

CRIME AGAINST WOMEN: MARITAL RAPE

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ABSTRACT

In India violence against women is at its peak stage. The dread of having to face it and still have to silently suffer through it is an unbearable thought that affects the psyche of the women. The impact and consequences of violence against women are said to be most devastating when such the perpetrator of such violence is the husband – the man who is supposed to be the protector and provider of the woman. The woman has been given the right to fight for protection when the violators are outside entities, but when the perpetrator of her bodily integrity is her own husband, whom she married with all the pomp and show, such protection is withdrawn by the legislators. The sexual violence is inflicted by the husbands in the name of irrevocable consent to matrimonial cohabitation. A woman (wife) has to have sex with her husband irrespective of her will, consent, health etc is absolutely unacceptable to a civilized society. There is no justification or applicability of the notion of marital exemption in the current times. The society and the legislature do not even recognize such sexual violence by the husbands, which seriously impinges upon the status of women in the society and maintains the status quo of the women's subjugated position in the family as well as the society. It is true that mere criminalization of marital rape in India will not end the problem, but it sure is an important step towards changing women's experience of sexual violence in a marriage. It is high time that the concept of "rape is rape, irrespective of the relationship between the victim and the perpetrator" is recognized by the law and put strictly to force.

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Concept:-

Any kind of unwanted sexual intercourse or penetration, obtained by force, threat of force without the consent of wife is known as marital rape. It is an act of aggression and violence which has become a major social and political issue directly connected with imbalances of power arising between husband and wife, wherein the wife is denied for her self-determination. The initial rationale for the marital exemption clause is based on Sir Matthew Hale's statement made in 1678 that "the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

Marital rape invokes feeling of emotional despair and victimization in a spouse which faces forced sexual intercourse with their spouse and it is not a one time experience which makes it impossible for the spouse to get rid of such feelings to feel normal ever after such experience.. This can prove to be destructive for the spouse mental and emotional state of mind and can aggravate her sufferings with no legal recourse available to her to come out these trappings.

Evidence in marital rape cases:-

In order to obtain justice in marital rape cases, the main issue to be proved before the courts is that the intercourse was initiated by force on the spouse and to impose allegations on strong evidences being produced for the same.

Section 102 of Indian Evidence Act 1872 talks about that the burden of proof lies on that person who would fail if no evidence at all were given on either side. Therefore the burden of proof will lie on the spouse who will allege that he/she is a victim of marital rape.

Apart from the provision, following are evidences which can prove the brutality upon a spouse:-

1. Physical injuries to vaginal and anal areas, lacerations, bruising.
2. Cruel conduct in sexual intercourse e.g. battery, mental torture
3. Evidences of damages to their genitals and rectum leads to the strong indicative proof that women are subjected to very violent rapes.
4. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be.
5. Nail marks, scratches and physical injuries around penis area in case of male victims.

Legislative Developments:-

For past thirty years, when the Indian Penal Code was enacted in 1860, there was no significant change in rape laws. Number of cases were reported in Bengal where the wife died due to consummation of marriage. The most notable case was *Queen Empress v/s Haree Mohan Mythee*². This case tells the pathetic story of Phulmonee Dasse, who was eleven years and three months old when she died as a result of rape committed on her by her husband. The medical evidence showed that Phulmonee had died of bleeding caused by ruptured vagina. In this case, rape of wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her.

The then MLA Hari Singh Gour introduced a Bill in 1924, which proposed for amending Section 375 of IPC for increasing the age to 14 years in case of both marital and extra-marital cases. The Bill was referred to Selection Committee, which made an alteration by reducing the age from 14 to 13 years in marital rape. On September 1, 1925 Sir Alexander Muddiman had introduced a Bill fixing 14 years the age in extramarital cases and 13 years in marital cases, which culminated into Amendment Act, 1925. The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasised in section 376 by incorporating the words – “unless the woman raped is his own wife and is not under twelve years of age”. In which case the punishment was diluted by prescribing a years, stood mitigated to a large extent by the diluted punishment provided by amended section 376.

