

MARITAL RAPE: STILL A MYTH? ROLE OF INDIAN JUDICIARY

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INTRODUCTION

Rape is an unlawful sex without assent of a man because of physical drive or dangers, or due to deceitful demonstration of perpetrator. In India rape by an outsider is a penal offence under Section 375 and 376 of IPC. Shockingly, it unequivocally avoids marital rape from ambit of conviction. Marital rape is sex by spouse with his better half without her assent or by compel or danger.

Patriarchal structure that administers Indian families has constantly considered women as an property of her significant other or guardian. Rape was considered as the injury to the family's pride and wrong against spouse or guardian. This belief system has impacted our Indian legislatures in regarding these offences or spouse raped by giving it shield of wedding right of the spouse and by this they are clearly and openly tolerating that women's are only an object of sexual satisfaction of her better half with no will of her own over her sexuality. This discrimination is deep rooted in the society. Before a woman gets married, a woman is considered to be her father's property. After marriage, she belongs to her husband. In this conception, women is seen to have no agency, autonomy or even personhood of her own. It is prescribed that she should not have sexual intercourse because she is not married and after she is married she may say yes to any kind of sexual relationship. She has no desire of her own, these patriarchal assumptions are crucial to the understanding on India's stand on marital rape. Marital Rape is not only a crime against women but rather it is a grave infringement of a person's fundamental right to life and individual freedom enshrined in Article 21 of Indian Constitution. Connection amongst victim and the culprit or the mere fact that both person belongs each other through a marital tie, does not transform it. In this manner it is not right to upheld that physical

intimacy with spouse is husband's privileges given to him by marriage. Social disgrace associated with marital rape has suppressed women's voice against marital rape where Husband uses his dominant position over women to break her trust and her self-esteem. Marital rape is more traumatic with long-lasting results whether physical and mental. Subsequently, marital resistance to spouse has been pulled back in a few nations. But Decriminalizing spouse-rape, state is failing in its obligation to guarantee sexual equity that includes security from wrongdoing and manhandle.

Doctrine of Coverture :

Non-criminalised nature of marital rape originated from British era. The marital rape is largely influenced by and derived from this doctrine of merging the women's identity with that of her husband. At the time when IPC was drafted in the year 1860, a married woman was not considered as an independent entity. The "marital rape" exception to the definition of "rape" was drafted on the basis of Victorian patriarchal norms that did not recognise men and women as equals and which did not allow married women to own property, and merged the identities of Husband and wife under the "doctrine of Coverture". Today, marital rape has been impeached in more than hundred countries but, unfortunately, India is one of the only 36 countries where marital rape still not criminalized. Even though many legal amendments have been done in criminal law for the protection of the woman, the non-criminalization of marital rape in India and by this the Indian parliament has undermined the dignity and human rights of women. Since 1979, some countries have criminalise marital rape either by adding a provision in the penal code or by removing the exemption from the provision or by introducing an act to protect married women. Countries like Brazil, Australia, Belgium, Finland, Canada, Dominican Republic, Ireland, Israel have taken active role years back either by changing the provision in the penal code or have decriminalised it before the 1980s or after.

- The highest punishment for marital rape is of 15 years of imprisonment in Australia which was criminalised in 1979.
- In 1994, Finland criminalised and prescribed punishment up to 4 years, and if violence has been committed on the married women then the punishment provided is more severe.

- Jordan, a husband who has committed marital rape on his wife shall be punished with at least 10 years of rigorous imprisonment.
- Israel, in 1980, the decision of the Supreme Court of Israel criminalise marital rape. It was considered a felony crime, with punishment up to 16 years or 20 years.

However in India, present legal system does not consider marital rape a crime yet, but it has an exception in the IPC under section 375, a man who has intercourse with his wife who is above the age of 15 years is not considered as raped by her husband, while intercourse with a separated wife is considered as rape and such a person shall be liable upto 7 years of imprisonment under a separate law.

