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Scope of Penalising Marital Rape in Indian Jurisprudence

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ABSTRACT

The concept of rape within marriage agonises the wife to the very core. It is an unbearable thought affecting the mind of the women that they must face such a dreadful act and still have to silently suffer through it. Though this silence is not self-enforced. The lack of laws and adverse social approach regarding the issue have helped this evil to hide behind the curtain of marriage. Today, everywhere we talk about women empowerment. Even, women have been provided many rights through various constitutional and legislative enactments based on 'principles of equality'. But in a patriarchal society like India, would women be empowered in real sense without criminalising marital rape! The concept of 'rape is rape, irrespective of the relationship between the victim and the perpetrator' ought to be recognised by law.

Keywords: *Marital rape, Principles of equality, Criminal jurisprudence of marital rape, Marital Rape Exception (MRE), Marital rape in India, Penalising marital rape.*

I. INTRODUCTION

Rape per se is a crime against women that violates her dignity and self-respect. And when it occurs within the four walls of family which is supposed to be the safe sanctuary for her, it would be at its worst manifestation. It reduces the status of the woman to a mere object of sexual gratification.

Marriage is an institution that allows a man and a woman into a family life. It is an institution of love and trust. Under the wedlock a man and a woman are socially permitted to have children implying the right to have sexual intercourse. Under the marriage the husband is duty bound to give due respect to the dignity of his wife. It generates confidence in wife that her husband will provide her safety and respect her dignity. But when the husband commits unwanted or forceful intercourse with her, it breaks her confidence as well as breaches her trust.

II. CONCEPT OF MARITAL RAPE

The word 'rape' has been derived from the term 'rapio' that means 'to seize'.² Therefore, this

¹ Author is an Assistant Professor at Kingston Law College, Barasat, West Bengal, India.

² Dr. Bhavish Gupta & Dr. Meenu Gupta, *Marital Rape: - Current Legal Framework in India and the Need for*

heinous crime may be called an oppressive seizure, or ravishment of a woman without her consent, or by fear, fraud or coercion.

Marital rape is a forceful sexual intercourse committed by one spouse against the other without her consent, or by force, fear, or fraud. It may also be called as spousal rape.

Usually no one can think of rape with reference to marriage. When one mentions the word rape, generally the tendency is to think that the accused must be a stranger. Even a woman finds it difficult to believe that a husband can rape his own wife as he is availing his conjugal rights. It appears that a woman has no right to her own body, and also her will is subject to that of her husband. It is the most irritated form of masochism as it is hidden behind the iron curtain of marriage. Women are usually conceptualized as property of husband after being married. And therefore, the act of rape within marriage is not recognised as an offence as a man cannot be regarded to violate his own property.³

(A) Kinds of marital rape

Like other forms of sexual assaults, marital rape can also be evident in several ways. Some common types of marital rapes are:

- 1. Force only marital rape:** It involves the use of physical force or violence to compel the wife to engage into sexual activity against her will. Battering may not be there. But it includes intimidation or physical abuse to avail the consent of the wife.
- 2. Battering rape:** Under this type, women experience physical violence as a precursor to or conjunction with sexual intercourse. Some are battered during the sexual intercourse, or the sexual intercourse may follow a physically violent episode.
- 3. Obsessive marital rape:** This kind of rape involves perverse sexual acts. Compulsive sexual acts are often forced upon the wife, which are usually driven by the husband's obsession. It is also labelled as 'sadistic' rape.⁴

(B) Effect of marital rape

Like other forms of sexual assaults, marital rape may also have severe and lasting physical and psychological effects on the survivors. Some potential consequences may include;

- 1. Physical effects:** The victim of marital rape experiences injuries to private organs, bruising, torn muscles, lacerations, soreness, or even broken bones, black eyes, bloody

Change, 1 GJLS 16, 17 (2013), <https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf>

³ *Id.*

⁴ Saurabh Mishra & Sarvesh Singh, *Marital Rape — Myth, Reality and Need for Criminalization*, PL WebJour 12, (August 9, 2023, 3.12 AM), <https://www.ebc-india.com/lawyer/articles/645.htm>

nose, and knife wounds depending upon the force used during the sexual violence. It may also cause acute sexually transmitted disease. Other gynaecological consequences may include miscarriage, stillbirth, bladder infection, along with other reproductive health complications.⁵

- 2. Psychological effects:** The survivors face psychological consequences as well. It includes anxiety, trauma, depression, post traumatic stress disorder, intense fear, shock, and suicidal ideation.⁶ As the victim of marital rape suffers through helplessness, fear and confusion, it creates a negative impact upon the natural intimacy and communication under the marriage.