The question of age of consent was not considered as finally settled and Hari Singh Gaur again introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases respectively. It was followed by the appointment of Age of Consent Committee, which reviewed the prevailing situations and suggested for few amendments.

² ILR 1891 Cal 49

The committee was of the opinion that the amended law was ineffective due to the nature of the offence, particularly in case of marriage as consummation necessarily involves privacy. The prevalent view among the awakened sections of society was that prohibiting the marriage of a girl under a particular age would be a better measure than to increase the age of consent for sexual intercourse. The dissenting group among these classes felt that law was partly futile because it afforded no protection to the girls over 13 years, who need it on account of their tender age. The Committee recommended the use of term 'marital misbehaviour' instead of rape in marital cases. The offence of marital misbehaviour would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehaviour in Chapter XX of IPC and section 375 and section 376 of the IPC should be confined to rape outside the marital relation. The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend upto one year or fine or both, where wife was between 12-15 years.

The Present Scenario (Latest Judgements):-

The exception to Section 375 of IPC embodies that sexual intercourse by the husband is not a rape, when the women is married and not less than 15 years of age³. But before the amendments made in 2013, when the wife was between 12-15 years, the drastically reduced quantum of punishment was provided, extending to two years and fine⁴. It amounts to rape, when the wife had been below 12 years of age.⁵ The amendment of 2013 has withdrew away with this clause but at the same time has not recognized the concept of marital rape and has chosen to continue with the earlier legal approach.

The distinctiveness of Indian laws is due to the adoption of primacy and supremacy of husband's right over that of the wife, even if she is well below the age of marriage. The legal proposition of not treating forcible intercourse with a minor wife (15-18 years) as rape would surely be not to consider such intercourse with an adult wife as

³ The Indian Penal Code, 1860, S.375. ,Exception 2

⁴ S-376 (1), IPC. In other rape cases, the minimum mandatory punishment is 7 years, which extend upto 10 years or for life

⁵ S-376 (2) (F), IPC, 1860.

marital rape at all. The only instance, which law covers is that of legally separated couples not living together under section 376-B of IPC and the vast bulk of marital rape remains out of the scope of law.

The Gujarat High Court in the case of *Nimeshbhai Bharatbhai Desai v/s State of Gujarat*⁶ gave relief to a man accused of raping his wife, on the grounds that there is no law criminalising marital rape. Justice JB Pardiwala, hearing a petition filed by a doctor seeking to quash the FIR registered against him by his wife, observed that marital rape shall be criminalised. Justice Pardiwala observed, "The husband cannot be prosecuted for the offence of rape punishable under Section 376 of the IPC at the instance of his wife, as marital rape is not covered under Section 375 of IPC which provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape. However, a wife can initiate proceedings against her husband for unnatural sex under Section 377 of the IPC."

The court observed that though a husband had the right to have sex with his legally wedded wife, she was not his property and it should not be without her consent. The Delhi Government contended before the Delhi High Court that the act of marital rape has already been criminalized as Section 498-A of the Indian Penal Code 1860, and hence there was no need of creating a new offence penalizing the same. Further, The Petitions also challenge Section 376B of the IPC, which says that whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment for a term which shall not be less than two years, but which may extend to seven years, and shall also be liable for fine. This punishment has been challenged as being arbitrary and unconstitutional.⁷

Law Commission Reports:-

1. The 42nd Law Commission Report:-

The Law Commission of India in its 42nd report put forth the necessity of excluding marital rape from the ambit of Section 375. In their words naturally the

⁶R/CRIMINAL MISC. APPLICATION NO.26957 OF 2017

⁷ <https://www.livelaw.in/marital-rape-disgraceful-offence-scarred-trust-confidence-institution-marriage-gujarat-hc/>

prosecutions for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of section 375 and not call it rape even in technical sense. The punishment for this offence may also be provided in a separate section.⁸

A number of women organizations and the National Commission for Women have demanded the deletion of the exception clause in Section 375 of the Indian Penal Code which states that “sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”. However, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India reviewed all existing legislation and schemes pertaining to women. Of the four recommendations made by the Task Force vis-à-vis rape under the Indian Penal Code, the most significant pertains to the definition of rape. It took the position that the definition of rape ought to be broadened to include all forms of sexual abuse. The Law Commission’s proposed definition of “sexual assault” could be adopted in place of the existing definition of rape in Section 375 IPC as “it is wide, comprehensive and acceptable”. However, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition.

