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Marital Rape: A Non-criminalized Crime in India

PARUL SAGAR¹ AND PRADUMN SINGH²

ABSTRACT

Marital rape means sexual intercourse without the consent of another spouse. It extensively experienced by women, but not exclusively. In India, it shows another side of the societal ideologies or it should be more appropriate to say particle side of our society, in which a man has every right over his wife including sexual intercourse without her consent. Man is considered superior to women over centuries, even in the 21st century where we talk about equality of gender, equality of opportunity, equality of social status but the concept of marital rape is left behind. We have provision for rape, sexual assault, but not for this. Marital rape is criminalized in many countries This article analyses the constitutional safeguard for women against marital rape as every human being has the right to live with dignity even after marriage. It discusses the case laws which provide a brief idea to provide women protection against marital rapes and protect their dignity. Also, this article discusses the current penal system and its flaws in dealing with marital rapes. Further, this article also discusses the recommendations made by law commissions.

I. INTRODUCTION

Rape is an act of sexual intercourse with and individual without his or her consent, through a force or threat of force. The word rape, it itself frames a picture of man forcing a woman for sexual intercourse and the society is so disturbed by instances of rape. But when it comes to marital rape the patriarchal society turns their face, they pretend as nothing has happened, and they don't have any responsibility toward the married woman who has been raped by her own husband. And there is no such law for marital rape. This is one of the major flaws in law regarding sexual assault. Unwilling sexual contact between a husband and wife is recognized as a criminal offense in almost every country of the world, India is one the countries that still have not criminalized marital rape.

¹ Author is a student at New Law College, Pune, Maharashtra, India

² Author is a student at New Law College, Pune, Maharashtra, India

II. MARITAL RAPE WITHIN THE BOUNDARIES OF IPC

In India, the marital rape can be seen de facto but not de jure. The definition of rape is given under section 375 of the Indian Penal Code (IPC). Includes all forms of sexual assault involving non-consensual intercourse with a woman.³ However, section 375 exception 2 talk about exempts unwilling sexual intercourse between a husband and a wife. A flaw in section 375 is ostensible as exception 2, which excludes wives from the definition of the rape but it does not provide any reason for such exclusion. The main focus of the section is on the concept of consent. Legislative intent to provide exception 2 is clear as it assumes the consent between the perpetrator and the victim. However certain relief is given to the victims of marital rapes under section 376B which renders sexual intercourse between husband and wife as rape, (1) where the consent of the wife is absent and (2) Sexual intercourse occurred during the separation. The first report to deal with this issue was **the 42nd Law Commission Report**. This report formally assumed the consent between a husband and wife living together. The first time in law marital rape was recognized and it was said that “it is not right to criminalize marital rape”. Why? This was not answered.

The Law Commission specifically dealt with the validity of the exception clause in the 172nd Law Commission Report.⁴ The report validated the exception clause since it feared that criminalization of marital rape would lead to “*excessive interference with the institution of marriage*”.⁵ Later in 2012 a nationwide agitation was there seeking the criminalization of marital rapes. As a result of that, a committee was formed which was headed by **Justice J.S. Verma (Retd.)**. The committee suggested criminalization of marital rape. This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.⁶

Recently in 2015 where the Ministry of Home Affairs reiterated the idea of criminalizing marital rape. One of the reasons given for this was the “mindset of the society to treat the marriage as a sacrament”. After the rejection of the parliamentary standing committee until now, no step has been taken to criminalize the marital rapes. Criminalizing marital rape is not only the duty of legislature but also of the judiciary.

³ Indian Penal Code § 375, No. 45 of 1860, India Code

⁴ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000)

⁵ Id., 3.1.2.1.

⁶ JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013)

III. VIOLATION OF ARTICLE 14

Article 14 of the Indian constitution says that “The state shall not deny to any person equality before the law or the equal protection of the law within the territory of India.” although constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husband. IPC was drafted in 1860s, and at that time married woman was considered to be the chattel of her husband.⁷ as a result she did not get her an independent legal entity including her own identity. As times have been changed Indian law can afford husbands and wife’s to have separated independent legal identities. Exception 2’s of IPC distinction between married and unmarried women also violates Article 14 insofar as the classification created has no rational relation to the underlying purpose of the statute. In *Budhan Choudhary v. State of Bihar*⁸ and *State of West Bengal v. Anwar Ali Sarkar*⁹, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. But Exception 2 frustrates the purpose of Section 375: to protect women and punish those who engage in the inhumane activity of rape. Exempting husbands from punishment is entirely contradictory to that objective. Put simply, the consequences of rape are the same whether a woman is married or unmarried. Moreover, married women may actually find it more difficult to escape abusive conditions at home because they are legally and financially tied to their husbands. In reality, Exception 2 encourages husbands to forcefully enter into sexual intercourse with their wives, as they know that their acts are not discouraged or penalized by law. Because no rational nexus can be deciphered between the classification created by the Exception and the underlying objective of the Act, it does not satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.

