

A STEP TOWARDS CRIMINALIZING MARITAL RAPE

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Marital Rape: What it is actually

Marital Rape refers to unwanted Intercourse (without Consent) by a man with his own wife or that consent is obtained by force, threat of force, or physical Violence¹, or when she is in a state where she cannot give her consent. Marital rape is generally a non-consensual act of Violence towards her own wife perversion by a husband against her own wife where she is physically and sexually abused. It is a form of sexual abuse and domestic violence. According to National Family Health Survey, 2015-16, Reports showed that 29% of married women have been subjugated to physical and emotional Violence at the hands of their spouse, also 83% of married women observed between the ages of 15 to 49 have over suffered sexual abuse current Husband as the perpetrator, while 7% refer to a former spouse.² Historically husbands have been given the right to use their wives as property that they owned. There was no concept of wife's consent. Until 1983, the Criminal Law Amendment Act, stated that "Sexual intercourse by a man with his own wife, the wife not being 15 years of age, is not rape." The government officials argued that criminalizing marital rape would weaken family values as contract of marriage presumes wife's consent to have sexual intercourse with her husband.

In *independent thought v Union of India*³, The Hon'ble Supreme Court Struck down the definition of Explanation 2 of Section 375 which earlier to be read as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under Fifteen years of age, is not rape." Supreme Court amended the new definition which extended the date from fifteen years to eighteen years. The contention made behind the case was that exception 2 of Section 375 which provides sexual intercourse or sexual acts by a man with his wife, the wife not being

¹ Anvesh Kumar and Ipshita MAzumdar, Bride and Prejudice – Marital Rape and Indian Dilemma, 2 NSLJ (2013) 15

² Richen Norbu Wangchuk, Analysis on National Family Health Survey 2015-2016, (June 5, 2018, 9:00 AM), <https://www.thebetterindia.com/134673/survey-nfhs-marital-rape-india/>

³ Independent Thought vs Union Of India and Anr. Writ Petition (Civil) No. 382 of 2013. (June 5, 2018, 12:00 PM), http://supremecourtindia.nic.in/supremecourt/2013/17790/17790_2013_Judgement_11-Oct-2017.pdf

under Fifteen years of age, is not rape. Poignantly, the age of consent has been prescribed in description sixth to Section 375 to mean 18 years. It was inter-alia contended that if a girl child was between 15 and 18 years of age and was married; her husband could have non-consensual sexual intercourse with her, without being penalized, In terms of exception 2 to Section 375 of IPC, 1860.⁴

Types of Marital Rape -

There are 3 types of marital rape that are generally prevalent in our society are as follows –

1. **Battering Rape** - In this type of rape, women in their marital relationship are battered during the sexual violence act and on the other hand they have to face the physical violence after the rape. Majority
2. **Force only rape** - In this type of rape, only that amount of force is used by the husband of the wife who is necessary to coerce them into the sexual intercourse. Battering is not a characteristic of such kind of rape. This type of assault takes place when the wife refuses to have sexual intercourse.
3. **Obsessive rape** – In this type of rape, torture and perverse sexual acts takes place which are physically abusive.

The Situation in India regarding Marital Rape -

In India, Under **Section 375**⁵ of the IPC, Sexual Intercourse with a wife of age less than eighteen years is considered rape. Moreover under Section 375 B of the IPC, a forced sexual intercourse by a man with his wife who is separated is a criminal offence.

⁴ Anupam Lal Das, [The Analysis Of the Statutory Rape Dichotomy](http://www.livelaw.in/analysis-statutory-rape-dichotomy/), (June 6, 2018, 8:00 AM), <http://www.livelaw.in/analysis-statutory-rape-dichotomy/>

⁵ K.D Gaur, [The Indian Penal Code](#) (4 th edition Justice V.N. Khare, Chief Justice of India 2010) Chapter XVI ,Offences affecting the human body, Section 375 Rape—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First — against her will.

Secondly —without her consent.

