

A Judicial Approach on Marital Rape

- Dr. Parantap Kumar Das¹
- Akash Tandon²

Abstract: Crimes against women were gradually increasing. Initially the concept of marriage meant the sacred union of two individuals, however gradually the male species gained more dominance and then changed the entire definition and concept of marriage. The general stereotype associated with marriage is that woman should always be the support system of a husband and obey him. The article tries to analyse whether exception for marital rape under Section 375 be removed and to criminalize marital rape in India, as this can be achieved by applying an individual rights approach to violence against women and whether a marital or any other relationship between the perpetrator or the victim would constitute as a valid justification in contradiction of the offenses of rape or sexual violation or not; the relations between the accused and the complainant is pertinent to the examine whether the complainant agreed by way of giving her consent to the sexual activity; the idea that the accused and victim are married otherwise in an alternative close relationship might be viewed as a mitigating factor justifying lower sentences for rape or not. This article also analyses the views taken by the judiciary in dealing with cases involving Marital Rape.

KEYWORDS: Marriage, Intercourse, Rape, Abuse, Spouse, etc.

¹ Dr. Parantap Kumar Das, Professor, School of Law and Legal Affairs, Noida International University, Greater Noida.

² Akash Tandon, LLM Student, School of Law and Legal Affairs, Noida International University, Greater Noida. Email Id : akashtandon04@gmail.com .

INTRODUCTION

“Violence against women is perhaps the most shameful human rights violation... As long as it continues, we cannot claim to be making real progress towards equality, development and peace.”

– **Kofi Annan**³

In India, marriage is sacred union between two individuals and their families. Marriage is an institution where the spouses promise to love and take care of each other forever. However, today marriage has been reduced to being an informal contractual relationship between two parties where the groom and his family demand dowry as a consideration for marrying the bride. The bride and her family are harassed and tortured by the groom and his family to meet their unreasonable demands. Sadly, the demands for dowry don't come to an end with the marriage as it is never-ending and continues till the lifetime of the marriage. Due to this, either a woman takes extreme steps and commits suicide because she doesn't want her family to suffer or else she is subjected to cruelty by her husband and in-laws.

Rape per se is an offence against woman, violating her dignity and self-respect and when it occurs within the four-walls of a matrimonial home, it reduces the woman to the status of an object who is subjected for sexual gratification. There's an immediate need for a distinct law on marital rape in India, which should be at par with the accepted international norms on this issue. Rape within marriage is a concept that agonizes the wife to the very core. The dread of having to face it and suffer silently through it is an unbearable thought that affects the mental well being of the women. This self-enforced silence has a very detrimental effect on the emotional, psychological and mental stability of women. However, this silence is not exactly self-enforced. By way of comparison, the best available statistics on marital rape in

³ *Review and Appraisal of the Implementation of the Beijing Platform for Action*, Report of the Secretary-General, (Jan. 19, 2000), UN Doc. E/CN.6/2000/PC/2, available at <http://www.un.org/womenwatch/daw/csw/ecn6-2000-pc2.pdf>.

the United States suggest that one out of every seven or eight married women has been subjected to rape or attempted rape by her husband.⁴

The lack of adequate laws and abundant social stigmas associated with the act of marital rape is one of the primary reasons that the evil of marital rape is still hidden behind the sacrosanct of marriage. Therefore there's no justification or applicability of the notion of marital exemption in the current times. It's true that mere criminalization of marital rape in India will not end the problem, but it sure would pave way 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. Women who are raped by their husbands are likely to be raped multiple times on multiple occasions. They experience not only vaginal rape, but also oral and anal rape.

The origin of the word 'rape' has been derived from the term 'rapio', which means 'to seize'. Rape is thereby, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud.

Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Criminal charges of sexual assault may be triggered by other acts, like genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women.

Advancing well into the timeline, marital rape is not an offence in India. Despite amendments, law commission recommendations and new legislations, one of the most humiliating and debilitating acts still doesn't constitute an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations

⁴Box, S., Power, Crime and Mystification, (London Tavistock Publications, 1983), p.122.

have been either non-existent or obscure and everything has just depended on the interpretation by courts.

Section 375, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.”⁵Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both. This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. How can the same law provide for the legal age of consent for marriage to be 18 while protecting form sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy the woman has.

LAW COMMISSION OF INDIA- REPORT NO. 172 ON REVIEW OF RAPE LAWS (MARCH 2000)

172nd Law Commission report ⁶ which was passed in March 2000 had made the following recommendations for substantial change in the law with regard to rape:

- ‘Rape’ should be replaced by the term ‘sexual assault’.

⁵Section 375 of the Indian Penal Code (45 of 1860).