III. STATUS OF MARITAL RAPE IN INDIA

1. Societal Approach

Law evolves from society and in our rural and semi-urban societies, marriage is still seen as the most effective tool to exempt the perpetrator of rape from being punished. In many cases, a raped woman is forced to marry her violator for saving him from the clutches of law. Marriages are often referred to as ‘licensed sex’ amongst teens and young adults.

For a large part of Indian society, marriage is not a romantic, egalitarian partnership entered by choice, but an understanding between two families promising economic and social security to a woman in exchange for sexual availability and fidelity, housekeeping, childbirth, and care. Rituals around the consummation of marriage, the episode of ‘suhaag raat’ and familial demands for progeny immediately after marriage make sexual intercourse the fulcrum of a married couple’s relationship with each other. The issue of con-consensual sex within marriage is therefore not even seen as a valid issue and is hardly discussed within families. With such a social negation in place, registering a complaint of sexual assault against a husband in India is very difficult. And even if a wife does so, there are no adequate laws on the issue to protect her.

2. Legislative Approach

Indian law does not recognize marital rape as an offence. Section 375 of Indian Penal Code, 1860 defines rape but there is no indication of penalising marital rape, instead Exception 2 to the aforesaid Section allows a man to rape his wife who is not under 15 years of age.⁷

In 2005 the Protection of Women from Domestic Violence Act was passed which although does

⁵ *Id.*

⁶ *Id.*

⁷ Indian Penal Code, 1860, §375, No. 45, Acts of Parliament, 1860 (India)

not consider marital rape as a crime, it does consider it as a form of domestic violence.⁸

Today's raging debate on marital rape in India echoes arguments that go back more than 128 years ago to the Phulmani case. In this case Hari Mohan Maitee was committed for trial to the Sessions Court at Calcutta on 6 July 1890. Maitee, a man of about thirty-five, was accused of having caused the death of his child bride Phulmani in 1889 through brutal sexual intercourse. Justice Wilson, who presided over the case, declared that Phulmani was eleven years old and, therefore, Maitee could not be tried for rape but only for the lesser charge of committing a 'rash and negligent act', the Exception to the Fifth Clause of Section 375 of the Indian Penal Code, introduced in 1860, declared that 'sexual intercourse by a man with his own wife not being under ten years of age is not rape'.⁹

Scoble, the Law Member, introduced a proposal that drew upon the recommendations that had been formulated earlier by the Bombay reformer, Dyaram Gidumal, for raising the age of consent from 10 to 12 years in the Fifth Clause and its Exception in Section 375 of the Indian Penal Code.¹⁰

But some of India's most prominent leaders opposed the measure, and the Age of Consent Act was passed only in 1891, after much acrimony and argument. Reflecting on this debate, Dr. B.R. Ambedkar said in 1943 that "It is impossible to read the writing of those who supported orthodoxy in their opposition to the Age of Consent Bill, without realising the depth of the degradation to which the so-called leaders of the peoples had fallen... Could any sane man, could any man with a sense of shame, oppose so simple a measure? But it was opposed...."¹¹

3. Various law Commission and Committee Reports on Marital Rape:

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) in February 2007 recommended in respect of India that the country should 'widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape...'¹²

The first report to deal with this issue was the 42 Law Commission Report. This report made two important suggestions. First, it suggested that in instances where the husband and the wife

⁸ The Protection of Women from Domestic Violence Act, 2005, §3, No. 43, Acts of Parliament, 2005 (India)

⁹ MRINALINI SINHA, *COLONIAL MASCULINITY: THE 'MANLY ENGLISHMAN' AND THE 'EFFEMINATE BENGALI' IN THE LATE NINETEENTH CENTURY* 143 (Manchester University Press 1995)

¹⁰ *Id.*

¹¹ Kanika Sharma & Aashish Gupta, *When even rape is legal*, THE HINDU (August 9, 2023, 5:59 AM), <https://www.thehindu.com/opinion/op-ed/when-even-rape-is-legal/article7298898.ece>

