

MARITAL RAPE: LACUNAE IN THE CRIMINAL LAW OF INDIA

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INTRODUCTION

Post 2013, Nirbhaya Amendment Act, 2013, (framed by Justice J.S. Verma Committee Report, headed by Justice J.S. Verma, Former, Judge, Supreme Court of India) expanded the definition of rape, which was made much more inclusive and was broadened and envisaged in itself a huge scope of crime that could be done. The punishment was increased and further, even including in itself Life Imprisonment and Death Sentence. Rape in itself means a non-consensual sex, wherein, consent is either not freely obtained or is not obtained for any sexual or physical act.

But it is to be taken into consideration that this rule of consent also has certain exceptions to it and one of the main exception to it is 'Marital Rape', which is not defined in any of the laws present in India.

General Assembly, while adopting the Declaration on the Elimination of Violence against Women, by its resolution, dated 20-12-1993, observed in Article 2"

"... violence against women shall be understood to encompass, but not be limited to:

- a) Physical, sexual and psychological violence occurring in the family including battering, 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."

The same was relied upon by *Justice S. Saghir Ahmad*, in the case of *Chairman, Railway Board v. Chandrima Das*¹.

¹ *Chairman, Railway Board and Others v. Chandrima Das (Mrs) and Others*, (2000) 2 SCC 465.

In 2013, NCRB (National Crime Records Bureau), reported over 1,15,000 cases which included domestic violence. The trend is felt to increase in over a decade where, in 2003 the crimes reported were somewhere over 50,000 (before the Domestic Violence Act was passed).² Sexual violence which also includes the barbaric and monstrous act of rape, clearly is a part of the entire aspect of domestic violence, but then a rape committed by a husband, clearly does not find its place in Indian Laws.

Kinds of Marital Rape as identified by the Scholars³:

1. Battering rape.
2. *Force-only* rape.
3. Obsessive rape.

“Battering Rape: In “battering rapes”, both physical and sexual violence is involved and further, in the relationship and they experience this violence in various ways, here in such a circumstance, some are battered either during the sexual violence, or after the rape, physical violence may follow, where the husband wants to make up and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

Force-only rape: In such cases, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.

Obsessive rape: Other women experience what has been labelled “sadistic” or “obsessive” rape; these assaults involve torture and/or “perverse” sexual acts and are often physically violent.”⁴

²<http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html>, last accessed on 28-07-2017.

³ Gosselin, D.K, Heavy Hands — An Introduction to the Crimes of Domestic Violence (1st Edn., Prentice-Hall Inc., New Jersey, 2000).

⁴ Marital Rape- Myth, Reality and Need for Criminalization, by Saurabh Mishra and Sarvesh Singh, 2003 PL WebJour 12.

SETTLED POSITION OF LAW AROUND THE WORLD

United States of America:

Until the 1970's the concept of marital rape was not given recognition. As it was only after the spread of the feminist movement that the concept of marital rape was even considered. This was because wives did not consider forced sex as rape. They felt that it was only natural and sex is a necessary part of the marriage whether it is forced or not. In 1993, marital rape was criminalized in the US in all fifty states.

It is to be noted that with the case of *People v. Liberta* the fact marital rape and non-marital rape do not have a difference was decided. It was noted in this case that marriage is not a license to forcibly rape one's wife with impunity. However, in states like California marital rape is a separate offence as compared to rape committed by a stranger.

United Kingdom:

An English Jurist Mathew Hale articulated that "*the husband cannot be guilty of rape for by their mutual matrimonial consent and contract, the wife has given up herself in this kind unto her husband, which she cannot retract.*"

Hence, the wife was only viewed as property and being treated as an equal individual was out of sight at that point of time. With the change in time the dominant notion that the wife is the property of the husband has changed and the wife is now viewed as an equal partner in marriage as a union.

After the settled position in law by the House of Lords, there was a change in law through Section 147 of the Criminal Justice and Public Order Act, 1994.

Canada:

As there is a socio-cultural resemblance between the US and Canada, the reforms with respect to women's rights were at a similar pace. Marital rape, was therefore criminalized in Canada in 1983, again only after there was an outcry from women's groups. With the criminalization of marital rape in Canada women's rights in a marriage and outside was given an advancement.

