the third decade of the 21st century, arguments criminalizing the acts of marital rape have gained their voice in the public law domain. The rise in feminism since the 70s has also been a key voice for the criminalization of marital rape. Various High Courts in India have been seen inclining toward the criminalization of marital rape in 2022 followed by the Supreme Court in September 2022. However, it has not yet been criminalized by the legislature by deleting Sec 375, exception 2, or by the apex court by declaring the said exception unconstitutional.

III. HISTORY

2013, J.S. Verma Committee, 2013 Report: A glance over this development can be seen starting from the recommendation of the J.S. Verma Committee on

23rd January 2013 after the infamous Nirbhaya Rape incident in December 2012 that made a recommendation for the criminalization of marital rape. It said²;

'The IPC differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offense of rape exists concerning un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.'

It has yet not been accepted and incorporated by the legislature.

2017, Supreme Court: POCSO, 2012 criminalizes sexual intercourse with a girl child below 18 years of age whether she is married or not. POCSO being special legislation is given precedence over Exception 2 of Sec 375, Indian Penal Code. The court said³ *'in our opinion, sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not.*

26th Sept 2018, Supreme Court: The Apex Court through a bench of 9 judges⁴ explicitly declared the right to privacy as part of the right to life and personal liberty under article 21 of the Constitution of India. The Supreme Court held that a fundamental right to privacy is guaranteed under the Constitution of India. This would imply that a woman's autonomy cannot be brushed away citing the sanctity of the institution of marriage. Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that 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." Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married women and unmarried women and there is no contrary ruling stating that the individual's right to privacy is lost by marital association. Thus, 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. Such a landmark decision is also going to be a major force in striking down exception 2 of section 375 of the Indian Penal Code, 1860 whenever the judiciary or legislature decides to do so.

2021, Kerala High Court: The High Court said the fact that marital rape is not recognized under penal law does not inhibit the court from recognizing the same as a form of cruelty to grant the divorce.⁵

23rd March 2022, Karnataka High Court: Justice M. Nagaprasanna held that *"in the peculiar facts and circumstances of the case when the husband rapes a wife, he cannot claim the protection of exception enumerated under Section 375 of the Indian Penal Code (IPC), since the exemption is not absolute. No exemption in law can be so absolute that it becomes a license for the commission of a crime against society". A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'. The institution of marriage does not confer, cannot confer, and should not be construed to confer any special male privilege or a license for unleashing of a brutal beast."*⁶

However, this judgment is problematic since Article 20(1) of the Constitution says that *"no person shall be convicted of any offense except for violation of a law in force at the time of the commission of the act charged as an offense". What was not an offense at the time of its commission cannot be termed as an offense by way of an interpretive process. Such a 'constitutional interpretation' can only be unconstitutional. The court even said that it is for Parliament to consider the question of changing the law. But while considering "the charge of rape being framed upon the husband alleging rape on his wife" in the given case, the court pronounced against the express words in the Penal Code. This is an alarming situation, by any yardstick of statutory interpretation or constitutional adjudication. This is simply impermissible in a system governed by the principles of the Rule of Law. There is a marked difference between decriminalizing an act and labeling it as*

*unconstitutional and criminalizing it on the ground of unconstitutionality.*⁷

This Judgment has since been stayed by the Supreme Court by a bench of Chief Justice N V Ramana and Justices Krishna Murari and HimaKohlisaid, *'Until further orders, there shall be an ad-interim stay of the common impugned judgment and final order dated 23rd March 2022 passed by the High Court of Karnataka.'* It also suspended criminal proceedings initiated in a Bengaluru court against the aggrieved husband.

11th May 2022, Delhi High Court: In May 2022, a division bench of the Delhi High Court pronounced a split verdict⁸ of 1:1 on the question of criminalization of marital rape. Hon'ble Justice Rajiv Shakhder for Criminalization of Marital Rape while Hon'ble Justice C. Hari Shankar against its criminalization.

21st July 2022, Supreme Court: The Apex Court by a bench headed by Justice D. Y. Chandrachud held that, *'Sexual assault" or "rape" under Medical Termination of Pregnancy laws includes marital rape without changing the contours of 'rape' defined under Section 375 IPC.'* This interpretation is limited to the application of the Medical termination of pregnancy Act, 1971, and does not dissolve the provisions of Exception 2, Sec 375, Indian Penal Code, 1860. The bench refrained from doing so since the matter regarding the criminalization of marital rape is already pending before a different bench.

Seeing all these legal developments which often stand contradictory to each other by various high courts, it becomes important that the Supreme Court makes the legal position clear. The matter is currently pending.

