



IS MARRIAGE A LICENCE TO RAPE?

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“Truth: Rape does indeed happen between girlfriend and boyfriend, husband and wife. Men who force their girlfriends or wives into having sex are committing rape period. The laws are blurry, and are in some countries marital rape is legal. But it still is rape.” – Patti Feuereisen

Rape is not merely a physical assault- it is often destructive of the whole personality of his victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The rapist is not always an outsider, many a times it is known and the most secured one is husband. The institution of marriage is considered as a certificate to do sexual intercourse with a wife by her husband, but when this is without wife’s consent it is marital rape.¹

The patriarchal framework of society provided rape the shield of the wedding right to spouse even without the consent of other partner. By this we are noiselessly tolerating that ladies are only a protest of sexual satisfaction of her better half.

In almost 106 countries marital rape has been impeached and has been documented as

desecration of human rights. Marital rape is illegal in 50 American states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland, and Czechoslovakia. It was declared illegal and a criminal offence in 2006 in Nepal. Many countries have considered it as a special offence and some has categorised it in general rape clause. In many jurisdictions across the world, including India, marital rape is not recognised as crime by law and society. Even when countries recognise rape as a crime and prescribe penalties for the same, they exempt the application of that law when a martial relationship exists between victim and perpetrator. This is often called the ‘marital rape exception clause’. Across these jurisdiction there are four justifications advanced for not criminalising marital rape. The first justification stemmed from the understanding of the wife as subservient to her husband.² In such scenario, it would not be possible to fathom a husband raping his wife since the husband was master to his wife, and enjoyed privileges over her body. Along with this the unity theory also existed which rested on the idea that after marriage, the identity of the women merged with that of her husband and whatever he wants, must get it though there is no will of other spouse.³

The United Nations has also recognised the concept of marital rape and has termed it as violence in its Declaration on the Elimination of Violence against Women 1993. It affirms that violence against women violates, impairs or nullifies women’s human rights and their exercise of fundamental freedoms. The

¹ P Ramanatha Aiyar’s concise Law Dictionary (Lexis Nexis 5th Edn.).

² Rebecca M. Ryan, *The Sex Right: A legal History of Marital Rape Exemption*, 20 LAW AND SOCIAL ENQUIRY, 944(1995).

³ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) HARVARD LAW REVIEW, 1251-1256(1986).



Declaration gives a broad definition to the word 'violence' and includes psychological harm inflicted on women. Violence against women according to Article 2 of the Declaration would encompass but not limited to: physical, sexual and psychological violence occurring in family including battery, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women. Non spousal violence and violence related to exploitation.

Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that despite various instruments, extensive discrimination against women continues to exist. It recalled that the discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 titled, "The elimination of violence against women", recommended that marital rape should be criminalized.⁴

India and Marital Rape

In 21st century where practicality has been prioritise over customs and traditions, marital rape is still not an offence in India. Enactments in regards to marital rape in India are either non-existent or esoteric and dependant on the understanding by the Courts.⁵ Section 375, Indian Penal Code, 1860 enumerates the offence of rape. The

word 'rape', which is derived from Latin word *rapio*, means 'to seize'. Thus, rape literally means a forcible seizure.⁶ Section 375 defines rape and its Exception 2 says that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not a rape. The exception clause does not state any reason for the exclusion. In case of *Independent Thought v. Union of India*⁷, Supreme Court held that sexual intercourse or sexual acts by a man with his own wife, the wife not being under **eighteen** years of age, is not rape. "It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of the constitution can be preserved and protected and perhaps given impetus", Justice Lokur said in his judgement. This landmark judgment criminalised marital rape with minor girl but still the concept of same in adult marriage is ambiguous.

The Protection of Women from Domestic Violence Act, 2005 gives protection to women against violence occurring within the family and for incidental matters but this Act also does not cover marital rape because legislators believe that marriage is a sacrosanct and inclusion of this concept will destroy the fundamentals of marriage institution. The provisions of the Act and of section 489A of IPC are considered as appropriate to provide remedy to the victims of domestic violence and it is believed they are given protection from offences like marital rape which is termed as form of cruelty. For the relief wife can demand

⁴ Mamta Rao, *LAW RELATING TO WOMEN AND CHILDREN* 48 (Eastern Book Company 3rd Edn. 2012).

⁵ Sangamithra Loganathan, *Marital Rape*, available at <http://legalserviceindia.com> (last visited June 7, 2019).