2. The 172nd Law Commission Report:-

The report, which was passed in March 2000, had made following recommendations⁹:-

- a) ‘Rape’ should be replaced by the term ‘sexual assault’.
- b) ‘Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- c) In the light of *Sakshi v/s. Union of India and Others*¹⁰, ‘sexual assault on any part of the body should be construed as rape.

⁸ Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> (last visited on December 15, 2017).

⁹ Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on February 6, 2016).

¹⁰ 2004 (5) SCC 518

- d) Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- e) A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
- f) Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- g) Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On reasoning, section 376 A was to be deleted.
- h) Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

Doctrine of Marital Exemption in light of Constitution of India:-

It will be seen as to how the doctrine of marital exemption to rape fails to meet the standard of conformity with the provisions of Articles 14 and 21 of Constitution of India.

a) Equal Protection of the Law:-

Article 14 provides fundamental right of equality before the law and equal protection of laws for every Indian citizen¹¹. But this article is subjected to restriction that every individual shall not be treated equally in every perspective, but requires that the equals within a society are not treated unequally and that the unequals of the society are not treated equally. Thus any law which makes a classification which is unnecessary or irrelevant to the purposes of the legislation is deemed to be outside the framework of the Constitution. In the case of *State of West Bengal v/s Anwar Ali Sarkar*¹², the Supreme Court laid down two major requisites for a valid classification:-

- 1) The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others.

¹¹ Constitution of India, Article 14

¹² AIR 1952 SC 75, 80

- 2) The differentia must have a rational relation to the object sought to be achieved by the legislation.

Before applying the test of equality, reasonable care must be taken so that the stereotyping enjoined by the patriarchal ideology does not predetermine what is reasonable classification.

Married women, exactly like men and unmarried women need protection of the law in their private spheres. While the rest of the section 375 of the IPC is interested in protecting the right of a victim from the crime of rape, such a right is withdrawn on marriage and the focus of the law instead shifts to protecting, the perpetrator of the crime of rape. Thus such classification is unnecessary, unintelligible, thereby violating the mandate of Article 14.

b) Right to Life and Personal Liberty:-

Article 21 of the Indian Constitution provides for the right to life and personal liberty. Post the case of *Maneka Gandhi v/s Union of India*¹³, it has become the source of all forms of rights aimed protection of human life and liberty. The meaning of the term 'Life' that 'Something more than mere animal existence' given by Field J. was affirmed in the Supreme Court case of *Bandhua Mukti Morcha v/s Union of India*¹⁴.

In light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression 'right to life and personal liberty' under Article 21. There can not be a more obvious and blatant violation of Article 21. The marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time.

c) Right to live with human dignity:-

As said in the case of *Francis Corallie Muin v/s Union Territory of Delhi*¹⁵, the concept of right to life under Article 21 of the Constitution includes the right to live

¹³AIR 1978 SC 597

¹⁴AIR 1984 SC 802, 811

¹⁵AIR 1981 SC 802

with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human being.

The Supreme Court in the case of *The Chairman, Railway Board v/s Chandrima Das*¹⁶ held that the offence of rape violates the right to life and right to live with human dignity of the victim of the crime of rape. Also the Supreme Court held in case of *Bodhisattwa Gautam v/s Subhra Chakraborty*¹⁷ that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society. Rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating a women. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes against the very essence of right to life under Article 21 and is hence unconstitutional.

d) Right to Sexual Privacy:-

The right of privacy under Article 21 includes a right to be left alone. The Supreme Court in cases of *Kharak Singh v/s State of UP*¹⁸, *Govind v/s State of Madhya Pradesh*¹⁹ and *Neera Mathur v/s LIC*²⁰ held that right to privacy is constitutionally protected under Article 21. Any form of forceful sexual intercourse violates the right of privacy.