Thirdly— with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly—with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly— with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly— With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

A report Published on June 1971 “**Law commission of India 42nd Report**” which made a contention that the Women had recourse to section 376-B of the Indian Penal Code, making husband liable for rape if he have sexual intercourse with her wife without her consent under a decree of judicial separation and punishable for 2-7 years as deemed fit to the court.⁶ The report by the law commission that the criminal liability should attach to the husband for raping her wife if she minor, However this recommendation was rejected as stated in explanation 2 that no Man can be penalized for committing rape against her own wife, as the wife ultimate consent reflected at the time of the marriage.⁷ The National Charter for Children, 2003 was notified on 9th February, 2004 Clause 11 reads: “the state and community shall ensure that crime and atrocities committed against girl child, including child marriages, discriminatory Practices, Forcing girls into prostitution and trafficking are speedily eradicated”

The marital rape exemption has over time been justified on the ground that rape in marriage would be difficult to prove, could be misused by a vengeful wife, and could lead to ‘unrest and discord’ in a marriage.⁸ It has also been argued that it would constitute an intrusion into the privacy of marriage.⁹ Regardless of its origins and legitimacy, the view became law and was reiterated in academic texts¹⁰ and in law cases for over 200 years. It was not until the last half of the twentieth century that this legal principle came to be seen as insupportable.¹¹ While many countries have now removed the immunity, 46 too many still have not and, as we will see, in the following discussion, this removal was not without its opponents. In United states it is estimated that 10% to 14% of married women experience rape in marriages. When researchers examined the prevalence’s of different types of rape, they found that about 25% of the total rape is Marital Rape.¹² In 1993, Marital Rape became a crime in all 50 States, under

⁶ 1977, Indian Penal Code, para 16.115, p. 277.

⁷ Law Commission of India, 42nd Report Law Commission Report, (June 7, 2018, 4:34 PM), <http://lawcommissionofindia.nic.in/1-50/report42.pdf>

⁸ Sonya A. Adamo, The Injustice of the Marital Rape Exemption: a survey of common Law Countries, (June 8, 2018, 12:00 AM), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1682&context=auilr>

⁹ M J Anderson, Lawful Wife, Unlawful Sex: Examining the Effect of the Criminalization of Marital Rape in England and The Republic of Ireland (June 8, 2018, 7:00AM),

<http://digitalcommons.law.uga.edu/gjic/vol27/iss1/4>

¹⁰ Grossi, Renta, Looking for Love in the Legal Discourse of Marriage, (June 7, 2018, 5:54 PM), <http://press.anu.edu.au>

¹¹ T Fus, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches’ (2006), (June 9, 2018, 10:00AM), <http://marriage.about.com/cs/maritalrape/f/maritalrape2.htm>

¹² Washington, DC: US Department of Justice , National Violence Against Women Survey, (June 9 , 2018, 10:00 AM), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>

at least one of the section of sexual offences codes.¹³ In New Zealand the exemption from marital rape was abolished in 1985 when the present section 128 to the crimes act, 1961 was enacted. Sub- section 4 provides that any person can be convicted of the Sexual offence notwithstanding the fact that they are married or not at the time of the sexual connection occurred.¹⁴

In 2013, **Justice Verma Committee** stated in its report that the Exception under Sec 375 of the IPC needs to be reframed immediately. Even though the offences Committed under Section 498 A by the Husband remain Unpunished due to onus of proof, which is totally on the victim and **the exemption clause to Section 375 infringes the Fundamental Rights enshrined in our Constitution.** For cite, Article 14¹⁵ which provides for equality before law and equal protection of law within the territory of India and prohibits discrimination on ground of sex, religion, place of birth or any of them. But the exemption under Section 375 discriminates a wife when it comes to marital rape and disables the State to make special provisions under Article 15¹⁶ for the betterment of women and children. Similarly, Article 21¹⁷ guarantees right to personal life and liberty. However the exemption clause takes away the personal liberty of a woman to have her say in the marital relation. Such cohabitation not only becomes immoral but also unconstitutional. Fundamental duties under Article 51¹⁸ also states that it is the duty of every citizen to denounce practices that our derogatory to the dignity of women.

