

Marital Rape

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ABSTRACT: *Privacy and dignity of women is brutalized by sexual harassment of all sorts. Marital rape is an aspect of marriage which is not exclusively protected by current legislation. In the event of marital rape, a spouse can defend under existing laws such as Domestic Violence Act. In India, however, marital rape does not constitute criminal act yet, as both spouses are expected to give tacit consent to marriage. Truth isn't, though. Husband forcing his wife even amounts to Rape. India is the seventh biggest state in the world at present. For a flourishing, multicultural, wide and secular nation like India, the rate of crime rises is extremely troubling and shameful. In the area of women's rights, marital rape is not only actually the main issue, but at the same time violated numerous constitutional provisions. The author in this paper attempts to explain the issue of marital rape. The author will talk about the heinous crime of marital rape and analyze the legal regulations provided as a safeguard. The author will discuss the Indian scenario of marital rape in this paper.*

KEYWORDS: *Institution of Marriage, Rape, Marital Rape, Right to Life and Personal Liberty, Women's dignity.*

INTRODUCTION

Some people have rightly said that the growth and prosperity of a country can be measured by looking at its status and respect for its women. The domain of a civilized society is human dignity. Only a culture is known as civilized when a woman is handled with the true spirit of equity as man. Any structure that addresses indignity and injustice between women and men calls for the fury of the Constitution. Any legislation with the imprint of peaceful approval, a few decades ago, may have to cope with the efflux of time.

Marriages are different in India, are considered a sacrament in the Hindu wedding system and a contract for Muslim wedding systems and both women and husbands play the crucial role in this system. In India, marriages occur in different ways. It is annoying that our law is handcuffed by the patriarchal mind when it comes to women's rights in the framework of marriage.

DISCUSSION

1. Meaning of Rape

The word rape comes out of Latino word that means 'seize'. Crime that typically counts in sexual assault or copulation that is commenced without the consent of one or more individuals against another person. Rape in India is classified "as deliberate, unlawful sexual intercourse with a woman without her consent" under Section 375 of the Indian Penal Code. This definition is too limited and for not including other forms of sexual harassment has been sporadically criticized¹.

In the Indian background, a socio-cultural aspect is also involved in the rape phenomenon. Rape not only physically hurts the victim, it also disgraces and tarnishes the spirit with a detrimental impact on the victim. Rape has been categorized into different forms of rape depending on a numerous circumstances. The most violent and dehumanizing form of rape is gang rape, which involves a group of attackers rapping the victim. Stranger rape occurs when the survivor is unfamiliar with the perpetrator. Sexual contact with a minor under the age of 18 is considered statutory rape.

2. Meaning of Marital Rape

Marriage is considered a holy institution in Indian life as the basis for a healthy family and a civilized society but sadly it is disguised as sexual cruelty and other forms of brutality. Marital rape can be characterized by

¹ Refer Indian Penal Code, Section 375.

force or threat or strength as an unwanted intercourse or penetration (anal, vaginal or oral), or if the woman cannot consent².

Marital rape, and most of the crimes reported in India, is the most prevalent crime against married women. Since it is unknown and not a crime under the Indian Penal Code, 1860. In India, female victimization and conjugal rape are normal.

Marital rape has been elaborated as undesired sexual or widespread (oral, anal or vaginal) intercourse, coercion, or if the woman does not consent. The limited and restricted concept of rape is one of the most unusual consequences of its inability to commit itself against a specific category of women – married women cannot be raped by their own spouse. Furthermore, the result of this lapse is not simply that violent and unwanted sex constitutes rape as unlawful that is to say, sexual harassment by a man who has no legal rights against a woman. That is to say, violence in law is permissible in the eyes of a woman who is not his own property but sexual relations are not permissible.

3. Marital Rape—An Exception to Rape

An intercourse of a man with his wife is said to be known regarded marital rapes, if a woman does not give her or herself consent obtained by coercion by her own wife, as a threat of physical abuse and of mental torture. Consider the brutal crime of physical and sexual abuse by its own husband against his wife. The statistics show clearly that married women have been burned or beaten to death every 6 hours, even committing suicide because of her husband's emotional misuse³.

An exception under Section 375 mentions if man performs sex with wife whom he is married, for fifteen years, non-consensual sexual contact does not constitute rape. It implied the execution of marital right by husband over wife without realizing the infringement of part of his counterpart and without fear of any consequence of forcing inappropriate or consent less relations with his wife.

