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Marital Rape: A Hideous Countenance of India's Criminal Justice System

SAFA NAVAS[1]

ABSTRACT

"Marriage is for woman the commonest mode of livelihood, and the total amount of undesired sex endured by women is probably greater in marriage than in prostitution."[2]

- ***Bertrand Russell, Marriage And Morals***

The submission by the Central Government to the Delhi High Court has reignited the debate over whether Marital Rape, an explicit exception for the definition of Rape under S.375 of the Indian Penal Code, 1860, should be recognized as a crime. Discussions are heating up with the female rights activists fighting for removal of the exception and criminalizing forced sex by a man over his wife of 18 years or above, while the Central Government has been vouching for preservation of family ideals. This remnant of India's colonial past is haunting it, while its colonizers have already abrogated it by the decision of the House of Lords in R v R[3] *where Lord Lane of the Court of Appeal observed that "the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable." The Hon'ble Chief Justice of India (Retd.), Deepak Mishra, in his judgement of Joseph Shine v Union of India,*[4] *opined, "And, it is time to say that a husband is not the master." With this view endorsed by the Supreme Court in mind, many are holding their breaths to know the Judiciary's stand on the issue.*

The paper studies the legality of Marital Rape in India through its history, legislations and the numerous precedents referring to the issue.

Keywords*- Marital Rape, criminalization, forced, marriage, Judiciary.*

I. THE MILIEU OF INDIA'S LAWS ON CRIMINALIZATION OF NON-CONSENSUAL SEX

Sexual violence against women have always been a predicament for India, a country which ironically has been worshipping female goddesses since time immemorial. While India tops

[1] Author is a student at School of Legal Studies, CUSAT, India.
[2] BERTRAND RUSSEL, MARRIAGE AND MORALS 101-02 (Taylor & Francis Ltd 1929).
[3] (1992) 1 FLR 217.
[4] (2018) SCC OnLine SC 1676.

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the list of Reuters list of World's 10 most dangerous countries for women,[5] it evokes a myriad of arguments against the list, since India is one of the countries that allow up to Death Penalty for offences against women.

Section 375 of the Indian Penal Code, 1860, after its amendment in 2013 has identified not only sexual intercourse but also sexual acts without consent of the woman as the offence of Rape. The decision of the Supreme Court in *Sakshi vs Union of India &Ors.*[6] also paved way for the Law Commission 172nd Report, 2000, which recommended for the sexual offence of rape construed as gender neutral, and that "sexual intercourse" as contained in Section 375 of the Indian Penal Code includes all forms of penetration such as "penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration". Though gender neutrality is yet to be established, the inclusion of sexual acts other than intercourse has been made by the Amendment of 2013.

While the conventional crimes against women are unambiguously identified by the Indian Penal Code, 1860, the Exceptions to Section 375 of the code, even after the 2013 amendment based on the J S Verma Committee report, specifies that "Sexual intercourse or sexual acts by a man, with his own wife not being under fifteen years of age, is not rape". This exception of Section 376 was problematic, considering there were no rational basis for limiting the age of consent for a married woman at 15 years.

And the Supreme Court, though quite late, has now interpreted the exception as "Sexual intercourse or sexual acts by a man, with his own wife not being under eighteen years of age, is not rape", thanks to the 2017 decision of *Independent Thought v Union of India*.[7]

The idea of marital rape derives from the Common Law of Coverture,[8] according to which a wife has been deemed to be consented at the time of marriage to have intercourse with her husband at his whims and this consent could not be revoked any time after the marriage. Though the provision is an invention of its colonial past, Indian customs and traditions as well as the religious personal laws insists that denying sex goes against the paradigm of the duties of an `ideal wife'. This view was endorsed by the majority of the Parliamentarians, during the discussions on the recommendations of the Law Commission of India 172nd report, 2000, the

[5]. Thomas Reuters, *'Fact box: Which are the world's 10 most dangerous countries for women?'*, THOMAS REUTERS FOUNDATION, (28 June 2018), https://www.reuters.com/article/us-women-dangerous-poll-factbox/factbox-which-are-the-worlds-10-most-dangerous-countries-for-women-idUSKBN1JM01Z .
[6] (2004) A.I.R. 3566 (SC).
[7] (2017) 10 S.C.C. 800.
[8] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 421(Clarendon Press at Oxford, 1765-1769).