¹² Kim D, *Marital rape immunity in India: historical anomaly or cultural defence?*, SPRINGER LINK, (August 9, 2023, 6:32 AM), <https://link.springer.com/article/10.1007/s10611-017-9705-3>

were judicially separated, the exception clause must not apply. It stated that, “in such a case the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right.” The second suggestion made in this report was regarding non-consensual sexual intercourse with women aged between twelve and fifteen. It stated that the punishment for such offences must be put into a separate section and preferably not be termed as rape. The defining feature of the second suggestion is the reluctance to classify marital rape as rape, but at best as a lower form of sexual misdemeanour.¹³

The 172 Law Commission Report directly dealt with the validity of the exception¹⁴ clause. It argued that when other instances of violence by a husband toward wife was criminalized, there was no reason for rape alone to be shielded from the operation of law. The Law Commission rejected this argument since it feared that criminalization of marital rape would lead to “excessive interference with the institution of marriage.”¹⁵

Justice Verma Committee was constituted to recommend amendments to the Criminal Law to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its report on January 23, 2013. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry whether the complainant to the sexual activity, the relationship between the victim and the accused should not be relevant.¹⁶

IV. JUDICIAL APPROACH TOWARDS MARITAL RAPE

In **Emperor vs. Shahu Mehrab**, the husband was convicted under section 304A Indian Penal Code for causing death of his child-wife by rash or negligent act of sexual intercourse with her.¹⁷

In **State of Maharashtra vs. Madhukar Narayan Mandikar**, the Supreme Court has referred to the right of privacy over one's body. In this case it was held that a prostitute had the right to refuse sexual intercourse if she was unwilling. It is to observe that the Court has conveniently put wife out and yet has not given her privacy over her own body where women who have been

¹³ Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), <http://lawcommissionatindia.nic.in/1-50/report42.pdf>

¹⁴ *Supra* 6

¹⁵ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

¹⁶ www.presindia.org/parliamenttrack/report-summaries/justies-verme-committe-report-summary-2628/

¹⁷ *Emperor vs. Shahu Mehrab*, AIR 1917 Sind 42

subjected to rape by stranger have that right as rape is criminalized but not marital rape.¹⁸

In **Sree Kumar vs. Pearly Karun**, the wife was subjected to sexual intercourse without her will by her husband when she went to live together with her husband for 2 days as outcome of settlement of divorce proceeding. The Court held that the offence under section 376A, IPC will not be attracted as the wife is not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will.¹⁹

In **T Sareetha vs. T Venkata Subbaiah**, the issue was that whether Section 9 of the Hindu Marriage Act, 1955 which provides for Restitution of Conjugal Rights violates Articles 14, 19, and 21 of the Constitution of India. In this case the husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. Since the provision of RCR transferred the right of choice to indulge in sexual intercourse from the woman to the state, the Andhra Pradesh High Court held RCR as unconstitutional. The Court also agreed that no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act.²⁰

In **Harvinder Kaur vs. Harmander Singh**, the Delhi High Court was also confronted with a petition challenging the constitutionality of the RCR. In this case the Court asserted that, “The introduction of Constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in relationships which should be obviously as far as possible protected from possibilities of that kind. The domestic community does not rest on contracts sealed with seals and sealing wax, nor on constitutional law. It rests on that kind of moral cement which unites and produces ‘two-in- one-ship’”.²¹

In **State vs. Vikash**, the Special Fast track Court in Delhi ruled that forcible sexual intercourse between husband and wife cannot be termed rape. The court had said that “The prosecutrix and accused being legally wedded husband and wife, the prosecutrix being major, the sexual intercourse between the two, even if forcible, is not rape and no culpability can be fastened upon the accused”.²²

¹⁸ State of Maharashtra vs. Madhukar Narayan Mandikar, AIR 1991 SC 207

¹⁹ Sree Kumar vs. Pearly Karun, 1999 (2) ALT Cri 77

²⁰ T Sareetha vs. T Venkata Subbaiah, AIR 1983 AP 356

²¹ Harvinder Kaur vs. Harmander Singh, AIR 1984 Del 66

²² State vs. Vikash, SC No. 1/14. Unique Case ID No. 02405R0349722013, (SPECIAL FIRST TRACK COURT), DWARKA COURTS, NEW DELHI.