The immunity of the husband from marital rape is assumed to be dependent on sex. Husband has the right to have sex with wife, whether consensual or forced, and is bound to give in or consent to his will. It also seeks to preserve the institution of the family by removing the likelihood of baseless, fabricated and justified rape charges against her husband by wife as well as pragmatic procedural difficulties emerging in such legal proceedings.

3.1. 42nd Law Commission Report

As per its 42nd issued Report, Law Committee in India proposed: the marital rape from Section 375 must be taken down. Usually passed sentences to convict for this crime are unwonted in their terms. We assume it would be prudent, even in a technical context, to take this offence from section 375. The penalty can also be provided in a separate Section for this offence.

A number of organizations standing for women progress and welfare along with National Commission of Women demanded expulsion in Indian Penal Code of Section 375 the exception clause stating that "a man who has sex with woman he is married to, who has crossed age of fifteen, does not constitute violation." The Women and Children Task Force formed by the Government of India's Woman and Child Department believed that a greater debate on this topic should take place. The Task Force's mandate was to review all relevant women's laws and schemes. Of the Task Force's four recommendations on rape in compliance with the Indian Penal Code, the definition of rape is the most relevant. He argued that horizon of rape should extend and cover all aspects w.r.t. sexual abusing. Instead of the current Section 375 IPC rape definition "is broad, detailed and appropriate," as suggested by the Law Commission, a new definition of "sexual harassment" should be adopted. Like the Law Commission, however, the Task Force did not recommend that the marital rape should also be included in the revised definition.

² Mrs. Pyali Chatterjee, *Marital Rape: Whether Marriage Is A License To Rape?*, June 2016

³ acadpubl.eu

3.2. REPORT OF LAW COMMISSION

Also 172nd report of the Law Commission, adopted in 2000 in March, came up with following recommendations to implement fundamental reform in the law in relation to rape⁴.

- Term 'sexual assault' shall be put up replacing term 'rape'.
- Penetration of any sort must be embraced within the purview of 'sexual intercourse' furnished under section 375 of IPC.
- Sexual assault committed over any body part shall be regarded as rape as elaborated by case of Sakshi v. Union of India and Others.
- Subject matter like 'rape' shouldn't be gender partial and be made gender neutral. Law has over looked custodial rape of young boys.
- Need to construct new offence or amend existing with addition of 376E named by 'unlawful sexual conduct'.
- Amendment under s. 509 of IPC shall be executed, making punishment more serious in which sexual intent is involved in committing offence.
- Removing concept of rape under marriage, deriving its status by 2nd explanation in section 375 of IPC. A husband's intercourse through force upon his wife should be viewed as a crime, same as any physical abuse committed upon wife by a husband constitutes as an offence. Section 376A is to be removed on this reasoning.
- When alleged it should be presumed by court that consent was given by victim for sexual activity and now the fact is denied when considered under the Indian Evidence Act.

Despite nine years of submission of 172nd report of Law Commission to Indian Government, which urged Parliament to amend, under Section 376 of the IPC, existing definition of rape with inclusion of sexual assault in definition making it both age and gender neutral, but none of changes are implemented till date.

4. Indian Scenario of Marital Rape

IPC through section 375 defines rape including exclusion w.r.t. marital rape from its purview. Although, where decree of judicial separation, divorced from her husband or is otherwise granted, involuntary sexual intercourse with wife is penalized within section 376B of the IPC of 1860.

Stinging portion in S.375 IPC can be realized by considering its 2nd exception, is that if a woman above 15 and 18 years and married, with or without her consent, she commits any sexual act found in S.375 IPC, it is not deemed to be a violation on account of her husband. In compliance with S.376 IPC, the same thing if a man does with another woman and not his spouse, of the age described above, is concluded as heinous crime and has serious penalties.

2018 National Crime Records Bureau (NCRB) stats reflect that from enlisted IPC crimes, the majority of crimes were against women and reported in regards to 'Cruelty committed by Husband or in-laws' i.e. 31.9% succeeded by 'Attack upon Women to cause outrage of her Modesty' (27.6) and 'Rape' (10.3%).

The crime rate per lakh female population in 2018 is 58.8 compared to 57.9 in 2017. No data on the number of marital rape cases is available with the NCRB in the absence of legislation. UN Women's Indian statistics, Global Data on Violence against Women, 2016 displays the detailed reflection of data of various brutalities in different manners targeting women. Ever-married women aged 15 to 49 years who have experienced physical and/or sexual violence from intimate partners at least once in their lifetime is 28.8 percent.

