

CRIMINALIZATION OF MARITAL RAPE IN INDIA

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ABSTRACT

In India rape while somebody is in a matrimonial relationship with each other is not considered as crime. The Indian Penal Code, 1860 only recognize Rape as offence under section 375 where rape has been defined under the Indian Penal Code, where rape as an offence has been defined, the intent of the legislature was to protect women against any forceable sexual intercourse which obviously would be against her consent and will and also to create a definition which would so far as possible would comprehensively cover the entire offence. It is beyond doubt that the Indian Judiciary in the previous years has delivered judgements which has remarkably deterred the commission of the offence and enhance the respect for women in the society. Marital Rape is an exception of rape as the commission of this offence has not been provided as an offence under the Indian Penal Code, as non – Consensual sex within marriage is not considered rape in India. In this paper we will pivot on Article 14 & 21 of the Constitution of India and nuptial rape is absolutely unconstitutional. Further we note the safeguards for women against marital rape and we complete on the note that criminalisation of rape in marriage is exclusively necessary and there is dire need of changes.

Keywords: Rape, Marital Rape, Violation of Fundamental Rights, Safeguards for Victim Women.

Introduction

Of all the offences, Rape is the most atrocious and brutal crimes of all times but still it has been a long struggle for it to be defined as an offence that affects the bodily integrity and sexual autonomy of women. Throughout most of the history women had no rights and were treated as mere property therefore rape was viewed as crime only in terms of property violation of another man.¹ With the evolving time, there was shift in the cultural beliefs and norms which lead to the significant change in the nature and manner of the offence. The Indian criminal law trace its origin from the English common law and it was in 1860 when first time section relating to anti-rape were mentioned in Indian Penal Code. The Indian Penal Code has a definition of rape which is of a comprehensive coverage of all acts of such nature but then also if we talk about marital rape there are many acts which are not an offence if committed by the husband of a married women committed against his own wife the only exception being that she should be above the age of 15 years. Therefore so far as the Indian law is concerned and the provisions under the Indian Legal system are concerned there is no legal remedy available to a wife against the rape committed by her husband. After the amendment of 2013 & 2018 there is a remarkable change in the contents of the definition of section 375. Thereafter whatever is an offence under section 375 of Indian Penal Code, can not be categorised to be an offence when it is committed by the husband against his own wife, the only rider being that she should not be below the age of fifteen years. Now if we comment upon the justified position in this regard, it would be very difficult to explain as to the same act when committed by a person against a woman is an offence but when it is committed by the husband is not an offence. The two situations though victimise the woman in the same manner and hurt her bodily dignity and integrity in the same way but for the latter there is no legal remedy available in the Indian Law, the only exception being in the latter case the woman should not be of the age of less than fifteen years.

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Exception 2 of the (section 375) of IPC does not include wives in the definition of rape and do not provide any reason for the such exclusion. Since the main crux of the section is on consent, it is possible that this was a legislative decision to exclude the operation of this section from married relationships as married relationship has given sanctity in our society. It is a religious ceremony and any sexual act performed within the limitations of a marriage without consent is not considered as crime. Minor, for example, are presumed to be unable to consent to such acts by law, so consent is unlikely. However, consent is commonly assumed when the victim and the offender are married. Women have always been regarded as property of their significant or guardians. As a result, rape was viewed as both a theft of a woman's property and a crime against her husband or guardian therefore a husband can't be accused of raping an adult wife. So far as the laws of other countries are concerned there are only fifty two countries which consider marital rape as an offence but the Indian Laws does not include marital rape as an offence. Therefore on the International prospective broadly speaking marital rape is not considered as an offence. Barring a few countries who have taken marital rape as an offence the maximum number of countries either do not at all consider it as an offence or has included it as an offence under their laws with a very lighter weightage. When we consider the reason behind such an intention which is prevailing internationally we find many reasons out of which four major commonly prevalent reasons need to be enlisted. Firstly the status of wife as compared to her husband has always been graded next to her husband and she is never given a position superior to her husband in the society.(3) The second reason being most obvious that a wife in the society is not able to make her identity independent and away from the identity of her husband she always carries with herself the identity of her husband. (4) The third reason is that the consent of a wife is always assumed to be on a positive side and this is taken to be an implied consent in a marital relationship.(6) The last but not the least the relationship of husband and wife is considered to be very personal and the legal system should interfere the least to maintain the integrity of this relationship.