STATUS OF MARITAL RAPE IN INDIA:

The definition of rape codified in **Section 375** of the Indian penal code includes all forms of sexual assault involving non-consensual intercourse with a woman. Non-criminalisation of marital rape in India emanates from exception to 2 section 375. However, exception 2 to section 375 exempts unwilling sexual intercourse between a husband and a wife over 15 years of age from section 375 definition of the IPC . As per current law, a wife is presumed to deliver the perpetual consent to have physical intimacy with her husband after entering into marital relations. Unwilling sexual intercourse between a husband and a wife over 15 years of age from section 375 definition of Rape and does immunises such acts from prosecution. The Indian penal code 1860, differentiates consent given by a married woman and an unmarried woman. As per exception clause in section 375, sexual intercourse by a man with his own wife, not being under 15 years of age, is not considered as rape.

Marital rape is violation of the right to equality enshrined in **Article 14** of the Indian Constitution as well as right to health, privacy, dignity, safe living condition and safe environment among others as enshrined under **Article 21** of the Indian Constitution. The exception to **Section 375 IPC** creates two classes of women based on their marital status and immunize the action perpetrated by men against their wives. In doing so, the Exception make possible the victimisation of married women for no reason other than their marital status while protecting unmarried women from those same acts. In the 2013, the UN Committee on Elimination of Discrimination Against Women recommended that the Indian Government should criminalize marital rape. In the year 2012 after the Delhi gang

rape case JS Verma committee set up in the aftermath of nationwide protest. The **JS Verma committee** recommended that by removing these laws, women will be safer from abusive spouses, can receive the help needed to recover from marital rape and can save themselves from domestic violence and sexual abuse. Most recently, in the year 2018, a private bill called as the women's sexual, reproductive and menstrual rights Bill, 2018, introduced by Congress MP ShashiTharoor in the Lok Sabha, sought to criminalize marital rape among the other rights. However, it lapsed after failure to garner support from the elected government. Multiple petitions have been filed across various courts across the country to criminalize marital rape. Unfortunately none of them have reaped any benefits yet

ROLE OF INDIAN JUDICIARY IN PROTECTING SEXUAL PRIVACY OF WOMEN:

Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court in **Queen Empress vs. HareeMythee**^{*}, 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, Indian Penal Code, for rupturing the vagina of his eleven-yearsold wife, causing haemorrhage leading to her death.

In **Emperor vs. ShahuMehrab**[†], 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. In **Saretha vs. T. VenkataSubbaih**[‡], 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

^{*}[(1891) ILR 18 Cal. 49].

[†][AIR 1917 Sind 42]

[‡][AIR 1983 AP 356].

integrity of such a person and invades the marital privacy and domestic intimacies of a person”

The Supreme Court in its landmark judgement titled as **Independent thought versus union of India**[§] has read this down to 18 years this also essentially goes against the right to equality enshrined under Article 14. The Apex Court observed that:

“we are left with absolutely no other option but to harmonise the system of laws relating to children and required exception two of section 375 of the IPC to now be meaningfully read as, sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 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 our Constitution can be preserved and protected and perhaps given impetus.” However, Hon’ble Supreme Court refrained from commenting on adult marital rape.

The Supreme Court in the case of **State of Maharashtra v. Madhkar Narayan**^{**} has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased.

As per present law, wife is presumed to deliver the perpetual consent to have physical intimacy with her husband after entering into marital tie. The concept of marital rape in India is the epitome of what we call an “implied consent”. Marriage between a man and women here implies that both have consented to sexual intercourse and it cannot be otherwise. In India, rape is not seen as an injury to a women’s personhood but as a “damage to her family’s honour”.

In the case titled **Arnesh Kumar versus state of Bihar**^{††}, the Apex court held that criminalising marital rape will be the collapse of the social and family system.

In the case titled **NimishbhaiBhartibhai Desai Versus State of Gujrat, 2018**, the question raised whether a husband who is forcing her wife to indulge in oral sex would amount to rape or not and should it be punished under section 376 of IPC? The court took this matter and said *“that our country hasn’t made marital rape a criminal offence till now. Because of the fear amongst the politicians that it will destabilise the institution of*

[§]PETITION (CIVIL) NO. 382 OF 2013.

^{**} AIR 1991 SC 207.

^{††} (2014) 8 SCC 273

marriage and also women can use this to act against their husbands and make false charges against him. Marital rape cannot be seen by law as it is equal to rape committed by a husband upon his wife so if any husband assaults his wife he would be punished under IPC for the offence of assault but if the same husband forces his wife to indulge in sexual intercourse he would be liable for the offence of assault only under a valid marriage and not for rape.” It was also observed by Hon’ble Gujarat High Court observed that the total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that the humanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege but rather a violent act and injustice that must be criminalised.