IV. KEY ISSUE

Seeing the position of the constitutional courts of the country, it wouldn't be farfetched to assume that the criminalization of marital rape is going to be happening soon. The main issue of the matter is that this could not be done without an adverse impact on the institution of marriage. We live inside a welfare model of governance and for better or worse; governments have always tried to overcorrect one

wrong by doing another kind. Historically, women were the exploited kind, giving them enough power to be able to exploit the men if they wish to do so cannot be the solution unless you wish to repeat the cycle with men being the exploited party this time.

I argue for the criminalization of marital rape, for I cannot seem to find any strong argument as to why women when married should be allowed to get raped if that be the case. However, criminalization of an act also provides an opportunity for the alleged victim to misuse such a provision and claim victimhood when they are not victimized to extort or harass the alleged offender, especially given the private nature of the offense of rape where victim and witness are the same people, the close relationship between the alleged victim and offender making it easier to plan incriminating evidence proving sexual intercourse, and on top of that, no burden of proof on the women to even prove the absence of consent during such intercourse due to section 114-A of the evidence act, 1872.

Let us discuss these three key points briefly to better understand the legal ramifications of criminalization of marital rape against men;

Alleged victim and witness same person: It is important to understand that the main concern of the matter is false marital rape accusations and not the actual cases of marital rape. This law stands good as far as it covers real instances of marital rape. But that is the issue, how does one ascertain whether a marital rape allegation is based on truth? It is easier to accuse men when they raise this issue that they should believe the woman and not be toxically patriarchal, but I ask why? Why should we believe anyone without proper evidence? Whether it is a woman or a man. Aren't we a nation of 'Rule of Law'? Aren't we a nation that follows the principle of 'Presumption of Innocence until proven guilty'? Are men so disposable/expendable that we are willing to not consider the unjust legal possibilities they can be thrown under? Women mustn't face injustice at the hands of men and it is also unequivocally important that men also do not face injustice at the hands of women. India is not foreign to instances of false rape allegations, law must take into factor justice for both genders. Throwing one gender under the bus to

appease the other is a miscarriage of justice. The offense of rape happens in private usually, and so does a false case of rape. At least in cases of strangers, circumstantial evidence is of some help to determine whether there is an element of consent or force, but in the case of a married couple overlapping makes it way more difficult to ascertain whether it was forced or the woman is just saying it was forced. Planting of incriminating evidence: Section 114-A evidence act, 1872 says,

'114A: Presumption as to absence of consent in certain prosecution for rape. In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.— In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).'

A plain reading of the section shows the reader, the law's tilt towards protecting one gender, even if it is at the cost of justice to the other gender. It says '*where sexual intercourse by the accused is proved*', how will that be proved? By the presence of semen, medical examination of the woman for signs of penetration, or any other sign showing the happening of acts as given under sections 375 (b) to (d). These factors are also present in a case of voluntary sexual intercourse, so what will stop a woman to file a false case of marital rape. How will the law ascertain whether it is a real case of forced sexual intercourse or a forged one?

No burden of proof/ Presumption of guilt on the part of man: Section 114-A also says, '*where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in*

her evidence before the court that she did not consent, the court shall presume that she did not consent.' The law inserted this provision in 1983, dispensing away the age-long principle of presumption of innocence until proven guilty in cases of the offense of rape which says that the prosecution needs to prove beyond reasonable doubt the commission of the offense by the accused. However, with the insertion of section 114-A in the evidence act, 1872, if a woman claims that she has been raped by the alleged accused and the sexual intercourse that happened between them was not with her consent, the court shall presume that she did not consent, so even the court cannot use its discretion to weigh the testimony of woman, instead, they must proceed with the issue believing her claim of the absence of her consent during such sexual intercourse.

Such a fem-centric approach will put a man at an extremely high risk if he were to get married, and hence there is a high probability that in the near future, as more and more men start to realize the legal bias in the system, the more they will distant themselves from the institution of marriage. There is hardly any benefit for men in marriage as it stands, and criminalization of marital rape makes it worse for men from a risk point of view.

V. HYPOTHESIS

'Criminalization of Marital rape' will affect the 'prospects of future marriages'.

VI. RESEARCH OBJECTIVES

To find out if there is a relation/association between the 'Criminalization of marital rape' and 'Willingness to marry in Men/Women'.

To find out if this relation/association is 'Gender neutral or Not' when it comes to men and women.

Note: *Relation/Association* means whether the probability of willingness to marry will increase/decrease due to the criminalization of marital rape.

VII. RESEARCH QUESTIONS

Whether there is a relation/association between the 'Criminalization of marital rape' and 'Willingness to marry in Men/Women'?

Whether this relation/association is 'Gender neutral or Not' when it comes to men and women?

VIII. RESEARCH FINDINGS

The research study is ongoing and data is still being collected however, the data so far collected supports the hypothesis that the 'Criminalization of Marital rape' will affect the 'prospects of future marriages'. It has been seen in the data so far collected that the criminalization of marital rape does decrease the willingness to marry in men and increase the willingness to marry in women.