New Zealand:

In New Zealand there is no distinction with respect to rape in a marriage or outside a marriage. The exemption of marital rape was done away with in 1985 when Section 128 of the Crimes Act, 1961 was enacted. Therefore, the legislation protected any person in a marital relationship from coerced sex. There will be no reduction in sentence because the offender is married to the victim or that he has a continuing relationship with her.

ABSENCE OF MARITAL RAPE LAW IS VIOLATIVE OF THE CONSTITUTION***Violative of Article 14:***

In the case of *Keshvananda Bharati v. State of Kerala*⁵, it was held that Rule of Law, is the part of the Basic Structure of the Constitution. Further, in the case of *Bachan Singh v. State of Punjab*⁶, Justice P.N. Bhagwati emphasized that rule of law excludes arbitrariness and unreasonableness. In *Maneka Gandhi v. Union of India*⁷, Supreme Court declared that Article 14 strikes against arbitrariness. Doctrine of equality enriched in Article 14 of the Constitution which is the basic feature of the Constitution which the Rule of Law is the basic feature of the Constitution.⁸

It is contended that Equality does not mean uniformity. Law can and should differentiate citizens on account of some features of some features which are sometimes labelled relevant.⁹ Article 14 forbids class legislation but permits reasonable classification, provided that it is founded on an intelligible differentia.¹⁰ Intelligible Differentia states that likes shall be treated likely and alikes shall be treated alike. The same was stated by then Chief Justice of India, Justice Chandrachud in the case of, *In re the Special Courts Bill, 1978*¹¹. Thus, it clearly means

⁵ *Keshvananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁶ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, 1983 1 SCR 145, AIR 1980 SC 898.

⁷ *Maneka Gandhi v. Union of India*, 1978 AIR 597, 1978 SCR (2) 621.

⁸ *Raghunath Rao, Ganapath Rao v. Union of India*, AIR 1993 SC 1267: 1994 (Supp-1) SCC 191.

⁹ *Commentary on the Constitution of India*, Durga Das Basu, 9th Edition, Volume 2, LexisNexis, page, 1380.

¹⁰ Available at <http://www.legalblog.in/2011/02/right-to-equality-article-14-reasonable.html>

¹¹ *In re Special Courts Bill, 1978*, (1979) 1 SCC 380.

that a particular class of people can be excluded on certain grounds but then there shall be a permissible classification on certain reasonable grounds.

It is humbly contended that non-inclusion of Marital Rape and excluding married women from availing this protection as against their husband is clearly violative of the Constitution on the touchstone of the Fundamental Rights. It is contended that the same is impermissible and non-reasonable, rather is arbitrary and unreasonable classification and further, the same is clearly violative of Article 14 as such protection is not granted to married women.

Violative of Article 21:

Further, it is also stated that Rape is clearly violative of Article 21. Hon'ble Supreme Court of India, in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*¹², held that Article 21 envisages in itself the dignity of a woman. A rape which is committed can be violative of right to life which includes right to live with human dignity. Further, it also violates the 'basic humanitarian rights'. Thus, non-inclusion of marital-rape as under the ambit of Section 375 and under Section 376 of the Indian Penal Code, 1860 and also further, under any other law in India, clearly does amount to violation of basic human right envisaged under Article 21 and further, it is contended that the same is grossly violative on the grounds of non-intelligible differentia as under Article 14 of the Constitution.

RECOMMENDATIONS OF VERMA COMMITTEE REPORT

The exemption from marital rape has been a long-excluded aspect from the criminal law in India. It has been a pre-conceived notion that a woman shall consent to sex has been deemed to be given as soon as a wife is married to a man. Sir Mathew Hale stated: "*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given herself up in this kind unto her husband which she cannot retract.*"¹³

¹² *Bhodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490: 1996 SCC (Cri) 133: (1996) 1 AndhLT (Cri) 252: AIR 1996 SC 922.

¹³ SIR MATTHEW HALE. HISTORY OF THE PLEAS OF THE CROWN, 1 HALE PC (1736).

In Canada, the law remained the same till 1983, but in 1983, the provision which denied criminal liability was repealed. In the case of *R v. J.A.*¹⁴, it was stated that the relationship between the rapist and the victim was completely immaterial with respect to rape. Thus, the same clearly meant that clearly because the rapist was the husband, on such grounds marital rape or rape of the wife in any manner can be justified.

