

MARITAL RAPE: AN UNRECOGNIZED OFFENCE

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ABSTRACT

Spousal rape also known as marital is the most common adverse form of domestic violence. Rape is codified under section 375¹ of the Indian Penal Code and is defined with the help of six descriptions. The offense of rape is said to be committed when a man has sexual intercourse with a woman without her consent or if she is a minor. Section 375 has certain exceptions to it, one of the exceptions of this offense is “Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape”.

India is one of the 32 countries where marital rape is not a criminal offense². In India the concept of marital rape is still unrecognized because of the stereotype and orthodox Indian mindset I.e., after the marriage, a woman is considered as the private property of the husband and he has a right to do anything with her even if it is without her consent.

In Indian society, the institution of marriage between two persons is a sacred relationship which is made in heaven and that is not only limited to this life alone but extends to seven or more lives that’s why countless women in India feel so much pressurize to make her marriage work and suffer all the misdemeanors by herself. The UN Population Fund states that more than 66% of married women in India, aged between 15 to 49 have been beaten, raped, or forced to provide sex and most of them do not report it because the women are legally and financially tied to their husband.

¹Section 375 of IPC

² <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>

According to the NHFS survey of 2014-2015, it has seen that 5.4% of women has been a victim of the of marital rape³. Since marital rape is not an offense in India so many cases go unreported and a very small number of cases get reported. Also, most of the cases which are reported are registered under the minor offense of cruelty because there is no such law that protects women from the heinous offense of marital rape.

CONSTITUTIONAL VALIDITY

Initially, section 375 of IPC was made to protect the women but instead of the exception mentioned in the section has categorized women into two categories, that is married and unmarried women. Section 375 of the IPC has only given protection to unmarried women and not to married women, which is the violation of article 14⁴ of the Indian constitution which ensures that every person will get equal protection of the laws within the territory of India and in the case of *Budhan Choudhary v. State*, 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.

Along with article 14, it is also a violation of article 21⁵ of the Indian constitution which is the right to life and that includes the right to live with human dignity. Psychologically, marital rape is even more traumatizing than the rape, as the presence of the rapist keeps on haunting and disturbing the women. In *Bodhisattwa Gautam v. Subhira Chakraborty*⁶, the court held that rape is a crime that is against the entire society not only against a single person and rape destroys the entire psychology of a woman and pushes her into deep mental trauma. Therefore, it is a crime against basic human rights and violates the right to life.

³ <https://indianexpress.com/article/gender/national-family-health-survey-underscores-need-for-serious-discussion-on-marital-rape/>

⁴ India Constitution. art. 21.

⁵ India Constitution art. 21.

⁶ AIR2008(8) SCC 531

HISTORY

All Indian laws were enacted and made by the Englishmen during the British colonial period and are based on Victorian and British norms. At that time even in the high British society, women were not considered equal to men; they did not possess any separate legal identity women were considered as the chattel of men and they have a complete right over their wives and were supposed to live under the shadow of their husbands.

It has been seen that post-independence the gender roles in Indian society have been changed, women were given more importance and a higher status too. So, with time, laws made by the Englishmen have become obsolete and there is a need to change them or to amend them because the laws made by Britishers were according to the mindset and psyche of the people at that time but with the development in the mindset of people, these laws also need to evolve with time.

In the *Phulmoni Devi* case⁷, a nine-year-old girl was raped on her first night of marriage with a 30-year-old man named Hari Mohan Malit and died due to excessive bleeding because of marital rape. But the husband was not convicted of rape but for ‘causing grievous hurt by doing a rash and negligent act dangerous to life’ with one year of imprisonment.

This was probably the first rape case that was reported in India which shook everyone and lead to several legal reforms. On 9th January 1891, the viceroy of India, Lord Lansdowne presented a bill before the Council of India and amended section 375. Previously in 1860, the age of consent was set as 10 years but then in 1891, it was changed to 12 which means that having sex with your wife who is under the age of 12 years is rape.

⁷ *Queen Empress v Hari Mohan Maiti* IOR/P/4103

PRESENT SCENARIO

After the Nirbhaya rape case⁸ (2012) which shook the whole country, a committee was set up by the government of India and headed by Justice J.S. Verma (Retd.), the main rationale behind setting up this committee was to make criminal law more efficient to deal with cases of atrocious sexual assault against women. In 2012 the committee published ‘Report of the Committee on Amendments to Criminal Law’ (‘J.S. Verma Report’). One of the suggestions was to delete the exception clause from section 375 which provided immunity to the rapist if he is the husband of the victim and the committee also stated that the marriage should be considered as an irrevocable consent to sexual acts⁹. Therefore, the rapist remains a rapist regardless of his relationship with the victim.

Considering all the suggestions given by the J.S. Verma Report, Criminal Law Amendment Bill, 2012 was passed in which the word ‘rape’ was replaced with the word ‘sexual assault’ to widen its scope. The government, then led by the Congress party, had rejected this proposal. A panel of lawmakers who opposed the move at the time argued it had “the potential of destroying the institution of marriage.”

“If marital rape is brought under the law, the entire family system will be under great stress,” a report submitted by lawmakers to Parliament had said in 2013. The government eventually passed a new sexual-assault law, which did not criminalize marital rape.¹⁰ Recently, in *Independent Thought v. Union of India*¹¹, the petitioner Independent Thoughts was a National Human Rights organization which was registered on 06.08.2009 working for the child rights. The petitioner filed a PIL (Public interest litigation) under Article 32 of the Indian Constitution with a view that it is a violation of the right of the girls who are married between the age of 15-18 years. Under the Protection of Children from Sexual Offences Act, 2012 it is illegal to have sexual intercourse with

⁸ (2017) 3 SSC 719

⁹ <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>

¹⁰ <https://www.kractivist.org/modi-sarkar-reasons-why-marital-rape-is-not-a-crime-vaw-wtfnews/>

¹¹ *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)

a girl who is below the age of 18 but the exception mentioned in the section allows to have intercourse with your wife even if she is below 18.

Recently in 2018, Dr. Shashi Tharoor introduced the Women's Sexual, Reproductive and Menstrual Rights Bill. The main purpose of the bill was to recommend the changes which are necessary for the protection of women with the main focus on marital rape, reproductive agency and menstrual rights.¹²

However, this attempt to criminalize marital rape was also unsuccessful. In 2016 the Minister for Women and Child Development, Maneka Gandhi told Rajya Sabha that *"the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of society to treat the marriage as a sacrament etc."*¹³ Nevertheless, this was not the first instance when an Indian Politician has resented the criminalization of marital rape. Patriarchy is deep-rooted in the Indian society and it's been ages since the women have been a victim of gender discrimination, women have been considered as the chattels of the husband and because of this mindset, the consent of the wife becomes immaterial.

CONCLUSION

It's been more than 100 years since the case of Phulmoni Dasa case, yet the battle to criminalize marital rape has not even come halfway to a win. Marital rape in India does not happen because of poverty or the lack of education but there is a lack of laws for women. There is an immediate need to introduce reforms to bring equality in the society as it's high time now that the Indian judiciary understands the inhuman nature of this crime and what effect it leaves on the victim. Therefore, rape is rape and marriage is not an excuse to escape from it, women should come up and report the abuse and violence, and revamp the stereotypical viewpoints of the society and bring the change.

¹² <https://www.thequint.com/neon/gender/marital-rape-laws-in-india-criminal-acts-against-women>

¹³ <https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>