Table RF.1

Female Respondents	Willingness to marry before Criminalization (On a Scale of 1 to 5)	Willingness to marry after Criminalization (On a Scale of 1 to 5)
1	3	5
2	5	5
3	5	5
4	3	4
5	2	4
6	1	4
7	4	4
8	2	3
9	2	2
10	4	4
11	5	5

Table RF.2

Male Respondents	Willingness to marry before Criminalization (On a Scale of 1 to 5)	Willingness to marry after Criminalization (On a Scale of 1 to 5)
1	5	3
2	5	2

3	4	2
4	5	1
5	3	1
6	5	4
7	5	4
8	3	3
9	4	4
10	3	3
11	2	2
12	4	2
13	5	3
14	4	4
15	2	5
16	4	4
17	4	3
18	3	3
19	3	4
20	5	1
21	4	4
22	1	1
23	3	4
24	4	4
25	3	4
26	5	5
27	4	2
28	5	3
29	4	4

Average Willingness to marry before Criminalization of marital rape in women = $36 / 11 = 3.2727$

Average Willingness to marry after Criminalization of marital rape in women = $45 / 11 = 4.0900$

“Willingness to marry Increased in women if Marital Rape is criminalized”

Average Willingness to marry before Criminalization of marital rape in men = $111 / 29 = 3.8275$

Average Willingness to marry after Criminalization of marital rape in men = $89 / 29 = 3.0689$

“Willingness to marry Decreased in men if Marital Rape is criminalized”

5 out of 11 female research participants had an increase in their willingness to marry if marital rape were to be criminalized and that increase in deviance

was significant as can be seen in female research participants 1, 4, 5, 6 and 8 in Table RF.1.

6 out of 11 female research participants remained at the same level as they were before the criminalization of marital rape as can be seen in female research participants 2, 3, 7, 9, 10 and 11 in Table RF.1.

13 out of 29 male research participants had a decrease in their willingness to marry if marital rape were to be criminalized and that decrease in deviance was significant as can be seen in male research participants 1, 2, 3, 4, 5, 6, 7, 12, 13, 17, 20, 27 and 28 in Table RF.2.

4 out of 29 male research participants had an increase in their willingness to marry if marital rape were to be criminalized as can be seen in male research participants 15, 19, 23 and 25 in Table RF.2.

12 out of 29 male research participants had no impact on their willingness to marry as can be seen in male research participants 8, 9, 10, 11, 14, 16, 18, 21, 22, 24, 26 and 29 in Table RF.2.

The hypothesis is proved as per the data so far collected which means that 'Criminalization of Marital rape' will affect the 'prospects of future marriages' and this effect will not be gender neutral since criminalization of marital rape will increase the willingness to marry in women and decrease the willingness to marry in men.

IX. ANSWERS TO RESEARCH QUESTIONS

Research Question 1:

Whether there is a relation/association between the 'Criminalization of marital rape' and 'Willingness to marry in Men/Women'?

Answer:

Yes, there is a relation/association between the 'Criminalization of marital rape' and 'Willingness to marry in Men/Women'.

Research Question 2:

Whether this relation/association is 'Gender neutral' when it comes to men and women?

Answer:

No, this relation/association is not 'Gender neutral' when it comes to men and women because though it does affect the willingness to marry in men/women if marital rape were to be criminalized, however, this effect is not the same since criminalization of marital rape will increase the willingness to marry in women and decrease the willingness to marry in men.

X. CONCLUSION/GENERALIZATION

The aim and objective of this research article were to find out if the criminalization of marital rape were to happen, would it affect the willingness to marry among men/women in light of the legal ramifications it would bring directly or indirectly upon the main parties to the marriage. The running hypothesis of the researcher before conducting the research study was that there would be some relation/association between the criminalization of marital rape and willingness to marry in men/women and the findings of the research study so far corroborates that hypothesis. However, the sample size from which data has yet been collected is still very small to make generalizations about the mass population, the process of data collection is still ongoing and the only sound path to follow is to wait till an adequate amount of participants take the survey and answers the questionnaire.

Still, the data that has yet been collected shows some signs favoring the hypothesis of the researcher. The legal ramifications of the criminalization of marital rape increase the risk to the male spouse and provide an additional layer of protection to the female spouse thereby affecting the willingness to marry between the two parties to the marriage. More the risk, the less the incentive, thereby a lack of motivation to do an act due to people operating on the principles of self preservation. More the security, more the incentive, thereby more motivation to do an act.

The legal air of the country is flowing in the direction of criminalization of marital rape and therefore the debate is way past the question of whether marital rape should be criminalized or not rather the question that remains now is what will be the impact of such criminalization on the prospects of future marriages. This small ongoing study is an attempt to find an

answer to that question and decide on the way forward.

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