

## THE NEED OF CRIMINALISATION OF RAPE IN THE SECRECY OF MARRIAGE

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### Abstract

*Crime against women has been increasing down the lane since ages and within these many levels of crime, RAPE is one of the most brutal, cruel and uncivil nature/forms of crime against woman, violating the privacy and integrity of a woman. Under the Justice J.S. Verma Committee Report certain rape laws were amended in the year 2013. Even after such amendment a hiatus that exists in the preview/context in the criminal law of India is the non-criminalization of marital rape. It is believed that in the purity of such a thing i.e. marriage, an implied consent is to be presumed between the married couple. But the very fact of this cannot change the meaning and gravity of rape in the secrecy of marriage, Rape is still Rape. Through many countries across the world has completely dealt with the exception of marital rape in their penal statutes. As mentioned above, In India even after the recommendations of the Law Commission of Justice J.S. Verma Committee Report no such rigid/concrete step has been made in regard to marital rape. Clearly, marital rape is a major violation of Fundamental Rights and criminalization of marital rape has to be done at its earliest.*

**Keywords** – Rape, Marital Rape, Privacy and Integrity, Marriage, Fundamental Rights, Criminal Law, Criminalization.

## INTRODUCTION

During the 17th Century in England (UK), Justice Sir Matthew Hale delivered a contractual consent theory wherein he made a deliberation that,

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

The above quote was made in time and memorial but we live this in our current reality. In the institution of marriage the wife and the husband are independent in terms of their privacy and authority of one's own body.

*“Article 14 of the Indian Constitution affords every person equality in gender. Neither the husband nor the wife can assert dominance or authority over the other.”*

In the Indian Society 'Marriage' is scrutinized as a sacred institution between the wife and the husband indicated as a stable family and a civilized society. However, the very fact that under the veil of this pure institution, hideous and shameful acts like sexual cruelty and brutality of marital rape takes place. Marital Rape is any unwanted intercourse or penetration (anal, vaginal or oral) either obtained by force, threat of force or when the wife has not made/given any consent to any such sexual desires.

In India, Marital Rape is one of the most under reported crimes against women. This is because of the lack of awareness, sacred to talk about it, having the fear of losing one's life and most importantly under the Indian Penal Code, 1980 section 375 marital rape is not considered as an offence. According to the International Institute of Population Sciences, Indian States such as Mumbai, Pune (26%), Bhubhaneshwar (23%), Jaipur (16%) often are the victims of a non-consensual sex with their husbands. Clearly, victimizing women of sexual intrusion in marriage has become a common being a common fact.

India is a secular country with a diverse culture but within this diversity it is the Indian women who suffer the most in every way, the women are subjected to restrict themselves from not discussing any sexual and personal life with anyone. The sadden and worst scenario is even if women at some point

gear up with full strength to out spoke against wrong there is something or the other circumstances related to her personal life that stops/restricts her mentally and physically to raise her voice against the harassment. Also, on the other hand the law itself has loop hole where Marital Rape can only be considered if the wife is less than 15 years of age.

## LEGISLATION ON MARITAL RAPE IN DIFFERENT COUNTRIES ACROSS THE WORLD

Unlike India many common law countries have abolished Marital Rape law exemption i.e. England, Australia, South Africa, Russia and Canada.

- In Australia, under the Criminal Law Consolidation Act, 1953, Section 73(4) provides “No person shall, by reasonably of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.”
- In South Africa, under the Family Violence Act, 1993, Section 5 provides “Notwithstanding anything to the contrary contained in any law or in common law, a husband may be convicted of the rape of his wife.” Thus, martial/spousal rape has been repealed.
- In Russia, the criminalisation is premised in marriage that the spouse has the right to have sex with his/her partner, and the act of doing it cannot be imposed by force, coercion or abuse of authority.
- In Canada, the concept of exemption in the marital/spousal rape has been repealed.

## TYPES OF MARITAL RAPE

There are three kinds of Marital Rape which are mostly prevalent in the society.

1. **Battering rape** - This is one of the kinds under which most marital rape victim's fall. It is defined as when the women face both physical and sexual violence through many ways in the

married relationship. In battered rapes the husband desperately causes physical violence upon the wife to have sex against her will.

2. ***Force-only rape*** – It is when the wives refused to have any sexual intercourse with their husbands, then the husbands tends to apply the amount of force necessary to pressurize their wives. This assault only takes place after the wives have protest/ declined to have any sexual intercourse.
3. ***Obsessive rape*** – The assaults involves torture and/or sexual acts which are often physically violent in nature.

## INDIAN LEGAL STAND ON MARITAL RAPE

According Indian Penal Code, 1860, under Section 375 provides Marital Rape as an exception i.e. the victimized married women is not entitled for any state protection. The very loop hole of this section is that wives above 15yrs and wives separated from their husbands do not come under the preview of Marital Rape even being the victim of it. Section 375 of IPC provides punishment of rape against girls below 12yrs is imprisonment for 10yrs or more whereas rape of a married wife by her husband is subjected to a lesser punishment.