Under section 498 A of the IPC a husband can be charged for subjecting his wife to cruelty. As Section 498 A has been diluted due to claims that it is used as a harassing tool by vindictive wives, the Judgment of the Supreme Court which has removed the Exemption Clause provided to husbands, it has ensured that women rights are protected and women have equal say in marriage as men who can't use them as their owned property. But still a lot of Confusion in the

¹³ National Clearinghouse, Marital and Date Rape, (June10, 2018, 9:00am), <https://www.library.illinois.edu/sousa/archon/index.php?p=creators/creator&id=2344>

¹⁴ Simester, A.P & Brookbanks, J., Principles of Criminal Law (1st Edn., Brookers Ltd., Wellington, 1998), p. 552.

¹⁵Indian Constitution, Article 14 : Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth 10

¹⁶Indian Constitution, Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

¹⁷Indian Constitution, Article 21:Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

¹⁸ Indian Constitution, Article 51A: Fundamental duties: (e) to renounce practices derogatory to the dignity of women.

laws that lead to impending cases and hence Justice remains Undelivered. The whole legal system come into a problem when it comes to rape, our framers of law has classified the law and made it applicable to be said as 'Rape' only under certain Circumstances and other that that made the prohibition of law who rape her wife, who are above the age of 18 years and ultimately set them free from any offence.:¹⁹

— The judicial interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and “*right to live with human dignity*”²⁰ is within the ambit of this article.

—Article 14 therefore protects a person from State discrimination. But this has been duly noted that according to the Exception 2, it clearly violates the equal rights of the Women by its unreasonable Classification of age, thus protection guaranteed under Article 14 of the Constitution gets violated.

—It seems that domestic violence and marital rape do not come under the definition of dignity because Protection of the dignity of women is a *fundamental duty* under the Constitution²¹ and thus imposing a duty upon every citizen “*to renounce practices derogatory to the dignity of a woman*”

— A husband cannot be prosecuted for raping his own wife because consent to marriage consent ultimately to sexual intercourse. This implies that having *sex anytime, anywhere and of any sort* as guaranteed by the contract of marriage, and the wife could not breach that term of the contract.

— The law prohibit the girl from marriage till she attains the age of 18 years old and also according can comes into the Jurisdiction till she had a non non-concensual intercourse with someone else other than his own husband but On the same time law gives the Ultimate access to the man to rape her wife who is above the age of 18 years.

Wrong Interpretation of words leading to injustice -

¹⁹ Saurabh Mishra and Sarvesh Singh, Marital Rape – myth, Reality and need for Criminalisation, SCC Online, 2003 PL Webjour 12

²⁰ Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

²¹ Indian Constitution, Article 51-A(e)

In *R v Aluwalai*²², many battered women go back to their families because they realize that the dignity of the family is at stake, they tend to fail that these men who cause them such a pain are the one who is meant to be expected the protector and are ought to close enough to provide them their freedom to Choice and prolong his wives Dignity. The High Court held that the introduction of the constitution would not be desirable as it would be a 'ruthless destroyer of the marriage institution application of the constitution will only weaken the bonds of the Marriage.'²³ This certainly only means that our state re-enforcement is reluctant to see any of that matters related to the personal laws and especially which adversely effects marriage.

To illustrate - restitution of Conjugal rights which lead to Judicial Separation and ultimately Divorce, which are the Only relief that a constitution offers to the Victim and even during that the offender has the full opportunity to forge the law through the statement of Wife.

In *Sareetha Case*²⁴, It was held that 'Constitution law recognizes the principle that human relations must be based on the free volition of individuals which would be contrary to the idea of restitution of conjugal rights, which includes the right to conjugal society in general and a specific right to marital intercourse. In *Sareetha's case*, Chowdhary J. concluded that S. 9 of the Hindu Marriage Act. 1956 is violative of the right to privacy and human dignity guaranteed by the interpretation in *Maneka's Case*²⁵ of Art. 21, and hence is unconstitutional. A decree under section 9 would amount to forced sex though there may not be any external manifestation of this violence. This, if not checked, may result in a situation as in the *Ahliuwalia case*.⁷ However the Supreme Court in *Saroj Rant's case*²⁶, has said that conjugal rights are inherent in the institution of marriage. This reflects the attitude of the courts towards forced sex and violations of the bodily integrity of a woman. The very fact that the law stays out of the family sphere considering it too private for its jurisdiction further reinforced male dominance and female subservience. Even though recently the High court of Punjab and Haryana said in the case²⁷

²² 1992 Cr. L.C.R. 63

²³ *Hiarvrider Kaur v. Harmancier Singh* AIR 1984 Del GG.