In the case of **State of Karnataka versus Krishnappa^{††}**, Hon’ble Supreme Court held that sexual violence apart from being a “Dehumanizing Act” is also an “unlawful inclusion” of the right to privacy and stand of a female. In the same judgement, it held that non-consensual sexual intercourse amount to physical and sexual violence. In **SuchetaSrivastava&Anrversus Chandigarh Administration^{§§}**, the Supreme Court equated the right to make choices related to sexual activity with the right to personal liberty, privacy, dignity and bodily integrity under Article 21 of the Indian Constitution. In Justice **K.S.Puttaswamy (retd.) versus union of India^{***}**, Hon’ble Supreme Court recognised the right to privacy as a fundamental right of all the citizens including female. The right to privacy includes “Decisional privacy” reflected by an ability to make intimate decision primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relationship. Therefore, forced sexual cohabitation is a violation of the Fundamental right of Article 21.

However, Kerala High court in case titled as **XXX VERSUS XXX**, on 30th July 2021, upheld that marital rape, although not penalised in India and a husband cannot be punished even if it is done by force but it is a good ground to claim divorce while dismissing a set of two appeals filed by the husband challenging the decision of the family court. A division

^{††}AIR 2000 SC 1470

^{§§}SLP NO. 17985 OF 2009

^{***}AIR 2017 SC 4161

bench of Justice A.MuhamedMustaque and Justice KauserEdappagath made several significant observation while granting divorce to the wife:

“a husbands licentious disposition disregarding the autonomy of the wife is a marital rape, Albeit such conduct cannot be penalised, it falls in the frame of physical and mental cruelty. In modern social jurisprudence, spouses in marriage are treated as equal partners and husband cannot claim any superior right over wife either with respect to your body or with reference to individual status. Treating wife’s body as something going to husband and committing sexual act against her Will is nothing but a marital rape. Autonomy essentially refers to a state of feeling or condition one believed to possess having control over it. In matrimony, spouse possesses such privacy as invaluable right inherent in him or her as individuals. Therefore, marital privacy is intimately and intrinsically connected to individual autonomy and any intrusion, physically or otherwise into such space would diminish privacy. Merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognising the same as a form of quality to grant divorce. We, therefore, are of the view that marital rape is a good ground to claim divorce. Insatiable urge for wealth and sex of the spouse would also amount to cruelty. Unsubstantiated allegations of adultery would also constitute mental cruelty.”

“a spouse in a marriage has a choice, a choice not to suffer, which is fundamental to the autonomy guaranteed under natural law and the constitutional law. Law cannot compel a spouse to suffer against his or her wish by denial of divorce by the court. In a change the scenario of marriage in the society, shifting from the social philosophy to individual philosophy, we are afraid whether the present divorce law on in numerate it grounds would stand to the test of constitutionality. Fine balancing of individual choice and individual’s best interest is missing in such law.”

Recently, Delhi High Court is hearing a petition **RIT Foundation versus UOI &Ors.**challenging exception to in IPC section 375 that protects men, who have forced non-consensual intercourse with their wives, from criminal prosecution under IPC section 376. Senior advocate Rebecca John, an amicus curiae in the case seeking criminalisation of marital rape argued before Delhi High Court that the exception in law was carved out to favour the conjugal right of the husband and is based on the doctrine which believes a woman’s irrevocable sexual consent on marriage grounds to her husband. The submission was made before the division bench of Justice Rajiv Shakhder and Justice C Hari Shankar

during the hearing of a petition challenging exception two of section 375 IPC. Tracing the origin of the exception in 375, John argued that even before Thomas Babington Macaulay, who presided over the first Law commission, had said that the exception was to protect the conjugal rights of a man, the concept find its origin in the doctrine of coverture and implied consent. “And according to this legal doctrine, the legal rights of the women were subsumed by the husband after marriage. By entering into marriage, a wife was considered to have granted irrevocable sexual consent to her husband.” After Amicus Curiae John’s submission, Justice Shakti Chaudhary observed, “she was almost treated under the doctrine as someone who is incapacitated from giving consent. It is like what we have in the contract act that certain categories of people cannot give consent. Enunciation by itself seems a little problematic.”