In this way the judgments of various courts created a private sphere where Fundamental rights cannot be enforced.

Nimeshbhai Bharatbhai Desai vs. State of Gujrat

In this case, the question to be decided was that whether a wife can initiate prosecution against her husband for unnatural sex under Section 377 of the Indian Penal Code Condemning marital rape the Court termed it as a 'disgraceful offence' Justice Pardiwala put out a succinct definition of marital rape as "unwanted intercourse by a man with his wife obtained by force, or physical violence, or when she is unable to give consent. It is a nonconsensual act of violent perversion by a husband against the wife where she is abused physically and sexually". The Court is essentially going against the prevalent judicial consciousness around the subject and extracts marital rape out of the myth of matrimonial privacy and in the public sphere.²³

Independent Thought vs. Union of India

A writ petition was filed by Independent Thought, a non-governmental organization, in 2013 by stating that Section 375 is heinously violative of Articles 14, 15 and 21 of the Constitution of India, and that consent for any sexual relationship should be increased to eighteen, respective of marital status of the girl child.²⁴

In this case, the Centre told the Supreme Court bench consisting of Justices Madan Lokur and Deepak Gupta that it stands by Exception 2 of Section 375 of the IPC to provide protection to the husband, his minor wife and the sanctity of their conjugal relationship of marriage independent Thought, in its petition, had challenged Exception 2, which states that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape However, there is a discrepancy within the same provision. It states that a man is said to commit rape who has sexual intercourse with a woman with or without her consent, when she is under 18 years of age. Independent Thought's plea to the judiciary was simple. It urged that all minors be protected from rape under Section 375, irrespective of marital status.²⁵

This discrepancy puts girls, who are between the ages of 15 to 18 and are married, in a legal vacuum where they are unprotected by law from intrusive sexual intercourse. Ideally, there is no rational nexus in classifying girls under the age of 18 into two groups-those who are married, and those who are not. Moreover, the Protection of Children from Sexual Offences Act, 2012

²³ Nimeshbhai Bharatbhai Desai vs. State of Gujrat, R/CR MA/26957/2017

²⁴ Independent Thought vs. Union of India, W.P. (Civil) No. 382 of 2013, decided on October 11, 2017

²⁵ Deya Bhattacharya, *SC says marital rape can't be considered criminal: Tradition doesn't justify assault, child manage*, FIRSTPOST, Oct 11, 2017, <http://www.firstpost.com/india/se-says-mantal-rape-cant-be-considered-criminal-tradition-doesnt-justify-assault-child-marriage-2917749.html>

(POCSO) states that a girl under the age of 18 years is a child and hence, does not have the capacities, physical emotional or mental, to take an informed decision about engaging in sexual intercourse. The petition stated: “If this is the object for increasing the age of consent to 18 years in 2013, then marriage of girl at the age of 15/16/17 years does not make the girl mature enough (mentally or physically) for the purpose of consent. Thus, the law is ex-facie discriminatory as the classification has no rational nexus with the object.”²⁶

On October 11, 2017, the Supreme Court held that sex with one's wife who is below 18 years of age is rape, whether the minor gives consent or not. Earlier, it was criminal only to have sex with a child bride below 15 years old and men were protected via Exception 2 which allowed sex with their minor wives if they were between 15 and 18 years of age, even if there was no consent. In effect, the IPC legally allowed a man to rape his underage wife if she was between 15 and 18 years old. Now, a man can rape his wife only if she is above 18 years of Age.²⁷

RIT Foundation vs. Union of India

In this case three petitions were filed against the Union of India by an NGO, the RIT Foundation, the All India Democratic Women's Association (AIDWA) and marital rape victim Khusboo Saifi. They challenge section 375, exception 2 as unconstitutional, inhuman and out of sync with the world, where a range of countries from Nepal in South Asia to the United States and Britain criminalize marital rape.²⁸

The petitions argue that the exception, by discriminating against married women, violates Articles 14 and 15 of the constitution, which prohibit discrimination without an intelligible basis, Article 21, which guarantees the right to life and personal liberty, and Article 19 which should guarantee the freedom to express or withhold sexual desire in all consensual contexts.²⁹