In England, in 1991, House of Lords, through Lord Keith stated, "*Marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband*".¹⁵ Further, the European Commission of Human Rights in *C.R. v UK*, stated, "*a rapist remains a rapist regardless of his relationship with the victim*".

Further, even South Africa had criminalized marital rape in 2006, striking down the principle and the common notion that a wife cannot be deemed to be raped by her husband and further, that there is implied consent upon marriage by the wife, given to her husband, with respect to sex.

The Committee Therefore recommended:

- *The exception for marital rape be removed.*
- *The law ought to specify that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.*
- *The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity.*
- *The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.*¹⁶

Why non-criminalization of Marital Rape in India:

In India there are many reasons why marital rape is not considered as an offence. Few of the main reasons are as follows:

¹⁴ R. J.A., through Chief Justice McLachlin, R.S.C. 1985, C. C-46.

¹⁵ R. V R [1991] 4 ALL ER 481 at page 484.

¹⁶<http://www.prsindia.org/uploads/media/justice%20verma%20committee/js%20verma%20committee%20report.pdf>.

1. **Implied Consent:** It is believed in India that once a woman is married to a man, there is an entire bundle of 'rights' that the man earns or gets. One of the same right is, husband's right to have sexual intercourse. It is believed that after marriage any sexual intercourse is more of a 'right' of a man, thus, such sexual intercourse cannot be brought under the ambit of 'rape' or under any other offence.
2. **Identity to a woman:** In this patriarchal society, it is believed that once a man and a woman get married, the identity of a woman is known only through her husband. There is a clear non-existence of a woman as soon as a marriage takes place, thus, such a behaviour in a male dominant society or rather in such a patriarchal society, in India, cannot include marital rape as an offence.
3. **Court's interference:** The pattern of the Courts have always been wherein, courts have more often than not tried to look into the matters only pertaining to public at large and have tried to avoid matters relating to the private aspect. Thus, courts may not think or may not feel competent enough, with respect to its jurisdiction, in the matters pertaining to, or revolving around such matters which, can be said to be in the private domain of a husband and a wife.
4. **Man's Ownership/ Property:** In India, it is believed or rather there is a common notion that a woman/ a wife, after marriage is the property of a man and man in such case owns the woman/ his wife.

NEED OF THE HOUR TO CRIMINALIZE MARITAL RAPE

In India there is no concept relating to marital rape. The only aspect which is somewhere close to it is that during judicial separation if rape is committed then in such a case the same is an offence and is clearly punishable. Though, the same is when there are clear intentions of separations or where there is a separation or the marriage is not in its normal course. Thus, the feeling of 'ownership' is not present.

Rest if seen the type of law in India, it is clear that a woman is clearly made an object in the hands of the man as is clear with the definition of adultery and further, with the exclusion of marital rape, which is also clearly against the basic touchstone of the Fundamental Rights, especially against Article 14 and Article 21, thus, ultra vires the Constitution of India. As, the same is clearly violative of Article 21 as the same, for the woman, amount to mere animal type

existence and such an act is clearly ultra vires Article 21¹⁷ ¹⁸. Further, having such a different law for both married and unmarried women and not giving protection to one class of women is clearly arbitrary and unreasonable, thus violative of Article 14.

The Indian constitution even assigns it as a fundamental duty under Article 51 (A) (e) “*to renounce practices derogatory to the dignity of the women*”. Thus, it is stated that the lacunae which is present in the Indian Laws with respect to the vacuum which is present because of absence of a marital rape law shall be clearly available. The position in other countries shall be followed wherein, it is clearly stated that woman can be a victim to such heinous crimes irrespective of the relation with the perpetrator of the crime.

Thus, even in India, woman can clearly be victim of such a crime and it is really a paradox that in a democracy and a welfare state like that of India which indeed is the biggest democracy, such laws are still looked down by our legislation framers or is it the representation of the two distinct genders that shows the thought process that goes in while framing the laws?

¹⁷ The Chairman, Railway Board & Ors. v. Mrs. Chandra Das & Ors., AIR 2000 SC 988.

¹⁸ Bodhisatwa v. Ms. Subdhra Chakroborty, (1996) 1 SCC 490.