²⁴ *T Sareetha v. Venkata Subbtah* AIR 1983 AP 35G.

²⁵ *Mrs. Maneka Gandhi vs. Union of India (UOI) and Anr.* MANU/SC/0133/1978

²⁶ MANU/RH/0024/1975

²⁷ *Preeti Kumari v Neelkanth Kumar*, SCC OnLine P&H 757 2018

“The nature of the allegations leveled by the appellant are very serious but the said allegations cannot be proved by any corroborative evidence as the acts of sodomy or unnatural sex or oral sex forcibly committed during difficult periods can neither be witnessed by any other person nor such allegations can always be proved by medical evidence.”²⁸

A woman in India has no legal recourse if she is raped by her husband. The Indian penal code does not have effective provision for tackling the problems of marital rape. Not only is marital rape absent as a crime in our Indian legislation, it does not exist as one in our imagination either. People in India have a misleading and trivialized view of this crime. They are prejudiced with the notion that the woman should meet the sexual requirement of his husband wherever and whenever he demands for it. This has also been influenced by religious interpretation. And because of this reason women are compelled to have sexual relations with their husbands against their will. In marital rape there is no real proof of rape because of absence of any bruise or resistance. Women can also be forced by verbal coercion, the use of menacing and verbal pressure or misuse of authority. With no bruises or violence rape are difficult to prove.²⁹

Sexual Intercourse is an act of mutual desire where both the gender enjoy equal participation which tend to trigger only the pleasure and not Threat which causes bodily harm and the use of force, as female is not a man's property.³⁰ The most serious problem in criminalizing marital rape is the breakdown of their whole family and making the whole family suffer a tag of 'Criminal Family'. Indian culture is vastly different from the western society where the marriage is the contractual and temporary phenomenon. Considering these types of offences which are sensitive in matter, can only be dealt in the Family court or any other court where these matter can remain a matter of secrecy and would also not even compliance with Injustice. It also true that marital rape is difficult to prove as the evidence is based on the interpretation of the circumstances and medical Injuries as been reported due to crime. Onus of proving the crime is on the victim who can be defended easily by interpretation of the Crime so as to create a reasonable Doubt and make the true Victim suffer the Ultimate loss. The Unjust remain to

²⁸ Shruti MAhajan, Sodomy, Unnatural sex forced upon spouse is ground for Divorce, Bar and Bench, (June 10, 2018, 3:37 PM), https://barandbench.com/unnatural-sex-ground-divorce-punjab-haryana-hc/?branch_match_id=484397644356702408

²⁹ Eqbal Hussain, Protection of women from domestic violence act, 2005: An Appraisal, I JCLC (2013) 62

³⁰ Susan Biowniniller, 'Against Our Will', Men, Women and Rape. (New York: BRantIam. 1975) 45-47.

the people because of the easy manipulation of circumstances and partial Access to the legal relief.³¹

Conclusion

This paper tends to take a step in criminalizing marital rape as it violates the fundamental rights of women, making them socially unacceptable and facing difficulties in approaching justice. The court had made injustice in the part of women by making the onus of proof on them. Even if it is proved, the court gives a decree of restitution of conjugal rights and makes it more socially and mentally difficult for the women to take a lead and rather they face discrimination against society and sometimes by their own family. Even though it is humbly contended that evidence does not even support women when it comes to rape absolutely; evidence is solely based on the interpretation of medical report but nobody cares of mental harassment and hence remains unjust able to court due to absence of witness in their marriage. While rape is a predominantly female social experience, the offence of rape continues to be viewed and defined in law from the male social perspective. Since penetration is central to the male idea of sex, it is also the focus of the offence of rape, regardless of its disconnecting with female sexuality, desire, or violation. The Criminal Law (Amendment) Act, 2013, though progressive in many ways, is also steadfast in its adherence to the penetration paradigm. In this paper, it is humbly contended that rape should be viewed as a violation of sexual autonomy and bodily integrity, rather than an act of penetration, and the legal definition of the offence ought to be expanded accordingly. This would facilitate a more wholesome, gender-just approach to the crime.

³¹ Aditya Shroff; Nicole Menezes, Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer, 6 Student Advoc. 67 (1994)