⁶ 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

- 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.
- In the light of *Sakshi v. Union of India and Others*⁷, ‘sexual assault on any part of the body should be construed as rape.
- Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
- 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.
- 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 the same reasoning, section 376 A was to be deleted.

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.

INCAPACITY OF CIVIL LAWS TO PROVIDE ACCOUNTABILITY & FRAMEWORK FOR MARITAL RAPE

The patriarchal attitude of the Legislature also gets highlighted by the fact that a significant difference, in the nature and term of punishment, exists between those committing rape on their wives and those committing rape on other women. In case of

⁷ 2004 (5) SCC 518.

rape of wife aged fifteen years, the perpetrator is absolved of any punishment.⁸ It is even more alarming that a man engaging in sexual intercourse with his wife of below fifteen years is treated as a normal rape,⁹ even though rape of a woman under sixteen years of age is severely punished with rigorous punishment of ten years extendable to life imprisonment.¹⁰ It begs to reason as to why such a distinction between the punishments has been made, is it that a married girl of fifteen years will not feel the pain and torture of a rape, or is it that the society expects a child getting married to suddenly grow up, become an adult and face the horrors of rape and expect no sympathy from the system which promises justice.

Further, in sec. 376C the IPC penalizes the perpetrator of the crime with a punishment of more than 5 years if he happens to be holding a fiduciary relationship with the victim. Husbands often stand in a fiduciary capacity to their wives even today. One party acts as a fiduciary to another when a party acts "for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part."¹¹ In India even today, a large population of women continue to depend on their husbands for all their material needs and thus unconsciously a contract of fiduciary relationship gets created. In such a situation sec. 376C and sec. 376 (2) (f) of the IPC should be brought into action. Under sec. 114A of IEA, there is presumption of no consent in rape cases, while in marital rape there is a presumption of consent by virtue of exception 2.

This fiduciary nature of this relation is evidenced in Sec. 122 of IEA, which prevents communication during marriage from being disclosed in any court except when one married partner is being persecuted for an offence against the other. Unfortunately, as marital rape is not recognized as an offence, the evidence is inadmissible unless it is a prosecution for battery, or physical or mental abuse under the provision of cruelty. The interplay of Indian Evidence Act, Domestic Violence Act and sec. 375 makes it a

⁸ INDIAN PENAL CODE, 1860, §. 375 Exception 2.

⁹ *(Treated as rape under sec. 376 (1), Indian Penal Code, 1860. It is punishable with minimum imprisonment of two years extending to seven years).*

¹⁰ INDIAN PENAL CODE, 1860, § 376 (2) (i).

¹¹ BLACK'S LAW DICTIONARY 564 (5th ed., 1979).

nearly impossible task to prosecute marital rape. However, such a violence should be construed as more serious offence owing to constructive reading of sec. 376C and sec. 376 (2) (f) of the IPC.

Inadvertently it is observed that the recent amendment has not addressed the issue of marital rape. Rather, a husband has leverage to intercourse with his wife without her consent or against her will, and still not be prosecuted for rape.

Today this provision has been termed as “Legal Terrorism” by the Judiciary because of the increased number of cases of misuse of this law. The Commission suggested to raise the compensation limit under Section 358 of Cr.P.C. from rupees one thousand to rupees fifteen thousand to avoid the misuse, however that’s not a deterrent. Section 358 of Cr.P.C. states the compensation to persons groundlessly arrested. This amendment was considered necessary to check to some extent the false and irresponsible FIRs/complaints in general, not merely confined to S. 498A.

The Law Commission Report also emphasized on having proper guidelines with regard to the procedure of arrest adopted by the authorities. The Commission was in par with the advisory issued by the Ministry of Home Affairs in October, 2009. It opined that the procedure as laid down in the case of *D.K. Basu v. State of West Bengal*¹² with regard to arrest should be applied in Section 498A complaints as well. It stated that the power of arrest without warrant should be exercised by the Police officers only after a reasonable satisfaction is reached that there is a need to affect arrest. Therefore, it may not necessary in all cases of matrimonial disputes to immediately exercise the powers of arrest. The Commission provided that recourse may be initially taken to dispute settlement mechanism such as mediation, counseling, conciliation, of the parties etc.

¹² AIR 1997 SC 610.

JUDICIAL APPROACH ON MARITAL RAPE

In India, the history of marital rape is very wide and very complex. Law against marital rape had been made and changed also but not entirely. Marital rape is not defined in any statute or anywhere, only the definition is being given by some authors and some political and legal thinker.