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J S Verma Committee report, 2013 as well as the

Parliamentary Standing Committee on Home Affairs 167th report, 2013, all of which sought to criminalize marital rape.

II. SPOUSAL RAPE AND THE COMMON LAW

The marital rape exemption was first discussed in Britain in 1736 in Matthew Hale's History of the Pleas of the Crown wherein he stated, "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 herself up to her husband, consent which she cannot retract".[9]

The exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of *R v R*.[10] The leading judgment, unanimously approved, was pronounced by Lord Keith of Kinkel. He opined that the contortions being performed in the lower courts in order to avoid applying the marital rights exemption were indicative of the absurdity of the rule. The bench held that "the fiction of implied consent has no useful purpose to serve today in the law of rape" and that the marital rights exemption was a "common law fiction" which had never been a true rule of English law. This affirmed similar judgments in Scotland and that of the Court of Appeal in *R v R*.[11]

Section 147 of the Criminal Justice and Public Order Act, 1994 made analogous amendments to the statutory laws applicable.

In *R v W*,[12] the Court ruled as

"It should not be thought a different and lower scale automatically attaches to the rape of a wife by her husband. All will depend upon the circumstances of the case. Where the parties are cohabiting and the husband insisted upon intercourse against his wife's will but without violence or threats this may reduce sentence. Where the conduct is gross and involves threats or violence the relationship will be of little significance."

As a consequence of the decision in *R v R*,[13] The cases *SW v UK*[14] and *CR v UK*[15] came up before the European Court of Human Rights. The applicants who were convicted of rape and attempted rape of the wives argued that their convictions were a retrospective application of

[9] 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN: IN TWO VOLUMES 628 (reprint ed. 1736).
[10] (1991) UKHL 12.
[11] (1991) 2 W.L.R. 1065; (1991) 2 All E.R. 257.
[12] (1993) 14 Cr App R (S) 256.
[13] (1992) 1 FLR 217.
[14] (1995) 21 EHRR 363.
[15] (1995) ECHR 51.

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the law, thus violating Article 7 of the European Convention on Human Rights. However, the contentions were dismissed by the Court, ruling that "the criminalization of marital rape had become a reasonably foreseeable development of the criminal law in the light of the evolution of social norms"; and that "the Article 7 does not prohibit the gradual judicial evolution of the interpretation of an offense, provided the result is consistent with the essence of the offense and that it could be reasonably foreseen".[16]

At present, marital rape is a form of sexual assault under UK law, as outlined by the Sexual Offences Act 2003. It is also be considered as a type of domestic violence and may also include allegations of assault or that the accused has acted in a controlling and coercive manner.

III. DEFENSE OF MARRIAGE – A PERMIT TO RAPE IN INDIA

The Indian Penal Code, 1860, codified as per the recommendation of the First Law Commission of India, 1834 under Lord Macaulay, is still in existence. The Code, after numerous amendments, have recognized Rape as an offence under Section 375, which along with the provision relating to its punishment in Section 376 of the Code went through an overhaul through the Criminal Law (Amendment) Act, 2013.[17] This amendment brought a considerable change not only in Indian Penal Code, but also in the Code of Criminal Procedure, 1973 as well as the Indian Evidence Act, 1872 when it extends to the offence of rape. But even after the huge revamp of the Criminal laws, it is to be noted that Exception 2 of the Section 375 of the Indian Penal Code, 1860 provides that "Sexual intercourse or sexual acts by a man, with his own wife not being under fifteen years of age, is not rape". A coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of age is kept out of the scope of the crime of rape in its strictest definition, thus reinstating a husband's marital right of non-consensual or undesired intercourse with his wife.[18] This means that the Indian Criminal Justice System has yet to identify marital rape as an offence.