The Supreme Court in the case of *State of Maharashtra v/s Madhkar Narayan*²¹ has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v/s State of Rajasthan*²² the Supreme Court extended the right of privacy to workplaces. Further, along the same line that there exists a right of privacy to enter into a sexual relationship even within a marriage. By decriminalizing rape within a

¹⁶AIR 2000 SC 988

¹⁷AIR 1196 SC 922

¹⁸AIR 1963 SC 1295

¹⁹AIR 1975 SC 1378

²⁰(1992) 1 SCC 286

²¹AIR 1991 SC 207

²²AIR 1997 SC 3011

marriage, the marital exemption doctrine violates this right of privacy of a married woman and is hence, unconstitutional.

e) **Right to bodily Self Determination:-**

The Constitution does not expressly recognize the right of bodily self-determination, such a right exists in the larger framework of the right to life and personal liberty under Article 21. The right of self-determination is based on belief that the individual is the ultimate decision maker in matters closely associated with her/his body or well-being and the more intimate the choice, the more robust is the right of the individuals to be the authors of their own fate. It is submitted that the marital exemption doctrine effectively deprives a married woman her right to bodily to self-determination in respect of one of the most intimate and personal choice, i.e., consent to sexual intercourse, and is hence, unconstitutional.

f) **Right to Good Health:-**

Another argument against the doctrine of marital exemption to rape is that it violates the right to good health of the victim of such crime. The Supreme Court in the case of *CESC Ltd. v/s Subhash Chandra*²³, held that the right to good health has been recognised as a part of right of life under Article 21. Such a right is necessary for the continuous intellectual and spiritual well being of a person. The marital exemption doctrine violates the right to good health of a victim as it inevitably causes serious psychological as well as physical harm in the process. It further destroys the psychology of a woman and pushes her into a deep emotional crisis. A more compelling argument can be made in case where forceful sexual intercourse in a marriage leads to the communication of a sexually transmitted disease (STD) to the victim of crime of rape.

The marital exemption doctrine effectively deprives a married woman of her right to good health and is hence, unconstitutional.

The doctrine of marital exemption in order to become constitutional, shall pass the test of reasonability in order to be included within the framework of the Constitution.

²³ (1992) 1 SCC 441

Other judgements:-

1. In *Emperor vs. Shahu Mehrab*²⁴, 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.
2. In *Saretha vs. T. Venkata Subbaih*²⁵, the Andhra Pradesh High Court held: “There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person.”
3. The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*²⁶, has referred to the right of privacy over one’s body. In this case it was decided that a prostitute had the right to refuse sexual intercourse. What is sad to know is that all stranger rapes have been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby envisaging the right to withhold consent and refuse sexual intercourse.
4. In *Sree Kumar v/s Pearly Karun*²⁷, the Kerala High Court observed that because the wife was 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 and without her consent, offence under Section 376A, IPC will not be attracted.. Hence the husband was held not guilty of raping his wife though he was de facto guilty of doing so.

Conclusion:-

Marital rape is one of the worst types of sexual violence occurring at the level of family. It shall be criminalized in India by applying an individual right’s approach to violence against women. Various Indian women organisations have been successful in achieving public awareness, but still it has not been fully criminalized by abolishing the distinction between marital rape and stranger rape. Marital rape can only be

²⁴ AIR 1917 Sind 42

²⁵ AIR 1983 AP 356

²⁶ AIR 1991 SC 207

²⁷ 1999 (2) ALT Cri 77, II (1999) DMC 174

criminalised if the legislators as well as the society acknowledges women's individual rights within the marriage.

Though a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, inquiry or matrimonial relief, what is needed is the incorporation of the principle of liability for marital rape in our penal laws. Not only child-brides, but all wives need legal protection from rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person must be recognized. There is a need for acknowledging a woman as a human being, instead of making her victimized and giving her respect and the dignity she deserves.