History of The Marital Rape

Since ancient times marital rape has not been granted the status of an offence in prevailing laws globally. Out of all the countries only US, UK and Canada provide for marital rape as an offence in their laws and India is amongst the three dozen countries which does not include marital rape as an offence under their laws. Rape is an offence so brutal that it not only gives bodily injuries to a woman but it is an attack on the soul of the woman. It has everlasting impacts on the behaviour mental framework of a woman which always gives her a sense of unsafe environment even when days and months have gone after the commission of an offence. In this prospective rape whether committed against a woman or committed against a married women by her own husband has more or less the same impacts on the bodily integrity of the victim. The another aspect of married life is when there is a judicial separation of husband and wife and there is a sexual intercourse during the period of the term of that judicial separation. An analysis of such a situation has been made under the provision of section 376 B of Indian Penal Code. Section 376B: Sexual intercourse by husband without the consent of his wife is an offence if wife is living separately.

Section 375 Explanation 2 indicates that consent is presumed in sexual act between husband and wife which is not so here since the husband and wife are not living together. Living in a relationship raises a presumption that the wife has given consent to her husband for sexual intercourse. In 1892 Lord Lansdowne, then Viceroy of India, presented a bill before the Council of India. The Bill was passed and it increased the age of consent from 10 to 12 years. However, criminalization of marital rape did not happen and still, Section 375 exempts it.

In the *Harvinder Kaur v. Harmander Singh* (case of 1984, the Delhi High Court) the high court held that the Constitution cannot hamper the married life because it will destroy the foundation of marriage and privacy of the married life is a fundamental right in Article 21.

In the *State of Maharashtra v. Madhkar Naraya* (case of 1991), the Supreme Court stated that every woman has the right to privacy, which must be free of violations.

In the *Bodhisattwa Gautam v. Subhra Chakraborty* case of 1995, the Supreme Court ruled out that rape violates Article 21 of the Constitution as it hampered basic human rights and ruptured the victim's right to life and dignity.

After the 2012 Nirbhaya rape case, the Verma Committee recommended criminalising marital rape by saying that marriage did not mean permanent consent to sexual acts. That time the Government of India, overlooked the recommendation.

In an article, the First Post reported that in 2015 the Supreme Court dismissed a plea by a woman where she accused her husband of sexual violence. The Bench of Justices AR Dave and R Banumathi said, "You are espousing a personal cause and not a public causes. This is an individual case."

In 2015, the RIT Foundation filed a Public Interest Litigation (PIL) in the High Court of Delhi to challenge the exemption of marital rape of Section 375 of the IPC. The ground of the challenge was Article 14 (Right to equality), Article 15 (Prohibitions of discrimination on ground of religion, caste, race, sex, and place of birth), Article 19 (freedom of speech) and Article 21 of the Indian constitution.

In 2016, Maneka Gandhi, then minister for child and women development, said that the 'concept of marital rape' that was understood internationally could not be applied to India considering the levels of illiteracy and poverty.

However, in *Independent Thought v. Union of India* on October 11, 2017, the Supreme Court stated that sexual intercourse with a girl, below then eighteen years, was rape regardless of her marital status.

In the *Nimeshbhai Bharat Bhai Desai v. State of Gujra* case of 2018, the Gujarat High Court admitted that marital rape is not a privilege of the male partner in a marriage, but instead a violent conduct and an unfair treatment that should be criminalised and the notion of 'implied consent' in marriage should be dropped. The law must protect bodily the autonomy of every woman (married or unmarried).

In 2019, Mr Shashi Tharoor while introducing 'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018, said, "Marital rape is not about sex, but about violence; it is not about marriage, but about lack of consent."

Justice DY Chandrachud stated in suit that "The freedom to say "no" (to sexual intercourse) must exist after marriage as well," A woman or man does not lose their level of sexual independence after their marriage.

Another significant judgement came in the year 2021 when Kerala High Court ruled 'marital rape as a valid ground for divorce.' The petition was filled to challenge the constitutionality of the exception to Section 375 of the IPC. As it violates married women's right to live with human dignity, personal and sexual autonomy and her right to self-expression",

Violation of Legal & Constitutional Rights

Rape in a marriage is a violation of the fundamental right of a woman specifically under Articles 14 and Article 21 of the Constitution of India. Exception relating to marital rape of section 375 violates the fundamental rights of woman. Even though this crime take place in the private sphere of a marriage, it is the responsibility of the State to come through this private sphere. If the State does not penalise this private sphere, then a woman is left without justice when raped by her husband.

Article 14 of the Indian Constitution

Marital rape is the violation of the Right to Equality which is guaranteed under Constitution of India. Article 14 of Indian Constitution says that:

"The state shall not deny to any person equality before law and equal protection of the laws within the territory of India".