⁶ K D Gaur, *TEXTBOOK ON INDIAN PENAL CODE*, 881 (Universal Law publishing 16th Edn. 2016).

⁷ *Independent Thought v. Union of India*, (2017) 10 SCC 800.



divorce or legal separation in specified legislations, and there is no specific mention of marital rape as a crime or offence.

Statistics of marital rape in country by NFHS 4: At an all India level, 9 out of every 100 men agree to the fact that a husband has the right to use force and have sex with his wife even if she doesn't want to. The survey further noted that, at an all India level, 11 out of every 100 men agree to the fact that a husband has the right to refuse financial support to his wife if she refuses to have sex with them. Five out of every 100 women in India reported that their husband had physically forced them to have sexual intercourse with him even when they didn't want it. The NFHS 4 reported that 36.5% of the ever-married women in the age 15-49 years who have experienced sexual violence ever suffered from cuts, bruises or aches due to the sexual violence committed by their husband on them.⁸

The data collected from the survey clearly highlights the fact that marital rape is in existence and just because there is no law for the same it goes unreported and justice is denied to the victim. The data also highlights the fact that physical force is not always the precondition of offence and mental agony or psychological pressure may create undue advantage on the wife to submit herself to her husband. It is true that inspite of stringent rape laws in country, many cases are unreported but those few who report their case gets justice many a times and thus law is always necessary no matter how many people resort to it for the remedy.

Steps towards criminalising marital rape

The idea of criminalising marital rape is not new and was in mind of the law makers from very starting and many reports of Law commission portrays the fact that law regarding this matter is necessary and present laws are arbitrary. Even the chairman of drafting committee of Constitution, Mr. B. R. Ambedkar has expressed his view to legitimise marital rape, as he was ever of the future condition which will overpower the society, but legislators denied his expressions.

The Law Commission was directly faced with the validity of Exception clause in the 172nd Law Commission Report⁹. Here it was argued that the explanation (2) to draft section 375 (which says that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, does not amount to sexual assault) should be deleted. Forced sexual intercourse by a husband with his wife should equally be treated as an offence just as any physical violence by a husband against the wife is treated as an offence. Following the same logic, they submitted that the words "unless the person subjected to sexual assault is his own wife and is not under 15 years of age in which case he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both" in section 376(1) of the Law Commission's draft [adaptation of the existing section 376(1)] should also be deleted. Section 376A should also be deleted, they said, on the same reasoning.¹⁰

⁸ National Family Health Survey 4, 2015-2016.

⁹ Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 200), available at:

<http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on June 8, 2019).

¹⁰ Id.



Justice Verma Committee was constituted under Justice J S Verma (Retd.) who advocated the criminalisation of marital rape. 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 about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.¹¹ This report had twofold recommendation, primarily of deleting the exception clause and secondarily of not providing defence of marriage to the accused, or making it relevant in matter of ascertaining the consent of spouse. The exemption given to marital rape, as Justice Verma noted, “Stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands”. Marital rape ought to be a crime and not a concept.

The judiciary is also not silent on the fact and in many case judges have expressed their opinion about criminalisation of the crime which is taking place in society then too ignored by everyone. Recently Gujarat High Court observed that the total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.¹²

Justice Pardiwala observed: “A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”¹³

Unanimously striking down provisions of adultery under the Indian Penal Code (IPC), the Supreme Court said that “curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to Constitutional values.” Without directly delving into the issue of marital rape, Justice D Y Chandrachud observed that “any legislation which results in the denial” of Constitutional guarantees to women “cannot pass the test of constitutionality”. “In adjudicating on the rights of women, the Court is not taking on a paternalistic role and “granting” rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink. Women are equal citizens of this nation,

¹¹ Justice J S Verma Committee, Reports of Committee on Amendments to Criminal Law (January 23, 2013) available at: <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary> (last visited June 8, 2019).

¹² Editorial, *Marital Rape Is Not A Husband's Privilege But A Violent Act And An Injustice That Must Be*

Criminalized: Gujarat HC, Live Law News Network: 2018 April 8, available at <https://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/> (Visited on June 10, 2019).

¹³ *Nimeshbhai Bharat Bhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732.



entitled to the protections of the Constitution. Any legislation which results in the denial of these Constitutional guarantees to women, cannot pass the test of Constitutionality,” he observed.¹⁴ These judgements portrays the mindset of the present day lawyers, bureaucrats and judges who understand the reality of existence of offence and utter need of making law.