In this case the Delhi High court provided a split verdict. Justice Rajiv Shakdher opined that impugned provision i.e. Exception 2 to Section 375, as it creates an arbitrary and unreasonable classification, is violative of articles 14, 15, 19(1)(a), and 21 of the Indian Constitution. He also stated that the concept of having conjugal rights does not give the husband to have unrestrained authority for having sexual intercourse with his wife without her consent. About creating a new offence, he stated that there is no need to create any new offence in this regard as the offence of rape is already in existence. He only advocated for declaring MRE as unconstitutional and

²⁶ *Id.*

²⁷ Urmila Pullat, *The Legs' Dissonance Between Marriage and Rape in India*. THE WIRE, Oct 14, 2017, <http://thewire.in/186792/the-legal-dissonance-between-marriage-and-rape-in-india/>

²⁸ Mallory Moench, *High Court Questions Centre on Marital Rape: How Do You Justify The Exception?*, THE WIRE, July 19, 2017, <https://thewire.in/159074/inarital-rape-exception-high-court>

²⁹ *Id.*

likewise he struck down the impugned provision in his judgment.

On the other hand, Justice C. Hari Shankar opined that there is an 'intelligible differentia' between sexual intercourse within marriage and the same with a stranger, and therefore the MRE cannot be said to be violative of Article 14. He stated that the protection of the institution of marriage is needed for the public and social interest, and the possibility of calling the husband rapist would damage the very institution of marriage. He further discussed about the legitimacy of the child born out of non-consensual sexual intercourse between husband and wife. In his views he strongly advocated against declaring MRE unconstitutional and he suggested for other remedies available to the wife under civil and criminal statutes like Sections 304B, 306, 377 and 498A of the IPC and Section 3 of the Dowry Prohibition Act, 1961 and also for seeking divorce on the ground of cruelty. In his judgment he dismissed the petitions without costs. And they both agreed to grant leave to appeal to the Supreme Court in the present matter as it involves interpretation of substantial questions of law.³⁰

V. CONCLUSION AND SUGGESTIONS

Rape is the most heinous crime committed against women Rape has been penalised under Indian law, but not marital rape. Article 14 of the Indian Constitution talks about 'equality before law, and equal protection of laws' that means every woman should be treated equally in the eye of law. But at the same time Section 375 of the Indian Penal Code, 1860 categorizes women based on whether they are married or unmarried. It provides protection to all unmarried women but only to the married women of below the age of 15 years. Now the question is, if in case of a married woman of below 15 years of age, forceful sexual intercourse by her husband should be regarded as rape, then why should the same act be not regarded as rape in case of other married women of above 15 years of age?

Further Article 21 of the Constitution guarantees 'right to life and personal liberty', the interpretation of which includes right to live with human dignity. When a woman is compelled to involve in a sexual intercourse against her will by her husband, and the law does not provide her any remedy, then how should her right to live with human dignity be maintained? If rape can be criminalized, then why should not marital rape? The married women are also human being. They also have right over their own body.

Article 19 guarantees 'right to freedom of speech and expression'. By virtue of this right and as well as it being a part of basic human rights, all married women have right to express or

³⁰ RTI Foundation v. Union of India, W.P.(C) 284/2015 & CM Nos.54525-26/2018

communicate their reluctance to a forceful sexual intercourse committed by their husbands.

Women are not equally treated on the issue of marital rape. Exception 2 to Section 375 IPC is a clear violation of Articles 14, 19 and 21 of the Indian Constitution.

From the above discussion, the following points may be suggested for implementation-

- 1) The discrimination in Section 375, IPC should be deleted.
- 2) Marital rape should be covered under the anti-rape laws in India.
- 3) Marital rape should be brought under the purview of the definition of rape.
- 4) Women, victimized by marital rape, will have to be provided protection through public institutions.
- 5) Victims of marital rape should be allowed to raise the issue before appropriate authority.
- 6) Appropriate complaint mechanisms should be created.
- 7) Proper medical treatment and rehabilitation measures should be provided to the victims of marital rape.
- 8) Proper maintenance should be provided to the victim of marital rape.
- 9) In case the victim of marital rape has children out of such marriage, proper custody and maintenance should be provided to such children.