This Article provides protection of law to every person but the criminal law discriminates female victims who have been raped by their own husbands. When IPC was drafted, a married woman was not considered as an independent identity and she was treated as chattel of her husband therefore she was kept away from many rights. The exception to the IPC definition of rape including the exception 2 was drafted on the basis of English law which did not recognize men and women as equal. Hence Exception 2 of section 375 violates Article 14 by discrimination between married and unmarried women and by denying them equal protection from rape and harassments.

In *Budhan Chadhary v. State of Bihar*⁸ & *In State of West Bengal v. Anwer Ali Sarkar*⁹, the Apex Court held that —any classification under Article 14 of the Constitution of India is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective.

The exception 2 of section 375 gives exemption to husband from such act that is totally contradictory to objective. It is very difficult for a married woman to escape out from abusive conditions because they are financially and legally bound to her husband compare to an unmarried woman and it

provides an opportunity to husband to enter in a forceful sexual relation with his wife. In reality exception 2 of section 375 boosts husband to enter into sexual intercourse with his own wife forcefully because no where these acts are penalized or discouraged by Indian Law.

Article 21 of the Constitution

Article 21 of the Constitution of India provides "Right to Life and Personal Liberty". It states that "No person shall be deprived of his life and personal liberty except according to procedure established by law." The Article 21 has been interpreted in widest manner that it contains all the rights. The Supreme Court of India in various cases like *Maneka Gandhi v. Union of India*¹⁰, *A.K. Gopalan and KharakSinghcase*¹¹, etc. have expended the scope of Article 21. The Supreme Court held that the life means not merely animal existence but to live with human dignity. In *K.S. Puttuswamy v. Union of India*, in 2017 the Supreme Court recognized the right to privacy as a fundamental right which ability to make intimate decisions in a marriage. The courts in recent years have acknowledged the right to abstain from forceful sexual intercourse and unwanted sexual activity by husband as fundamental right to life. The High Court of Punjab & Haryana in *Surjit Singh Thind v. Kanwaljit Kaur*¹², has held that medical examination of a woman regarding her virginity would amount to violation of Article 21. In the case of *State of Karnataka v. Krishnappa*¹³, The Supreme Court held that "sexual violence is interference of the right to privacy and sanctity of a female. The Court also observed that non-consensual sexual intercourse is a physical and sexual violence.

But in its another judgment the scope of Article 21 has expended more.

In *Suchitra Srivastava v. Chandigarh Administration*¹⁴, the Supreme Court expended the interpretation of Article 21 and therefore the right to make reproductive choice (to produce child or not to produce) was recognised as fundamental right. The rulings of the cases do not differentiate between married or unmarried women and it is not related to their marital status. Thus, it is a fundamental right of a woman to have sexual relation with her husband and forced cohabitation is the violation of her fundamental right. Exception 2 of Section 375 infringes right to live with human dignity, right to privacy, right to healthy life, right to choice of making sexual relations or to participate in sexual activity.

Right to Live With Human Dignity

In *Francis Corallie Muinv. Union Territory of Delhi*, the right to life under Article 21 of the Constitution was highlighted. As Article 21 incorporates many aspect of life in the purview of right to live with human dignity 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 beings. The right to live with human dignity perceives the independence of a person. The Supreme Court held in number of cases that the marital rape is violation of right to life and personal liberty. In *Chairman, Railway Board v. Chandrima Das* the Supreme Court observed that rape is not merely an offence under the criminal law but is a crime against the society as whole. In *Bodhisattwa Gautam v. Subhra Chakraborty* the court observed that any law which damages female entitlement to live with dignity and gives spouse to drive wife to have sexual intercourse without her will and consent is unlawful and unconstitutional.

Right to Sexual Privacy

Right to privacy is also part of right to life and personal liberty. In many cases like *Kharak Singh v. State of U.p.*, *Neera Mathur v. LIC* the Supreme Court of India has observed that right to privacy is fundamental right under extent of Article 21. The Apex court has observed that any type of intense sex damages the right of protection and sexual security of woman also protection of sexual orientation lie at the core of the fundamental rights under Article 14, 15 & 21. In the case of *State of Maharashtra v. Madhkar Narayan*¹⁵ the Supreme Court held that every woman is entitled for her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished. It is recognised by the Supreme Court that right of privacy is fundamental right as to go into a sexual relationship even inside marriage. Subsequently rape inside a marriage is violation of right to privacy of a wedded lady and is consequently is illegal.

