

MARITAL RAPE, A HEINOUS CRIME STILL LEGALISED IN INDIA- Hridhima Biswas¹**ABSTRACT**

For any law to be successfully implemented, society must recognise the act as heinous, wrong, or abusive. The law cannot be implemented successfully unless it is accompanied by a social recognition law. A social enactment is required prior to the legal enactment of a law. Due to the spousal exception clause, marital rapes are not considered an offence under the Penal Code, 1860, but they are recognised as a form of sexual violence that can be defined as non-consensual or forced sexual intercourse by the victim's husband. Despite this, some countries have criminalised marital rape, while others believe that raping one's own wife is impossible and would be a mockery of the sacred institution of marriage.

Dr. Shashi Tharoor introduced the Women's Sexual, Reproductive, and Menstrual Rights Bill 2018 in Parliament, and the issue of marital rape has been heavily debated since the Supreme Court decision in *Independent Thought v. Union of India*² (hereinafter, *Independent Thought*), in which the Hon'ble Court refrained from dealing with the overall aspects of the marital rape exception clause of the Penal Code and the approach by the Delhi High Court. "We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally."³

¹ Student at Amity University, Mumbai

² *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*).

³ *Independent Thought*, p.2, para 2.

The law is a dynamic tool for reaching out to every human being in the country. Human beings must be the focus of law, and thus this Article is presented to present an all-around legal analysis of marital rape in India and the modern world.

Keywords: Marital Rape, Rape , Husband, Sexual Violence, Decriminalizing, Crime, Punishment, Marital Exception.

INTRODUCTION

The basic right to equality and the right to life are enshrined in Articles 14 and 21 of the Indian Constitution, respectively, for all citizens of India. This clearly means that every citizen of our country has the right to live a life of equality and dignity free of discrimination, abuse, or any other form of violation of these rights. However, because of the largely patriarchal confines of Indian marriage laws, the basic idea behind these fundamental rights is exploited blatantly and on a large scale, particularly when it comes to gender-based or minority-based crimes.

The heinous offence of rape is defined in Section 375 of the Indian Penal Code. Rape, according to it, is "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 16 years of age."

Unfortunate and disturbing is the second exception in this section. According to the exemption to section 375 of the IPC, "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape" . Thus, the act of one's forcible sexual relationship with his spouse without the consent of the spouse, i.e. Marital or spousal rape, is still legal in India. The Indian Penal Code (IPC) still provides that a husband is exempt from prosecution for raping his wife, subject to the wife's age. This is a clear example of the current norm in India being archaic and heavily biased against women, in which the husband has ultimate supremacy and legal recognition over the rights of the wife. Sexual intercourse by a man with his own wife, if the wife is not under the age of fifteen, is not rape, according to the second exemption of section 375

of the IPC. As a result, such acts and the perpetrator are immune from prosecution. Marital rape is not a crime in 36 countries around the world, including India.

Our neighbours too, including Pakistan, Afghanistan, Bangladesh, China, and Myanmar, do not consider marital rape to be a crime. In India, marital rape is a major issue. One in every three men admits to raping their wives, and every three seconds, an Indian woman is raped by her husband. It is a tragedy that, even after so many years, marital rape is still not criminalised in this country. According to a survey conducted by "The Hindu," at least 60% of married women have experienced sexual violence, with forced sex being the most common form.

Marriage is regarded as a sacred institution and is considered a bedrock of the society. As a result, the state and the courts frequently hesitate to intervene in the private affairs of a married couple, but this refusal of the state and the judiciary to intervene in the private affairs of a married couple would be problematic in certain circumstances. For example, when a woman is raped by her husband, she has no recourse because the state is negligent in handling the matter.

VIOLATIONS OF ARTICLES FROM THE CONSTITUTION ON INDIA

Violation of Article 14

Article 14 of the Indian Constitution guarantees that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Despite the fact that the Indian Constitution guarantees equality to all, Indian criminal law still discriminates and is biased against married female victims who are raped by their own husbands.

When the IPC was drafted in the 1860s, a married woman was not considered an independent legal entity; she was always considered her husband's property. The marital exception to section 375 of the IPC was drafted on the basis of Victorian patriarchal norms that did not recognise and consider men and women as equals or on the same social status; it also did not allow married women to own property and merged the identities of husband and wife under the "Doctrine of Coverture."

