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Marital Rape: A Critical Analysis of Sec. 375, Exception (2)

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ABSTRACT

During the last decade, the reporting of rape cases have drastically increased, owing to which there have often been demands for stringent laws to deal with the rape offenders. However, people have overlooked one of the most under-reported forms of forceful sexual intercourse i.e. marital rape. The codified laws provide protection against marital rape only in only two circumstances, namely, when the wife is minor or when the husband and wife are living separately, thus leading to non-reporting of the cases. Recently, the Indian judiciary has been making attempts to grant some relief to the victims of marital rape, but the offence has not been able to find its place in the penal laws due to various societal factors. On these lines, the article analyses various factors and discusses the responses put forward by major reformative bodies in respect of marital rape.

I. INTRODUCTION

Phulomoni Dasi, aged 11 years old, died in 1879 due to excessive bleeding caused by a ruptured vagina after sexual intercourse with her husband, Hurree Mohan, on her wedding night.³ However, during the trial, the jury found him guilty only under section 388 of the then Indian Penal Code (hereinafter IPC) for causing grievous hurt by doing an act so rashly or negligently as to endanger human life or personal safety of another. Subsequently, he was sentenced for just one year of imprisonment for causing the death of his minor wife.

The IPC recognises marital rape as an offence only in two circumstances. *Firstly*, Section 375⁴ of the IPC states that forceful sexual intercourse by a husband shall be considered as rape only when the wife is below 15 years of age (which through judicial intervention⁵ has been raised to 18 years old); and *secondly*, under section 376 A, where a husband is liable for an offence of rape when he has forceful intercourse with his wife living separately from him under a court decree of separation or custom. However, the code fails to recognise the forceful sexual

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³ *Queen-Empress v. Hurree Mohun Mythee*, (1891) ILR 18 Cal 49

⁴ Chapter XVI, The Indian Penal Code, 1860

⁵ *Independent Thought v. Union of India*, AIR 2017 SC 4904

intercourse of a husband with his wife, living together, as rape.

As of 2020, only 36 countries have not criminalised marital rape with India being one of them.⁶ The present situation reflects the stereotypical mindset of the society which presumes a woman to be the property of his husband and henceforth they don't even recognize rape or sexual abuse by their husband as a criminal offence. There are generally four observations that can be drawn as a justification for not recognising marital rape as an offence. The first justification advances from the understanding that the wife is acquiescent to her husband.⁷ When a relationship is founded on such a belief, the husbands treat themselves as the master of the wife and enjoy the privileges over her body. The next justification is rooted in the stereotypical idea of marriage being considered as a sacrosanct institution and considered as the conglomeration of two souls, thus assimilating the identity of a wife into that of a husband. This idea has been largely advertised with the help of the Indian movie industry for decades which has ultimately trickled down to the very roots of society. However, in the present society, a more nuanced justification is forwarded, i.e. the 'implied consent' theory, where if the husband and wife are living together under the same matrimonial roof, it raises the presumption of consent by the wife for sexual intercourse(s).⁸ The fourth and the most recent justification is that the criminal law must not interfere in the private sphere of a matrimonial life of a husband and wife as this would ultimately affect the social fabric of the Indian society and its customs.⁹

*To the women, God said, 'Your desire will be for your husband, and he will rule over you.'*¹⁰

Even the enlightenment era¹¹ propagated this notion put forth in the bible. Earlier in England, a husband could not be held guilty of raping his wife. The foundation of this exception can be stemmed from the observations of Sir Matthew Hale C.J., in the 17th century. He observed:

*"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract."*¹²

However, marital rape as an exception was criminalised in 1991 in R. v R.¹³ In this case the House of Lords widened the scope of criminal liability by declaring that a husband could be

⁶SarthakMakkar, *Marital Rape- A Non Criminalized Crime in India*, Harvard Human Rights Journal, available at https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#_ftn1

⁷ Rebecca M. Ryan, *The Sex Right: A Legal History of Marital Rape Exemption*, 20 LAW AND SOCIAL ENQUIRY, 944 (1995).

⁸ *Ibid*

⁹ *Ibid*

¹⁰The Bible, Genesis, 3:16

¹¹The enlightenment era is marked by increased rationalisation and the rise of modern science.