IV. VIOLATION OF ARTICLE 21

Exception 2 is also a violation of article 21 of the Indian constitution. Article 21 states that “no person shall be denied of his life and personal liberty except according to the procedure established by law.” Supreme court has interpreted this clause in various judgments to extend beyond the purely literal guarantee to life and liberty but held that article 21 includes the right of health, privacy, dignity safe living conditions, and a safe environment among others.

⁷ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986)

⁸ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India)

⁹ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India)

interpreting the case of *state of Karnataka v. krishnappa*, the supreme court held that sexual violation apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female.¹⁰ in the same judgment, it held that non-consensual sexual intercourse amount to physical and sexual violence. in the case of *Soka v Emperor* which says that:-

“Modesty is considered to be an attribute of every female since her birth and an outrage against a wife will be punishable irrespective of the fact that she is of tender age or developed enough understanding so as to appreciate the nature of the act. Modesty is an inherent characteristic of womanhood independent of any individual’s personality.”

From the above, it is clear that a wife has a dignity which is protected by Article 21. The act of marital rape not only a form of physical and sexual abuse but also abuses the dignity and modesty of a woman irrespective of her marital status, no one is entitled to infringe into that not even her husband. A woman is the owner of herself, thus her consent always matters. A marriage can never be the justification of outraging the modesty and diminishing dignity of a woman. most recently in the case of justice *K.S. Puttuswamy (Retd.) v. Union of India*, the supreme court held the right to privacy as a fundamental right of all the citizens. Privacy is a serious concern for everyone, even a married woman has her own privacy. And categorically this privacy includes the right to sexual privacy. No one can interfere in the sexual privacy of a woman against her consent. Such sexual rights are abstractly covered under the case of *Vishakha v State of Rajasthan* where the Court said sexual intercourse is a woman’s personal right. Also, in the case of the State of *Maharashtra v Madhukar Narayan* the court acknowledged that sexual privacy of a woman cannot be infringed and her own personal rights and decision should be respected. Additionally, exception 2 violates Article 21's right to live a healthy and dignified life. the court has repeatedly held that the "right of life" encompasses a right to live with human dignity.¹¹ yet the existence of exception 2, which fails to deter husbands from engaging in acts of forced sexual contact with their wives, adversely affects the physical and mental health of women and undermines their ability to live with dignity.

V. CRIMINAL LAW

Section 498 of the IPC is the most relevant provision in this regard. Section 498 was inserted to provide a safeguard from the act of cruelty against women. But this section lacks its capacity when it comes to marital rape, because (1) there is a considerable difference between rape and cruelty and (2) the section only deals with cruelty and not with the rapes.

¹⁰ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India)

¹¹ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India)

Dealing with the first reason, to begin with, there is no straightjacket definition of cruelty. However, what would amount to cruelty is purely a question of fact and would vary from case to case. There is no specific definition of cruelty given by the courts to keep it broad, it is still very difficult and tricky to bring in cases of rape within this section. We cannot deal with the cases of marital rape with section 498 for the reason being; (1) under cruelty intensity of the act is looked into and the threshold for such is very high but in cases of rape, the threshold is too kept very low. (2) Section 498 demands the repetition of conduct but in the case of rape, only one instance is enough. (3) Punishment under section 498 is a maximum of 3 years with or without a fine but in rape, it is 7 years or life imprisonment.

VI. CIVIL LAW

For civil law, we have already recognized the 'right to sexual intercourse'. This right should also be used as in its negative connotation providing the right to say no to the sexual intercourse. If this is done then we can use it as a ground for divorce in The Hindu Marriage Act as well. Moreover, the PWDVA, 2005 includes sexual violence in its definition of domestic violence. This definition can be used for the interpretation of word cruelty. In this way, the safeguards under civil law can be used.

VII. CONCLUSION

The above conclusions clearly reflect that Exception 2 to Section 375 of the IPC is an infringement of Articles 14 and 21 of the Constitution. It is the time that Indian jurisprudence understands the inhumane nature of this provision of law and strikes it down. Although we have alternatives to such cases but rather focusing on alternatives, we should criminalize the marital rapes. The following step should be taken:

- (1) Exception clause under section 375(2) of IPC must be deleted.
- (2) Complexities must be simplified in proving rape in such cases.
- (3) Relation of husband-wife should not be considered as a defense in such cases.
- (4) 'Right to sexual intercourse' should also be taken in its negative connotation.