United Nations Committee in February 2007 on Elimination of Discrimination against Women ("CEDAW Committee") made recommendations that:

A country in its Penal Code, the definition of rape shall be expanded in manner to acknowledge the perception that women are subjected to harassment and to remove the marital rape exception from its scope.

⁴ *Ibid.*

In 2013, Justice JS Verma's Committee on Changes to Criminal Law recommended the abolition of the IPC's marital rape exemption, but this was reluctantly ignored by the Government of India. In 2015, the NGO' RIT Foundation 'filed a written petition questioning S.375 IPC's constitutionality, describing it as patriarchal and against the dignity of women in marriage. In the Delhi High Court, the case is sub-judice.

The government of India is complacent regarding the question of legalizing marital rape. It has consistently opposed the law by arguing that "since forced marriage sex could become a strategy that impoverishes the marriage structure and enables to harass the husband, if it is declared as a crime." These activities are the legalization of marital rape by law and the preservation of protected rights. The institution of marriage is corrupted by marital rape. There are several cases in which court interference by legislation has upheld rights and preserved women's dignity and reputation from stereotypical thinking. The most recent law criminalizes Talak-e-Biddat.

5. *The Present Legal Position*

As per mentioned in Indian law, sexual activities executed upon wife by her husband is regarded out of purview of rape or is an exception of 375 of IPC, on condition if wife is above 15 years.⁵ Prior to 2013 Amendment in IPC, punishment awarded for establishing non-consensual sexual contact with wife when wife is 12-15 years age was of two years or fine which was significantly less for crime committed. Rape was constituted only if wife was below 12 years at age. The 2013 Amendment removed this vague provision but still marital rape was not included in list of offences under the Act and preferred to stick with the earlier legal strategy. It's worth noting points laid down by Justice Verma Committee Report that recommended "exemption from rape in marriage is required to be scrapped as an exception" in the IPC⁶.

The recognition of the principle of exercising prerogatives and supremacy by the husband over his wife, even if she is well below the actual age of marriage determined by legal statute, is a distinguishing feature of Indian law. The quantum decided as legal consequence for considering forced sex of husband with wife as rape if she is aged 15-18 years is not the same as forced sex by husband if wife is above 18 years. It is not applicable to later condition. Section 376-B of the IPC provides only legal defence for legally divorced or separated partners who are not living together. All other important, major marital rape constituting offences remains outside the scope of the law.

The court held in Haree Mohan Mythee case that the only situations under which the law acknowledges the invasion of utter right belonging to husband to make sexual contacts are when, due to some physical condition etc., it becomes extremely dangerous for women and serious consequences such as death may result.

It will be right to understand that Indian Law not taken any steps to safeguard the right of women who are married in terms of physical or sexual autonomy. No ray of hope can be realized to introduce changes to existing laws and give diligence to marital rape for adult married women. Also, penalties imposed for marital rape of minor women is comparatively not accurate. Although no rationale was mentioned, 156th Report of Law Commission came up with suggestion to increase the bar given in exception from 15 years to 18 under 376 of IPC. The ousting deemed unwonted for exception envisaged in section 375 of IPC by 172nd Report of the Law Commission because Commission had a view, it might constitute undue intervention in the marital relationship. However, the wife's age limit be increased to 16 years from the present 15 years through Commission suggestion.

5.1. *Equal Protection of the Law*

Article 14 guarantees citizen with fundamental right ensuring equality in context to law along with equal protection to be established via laws. The Article doesn't always require persons to get equal weightage in all cases, but demands "equals of society must not get partial or biased or unequal treatment". In 1952, the Supreme Court set out the two criteria of a proper classification:-

⁵ See Explanation II of section 375 of IPC, 1860.

⁶ *Supra note 3*

- Classification must be premised on a discernible difference that distinguishes those who are 'grouped together' from those who are not.; and
- The distinction must have a logical with the purpose desired by the legislation to be accomplished.

Therefore, any statute that defines a classification that is unnecessary or irrelevant for legislative purpose is considered to be against the Constitutional structure. It will continue to rely on judge-made techniques to determine what is fair, and with each future group of justices, a new understanding of law and appropriateness will emerge, making the Constitution a living book. It is critical to oppose gender categorization in order to alleviate gender-biased inequalities.