¹² Hale, *History of the Pleas of the Crown* 629 (1778).

¹³(1992) 1 AC 599

charged as a principal offender if he commits rape of his wife. This decision seems to have obliterated the husband's protection from such prosecution under the common law doctrine of *marital exemption*. Further, this exemption was based upon the belief under which the wife was regarded as husband's chattel and such outmoded common-law fiction can no longer represent the position of a wife in present-day society and should no longer be applied.

The Indian legal system has been highly inspired by the principles laid down in *English Common Law*, but the reforms brought forth by the House of Lords in *R. v R.*¹⁴ could not percolate in Indian society. The Hon'ble Supreme Court has observed that rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life and personal liberty as enshrined under Article 21 of the constitution¹⁵. Yet, marital rape has not been recognised as an offence.

Marital rape is one of the most under-reported crimes against women. Broadly, it can be categorized into 2 forms: Non-physical sexual coercion and threatened or forced sex. In *non-physical sexual coercion*, the perpetrator (husband) use social or normative coercion which invokes belief in 'wife's duty'; the responsibility of a wife to satisfy her husband.¹⁶ Whereas, in *threatened or forced sex* the husband forcefully establishes sexual relations with his wife, against her will. The Hindus, which constitutes majority of Indian population, view marriage as an indissoluble union, which joins two individuals for life. As early as Rig Veda, marriage had assumed the sacred character of sacrament or *Samskara*, and sanction of the religion has heightened the character and importance of marriage as an institution.¹⁷ Marriage is the last of the 10 sacraments.¹⁸ In terms of religious belief, a Hindu marriage is considered as a bond of *Seven Lifetimes*. Owing to this belief, the concept of divorce was not recognised until the enactment of the Hindu Marriage Act¹⁹ in 1955. However, the larger belief system in the Hindu population still remained the same and separation or divorce is seen as one of the most extreme measures, with a popular view still persisting in the society that the disputes related to matrimonial life should be resolved amidst the four walls. On the same lines, a larger sect of society has not been able to focus on the very idea of marital rape. There has been advancement in Indian legislation with respect to domestic violence by the virtue of section 498-A of the IPC which affords protection to the wife against the cruelty from husband or the relatives of

¹⁴ *Ibid*

¹⁵ *BodhisattwaGautam v. Subhra Chakraborty*, (1996) 1 SCC 490

¹⁶ Kshitij Naikade, Garima Pal, *Issues and Challenges Related to Marital Rape in India*, 7 IJHSSI 58-69 (2018)

¹⁷ Dinshaw Fardunji Mulla, Satyajit Desai, "*Mulla Hindu Law*", 23rd ed., pg. 1284, 2013,

¹⁸ *Ibid*

¹⁹ Act No. XXV of 1955

the husband,²⁰ but this has mainly been confined to physical rather than sexual abuse. This allows husbands rights of sexual access over their wives in direct contravention of the principles of human rights and provides husbands with a ‘*licence to rape*’ their wives.

The Hon’ble Supreme Court in one of the landmark judgements²¹ criminalised unwilling sexual contact with a wife between fifteen and eighteen years of age. This judgement has caused a ripple in the legal fraternity resulting in floods of writ petitions challenging the constitutionality of *exception 2, Section 375 of IPC*.²²In the light of the recent petitions, this article aims to critically analyse the constitutionality of exception (2).

For the first time, the Law Commission of India in its 42nd report dealt with this issue and made two important suggestions leading to the advancement in subsequent legislation. *Firstly*, the report noted that in instances where the husband and wife were judicially separated, the exception clause must not apply. And *secondly*, it stated that punishment for non-consensual sexual intercourse between women aged between twelve and fifteen should be put under a different section and preferably not be termed as rape.²³ It could be deduced from the observation of the Law Commission that the report emphasized more on the presumption of consent when the husband and wife are living together. It also marked a difference between marital rape and other rape, where the former was viewed as less serious. The law commission delved into the validity of the exception clause in its 172nd report²⁴ in depth. It was argued during the consultation round that there is no valid reason in shielding marital rape from the operation of law when other instances of violence by the husband towards his wife are criminalised.²⁵ However, the law commission rejected this argument since it feared that criminalization of marital rape would lead to “excessive interference with the institution of marriage.”

