

Marital Rape: Why marital rape is not being covered under Indian penal code

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ABSTRACT: Do the relationship made by husband forcefully with his wife come under the category of rape? If a husband acts sexually with his wife against her will, without her consent should he be punished by Indian criminal law? The answer to all these questions will be received in NO by the Indian civil society because our law is silent on all these. But if the situation is changed and it is to be asked that an outsider is forced to intercourse with unmarried woman without any consensus, against her will, should he be punished? The answer will be received that he should be punished under section 376 of Indian Penal Code. Why this discrimination, While our Constitution does not discrimination it. Whether a woman is married or unmarried everyone have the right to live with dignity (Ar.21). The question rises whether after marriage the married women are being considered an object or the property of the husband who fulfill his sexual need. Does a woman lose her right to live her life with dignity, lose her own existence upon marriage? Does she have no right to speak No? Is marriage a way to legitimize sexual act? Marriage does not provide license for committing rape and the dignity of women either married or unmarried is alike. The main purpose of this paper is to find out as to whether sexual act without the consent of wife should be considered as rape and why marital rape is not being covered under Indian penal code.

Key words: Marital Rape, Dignity, Consent, Constitutional Right

INTRODUCTION

This is no imagination; it is a true story of a married girl who got married in the state of Haryana. The girl had also dreamed of a lot like the normal girls for marriage. But what did she know was that her life was going to get worse after marriage. The first night of marriage was very fierce for that girl. Her husband had broken on him like a beast. Talking to her, getting her consent, knowing her will was far away. She continued to keep saying, I'm getting hurt, but her husband did not listen to her and threatened her to leave the room when she refused. When the woman came out of the room when she was suffering from pain, she was put on the burden of work at home, without felt her pain. Days passed and her pain, the wounds/infection on her private parts of body, nails and teeth marks on the body continued to grow when she mentioned her pain to her mother, the mother explained that every girl has to undergo all these things. It is your duty to keep your husband happy, fulfil all his wishes; it is your responsibility to keep your husband happy at all times. This is the religion of good wife. Gradually all will be correct, but her pain was increasing day by day, stamina was decreasing and she was going to hate her own body. When she raised a voice in the police station for help, the police refused to register a case saying it was not a crime. Every husband has full control over his wife. Today the girl has gone into depression and her treatment is going on.

This is not a single example in itself; there are many instances where women are facing not just mentality and physical cruelty but also sexually cruelty/sexual assault/unwanted intercourse after marriage. But due to lack of law, lack of awareness, fear of cut the nose in civil society, fear of dishonour (What will people say) that case is not coming out. After listening to this incident, the question arises in the mind that does marriage give full authority to a man to use force with his wife? Is marriage a way to legitimize sexual act? Should sexual acts not be considered as rape without the consent of the wife? Why should not marital rape covered under the Indian Penal Code?

NOW TAKE A HYPOTHETICLE EXAMPLE

If unwanted sexual act is done by a stranger with an unmarried girl without her consent, against her will and then told the girl that as a punishment, that boy will have to marry with you and that boy will not have the right to divorce at any cost. Think of whether the victim will be ready to get married with the offender or punish the culprit under section 376 of Indian penal code. How can he live with a boy who has hurt her self-esteem, dignity and prestige? Obviously, no girl will want to live with that person, where she does not feel secure herself.

Now the question arises that when an unmarried woman can't be compelled to live with accused person, then why married woman is forced to live with the person who stabbed not only her body but also her soul every day just because she has married him. Does she become a slave after marriage? She does not have any existence of its own. After marriage, a woman gives her body, soul, freedom, dignity, and prestige, everything in her husband's hands. It is clear that there is discrimination between the law of married and unmarried woman in Indian law.

MARITAL RAPE – AN UNDERSTANDING

When one mentions the word rape and it is said that a girl has been raped, all the attention goes to section 376 of Indian penal code. But when it is said that a husband has raped his wife, then a question mark is imposed on that by the Society. And it is argued that no husband can be liable for rape his own wife because a woman gives all kind of acceptance at the time of marriage.

Marital rape means rape committed by the person to whom the victim is married. Marital rape is defined by any unwanted sexual acts by a spouse or ex-spouse, committed *without consent* and/or against a person's will, obtained by force, or threat of force, intimidation, or when a person is unable to consent. There are various types of rape, including battering rape, force-only rape and obsessive/sadistic rape.

NON-CONSENSUAL SEXUAL ACTS

These non-consensual sexual acts include intercourse, anal or oral sex, forced sexual behaviour with other individuals, and other sexual activities that are considered by the victim as degrading, humiliating, painful, and unwanted.

In Bodhisattwa Gautam v. Subhr.a Chakraborty (1996) 1 SCC 490 It was held in paragraph 10 of the Report that: “Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”

It was pithily stated in **State of Punjab v. Gurmit Singh (1996) 2 SCC 384** “We must remember that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.”