Lacunae in present laws

Though many steps have been initiated by legislators as well as members of Judiciary in the Country, due to some loopholes in the organs of the government and ideologies of the society and the representatives of people that view to decriminalise the marital rape is still a dream today.

Article 14- Right to Equality – Article 14 embodies the general principle of equality before law and prohibits unreasonable discrimination between persons. Article 14 is the epitome of the noble ideals expressed in the preamble of the Constitution.¹⁵ According to Dr. Jennings “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and to be prosecuted for the same kind of action should be same for all the citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence.¹⁶

Exception 2 of Section 375 IPC violates the right to equality enshrined in Article 14 insofar as it discriminates against married women by denying them equal protection from rape and sexual harassment. The Exception creates two classes of women based on their marital status and immunizes actions perpetrated by men against their wives. In doing so, the Exception makes possible the victimization of married women for no reason other than their marital status while protecting unmarried women from those same acts.

Exception 2’s distinction between married and unmarried women also violates Article 14 insofar as the classification created has no rational relation to the underlying purpose of the statute. In *Budhan Choudhary v. State of Bihar*¹⁷ and *State of West Bengal v. Anwar Ali Sarkar*¹⁸, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. But Exception 2 frustrates the purpose of Section 375: to protect women and punish those who engage in the inhumane activity of rape. Exempting husbands from punishment is entirely contradictory to that objective. Put simply, the consequences of rape are the same whether a woman is married or unmarried. Moreover, married women may

¹⁴Sowmiya Ashok, *Supreme Court signal on marital rape: Consent, sexual autonomy in marriage are key values*, available at: <https://indianexpress.com/article/india/supreme-court-signal-on-marital-rape-consent-sexual-autonomy-in-marriage-are-key-values-5377501/> (visited on June 9, 2019).

¹⁵ Mamta Rao, *LAW RELATING TO WOMEN AND CHILDREN*, 66 (Eastern Book Company 3rd Edn. 2012).

¹⁶ Dr. J.N.Pandey, *CONSTITUTIONAL LAW OF INDIA*, 84 (Central Law Agency 54th Edn. 2008).

¹⁷ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India).

¹⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).



actually find it *more* difficult to escape abusive conditions at home because they are legally and financially tied to their husbands. In reality, Exception 2 encourages husbands to forcefully enter into sexual intercourse with their wives, as they know that their acts are not discouraged or penalized by law. Because no rational nexus can be deciphered between the classification created by the Exception and the underlying objective of the Act, it does not satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.¹⁹

Article 21- life and liberty – Article 21 protects the right to life and personal liberty of citizen not only from Executive action but from the Legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with, first, there must be a law and secondly, there must be a procedure prescribed by the law, provided the procedure is just, fair and reasonable.²⁰

In recent years, courts have begun to acknowledge a right to abstain from sexual intercourse and to be free of unwanted sexual activity enshrined in these broader rights to life and personal liberty. In *The State of Karnataka v. Krishnappa*, the Supreme Court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.”²¹ Later, in *Suchita Srivastava v. Chandigarh Administration*, the Supreme

Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.²² In the landmark case of *The Chairman, Railway Board v. Chandrima Das*²³, the Hon'ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman; it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

Most recently, the Supreme Court has explicitly recognized in Article 21 a right to make choices regarding intimate relations. In *Justice K.S. Puttuswamy (Retd.) v. Union of India*²⁴, the Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married women and unmarried women and there is no contrary ruling stating that the individual’s right to a privacy is lost by marital association. Thus, the Supreme

¹⁹ Sarthak Makkar, *Marital Rape: A Non-criminalized Crime in India*, Harvard Human Rights Journal, available at: <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/> (last visited: June 11, 2019).

²⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

²¹ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

²² *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India).

²³ *The Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465.

²⁴ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).



Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.²⁵

Even though the judiciary has from time to time has given the judgement in relation to marital rape phenomenon but still restricting itself from making a law and following this there are many petitions being filed in Delhi High Court to criminalise it. The above understandings will help the Court to decide the matter in case of RIT Foundation v. Union of India, which is still pending.