But time has evolved. Husbands and wives now have separate and independent legal identities

under Indian law. Exception 2 violates Article 14's right to equality by discriminating against married women by denying them equal protection from rape and sexual harassment. Article 14 is violated because Exception 2 distinguishes between married and unmarried women. Rape has the same consequences regardless of a woman's marital status. Furthermore, because they are legally and financially bound to their husbands, married women may find it more difficult to flee abusive situations at home. In reality, Exception 2 of Section 375 encourages husbands to forcefully engage in sexual intercourse with their wives because they are well aware that their actions are neither discouraged by society nor penalised by the law.

Violation of Article 21

Article 21 states that “Protection of life and personal liberty no person shall be denied of his life and personal liberty except according to the procedure established by law.” It has held that the rights enshrined in Article 21 include, among other things, the rights to health, privacy, dignity, safe living conditions, and a safe environment.

Exception 2 infringes Article 21's right to live a healthy and dignified life. The very existence of Exception 2, which fails to deter husbands from engaging in acts of forced sexual contact with their wives, has a negative impact on women's physical and mental health and undermines their ability to live with dignity.

In the case of *State of Karnataka v. Krishnappa*⁴, the Supreme Court held that “[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.” Further the court had held that non-consensual sexual intercourse amounts to physical and sexual violence.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

The Protection of Women from Domestic Violence Act of 2005 is an act passed by the Indian Parliament to protect women from domestic violence. It went into effect on October 26,

⁴2000 CriLJ 1793, JT 2000 (3) SC 516, 2000 (2) SCALE 610, (2000) 4 SCC 75, 2000 2 SCR 761, 2000 (2) UJ 919 SC

2006, by the Indian government. The definition of domestic violence in this Act includes, among other things, sexual abuse, which is defined as , ‘any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman’. However, the definition does not specify the acts that constitute sexual abuse. Thus, Section 375 exception 2 and The definition of Domestic Violence from The Protection of Women from Domestic Violence Act, 2005 appear to contradict each other, because rape can be defined as “sexual conduct that abuses, humiliates, degrades, or violates the dignity of a woman.”

The exception 2 discriminates between married and unmarried women because the latter is considered rape while the former is not. When a married woman is not protected from rape by her own husband, this is discrimination. As a result, it is equally important to protect married women over the age of 18 from the crime of rape.

Former Indian Minister for Women and Child Development Renuka Chowdhury agreed in a Hindustan Times article that " an equal gender law would be ideal. But there is simply too much physical evidence to prove that it is mainly the woman who suffers at the hands of man ".. This demonstrates that our Ministers are also well aware of the atrocities and sexual abuse that women face in India. However, a loophole in Section 375, i.e , the exception 2, continues to ignore and discriminate against married women who are sexually abused by their own husbands.

SECTION 9 OF HINDU MARRIAGE ACT

Section 9 of the Hindu Marriage Act encompasses the provision for the restitution of conjugal rights, according to which, if either of the spouses withdraws themselves from the society of the other, without reasonable cause , the aggrieved party has the legal right to file a petition demanding the restitution of conjugal rights . A decree of restitution of conjugal rights implies that the guilty party is ordered to live with the aggrieved party. The constitutional validity of this provision too has been debated time and again just like Exception 2 of Section 375 of the IPC .

In the case of *T Sareetha vs Venkata Subbaiah*⁵ before the Andhra Pradesh High Court in 1983, the court declared Section 9 of the Hindu Marriage Act unconstitutional, citing Articles 14 and

⁵ AIR 1983 AP 356

21 of the Constitution. However, The High Court of Delhi in the case of *Harvinder Kaur Vs Harmander Singh*⁶, less than a year later and also the Supreme Court, in the judgment of *Saroj Rani Vs Sudarshan Kumar Chadha*⁷ stated that the decree's goal was only to induce the spouses to live together, and that it did not force an unwilling wife to engage in sexual relations with the husband.

However, what both of these Courts may have overlooked is that marital rape is legal in India. The husband can force the wife to engage in sexual intercourse with him with no repercussions and is immune from prosecution too.