In **State of Haryana v. Janak Singh (2013) 9 SCC 431** wherein reference was made to Bodhisattwa Gautam and it was observed in paragraph 7 of the Report: “Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under Article 21 of the Constitution of India.”

If we have a look at the definition of rape given in section 375 of Indian Penal Code, then we will find that there is a lot of emphasis on the consent.

Clause (1) to (4) - If the consent of the women is absent, fraudulently or mistakenly been obtained.

Clause (5) to (7) - When a woman is not able to consent properly or is not fit to convey her consent.

Its mean the consent is very important to constitute the offence of rape. Consent for the purpose of section 375 requires voluntarily participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act.

WHAT IS CONSENT IN CRIMINAL LAW?

Section 90 in the Indian Penal Code

Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.....

It is clear that the consent should be free and should not be obtained by fraud, threatening, by providing emotional black mail.

In any case, marriage doesn’t amount to volunteered sexual consent at all times to come. Justice Leila Seth elucidates this in her book, *Talking of Justice, People’s Rights in Modern India*, saying, “A woman’s autonomy and bodily integrity are concepts that have developed over the years, thus making rape an offence unless there is true consent.”

Exception (2) to section 375, which is sexual intercourse or sexual acts by a man shall not constitute rape with his own wife, the wife not being under 15 years of age. The exception is in itself contradictory and indistinct. Law amerce marriage to a girl who is below eighteen, and that to a rigorous punishment will be served only to the one who commits rape with a below 12-year aged- girl then the below 15-year- old girl, and evasive in a sense that if all the clause include consent in sec. 375 then why an exception is put for a

married women, does she lose the right to consent after marriage or her consent suddenly becomes illogical, is the consent to marry a person, to have sex anytime the other individual wants or bear the sexual violence the husband imposes. Does consent to marry include consent to give up will, freedom, dignity, or to say no to something which one does not want.

This established the impression that once married, a woman does not have the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct infringement of the principles of human rights and provides husbands with a "licence to sexual violation" their wives. Women so far have had recourse only to section 498A of the IPC, dealing with tyranny, to protect themselves against "perverse sexual conduct by the husband". But, where is the standard of measure or interpretation for the courts, of 'perversion' or 'unnaturalised', the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn't consent a sine qua non? There is no answer, because the judiciary and the legislature have been silent. The Domestic Violence Act, 2005, also does not help much as it provides only for civil remedies to what the provision of cruelty already gives criminal remedies for, while keeping the status of the matter of marital rape in continuing irrelevance. Section 3 of the Domestic Violence Act, connives sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom or decision of a woman's wants.

Marital rape reflects the sexual perversion of an individual. It is not only the rape of a woman's body but a rape of her love and trust as well. Being subject to outrage by her own husband intumesces her in a sense of insecurity and terror. Her human rights are sacrificed at the chancel of marriage. The Indian Penal Code has dealt with this form of rape in a very discrete manner. Various provisions of the IPC relating to sexuality reinforce not only Victorian moralistic but also the non-agency of women.

While we are concerned with the general question of marital rape of an adult woman but in the context of Exception 2 to Section 375 of the IPC, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows: "

72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of covertures, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, **Sir Matthew Hale declared**: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, '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.'

74. Our view is supported by the judgment of the European Commission of Human Rights in **C.R. v UK Publ. ECHR, Ser.A, No. 335-C** which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994."

In **Eisenstadt v. Baird 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092** the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

On a combined reading of C.R. v. UK and Eisenstadt v. Baird it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

INDIAN COURT VIEW: MARITAL RAPE

Queen-Empress vs Hurree Mohun Mythee (1891) ILR 18 Cal 49 In the case of married females, as you probably know, the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape

does not apply as between husband and wife, if the wife has attained the age of ten years, that the law regards a wife over ten years of age as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law.

Pressing against provisions allowing marital exception of rape and the unconstitutional classification of rape, the RIT Foundation and The All India Democratic Women's Association (AIDWA) has submitted before the Delhi High Court . The case is listed for hearing before the bench of the Acting Chief Justice of the Delhi High Court , Gita Mittal and Justice C.Hari Shankar.

In RTI Foundation v. Union of India W.P. (C) No.284/2015 (India) The Delhi government told the Delhi High Court that the Marital Rape has already been declared as cruelty under Section 498A of the IPC and hence there is no need for any new provision to punish them.

In Independent Thought V. Union of India W.P. (c) No. 382 of 2013 (India) The Supreme Court bench, in the present case, refused to look at marital rape as an issue that can debate and considered as a criminal act under the IPC. "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." In fact, the bench seemed to have clammed up and passed the buck to the Parliament.

The UN has repeatedly suggested that India make marital rapes a criminal offence.

In the light of recent UN reporting, it stands true that women in India are 40% more likely to be raped by their husband than by a stranger. In 2015, a woman reported to having been raped and assaulted by her husband, and though she was hospitalised for the injuries she suffered, her husband was not prosecuted. When she filed a petition before the Apex Court of India, it was dismissed with the court saying that "the law was not to be changed for the experience of one individual."