The existence of Section 498A of the Indian Penal Code, 1860 was used as an argument against the institution of marital rape as an offense. But this provision does not actively criminalize rape, instead it denotes to those acts physically or mentally endangers the woman.

Rape was one of those offences that the Judiciary were prejudiced against during criminal adjudication. This can be seen in the judgements prior to 1983, where habituation to sex, non-raising of alarm, no injury marks, etc. translated into consent.[19] It was only in 1991 the character

[16] M MOLAN & M MOLAN, CASES & MATERIALS ON CRIMINAL LAW (Routledge-Cavendish 2007).
[17] Sec 9, Act 13 of 2013, Acts of Parliament, 2013.
[18] KI Vibhute, *"Rape within Marriage" in India: Revised*, 27 Indian Bar Review 167 (2000).
[19] Tukaram and Another v State of Maharashtra 1979 AIR 185: (1979) 1 SCR 810.

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and morality of the rape victim was not considered as consent by the Judiciary. In *State of Maharashtra v Madhukar N Mardikar*,[20] the Supreme Court had ruled that the "… unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes."

The controversial decision of *Tiara and Another* v *State of Maharashtra*[21] resulted in the Criminal Law (Amendment) Act, 1983.[22] This amendment brought about changes including the constitution of new offences under S. 376 A, 376 B, 376 C, and 376 D- all of which were aggravated forms of Rape. It also recognized publication of the identity of the victim of Rape as a distinct offence under S. 228A of the Code.

S. 376 A of the Code stood as "Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend up to two years and shall also be liable to fine." This was the first discussion of marital rape, which was based on the Common Law decision of *R v Clarke* [23] where a husband was found guilty of raping his estranged wife, as it was held that a Court order for non-cohabitation had revoked the consent. This provision rendered the application of the exception restricted.

In *The State of Karnataka v Krishnappa*,[24] the Supreme Court held that "[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female." The Supreme Court in *Suchita Srivastava v Chandigarh Administration*,[25] drew parallels between the right to make choices related to sexual activity and rights to personal liberty, privacy, dignity and bodily integrity under Article 21 of the Constitution. From the creative interpretation of *Govind v State of M P*[26] and *Kharak Singh v State of U P*[27] we can see that forced sexual cohabitation is a violation of that fundamental right.

The decision of *Sakshi v Union of India and Ors*[28] paved way for the 172nd Report of the Law Commission of India (on review of rape laws, March 2000). The Hon'ble Supreme Court had ordered for a Law Commission report based on the issues raised by Sakshi, an NGO working on violence against women. They put forth a suggestion to the Law Commission, based on the

[20] (1991) AIR 207 SC: (1991) 1 SCC 57.
[21] (1979) AIR 185: (1979) 1 SCR 810.
[22] Act 43 of 1983, Acts of Parliament (1983).
[23] (1949) 2 All ER 448: 33 Cr App R 216.
[24] (2000) 4 SCC 75.
[25] (2009) 9 SCC 1.
[26] (1975) AIR 1378 SC.
[27] (1963) AIR 1295 SC.
[28] (2004) AIR 3566 SC:2004 (2) ALD Cri 504.

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draft forwarded, to delete the exception to Section 375 of Indian Penal Code, 1860 which granted marital immunity to rape, among others. This suggestion was first of its kind; one which the Law Commission did not agree with as it "may amount to excessive interference with the marital relationship".

The Parliament amended Indian Evidence Act to insert Section 146, that states that a rape victim can no longer be questioned about her sexual history and 'general immoral character', rejecting what the courts had condoned in the rape cases since the 1980s.