Offence of rape is penalized under section 375 of the IPC and, woman is given protection against her will and without her permission, from forceful sexual intercourse. The section thus establishes protection from criminal attacks w.r.t. women bodily autonomy, further reflects state's responsibility to penalize people who violate their bodies' autonomy. It is moreover justified to interpret right of choice of woman is safeguarded under Section 375 of the IPC as an independent and also rape is regarded as a violent criminal offence that disregards rights given to the women.

Exemption II goes against the spirit of 375 of IPC and it snatches the protections from married woman within this section founded simply on her relationship status being married. It seems like protection against forceful sexual activities is never demanded by married women from State like other citizens because of classification and unequal treatment given to married women. Furthermore, the presumption derives out of fact in which wife is considered to have given permission w.r.t. establish intercourse, that also irrevocable with spouse during a marriage. Such an inference is argued to be false, unreasonable and not founded on an intelligible distinction.

Married women, like males and single women, deserve legal defense in her personal lives. Except one sentence when remaining portion of section 375 focuses on the security of a victim's right from rape offence, why such defense was abolished in regards to married women and emphasis of legislation shifts completely to safeguarding of the rape culprits. It snatches the independence of choice for woman along with depriving her from bodily autonomy and her personality effectively. As nutshell, the categorization is superfluous, incomprehensible, and contrary to the intent of mentioned Article.

5.2.Right to Life and Personal Liberty

Article 21 of Constitution in India furnishes person with right to life including personal liberty. It has awarded the status of protector to safeguard all types of right which relates to protection of human life along with liberty since judgement of *Maneka Gandhi v. UoI* came into light. Therefore, expanding description of phrase 'life' and hence be summarized appropriately in the words of Field J. In celebrated judgement of *Munn v. Illinois*, it got further reiterated by Apex Court in India during *Bandhua Mukti Morcha v. Union of India* matter, stating life implies 'something more than existence of animal.'

While looking into the expanded horizon of Article 21, exception of rape i.e. marital rape was found host of rights that stems out of right for life as well as personal liberty under abovementioned article. More clear-blattant breach of said article cannot be established. Marital rape per se includes and destroys privacy rights, right for good health, right to bodily self-determination, etc. All these rights have been reiterated by Supreme Court under Article 21 several times.

5.3.Right to Live with Human Dignity

According to Article 21 of the Constitution, the definition of the right to life diffuses into the right to live with human dignity and all that accompanies it, namely the basic necessities of life, such as sufficient nutrition, clothing and shelter and facilities for reading, writing and exhibiting oneself in various ways, free movement, mixing and mixing with fellow human beings. Most important stem of Article 21 is to have a life with dignity because it enables a person to live life on their conditions.

In a series of cases, the Supreme Court ruled that the crime of rape violates the right to life and the right to live with human dignity of the survivor of the crime of rape. The Supreme Court has ruled that under the Indian Penal Code, rape is not merely an offence, but is a crime against society in whole. Rape contributes less to a sexual crime than an act of violence humiliating and degrading women. Therefore, the doctrine of marital exemption also defeats the right of a woman to live with human dignity. Any statute that legitimizes the right of a husband to force a wife against her will to enter into sexual intercourse without her permission is contrary to the very nature of the right to life under Article 21 and is therefore unconstitutional.

5.4. Right to Sexual Privacy

The Indian Constitution does expressly state the right to privacy. However, in a variety of cases, the Supreme Court has acknowledged that, under Article 21, the right to privacy is constitutionally protected. Under Article 21, the right to privacy requires a right to stay alone even when surrounded by people. The right to privacy is violated by any sort of forceful sexual intercourse. It is claimed that by pressuring her to enter into a sexual relationship against her will, the doctrine of marital immunity from rape violates the right of a married woman to privacy.

In the case of the State of Maharashtra v. Madhkar Narayan, the Supreme Court held that every woman is qualified to have sexual privacy and that it was not open to any and all persons to invade her privacy as per their wishes or for their pleasure. The Supreme Court expanded this right to privacy to workplaces in the case of Vishakha v. State of Rajasthan. In addition, there is privacy right to enter into a sexual relationship, including inside a marriage, along the same line. The marital exception doctrine violates this right to a married woman's privacy by decriminalizing rape within a marriage, and is therefore unconstitutional.

