

A Hideous Crime in the Name of Matrimonial Sacrament?

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ABSTRACT:

In contemporary India, under section 375 of the IPC, a limitation still exists against criminalizing marital rape. The rate at which this heinous and barbaric crime is committed in India is extremely high and is compounded by the fact that it is not recognised as a crime. This paper explores how marital rape is a black thorn within our society and recognises the adverse effects caused by its impact. The archaic thought process behind not introducing legislation to criminalise marital rape permits our society and culture to remain stuck in its orthodox ways and hampers progress. It encourages patriarchal undertones in the Indian law and protects the men who met out cruelty to their wives. It also explores the various fundamental rights of women that are violated due to the heinous act of marital rape being inflicted on them such as the right to equal protection under the law, right to life and liberty, right to privacy of sex, right to discretion over body, etc.

I. INTRODUCTION

“While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female.”

– Justice ArjitPasayat

Rape is one of the most evil acts committed against mankind. The effect of rape is not limited to forced sexual misconduct but it goes on to inflict effects on the mental, social and physical life of the victim. We live in a country where sexual sanctity of an individual is given utmost importance; the act of rape thus often has extremely hideous and grave implications on the life of the individual as well as of the family members. Being cast out by the community members or by the general public is just one. Society always tends to blame and condemn the victim, questions her morals and ethics, which furthermore traumatise the victim, and all this often leads to suicide. This attitude and perception towards the sufferer is deeply embedded in the society and it needs to be altered for good.

The Supreme Court in its judgement narrated rape as *“deathless shame and the gravest crime against human dignity.”*¹ This offence is all the more abhorrent when it is committed within the sacred bond of marriage. Marital Rape is act of sexual intercourse with one’s spouse without the consent of the spouse. Mostly, women are subject to this ‘victim less’ crime because India does not recognize marital rape as an offence. The main argument behind not penalizing marital rape is because marriage is viewed as a pious relationship, which is attached to numerous religious values. Moreover women are often considered subordinate to men, possessing

¹BodhisattwaGautam v. Subhra Chakraborty, A.I.R 1996 S.C. 922(India).

the duty to serve their husbands. Marriage definitely gives right to sexual intimacy but it does not give rights for involuntary and forced sexual misconduct.

At present there is no immunity available to wife from the offence of marital rape. As the law assumes that there is implied consent of the wife owing to the sanctity of the matrimonial bond. Section 375² penalizes rape under six different descriptions. But Exception 2 of Section 375 provides immunity to husband, it states that “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”. Also the Domestic Violence Act, 2005 specifically made for protection of women, does not provide immunity to married women in this regard.

Furthermore in today’s civilized society, the notion that the wife is bound to have sex with her husband irrespective of her consent should be completely unacceptable and the exceptions to the same should be done away with. Mostly importantly the impression that “rape is rape, irrespective of the relationship between the victim and the perpetrator” should be accepted and brought into force.

II. MARITAL RAPE EXEMPTION – ORIGIN AND RATIONALE

“The day will come when men will recognize woman as his peer, not only at the fireside, but in councils of the nation. Then, and not until then, will there be the perfect comradeship, the ideal union between the sexes that shall result in the highest development of the race.”

- Susan B. Anthony

The idea that men are superior to women was present in most primitive societies, which gave authority to men over women, especially when they were married, thus it also gave men power to force women to do certain acts against their will, which sex was certainly part of. This is the reason why most countries did not consider involuntary sex with one’s wife as an offence. This ideology also looked apparent in the Judgements of various judges of England court. For instance, Sir Mathew Hale, Chief Justice wrote that:

“the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract”.³

Lord Hale argued the concept of ‘implied consent’ starts at the time of marriage and continues to be present till the entire course of marriage.

III. MARITAL RAPE AND LAWS IN INDIA

A sight into legislation to look for ways that woman has to protect against the heinous crime lead us to

²Indian Penal Code, 1860, § 375, No 45, Acts of Parliament, 1860 (India).