JS VERMA COMMITTEE ON MARITAL RAPE⁸:

The report of the Justice Verma Committee is a consequential response to increasing rape cases in India and following the Delhi Gang Rape (Nirbhaya case)⁹, which forced the government to change the violations' laws more strictly, thereby creating disincentives. A major finding from JS Verma Committee report and Usha Mehra Committee report¹⁰ was the Criminal Law amendment Act 2015, effective from 3 February 2013. The Committee of JS Verma suggested that, in England, the hale concept was replaced by the House of Lords in 1991, where Lord Keith, said, “marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be subservient chattel of the husband.”¹¹ There are no differences in the view of marital rape and the nature of rape cannot change relations. Comparisons within jurisdictions, such as Canada, Australia, South Africa, etc., were considered to criminalise marital rape. The significance of the consent was addressed where the relationship status could not be implied.

This report also addressed sentencing, which was a major issue in assuming that judges might see marital rape as a less serious offence with lenient sentences, as the South African Criminal Law Sentencing Act of 2007 could be adopted if a rape judgement requires reasonable justification for the deviation from the minimum statutory punishment. The CEDAW Committee recommendations have also been highlighted.

⁶AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187

⁷1984 AIR 1562, 1985 SCR (1) 303

⁸Justice Verma Committee Report on Anti-Rape Law, 2013 available at www.manupatra.com.

⁹*Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1.

¹⁰P.K. Das, *Handbook on New Anti-Rape Law*, Universal Law Publishing Co. 1st edition 2013.

¹¹*R. v. R.*, [1991] 4 All ER 481 (484)

172ND LAW COMMISSION REPORT ON REVIEW OF RAPE LAW¹²

Some recommendations were sought by a written petition in *Sakshi v. Union of India*¹³; a recommendation was that a marital exemption clause be removed and therefore marital rapes be made criminalised. The issue of marital rape was discussed in detail in a 2014 Delhi High Court case, although the Court ultimately decided that it would not be time to criminalise the marital rape in India, as 498-A is a enough ground for dealing with its related questions. Neither the deletion of the exemption clause is required for a new law. A gender-neutral approach towards rape was also suggested in the 172nd report. However, India was not adopted. This report's recommendations did not contain the removal of marital exceptions.

*Independent Thought V. Union of India*¹⁴ was a landmark decision punishing marital rape of a minor, but it was also held that the criminalization of marital rape or marital rape as crimes is still not recognised in India. In accordance with Section 377, a woman was held able to initiate an action against her husband for unnatural sex, but it was restricted to sodomy, buggery and bestiality. Recognition and punishment may prevent the husbands from perpetrating such acts.

*The State v. Vikash*¹⁵, which was a 2014 Delhi High Court case, discussed the issue of Marital rape in detail but ultimately decided that it is not the time for criminalization of marital rape in India because 498-A is a sufficient basis and ground to deal with allied issues. Neither a new legislation is required nor is the removal of exemption clause.

Recently, the Gujarat High Court in its recent judgment on *Nimesh Bhai Bharatbhai Desai vs. State of Gujarat*¹⁶ while examining the law relating to sexual offences, observed that the husbands need to be reminded that marriage is not a licence to forcibly rape their wives at all. A husband does not own his wives body by reason of marriage and she does not in any manner, become an object of ownership. By marrying, she does not divest herself of the human right to

¹²172nd Report Law Commission of India Report, available at <http://lawcommissionofindia.nic.in/reports/172rpt.pdf>.

¹³*NimeshbhaiBharatbhai Desai v. Union of India*

¹⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

¹⁵ Sessions Case No. 31/10

¹⁶2018 SCC OnLine Guj 732

an exclusive autonomy over her own body and therefore, she is well within her rights to lawfully give or withhold her consent to marital coitus at any point. Marital rape exists in India, and it is a heinous crime that has completely eroded trust and confidence in the institution of marriage. A large number of women have borne the brunt of the practice's decriminalisation and live in constant fear for their lives as a result. The Gujarat High Court ruled that the accused should be charged for insulting his wife's modesty, and that an investigation into this matter should be launched.

ARGUMENTS SUPPORTING MARITAL RAPE IN INDIA

- The first argument concerns the goal of protecting the institution of marriage while not interfering in its private affairs.
- The second argument contends that women have legal recourse, citing Section 498A of the IPC and the Protection of Women from Domestic Violence Act of 2005.
- The third argument deals with Indian cultural values and how they prevent the criminalization of marital rape; this is by far the most bizarre argument.