5.5. Right to Bodily Self-determination

While the right over bodily self-determination has not been specifically acknowledged under Constitution, such a right endures within the wider scope of Article 21 reflecting right to life and personal liberty. The theory of self-determination furnishes the right that where the matter draws direct connection to one's body or well-being, that individual holds whole sole decision making power for such matters. It establishes the direct proportionality of more intimate option with more authority of person to take decision. Concurrence to have sex is regarded as one of the most personal along with being intimate options woman withholds for herself. It has become means of self-expression and self-determination. Legal statute that seizes such right to express and withdraw such necessary consent certainly dispossesses an individual of the constitutional right to bodily self-determination.

This is argued that marital exemption directly deprives right to self-determination of a married woman in relation to one of most private and personal decisions, i.e., consent to establish sexual relationship, which is ultimately unconstitutional.

5.6. Right to Good Health

In addition, grievance posed by married couples against this exemption of rape implies that it is contradicting the right acquired by victim to maintain good health. The right to good health is enlightened in Article 21 as one of integral segment of the right to life. Right of having good health is an important factor for continuous growth in terms of an individual's intellectual and spiritual health. This right is vital for an individual's continued intellectual and spiritual wellbeing. Marital exemption violates a victim's rights to good health because it causes both physical and psychological damage. It undermines the psyche of a woman and draws her into emotionally profound suffering. There is a claim that is sufficiently compelling that close sexual contact may lead to transmission of sexually transmitted disease (STD) if victim is allegedly subjected to marital rape.⁷

Indeed, doctrine creating the marital exemption from rape, in addition to breaching the doctrine of classification referred to in Article 14 and the separate rights resulting from Article 21, also fails to justify the

⁷ Idib

bar of 'just, fair and rational' law and thus, becomes contrary to Articles 14 and 21 of Indian Constitution. The Supreme Court has ruled, in countless cases, that every 'rule' subject to review pursuant to Article 14 or Article 21 should comply with the reasonableness test to be designated in accordance with the Constitution. The doctrine claiming marital exemptions, from rape if even passes the classification test laid upon under Article 14, it is also expected to withstand the bar of so-called 'just, equitable and rational' law. It must be possible to say in Article 21 that, by means of a legally-based mechanism, an individual might be divested of his or her rights to life with liberty. Similarly, it is under jurisdiction of Constitution when doctrine of marital waiver has gained the accent of "law-based action." This, being an old as well as wretched claim, and in some cases the Apex Court ruled that 'Article 21 demands that no-one, except by law-determined process, be deprived of life or personal freedom and this should be just, fair and reasonable other than simply being just arbitrary, foolish or just fanciful'.

CONCLUSION

Marital rape is a common issue concerning married women for decades. Despite this, marital rape has received little attention in the rape and domestic abuse literature. Experiences of victims to such rapes has proven to be invalidated, be it moral and psychological terms. As a result, for the victims of this abuse, the spread of invalidation has had and remains to still have significant consequences.

It was concluded that as earlier, Indian laws failed to provide women with adequate protection because women are still regarded as husband's property and he has complete legal authority to rape her, and no recourse has been given. A wife though can file a sexual assault complaint against her husband if he engages in aggressive and non-consensual intimacy, but there is no inclusion in our penal laws related to marital rape. It prima facie compromises Article 14 & 21 of Indian Constitution. In Indian legal system, the non-criminalization of marital rape is the main topic of concern. The judiciary should take measures to safeguard women in order to protect them. Married women should be adequately taken care of and not exposed to sexual harassment or abuse. Therefore, in dealing with sexual harassment, this section has a rather narrow view and, as such, there is no legal framework to support married women so far.

One of the worst forms of sexual assault happening in the family level is marital rape. Because of the essence of activity including related private matters of relationship, patriarchal demonization is internalized, and more consistently in time, women victims do not come forward with their misery because of their economic dependence and emotional attachment. Patriarchal trend followed under societies have enabled the legal structure of country to become blind and not consider the circumstances and misery of women facing abuse. Even law has shown no efforts to consider marital rape as a crime by offering any punishments. Regardless of women's social status, age, race, marital rape happens in all kinds of marriages. There is very restricted study evidence available on the topic and a lack of knowledge presents a significant barrier to the government and the legislature making sufficient efforts to provide an appropriate legal platform to resolve the concerns of the traumatized women victim.

Hence, The Supreme Court has admitted the rape of a minor wife and issued a landmark judgment recommending the constitutional provision to declare child marriages illegal. The limited and discriminatory elaboration of rape clearly shapes it as a baseless declaration by enabling a marital rape as exception. Further, providing numerous wrongdoer or offenders of sexual assault with an escape route and the pursuit of justice remains unquenched.