³Hale Matthew, History of the Pleas of the Crown p. 629 (1736, London Professional Books, 1972).

nowhere. It is either ambiguous or absent, suggesting that it depended upon interpretation by the Courts. Section 375⁴ of IPC, which is just another version of Clause 359 of Draft Penal Code by Macaulay contains the clause that provides exception to the perpetrator husband. Section 376⁵ lays down the penalty for rape as incarceration for minimum seven years that may extend for 10 years or for a lifetime and a fine. In case the victim is his own wife, not under 12 years of age, the imprisonment reduces to maximum of 2 years or a fine or with both. Thus the section recognizes marital rape of wives aged between 12 and 15, and punishes the culprit for the same. After the attainment of 15 years of age there is no protection is bestowed by law upon young wives against the vice of marital rape. Rape of a lawfully separated wife is punishable⁶ and also when in cases where wife is below 12 years of age.⁷

Thus law, which is supposed to safeguard individuals from vices that prevail in a society, does nothing for it. Although the provisions of Section 498A of IPC wherein a wife can bring liability upon the husband for domestic violence⁸, might provide a relief, it is undeniably arguable that rape is a crime of a different magnitude and cannot be clubbed with domestic violence. A law⁹ passed in 2005 which allows the woman to obtain judicial separation by approaching the court. The legislation still didn't consider marital rape as a crime, only a form of domestic violence.¹⁰

It is nothing but tragic that human rights are sacrificed at the onset of such marriages. Not only this shatters the trust, but it highlights the shallowness and perverse desires of an individual. The argument most often put forward is that matrimonial bond implies a consent to engage in sex. However it needs to be differentiated that the consent is for sexual intimacy arising out of natural love and affection for a person and not for forced sexual misconduct. It is paradoxical that how legislation provides right to life and liberty but not the right to protect one's body or dignity, which is impliedly important for a right to life of dignity to exist.

42nd Report of the Law Commission

The 42nd report of the Law commission of India stressed on the need of excluding the exemption of marital rape from section 375 of IPC. In addition to this, they also recommended that, a punishment for this offence may also be provided in the separate section.¹¹

Marital Rape Exception Infringes on Core Constitutional Values

⁴Indian Penal Code, 1860, § 375, No 45, Acts of Parliament, 1860 (India).

⁵Indian Penal Code, 1860, § 376, No.45, Acts of Parliament, 1860 (India).

⁶Indian Penal Code, 1860, § 376B, No.45, Acts of Parliament, 1860 (India).

⁷*Id.*

⁸Indian Penal Code, 1860, § 498A, No.45, Acts of Parliament, 1860 (India).

⁹ The Protection of Women from Domestic Violence Act, 2005, § 3 Explanation 1 (ii), No.43, Acts of Parliament, 2005 (India).

¹⁰*Id.*

Constitution of India is the Supreme text of the land. Its aim is to protect the interest of the individual and public at large, and also work as a vehicle for progress of the nation. All the Statutes and acts should abide by the provisions of the constitution or the courts has the power to strike them down and declare them as *ultra vires*.¹²

Now we'll look into as to how the marital exemption fails to meet the provisions of the constitution.

Right to Equal Protection by Law

Article 14 in the Indian constitution guarantees equality before law and equal protection of law. This article does not require that all the individuals should be treated equally in every circumstance rather it requires "that the equals within a society are not treated unequally and that the unequals of the society are not treated equally." The contemporary law protects females till a certain age bracket. It does not do the same females who aren't inside the sanctioned age bracket. It is blatant enough that females who were protected earlier by law from the looming societal vice while they were of a certain age, do not cease to be females after they attain an age which is out of the sanctioned age bracket. The Section is creates the differentiability between victims on the fact whether they're married to the perpetrator or unmarried.

Thus, any legislation, the provisions of which are found to be outside the legal framework of this article can deemed to be *ultra vires*.

Right to Life and Personal Liberty

The right is a source of all kinds of rights pertaining to liberty and life of people, by virtue of Article 21. Here the word 'life' does not refer to mere physical existence. It's a lot more than that.¹³ Thus there cannot be a more overt violation of right where victims forfeit consent and authority over their own bodies.

Right to Live with Human Dignity

Rape is often more than a sexual act without consent. It is atool to show superiority. It is to manifest strength and boost one's authority at the cost of forfeiting dignity of another human being which is essentially against Article 21.