Maneka Gandhi, the former Union Minister for Women and Child Development, made an infamous reversal on the issue when she stated that “ Marital Rape cannot be applied in Indian Context , because of factors including “Level of education and illiteracy, poverty, social customs and religious beliefs.”

Now, if we consider the preceding statement and the factors for which Martial Rape cannot be criminalised and applied in India, we can make the following counter-arguments for it :

- a) **Level of education and illiteracy:** According to the 2011 Census, India has a literacy rate of 74.04 percent, whereas countries such as Mali, which has a literacy rate of 35.5 percent, criminalises spousal rape , although Article 226 of The Code Pénal does not specifically prohibit spousal rape, law enforcement officials have stated that criminal law against rape applies to spousal rape as well . Burkina Faso, with a literacy rate of 41.02 percent, explicitly criminalises marital rape; in 2015, the government passed the Law on

the Prevention and Repression of Violence Against Women and Girls and Support for Victims. Rape convictions are punishable by five to ten years of imprisonment and Marital rape is covered by this law too . Benin, which has a literacy rate of 42.4 percent, explicitly criminalises marital rape according to Article 2 of the 2011 Law Portantprévention et répression des violences faites aux femmes (For the prevention and repression of violence against women) explicitly prohibits spousal rape and provides a maximum penalty of 5 years imprisonment for conviction of raping a domestic partner.

- b) **Poverty** : Some of the world's poorest countries, such as Mozambique, which has a GDP per capita much lower than India, explicitly criminalise marital rape. Law N.29/2009 on Domestic Violence Perpetrated Against Women (arts. 3 & 17) and the Criminal Code Law N.35/2014 (arts. 37(aa) & 218) expressly criminalise marital rape. Rape, including spousal rape, and domestic violence are both illegal under the law. Penalties for Conviction carries a sentence of two to eight years in prison if the victim is over the age of twelve, and a sentence of 20 to 24 years in prison if the victim is under the age of twelve.
- c) **Social Custom and Religious Beliefs** :According to English customs, "bride capture" (a man claiming a woman through rape) was common, and raping a father's daughter was thought to be stealing his property. As a result, rape laws were created to protect the property interests men had in their woman and wives and not to protect and rights of woman . However, under current UK law, marital rape is considered a form of sexual assault, in contravention of the Sexual Offences Act of 2003. If convicted of marital rape, the sentence will most likely range between 4 and 19 years, depending on the facts and circumstances of the case, alongside any mitigating or aggravating factors. The maximum possible sentence in the UK is life imprisonment.

CONCLUSION

Consent for marriage does not always imply consent for sexual relations.

Acting Chief Justice Gita Mittal and C Hari Shankar of the Delhi High Court ruled that marriage gives both men and women the right to refuse physical relations . “Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party,” the bench observed. The Delhi High Court, while hearing petitions on making marital rape an offence, observed that physical force is not always the main criterion for rape because a man can also put his wife under financial restraints and force her to be in a physical relationship.

Thus, in a country like India, where the majority of women are forced into arranged marriages, where a large number of married women are financially dependent on their husbands and are mostly suppressed by them, and where the majority of married women lack freedom, if a heinous crime like marital rape is justified, and punishment for a crime like rape is biased on the basis of marital status, then the life of a married woman becomes intolerable .

True, the Indian legal position on marital rape should be elevated from the de facto to de jure state . According to the majority of reports, studies, and the opinions of various stakeholders in the legal fraternity, the issue of marital rape has always been marginalised and sidelined. Although some argue that marital rape should be criminalised, they disagree with the sentencing policy of treating marital rape convictions the same as rape convictions. However, putting the same crime on a different pedestal can be interpreted as a violation of Right to equality.

Rape is rape, and justifying such a heinous crime on the basis of someone's Marital Status is heinous. In today's evolving century, such biasness is strange and pathetic. Women's identities can never be merged with those of their husbands. Sexual autonomy is an essential part of one's life and one of the fundamental rights guaranteed by Article 21 of the Indian Constitution. Rape laws in India have changed dramatically, particularly following the recommendations of the JS Verma Committee and the enactment of the Criminal Law Amendment Act, 2013. The exception clause is also a change that is urgently needed.