A husband cannot be guilty of rape with his lawful wife. Until the 20th century, there was a doctrine due to which after marriage the legal right will be subsumed by her lawful husband. The implication was that of that doctrine, if you got married then your spouse will not be guilty of committing rape. In some culture it was seen that the consent for marriage is not necessary, following this logic if the consent is not necessary for marriage, then the consent for intercourse is also not necessary. Even the autonomy of the wife is being compromised in some cultures where the bride price is paid.

In US, the case of *Kirchberg v. Feenstra*¹³ the wife's legal subordination to her husband was fully ended up. The court held a Louisiana head and master law, which gave sole control of the marital property to the husband as unconstitutional.

The common law of English has a very great impact on that particular trend. Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court in *Queen Empress vs. Haree Mythee*¹⁴, observed that in case of married women, the law of rape does not apply between husband and wife after the age of 15, even if the wife is over the age of 15, the husband has no right to disregard her physical safety, for instance, if the circumstances be such that intercourse is likely to cause death. In the present case, the husband was convicted under Section 338 of Indian Penal Code, for rupturing the vagina of his eleven-year old wife, causing hemorrhage leading to her death. Further in, *Emperor vs. Shahu Mehrab*¹⁵, 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.

¹³ 450 U.S. 455 (1981)

¹⁴ (1891) ILR 18 Cal. 49

¹⁵ AIR 1917 Sind 42

In *Saretha vs. T. Venkata Subbaih*¹⁶, 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.”

If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman’s right to privacy is equally violated in case of non-consensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association.¹⁷

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*¹⁸, 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 the modesty of a women or under Section 377 IPC as unnatural offenses.

The judiciary seems to have completely relegated to its convenience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist. The problem lies in the fact that it has been accepted that a marital relationship is practically sacrosanct instead of, making the wife worship the husband’s every whim, principally sexual, it is supposed to thrive, mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse? *Gobind v State of*

¹⁶ AIR 1983 AP 356

¹⁷ Ibid.

¹⁸ AIR 1991 SC 207.

*Madhya Pradesh*¹⁹ (“Gobind”), *R Rajagopal v State of Tamil Nadu*²⁰ (“Rajagopal”) and *People’s Union for Civil Liberties v Union of India*²¹ (“PUCL”). These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in *M P Sharma* and *Kharak Singh*. An investigation was ordered by the Union government under the Companies Act into the affairs of a company which was in liquidation on the ground that it had made an organized attempt to embezzle its funds and to conceal the true state of its affairs from the share-holders and on the allegation that the company had indulged in fraudulent transactions and falsified its records. Offences were registered and search warrants were issued during the course of which, records were seized. The challenge was that the searches violated the fundamental rights of the petitioners under Article 19(1)(f) and Article 20(3) of the Constitution. The former challenge was rejected. The question which this Court addressed was whether there was a contravention of Article 20(3). Article 20(3) mandates that no person accused of an offence shall be compelled to be a witness against himself.

In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*²² court held that rape is to manner the marital exception principle is violence of spouse's charter to live with dignity and give spouse appropriate to drive wife with to have sexual intercourse without her will is along these lines unlawful.

In an important case of *Justice K.S.Puttaswamy(Retd) v. Union of India and Ors.*²³, Chandrachud J analyses the concept of privacy as being founded on autonomy and as an essential aspect of dignity :

“Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognized. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which

¹⁹(1975) 2 SCC 148.

²⁰ (1994) 6 SCC 632.

²¹ (1997) 1 SCC 301.

²²1996 SCC (1) 490.

²³(2017) 10 SCC 1.

straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.”

The Supreme Court bench, in the case of *Independent Thought v. Union of India*²⁴ read down Exception 2 to Section 375, of Indian Penal Code, 1860 which now stands thus altered,

*“Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape” instead of (15 years of age, is not rape. “Parliament has extensively debated the issue of marital rape and considered that it was not an offence of rape. Therefore, it cannot be considered as a criminal offence.”*²⁵

In fact, the bench seemed to have clammed up and passed the buck to the Parliament. On one point, however, the Supreme Court was categorical that the decision would not apply to marital rape of adult women (hereinafter, marital rape simpliciter). The Court stated,

*“We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.”*²⁶

Right to privacy is not defined anywhere in the Indian constitution. But in a series of cases like *Kharak Singh v. State of UP*²⁷; *Govind v. State of Madhya Pradesh*²⁸; *Neera Mathur v. Life Insurance Corporation*²⁹, Supreme court has observed that the right to privacy is intrinsically ensured the extent of Article 21. The right to privacy under Article 21 incorporates a right to allowed to sit unbothered and not aggravated. Any type of intense sex damages the right to protection sexual security. It is presented

²⁴ (2017) 10 SCC 800

²⁵ Ibid.