The sole reason for decriminalisation of marital rape is not only orthodoxial laws but also the ideologies of the government which does not want to bring change. The judiciary is not empowered to create a new law and for the same, work has to be performed by the legislators, but they are reluctant to do so. Until now, the stance of the Government has been that the term “marital rape” is oxymoron. The analogy which is sought to be applied by the government hinges on the statement that to get married is to give all time consent forever to sex with your spouse. What is in the mind of the legislature is that marital rape is completely unprovable. A wife accusing her husband of rape and pressing charges only demonstrates that the marriage is irrevocably over.²⁶ “It is considered that concept of marital rape, as understood internationally, cannot be applied in the Indian context due to various factors, including level of education, literacy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to

treat the marriage as sacrament” said Haribhai Parthibhai Chaudhary, a Union Minister, in written reply in the parliament, in 2015. Same argument was echoed by then Women and Children Minister Maneka Gandhi in written reply in Rajya Sabha in 2016. The government puts two arguments in its defence, firstly, marriage is sacred and its criminalisation will disbalance the Indian society and secondly, there would be large number of fake cases. These arguments are senseless as, if it is about the sacramental character of marriage then what is the justification of success of Protection of Domestic Violence against Women Act, 2005 which also interferes in the matters of marriage. On the other side every concept brings with it fraudulent cases no matter whether it is murder, dowry or any other case, but it does not mean that we will not make a law as it will bring dishonest cases. It is the duty of court to identify them and bring justice to the desired once by moulding the procedural laws.

Draft for Criminalisation of Marital Rape

The aim of this article is not only to discuss the concept and problem in the matter of marital rape, it also focuses on the solutions to the problem by giving an idea of law which can be eliminated to bring the Marital rape in ambit of a crime in IPC. For this there is need of changing both the Penal Code and Evidence Act to provide justice to the victim without any harassment and to limit the fraudulent cases which can come up to the court and overburden their work. 172nd Law Commission Report by Justice Verma also provided framework and he suggested not

²⁵ Supra Note 19.

²⁶ Editorial, *Guj HC: Marital Rape ought to be a Crime and not a Concept*, available at: [https://www.vakilno1.com/legal-news/gujarat-hc-](https://www.vakilno1.com/legal-news/gujarat-hc-marital-rape-ought-to-be-a-crime-and-not-a-concept.html)

[marital-rape-ought-to-be-a-crime-and-not-a-concept.html](https://www.vakilno1.com/legal-news/gujarat-hc-marital-rape-ought-to-be-a-crime-and-not-a-concept.html) (last visited June 11, 2019).



only deletion of exception clause but also to mention that presumption of consent in marriage is no defence.

A) there is need to specify that only removal of exception clause is not enough as it will be open to judiciary to deal with different cases accordingly and opposition from society will also influence the judgement.

B) The existence of marriage should not lead to presumption of consent. However in practicality, the judiciary will undeniably look at some threshold of force to answer questions of consent. There are three ways to treat consent while criminalising marital rape. The first would be to presume consent, and put the burden on the victim to rebut that consent. The second is to presume absence of consent, and the accused will have to establish consent. The third would be to draw out a system especially for cases of marital rape, and this will require a review of existing principles of evidence law.²⁷

Amendment in Section 375 by removing exception clause and adding explanation clause which would say that marriage is not exception in case of offence of rape and secondly under Evidence Act, there must be clause that in cases of marriage consent will not be presumed and the accused must prove that he had free consent of the victim. Moreover as presently if victim says that there is no consent the onus is on accused, this must not be the same in cases of marital rape in order to limit the cases which proceeds on basis of revenge in marriage relation and other circumstantial evidences must also be given by the victim like use of force adopted by accused and then only the

burden should shift on the defendant. This additional requirement will save the innocent husbands too and then only the law will be in equality to both the genders.

Conclusion

It is conceded that law on sexual offences is an alarming task and in country like India where there is so much class distinction between two genders there is utter need of criminalising such crimes which provides defence merely on basis of spousal relationship to do whatever one partner wants to do no matter what is the will of the other one. There is not only need to outlaw marital rape, but so to educate the masses about this crime as the real objective is to devaluate the myth that spousal relational is inconsequential. The time has come when various ally of this country should accept the fact that there is need to criminalise marital rape. After all “**NO MEANS NO**”, no matter where it is said. The law must uphold the bodily autonomy of all women, irrespective of their marital status. “**She is my wife**” should be no more a defence.

²⁷ Raveena Rao Kallakuru & Pradyumna Soni, *CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT*, 11 NUJS L. Rev. 1 (2018),

available at: <http://docs.manupatra.in/newsline/articles/Upload/8787A55C-D93F-4589-8A68-A9A032AF0E.pdf> (last visited: June 10, 2019).