Safeguards Against Marital Rape

Criminal Law

The most relevant provision regarding to the safeguard against marital rape is section 498A of Indian Penal Code. Section 498A was inserted into the IPC to specifically deal with cases of cruelty against women. There are many provision in the IPC which gives protection to female regarding sexual violence in their marriage. A woman can seek relief in the following provisions.

Section 319 Hurt

Section 319 provides provision regarding simple hurt i.e. bodily pain that must be physical rather than mental. causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320 Grievous Hurt

Grievous Hurt is higher form of hurt in this category the following types of hurt are as:

- Causing hurt by emasculation (castration of male sexual organs);
- Permanent privation of one's eyesight;
- Permanent privation of one's hearing;
- Privation of one's members or joints;
- Destruction or permanent impairing of the powers of one's members or joints;
- Permanent disfiguration of one's head or face;
- Fracturing or dislocating one's bones or teeth;
- Causing any hurt which endangers one's life or causes him to suffer severe bodily pain for 20 days or makes him unable to follow his ordinary pursuits.

Section 376B: Intercourse by a man with his wife during separation

"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 to two years and shall also be liable to fine."

Section 377 unnatural sex with female

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal is punishable. In this section it is immaterial that woman is married or unmarried.

Section 498A

This section gives protection to married women regarding the cruelty which is done by her the husband or her husband's relatives. Any wilful conduct which drive the woman to commit suicide or cause grave injury to her life, limb or health is known as Cruelty. Harassing the woman to get property or valuable security from her or her relative is also comes in the ambit of cruelty.

Section 498A is often used to file complaints about sexual harassment by the husband and his relatives.

Civil Law

- **The Hindu Marriage Act, 1956**

In civil law rape in marriage is a ground of divorce. According to section 13 of Hindu Marriage Act, 1956, a woman can take divorce on the ground of cruelty, impotency of husband, adultery etc. it is clear that any kind of cruelty which also include rape in marriage.. In Farhan v State & Others on 11 May, 2022 the Delhi High Court held that marital rape is ground of divorce.

- **Domestic Violence Act, 2005**

The Domestic Violence Act protects women from any physical or mental cruelties of all forms. Section 3 of Domestic Violence Act defines the term domestic violence. Harm, harassment, threatening and physical and mental injuries are recognised as violence. Explanation 1 of Section 3 also explain term "Physical abuse" and "Sexual abuse" and it says that any act or conduct which is occurs bodily pain, harm or danger to life is considered as physical abuse and any sexual conduct that abuses, humiliates, degrades or violates the dignity of woman is recognised as sexual abuse. So here we can say that this law is often used to safeguard woman against sexual harassment in domestic sphere.. This law is not just for the benefit of women in marriages but also for women in live-in relationships. A woman who has been abused can also seek judicial separation from her husband. However, even if it does not criminalize the offence, it still shifted the state approach from non-interference into family relations to protecting women in their domestic environment.

Judicial Decisions

IN Xxxxx @ Xxxxx v State Of Karnataka, The High Court of Karnataka stated that sexual violence in marriage is not a valid defence for the perpetrator and the person can not take advantage of consent in sexual activity.

Justices Rajiv Shakdher and C Harishankar, of Delhi High Court has observed that there is no meaning of “implied consent” of wife in sexual relationship as it indicate that it takes away wife’s right to say ‘NO’ and the husband has right to have sexual relations with his wife.

In another case the Justice of Karnataka High Court M Nagaprasanna said that the institution of marriage does not mean that any special privilege or license will be given to husband against his wife. The court observed that a man is a man; whether he commits rape with his wife or any other woman. Such sexual assault by a husband on his wife will have grave impact on the mental sheet of the wife. Such acts of husbands scar the soul of the wives.

Last but not the least in another case Justice Shakdher of Delhi High Court said that it is a heart- breaking if after the enactment of Indian Penal Code, a married woman calls for justice. Marital rape is violation of Constitutional as well as legal rights of woman.

Conclusion

The exemption in the Indian Penal Code stems from a long outdated notion of women. The women in the past were regarded as the property of their husbands. The idea was due to the deeply-rooted patriarchy in the world that needs to be changed in today’s world. The government should aim to protect the bodily autonomy of all women irrespective of whether they are married or not. The argument that criminalisation of marital rape will destroy the institution of marriage is not a reasonable contention. When a woman at home is not being treated with dignity and respect at that moment only, the failure of the marital relation reflects. The state should enter into the realm of home and bring the most atrocious crime under the purview of state laws. The license given to the husband for forced sex is a total negation of a woman’s self-worth. Therefore, there is a much-needed reform for criminalizing marital rape in India to protect women’s integrity and dignity in India.

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