In the present case Supreme Court judgement has also been referred as case title “ **State of Maharashtra versus Madhukar Narayana Mardikar**”^{†††}, in which it was observed, “*even a women of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes, so also it is not open for any and every person to violate her person as and when he wishes, she is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.*”

WHAT REMEDIES AVAILABLE TO WOMEN VICTIM OF MARITAL RAPE?

Survivors of marital rape really want to take action against the accused but when they do, there are Indian laws that take cognizance of it first one is **the Domestic violence act 2005** and other one is **section 498-A of IPC**. Section 498-A deals with women being subjected to cruelty by her husband or any relative of her husband. Under this section, the man can be imprisonment for up to 3 years and shall also be liable to pay fine. The most common remedy used by the women is the protection of women from Domestic Violence Act 2005, which recognises forced sexual activity as punishable under Indian law. However, a magistrate under the law has no power to criminalise the act of a man raping his wife, neither can the man be sentenced. As marital rape is not a crime or a criminal act in India, women could simply file a case under other provisions of the Indian penal code, such as cruelty and could also file for divorce.

^{†††}AIR 1991 SC 207

How is it fair, when a married woman is raped by her husband and he is punished for the offence of assault and not for rape? An investigation can tell for how long your wife has been raised but the investigation cannot tell us what she has suffered in the past few days or months or sometimes even years. Even if a husband does that for once it is a crime against his wife whom he shall protect and not endanger her life or harm her dignity or lower her in any way whatsoever. Husband must be punished for the acts he has caused to a human body, which cannot be measured in terms of us physical and mental. Regardless of the Perpetrator's Identity or the victim's age, the fact that it was a rape does not change. A women who is raped by a stranger carries the memory of a horrific incident with her; on the other hand, a woman who is raped by her husband lives and also has to sleep with her rapist. It is very much difficult for a married woman to come out in public for complaining the acts which has been done within the four walls of the house due to social stigmatization but when she did complain about the same, we should support such women because not every female who suffers decided to speak up about her abusive relationship.

The availability of various provisions including section 498-A, 304-B IPC, Domestic violence act and other civil remedies, are insufficient to deal with the offence of rape under section 375, as regards to a wife alleging rape by her husband. There is no commonality between the said provisions and for section 375 of IPC there are some pre-requisite elements which are very essential, thus, every offence must be separately prosecuted. Therefore to argue that wives have remedies under section 498-A, and the domestic violence act and such like acts, is not tenable argument. Of course, they exist but for a separate offences, which may be added in the given case to an aggravated offence. The ingredients of section 375 are separate and there is no reason why section 375 are separate and there is no reason why section 498-A can be used as a substitute for section 375. It can be used in addition but it is not a substitute.

We as respected citizen of India should help her out and in the process protect another women. While it is known to us now that in India a judicially separated wife is protected under separate law by the Indian legislation the married women should also be protected. It is high time that Indian judiciary should take a step and deliver a landmark judgement on marital rape and it is high time that Indian Women and their Human Rights are not

ignored, especially the judiciary that has sworn to protect every individual's Fundamental Rights.

CONCLUSION:

As aforesaid, marital rape is not fully criminalized in India. It is clearly a serious form of violence against women and worthy of public and State attention. The studies till date indicate that women who are raped by their husbands are more likely to experience multiple assaults and often suffer long-term physical and emotional consequences. In this context, marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault whether she is awake or asleep. Given the serious effects, there is a clearly an urgent need for criminalization of the offence of marital rape. India is moving in the direction of positive legal change for women in general, but further steps are necessary to ensure both legal and social change, which would culminate in criminalizing marital rape and changing the underlying cultural assumptions about women in marriage. Although most Indian women feel protected under the Protection of Women from Domestic Violence Act, there are many loopholes in it, as the Act does not openly speak against marital rape. However, the enactment of a specific legislation against domestic violence has opened the door for a legislation criminalizing marital rape because it would signal a shift in the State's approach of non-intervention in family life. Though a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, inquiry or matrimonial relief, what is needed is the incorporation of the principle of liability for marital rape in our penal laws. Not only child-brides, but all wives need legal protection from rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person must be recognized. Criminalizing marital rape would not hinder the marital union rather it will punish the preparator of the crime.