²⁶ Ibid.

²⁷ 1963 AIR 1295

²⁸ 1975 AIR 1378

²⁹ 1992 AIR 392

that the teaching marital exclusion to rape damages a wedded a lady entitled to charter to protection by driving her to go to sexual intercourse without wanting to.

In the landmark case of *Vishakha v.State of Rajasthan*³⁰, the apex court has extended the right to privacy in the work places as well. There exists a right to privacy to go onto sexual intercourse even inside a marriage. Subsequently, decriminalize the rape in marriage, the marital exception in teaching damages this right to privacy of a wedded lady is consequently is illegal.

Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order.

CONCLUSIONS AND SUGGESTIONS

It is argued that marital rape should be criminalized in India, as this can be achieved by applying an individual rights approach to violence against women. Indian women organizations have succeeded in achieving public awareness and to pass legislation on domestic violence, but marital rape has not been fully criminalized, by abolishing the distinction between marital rape and stranger rape. But marital rape will neither be criminalized nor punished, until legislators and the society acknowledge women's individual rights within the marriage.

VARIOUS STEPS TO BE UNDERTAKEN FOR MAKING MARITAL RAPE AN OFFENCE.

To disclose the extreme violation of marital rape is an expression of trust. Indian family affairs mostly remain behind the curtains. Indian women do not feel

³⁰ (1997) 6 SCC 241

comfortable sharing their marriage stories either with family members or with her friends. In order to break that veil lot of courage and encouragement is required to be given to wives to share their pain and sorrow so that they can comfortably confide into someone about their marital issues.

It is very often seen that in hospitals every other day a wife is brought for abortion, fetus testing, burned wives who are subjected to Dowry Harassment and beaten wives by their frustrated husbands. Nurses and Doctors due to their profession are comfortable with physical examinations and are often better prepared to explore the issue of marital rape. On the other hand women see nurses as empathic and knowledgeable about sexual concerns. They are able to share their concerns and explain their bruises to them without being judged.

But there lies a small risk to this undertaking. If a woman confides such information and the nurse immediately refers her elsewhere, the nurse's behavior will imply that the problem is too personal and gross for the nurse to handle, or that the patient is psychologically disturbed. This then reinforces the woman's shame. Thus, questioning a woman about marital rape carries with it a responsibility to intervene. This at no cost means referring the patient to social service agencies, battered women's shelters and support groups, and legal and counseling services.

Justice Krishna Iyer in *Ashok Kumar Thakur v. Union of India*³¹ said that the Constitution embraces the substantive equality; it is desirable that a married woman is treated at par with other women. However, in a country where sexual harassment and assault are endemic and where according to a recent UNICEF Global Report Card on Adolescents 2012³² most of the young males think that beating wife is justified, it is conceded that changing the law on sexual offences is a challenging and sensitive task. In a country like India where there is a contemporaneous presence of a varied and

³¹ *Ashok Kumar Thakur v. Union of India*, (2008), 6 SCC 1.

³² Reporter, *Domestic Violence and Spousal Violence: Centre for Social Research*, THE TIMES OF INDIA, (Apr 25, 2012), available at http://articles.timesofindia.indiatimes.com/2012-04-25/india/31398208_1_domestic-violence-spousalviolence-centre-for-social-research.

differentiated system of personal and religious laws, any radical overhauling of the structure of sexual offences is not advisable.³³

A) Amendment to Section 375 and Section 376 of The Indian Penal Code, 1860.

Ideally, the exception to sec. 375 should be removed by the Parliament. In absence of any legislative action, it is desirable that the judiciary builds upon the existing legal structure by

- (i) interpreting marital rape as a crime under sec. 376C or sec. 376 (2)
- (f) the IPC, and
- (ii) striking down the exception by declaring it ultra vires the Constitution.

B) Amendment to Section 498 A of The Indian Penal Code, 1860.

Women today face many kinds of violence in their matrimonial home. However, the section only protects mental and physical violence. It is time that sexual violence faced by women particularly marital rape be covered under this Section because any sexual activity without consent is a form of cruelty and torture and should be punished under law.

There is also a need for sensitization of judiciary and police, and creating awareness among the people of the ills of marital rape and its impact on families.³⁴ The only way to bring about a social change in the matter is through busting the myth that forceful sex by the husband is consequential and that it is rape.

³³ D. NICOLSON & L. BIBBINGS, FEMINIST PERSPECTIVE 185 (1st Ed. 2000).

³⁴ Saurabh Mishra & Sarvesh Singh, *Marital Rape-Myth Reality and Need for Criminalization*, 120 CR.L.J. (2003).