Protection of Women from Domestic Violence Act 2005, acknowledges sexual abuse as domestic violence and provides civil remedies comprised of protection orders, judicial separation, and monetary compensation. But the lacuna of the legislation is in the nature of the remedy available- the Act provides for civil remedy, which does not necessarily protect women from marital rape.

The Delhi Gang Rape of 2012, one of the most notorious sexual crimes in India, threw light upon the lacunae in the criminal justice system to combat sexual offences. In the resulting case of *Mukesh & Anr v State for Nct of Delhi & Ors*,[29] senior lawyer Indira Jaising was appointed by the Court as amicus curiae while considering a group of petitions on safety of women following the Delhi Gang Rape of 2012. She made the need to make marital rape a criminal offence a key recommendation in the brief that she submitted. "Forced sexual intercourse within marriage should be brought within the ambit of definition of rape under Section 375 IPC, by deleting Exception 2," her recommendation states.

The J S Verma Committee was constituted on December 23, 2013, headed by Justice J.S. Verma, former Chief Justice of India, to recommend amendments to the Criminal Law in order to ensure quicker trial as well as enhanced punishment for criminals accused of committing sexual assault against women. Justice Leila Seth, former judge of the High Court and Gopal Subramaniam, former Solicitor General of India formed the rest of the committee members. The committee submitted its report on January 23, 2013 with recommendations for changes in the laws relating to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms.

The committee recommended changes to Section 375 of the Indian Penal Code, 1860 so as to include all forms of penetration under the offence of Rape. The report suggested that the existence of relationship is not a valid defense against the sexual violation. It also recommends the inclusion of marital rape as an offense, thus eliminating the Exception 2 of Section 375 of

[29] (2013) 2 SCC 587.

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the Code.

It further recommended introducing 'widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship'. It also put forth proposals for acid attack victims, establishment of rape crisis cells, medical examination of victim etc.

However, the Parliament, while considering the report, ignored and rejected the part which suggested for criminalizing spousal rape and arbitrarily took up certain recommendations, which fulfilled only part of the committee's goals. Furthermore, the Criminal Law (Amendment) Act, 2013, which brought in key changes in rape laws, did not touch upon the Exception 2 to the Section 375 of the Indian Penal Code, 1860, thus rendering the committee's report impracticable.

The discussion of the Parliamentary Standing Committee on Home Affairs 167th report, 2013 exposed the mindset of the ministers as well as the parliamentarians on the debate of criminalization of marital rape.

The Committee noted that 'somewhere there should be some room for wife to take up the issue of marital rape'. It was also felt that 'no woman takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent forever'. India's then Minister of State for Home Affairs remarked on how marriage is a sacrosanct institution, maintaining that "the concept of marital rape, as understood internationally, is not suitable in the Indian context, due to illiteracy, poverty, social customs and values, religious beliefs and the fact that Indian society treats marriage as a sacrament".[30]

IV. INDEPENDENT THOUGHT V UNION OF INDIA[31] – A LONG AWAITED BEACON OF CHANGE

The bench consisting Supreme Court Justices Madan B. Lokur and Deepak Gupta considered the Public Interest Litigation by Independent Thought, an NGO, and examined the legality of Exception 2 of Section 375 of the Indian Penal Code 1860. It sought answer for whether sexual intercourse by a man upon his wife between ages of 15-18 years would be rape, considering the age of consent as specified in the provision to be 18 years of age.

Justice Madan B Lokur was of the opinion that the exception carved out by the IPC creates "an unnecessary and artificial distinction between a married girl child and an unmarried girl child

[30] WOMEN SUBJECTED TO MARITAL RAPE (Apr. 29, 2015), https://pib.gov.in/newsite/PrintRelease.aspx?relid=119938.
[31] (2017) 10 SCC 382.

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and has no rational nexus with any clear objective sought to be achieved". The artificial distinction, he observed, is arbitrary and discriminatory and is definitely not in the best interest of the girl child.