Right to Privacy of Sex

*"Privacy can also extend to other aspects, including bodily integrity, personal autonomy, informational self-determination, protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move or think."*¹⁴

¹²Vakasha Sachdev *Delhi high court hears argument against marital rape exception*, THE QUINT (Jan.5 ,2018) <https://www.thequint.com/news/india/delhi-high-court-marital-rape-exception-case>.

¹³*Bandhua Mukti Morcha v. Union of India*, A.I.R 1984 S.C. 802, 811(India).

After right to privacy being determined as a fundamental right under article 21¹⁵ of the Constitution by a nine judge bench¹⁶, a person can claim the same against the state. On these lines it can be said that it gives the option to a woman to be entitled to her sexual privacy and not engage herself in sexual intercourse with her husband, unwillingly. The same was upheld in *State of Maharashtra v. Madhkar Narayan*¹⁷ Thus the provision that provides immunity to husband and decriminalises marital rape, violates fundamental right of privacy.¹⁸

Right to Discretion Over Body

Sexual relations are a kind of the most personal things a person can enter into. By not providing protection to this choice, it takes away an important freedom of expression, leaving the victim in despairs, without any kind of control over her own body and desires. Thus this law, takes away her discretion over her very own body, and thus should be unconstitutional.

Right to Good Health

Right to good health had been given recognition under Article 21 in *CESEC Ltd. v. Subhash Chandra*¹⁹ and in *Regional Director, ESI Corpn. v. Francis de Costa*²⁰. Generally speaking health includes both mental and physical health. The mental well-being of the victim suffers gravely due to this crime. The graveness is exponential since it happens at the hands of the person that the victim is supposed to spend her life with. It leaves the victim with emotional scars. It can lead to STIs and STDs thus harming the physical well-being as well and can lead to harmful diseases like HIV AIDS.

Right to Reproductive Choices

In the case of *SuchitaSrivastav v. Chandigarh Admn.*²¹, Supreme Court said that ‘personal liberty’ included a woman’s right to make reproductive choices. These choices also include the choice of abstaining from procreating. Hence, her refusal to participate in sex and usage of contraceptive methods form essential ingredients of her right to make reproductive choices. Hence the exemption clause in the legislation violates Article 21 from this angle also.

¹⁴KrishnadasRamagopal, *The low down on the Right to privacy*, THE HINDU, (July 29,2017),<http://www.thehindu.com/news/national/the-lowdown-on-the-right-to-privacy/article19386366.ece>.

¹⁵INDIA CONST. art 21.

¹⁶ Justice K S Puttuswamy (Retd.),and Anr. v. Union of India and Ors., (2015) 10 S.C.C 92(India).

¹⁷ State of Maharashtra v. Madhkar Narayan, A.I.R 1991 SC 207(India).

¹⁸Maanvi, *Privacy a Fundamental Right:Now what happens with marital rape ?*, THE QUINT (Aug 29, 2017) <https://www.thequint.com/voices/women/marital-rape-supreme-court-right-to-privacy-judgement-delhi-high-court>.

¹⁹ CESC Ltd. v. Subhash Chandra, (1992) 1 S.C.C 441(India).

²⁰ Regional Director, ESI Corpn. v. Francis de Costa, (1993)Supp (4) S.C.C 100(India).

²¹SuchitaSrivastav v. Chandigarh Admn., (2009) 9 S.C.C 1(India).

IV. CENTRE'S STAND ON NOT DECRIMINALISING MARITAL RAPE

The main petition challenging constitutional validity of Sec 375(b) of IPC has been filed by RIT foundation and the All India Democratic Women's Association (AIDWA). Similar petition was filed by Independent thought²² in the Supreme Court challenging the same section.

Centre, in reply to all these petitions submitted before the court that if they criminalize marital rape, then it would be an easy route for wives to harass their husbands. Moreover merely doing away with exception 2 will not serve any purpose because definition of 'rape' given in section 375 cannot be applied in the case of 'marital rape'. Furthermore it would be difficult to prove this offence, and the government has to ascertain beforehand as to what all factors would be considered as evidences in such circumstances, because all sexual acts by husband with his own wife cannot be considered as 'rape'. Thus the decision whether the sexual act by husband is rape or not will solely rest on the wife, which should not be the case. The centre also submitted various problems such as illiteracy, lack of financial security of females, practice of various cultures in different parts of the country etc, which might come in the way of criminalizing marital rape. At last centre also recommended that, the views of all the states should be considered on this matter, so as to avoid any future complications.