The first progressive view of criminalising marital rape was put forward by *Justice J.S. Verma Committee*,²⁶ which was formed in December 2012. The committee report discussed that how the husband takes undue advantage of the immunity granted under Sec. 375 exception (2)²⁷ stems from the outmoded notion of a wife being the property of the husband. It was also observed that marriage should never be considered as the final consent for sexual intercourse.

²⁰Chapter XXA, The Indian Penal Code, 1860

²¹ *Supra* Note 4

²² *Supra* Note 3

²³Law Commission of India, *Review of Indian Penal Code*, Report No. 42 (June 1971)

²⁴Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000)

²⁵ *Ibid*

²⁶Report of the Committee on Amendments to Criminal Law, Justice J.S. Verma Committee, 2013.

²⁷ *Supra* Note 3

Further, exception (2) shall be removed in order to give full recognition to marital rape as an offence. The committee while giving their observations relied on the decision of the European Court on Human Rights in the case of *C.R. v. the United Kingdom*²⁸, where it was observed that a rapist is a rapist irrespective of the relationship which he shares with the victim. Further, the offender must not get the defence of his relationship with the woman to justify the offence of rape. However, the Indian Criminal Law Amendment Bill, 2012 did not accept this recommendation of the committee. The Parliament Standing Committee on Home Affairs in its 167th report argued that accepting the recommendations in toto would put entire family system at a greater risk and the committee may perhaps be doing more injustice. However, Ministry of Women & Child in a report²⁹ criticized this move by the legislature, for not criminalising marital rape.

Broadly, we can summarise the reasons for not criminalising marital rape into four heads. *Firstly*, marital rape would destroy the characteristics of marriage as *Samskara*. *Secondly*, on marrying a woman, her husband gets an implied consent from her for having sexual intercourse. *Thirdly*, even if recognised, it will be a tedious job for the parties to prove non-consent of the wife. And *fourthly*, the misuse of the marital rape against the innocent husband as a tool for vengeance may tear the social fabric of the Indian society. However, these observations can only be deduced through the glass of a patriarchal society. Furthermore, owing to recent judicial developments with respect to the liberal interpretation of Article 21,³⁰ these views appear to be archaic in nature. The Hon'ble Supreme Court has time and again stated: "that any act which damages or injures... or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21."³¹ In the same case, Justice Bhagwati observed that "we think that the right to life includes the right to live with human dignity... writing and expressing itself in diverse forms, freely moving about and mixing and commingling with fellow human beings."³²

When we analyse the *four* views put forward from time to time for not criminalising marital rape on the touchstone of Article 21,³³ we come to an observation that the decisions of the Supreme Court collectively considers the human body as a private space in itself. Furthermore,

²⁸ *CR v. United Kingdom*, App No 20190/92 (Official Case No) A/355-C

²⁹ Report of the High Level Committee on the Status of Women in India, Pam Rajput Committee for Status of Women in India, Ministry of Women and Child Development, 2013.

³⁰ The Constitution of India, 1950

³¹ *Francis Coralie Mullin v. UT of Delhi*, AIR 1981 SC 746

³² *Ibid*

³³ *Supra Note 28*

the *Right to Privacy* is recognised as a fundamental right under the ambit of Article 21.³⁴ This fundamental right also protects the privacy of the wife regardless of the circumstances when she is living together with his husband. In a recent landmark judgement, the Kerala High Court³⁵ took a leap by recognising that marital rape is a good ground for divorce. The bench also observed that merely because marital rape is not recognised under penal law, it does not inhibit the court from recognising the same as a form of cruelty to grant a divorce. This judgement has been highly celebrated by legal scholars around the country and a shift is observed by the judiciary from the outmoded notion of consent theory. However, merely recognising forceful sexual intercourse as a ground of divorce is not enough; a positive step towards criminalising all forms of sexual violence (including marital rape) should come from the legislature.

³⁴*Justice K.S.Puttaswamy(Retd) v. Union Of India*, (2017) 10 SCC 1

³⁵*XXX v. XXX*, 2021 available at https://images.assettype.com/barandbench/2021-08/1b4e735c-c4aa-476e-af69-12ae911a8c0d/Kerala_High_Court___Marital_rape_and_Divorce.pdf