While it was cautioned that the bench has not considered, not even collaterally, the issue of marital rape on adult women, it is interesting to note that both the judgements of the bench mention the J S Verma Committee's recommendation to delete the exception of marital rape. Justice Lokur's judgement comments on the manner in which the law in the United Kingdom and the United States recognize marital rape as a crime. It referred to *CR v UK*,[32] which concluded that a rapist remains a rapist regardless of his relationship with the victim, and the US Supreme Court's remark in *Eisenstadt v Baird* [33] that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." On a combined reading, Justice Lokur opined, it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. However, that was the extent of the bench's foray into the legality of the exception of marital rape. While it is disheartening to see that despite having a clear opportunity to invalidate marriage as an exception for rape the Apex Court failed to utilize it, the judgement has paved way for a potentially extensive deliberation on the issue by the Judiciary in the pending public interest litigation filed by RIT Foundation and the All-India Democratic Women's Association.

V. RIT FOUNDATION V UNION OF INDIA[34]- THE GAME CHANGER

RIT Foundation, an NGO and the All-India Democratic Women's Association challenged the constitutionality of Section 375 before the Hon'ble High Court of Delhi on the grounds that it failed to adequately protect married women from being sexually assaulted by their partners.

The Centre vide its affidavit stated that criminalizing marital rape would "destabilize the institution of marriage" and could become an easy tool to "harass husbands". Also, an NGO Men Welfare Trust, opposed the plea to make marital rape an offence. When the NGO's representatives argued that a wife is already protected from marital sexual violence under Prevention of Women from Domestic Violence Act, harassment to married woman, sexual intercourse with wife without her consent while she is living separately and unnatural sex laws, the Court responded that, if that is so, Section 375 of the IPC should not be an exception. The Bench, constituted by then Acting Chief Justice Gita Mittal and C Hari Shankar, commented,

[32] (1995) ECHR 51.
[33] 405 U.S. 438 (1972).
[34] Writ Petition (Civil) 284 of 2015.

"Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party." This observation questions the presumption of "consent" in a marital relationship.

Conversely, the Delhi High Court refused to entertain the petition of Adv. Anuja Kapur seeking directions to the Centre to frame guidelines for registration of FIR for marital rape as also laws for making it a ground for divorce. The bench consisting Chief Justice D N Patel and Justice C Hari Shankar disposed of the PIL expressing that the Court cannot direct framing of laws as it is the domain of the legislature and not the judiciary.[35]

With the hearing of the PIL filed by RIT Foundation is still in motion, it will be entertaining to see the proceedings before the Hon'ble High Court of Delhi, which will be revered as a part of the history that acknowledged women's rights in India.

VI. CONCLUSION - CRIMINALIZATION OF MARITAL RAPE: AN UNFULFILLED REVERIE

Sanctity of marriage has always been considered to be paramount to Indian Society. The submission by the Central Government as well as that of the Men's Welfare Trust echoes this philosophy of sanctity of marriage that prevails in the minds of an average Indian. It also resonates the nightmares suffered by married Indian women, who is left with no option but to either claim compensation or to continue suffering, since marital rape is not even a ground for divorce. The only available remedy at present is civil in nature, which is insignificant compared to their woes. And therefore, it is imperative to recognize spousal rape as a crime so as to reduce rates of its occurrence.

Though criminalization does ensure deterrence, it is also crucial to provide sex education as well as to redefine the gender roles. For this, not just the State, but also the individuals must ready themselves to accept and acclimate to change. Only then shall the idea of man as the master of woman scale down.

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[35] PTI, *Delhi HC Declines Plea to Direct Centre to Make Marital Rape a Ground for Divorce*, (July 9, 2019), https://www.news18.com/news/india/delhi-hc-declines-plea-to-direct-centre-to-make-marital-rape-a-ground-for-divorce-2223529.html.

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