V. JUDICIAL STAND

If we look into some of the historical judicial decisions, the court even in the presence of marital rape exception, has observed that the husband has no right to disregard physical safety of his wife. The court in this case of *Queen Empress vs. Haree Mythee*²³, charged this man for causing his wife's death, by having brutal intercourse which led to hemorrhage causing death of the eleven year old.

In *Emperor vs. Shahu Mehrab*²⁴, the husband was booked under section 304A²⁵ for causing death of his minor wife by having rash and negligent act of sexual intercourse with her.

The Andhra Pradesh high court in the case of *Saretha vs. T. Venkata Subbaih*²⁶, held that

"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 argues that enforcing a law between the sexual relationship of the husband and wife is infringement to

²² Independent Thought v. Union of India, W.P. (Civil) No. 382 of 2013, decided on October 11, 2017 (Madan B. Lokur and Deepak Gupta JJ) (hereinafter, *Independent Thought*).

²³ *Queen Empress v. Haree Mythee*, (1891) I.L.R 18 Cal. 49. (India)

²⁴ *Emperor v. Shahu Mehrab*, A.I.R 1917 Sind 42 (India).

²⁵ Indian Penal Code, 1860, § 304A, No.45, Acts of Parliament, 1860 (India).

²⁶ *Saretha vs. T. Venkata Subbaih*, A.I.R 1983 A.P 35 (India).

their privacy, then surely a women's privacy is infringed when she is forced to have sex with her husband without her consent. A person's individual privacy is not lost by the association of marriage.

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*²⁷, discussed the right to 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."

In *Sree Kumar vs. Pearly Karun*²⁸, the husband and wife were not on good terms and were looking divorce, thus wife did not reside with him during such period. After some time they reached a settlement and decided to live together again. They stayed together for two days and in those two days she was subject to sexual intercourse against her will and consent by the husband. The court held that this would not constitute rape because of the exception clause - "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."

Therefore, from the above decision it is apparent that judiciary does not believe in the idea that rape within marriage is possible. Thus, it upholds the view of centre, that criminalizing marital rape would 'destabilize the institution of marriage'.

VI. CONCLUSION

"Marriage is an exchange of souls NOT Transfer of Property"

The fact that marital rape prevails and is out of ambit of criminal law points implies the status of woman as a 'property' instead of a 'partner'. Organizations for women have so far succeeded in providing legislations protecting women from domestic violence but haven't had even an ounce of success in the case of marital rape. The most vehement arguments for the criminalization of the social vice are based on rights of an individual. However it is imperative to understand that until legislators and the judiciary do not recognize individual rights of a woman within a marriage, it can't happen. More often, the discussions about sexuality of a woman pertain to shame, concept of gender and honour of the family. They rarely pertain to consent or bodily rights.

Till the time, society doesn't see the crime as an infringement of basic human rights, a tool of inflicting domination and patriarchy, and something that harms the emotional and physical health of a women, criminalization cannot be a real possibility. But then foremost contention laid out is that it should start from

²⁷State of Maharashtra v. Madhukar Narayan Mandikar, A.I.R 1991 S.C 207.(India)

²⁸Sreekumar and Anr. V. Pearly Karun, 1999 (2) A.L.T Cri 77.(India)

society. Members of the society must acknowledge the existence of this heinous vice. Until and unless that happens, expecting government to legislate on a subject that society doesn't even acknowledge cannot be expected.

Another contention raised is that the victims of marital rape do not remain victims for that specific incident. They're can be multiple attempts by the perpetrator at it. It is even more hideous because the woman in most circumstances is expected to live with the perpetrator and possibly start a family. Hence in this respect it is regarded as greater in magnitude of infliction of pain on the victim's emotional and physical health. Living forever in intimidation is the only option left for such victims. The enactment of Domestic Violence Act, 2005 has paved way for criminalising marital rape as it changed the government's outlook of avoiding intervention between families.

This is the need of the hour is to bring a social change and then can be followed by a legal uprising. Women have to recognize as individual with all her human rights within and after her marriage. The mere tag of being a 'married' woman should not snatch away her right to approach the Court against a heinous crime born out of patriarchy and domination