MARITAL PARE: THE STATISTICS SHOW HOW REAL IT IS

Latest research confirms the belief of many activists that sexual violence is grossly under-reported in India			
Raped by	Reported to NFHS	Officially reported in NCRB data	Proportion of cases reported
Husband	6590/1,00,000	37.2	0.06%
Others	157	9.1	5.8%

How many married women are facing sexual violence after marriage its exact figures are not available as most of related cases not reported. Sexual violence, including rape by husbands within marriages is a shadowy subject in India and exact numbers are hard to come by. According to National Crime Bureau Report (NCRB) 37.2 and National Family Health Survey (NFHS) 0.06 per cent women said they faced sexual violence, in fact, filed complaint with the police.

According to NCRB, 98% of all rapes involve perpetrators familiar to survivors. These presumably include friends, acquaintances, colleagues and relatives. But husbands? 2005-06 National Family Health Survey, which found that the commonest source of violence for married women was spouses. Only one in four abused women has ever sought help, found the survey, and women are much less likely to seek help for sexual violence than for physical violence. When they do seek help, they'd rather go to family members than the police.

Despite an increase in reporting among survivors following the passage of the Criminal Law (Amendment) Act, 2013, rape continues to remain under-reported. Only about six of every 100 acts of sexual violence committed by men other than husbands actually get reported, says a report by Ashish Gupta of Rice Institute, a non-profit research organization. "Most incidence of sexual violence, however, was committed by husbands of the survivors: the number of women who experienced sexual violence by husbands was 40 times the number of women who experienced sexual violence by non-intimate perpetrators," noted the report.

CONSTITUTION OF INDIA V/S MARITAL EXCEPTION OF RAPE

Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India.

State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80. The two requisites of a valid classification were laid down by the Supreme Court, as early as in 1952

- a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others;
- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.

Exception 2 to section 375, Section 376B of IPC and Section 198B of the Criminal Procedure Code, 1973 classify rape victims into three categories based on their marital status i.e. married, married but separated, and unmarried.

Married women and unmarried women need protection of the law in their private spheres. The classification is unnecessary, unintelligible and violates the mandate of Article 14. Withdrawing the protection of Section 375 of the IPC from the victims of the crime of rape solely on the basis of their marital status is irrelevant for the purposes of legislation and thus violates the test of classification under Article 14.

Article 19 (1) says all citizens shall have the right—to freedom of speech and expression; The petitioners contend that exception to Section 375 does not recognize the right of a married woman to say no to sexual intercourse with her husband.

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The petitioners say “All women’s physical integrity flows directly from the fundamental right to life, dignity and bodily privacy; her right to sexual and reproductive autonomy flows directly from the right to liberty.

The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape (**The Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988**). Thus the marital exemption doctrine is also vocative of a woman’s right to live with human dignity. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes against the very essence of right to life under Article 21 and is hence unconstitutional.

CONCLUSION

Marriage cannot be used to bypass basic principles of criminal jurisprudence. Rape is a crime and whether one is married or not; wearing a short skirt, a saree or walking on the road naked; whether she is a sex worker—rape is rape. Rape is a crime. There can be no justification for it, no excuse, and it is criminal that the Indian government, bound by the constitution of India, thinks it is completely okay to defend the ‘institution’ of marital rape.

When will our eyes be opened, whereas the second case, such as the Nirbhaya rape case, will be repeated by her husband against a married woman? Just because of this fear there will be a misuse of the law, therefore the law is not being created, it is wrong. Because the misuse of the 498A is also being regular, but the law is extant. Because of fear of the misuse we can’t keep the needy out of receiving justice. Due to lack of any law in this regard, women who need justice are travelling and taking the support of 498A of Indian penal code. Because when a victim woman is reported, she is advised by the police and the lawyer that you will have to take the support of the same. The result of which is that the lawyer allows the woman to file a false case. Therefore, to prevent the misuse of 498A and to get justice to the married woman, it is necessary to make the marital rape criminalized.

Marital rape definitely is a serious form of crime against women and capable of government’s attention. It is a fact that women who are raped by their husbands are more prone to multiple attacks and often suffer long-term physical, mental and emotional problems. In this context, marital rape is even more traumatic for a woman because she has to stay with her aggressor every day. As the consequences of marital rape are really high, need for protection of woman, here are some effects a rape victim may have to live with—Physical injuries to vaginal and anal areas, Gynaecological effects including miscarriage, bladder infections and infertility, long drawn symptoms like insomnia, eating disorders, sexual dysfunction, and negative self image.

The men must understand that marriage does not thrive on sex. There is clearly an urgent need for criminalisation of the offence of marital rape. There are many loopholes in Protection of Women from Domestic Violence Act, as the Act does not openly speak against marital rape. On the brighter side enactment of a specific legislation against domestic violence has opened the door for a legislation criminalising marital rape.

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