In the current reality it is sadden to see that the society's mindset is such that domestic violence is considered as a private matter and should me resolved within the boundaries of the household. Under Section 498 of IPC provides remedy against violence in marriage which has a very mere scope of immediate relief.

In Indian legal system till 2017, if a husband has contacted any sexual intercourse with his wife of an age above 15yrs it was not subjected as criminal offense, later this particular provision clashed with protection of children from sexual offences and (POCSO) and the Child Marriage Act, 2006, which made the Indian judiciary criminalize sexual intercourse with a girl child below the age of 18. The Honorable Apex Court also stated that, any sexual intercourse with minor wife despite of her consent will amount to rape.

The Criminal Amendment Act, 2013, brought many positive reforms but at the same time being non inclusion of Marital Rape within the ambit of the definition of rape. It is high time to make the violence against women a criminal offense and most importantly criminalization of Marital Rape has to be done at its earliest in order to protect the women of the country.

## **WHAT ATTEMPTS WERE MADE TO CRIMINALIZE MARITAL RAPE**

The Justice Verma Committee, 2020, recommended changes to the Criminal Law Amendment Act, 2013, in respect to Marital Rape.

1. The exception for Marital Rape to be removed from the IPC, 1860
2. The law ought to specify that:
  - A marital or other relationship between the perpetrator and victim is not a valid defence against the crimes of rape or sexual violation;
  - The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
  - The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

## **INFRINGEMENT OF FUNDAMENTAL RIGHTS OF WOMEN IN MARITAL RAPE**

1. In earlier times, women were considered to be sexual property of the men which is not the same in the present as everyone is equal.
2. The Article 375 of IPC is a major drawback leading to the infringement of Article 14 and Article 21 of the Indian Constitution. Therefore, the immorality that a woman faces is not only about unconstitutionality but also about her dignity.

3. Under the Indian Constitution Article 51A(e) states that every citizen of India has its fundamental duty to safeguard the dignity of a women. Therefore, Section 375 of IPC should be amended in order to save married woman from the evilness of man wanting to have forceful sexual intercourse.

## JUDICIAL INTERPRETATION WITH REGARD TO MARITAL RAPE

- “*Bodhisattwa Gautam v. Subhra Chakraborty*<sup>1</sup>” - The Supreme Court said 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 enshrined in Article 21 of the Constitution.” Yet the current law negates this very pronouncement by not recognizing marital rape, thus, directly violating the Right to life with dignity under Article 21.
- “*RTI Foundation filed a Public Interest Litigation (PIL)*<sup>2</sup>”, in the year 2015, challenging the exemption under section 375 and section 376B IPC. The exceptions to these sections do not consider unconsented sexual intercourse forced upon the wife as a criminal offence. The PIL claimed that the exemption is unconstitutional, as it violates the right of married women under articles 14, 15, 19, and 21 of the constitution.
- “*State of Karnataka v. Krishnappa*<sup>3</sup>” - The Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It was also held that non-consensual sexual intercourse amounts to physical and sexual violence.

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<sup>1</sup> 1996 AIR 922, 1996 SCC (1) 490

<sup>2</sup> Writ petition (Civil) No. 436 of 2019

<sup>3</sup> 2000 CriLJ 1793, JT 2000 (3) SC 516, 2000- (2) SCALE 610, (2000) 4 SCC 75, 2000 2 SCR 761, 2000 (2) UJ 919 SC

- “*Suchita Srivastava v. Chandigarh Administration*<sup>4</sup>” - The Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.
- “*Justice K.S. Puttuswamy (Retd.) v. Union of India*<sup>5</sup>” - The Supreme Court recognized the right to privacy as a fundamental right of all citizens. The right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.”

The above-mentioned cases are the judgments given by the Supreme Court which recognize the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution. Hence, making forced sexual cohabitation is a violation of the fundamental right under article 21.

- In the year 2018, a division bench of Chief Justice Gita Mittal and C Hari Shankar stated that in a relationship like marriage, both men and women have the right to say “no” to physical relations. Men can put their wives under financial constraints or other coercions and can indulge in sexual intercourse with her.<sup>6</sup> The central government replied to the bench submitted an affidavit stating, ‘criminalizing marital rape may destabilize the institution of marriage’. This absurd remarks made by the state clearly gave the picture of patriarchy which the Indian system have internalized.

## CONCLUSION

There is an urgent need of awareness within the society and its time that the mentality of the society change in respect of women. Marriage is a pure institution where two human beings are meant to give equal respect and dignity, a place where there is no space for such evilness of marital rape, rape

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<sup>4</sup> AIR 2010 SC 235

<sup>5</sup> Writ petition (Civil) No. 494 of 2012

<sup>6</sup> Sahariah, S., & Global Citizen. (n.d.). Indian Courts Finally Consider Making Marital Rape Illegal. <https://www.globalcitizen.org/en/content/marital-rape-india-criminal-offense/>

is still rape and it should not be under the veil of this pure institution making it contaminate with heinous offences. Marriage should be a union built upon trust, love, and mutual respect. Marital rape in no way signifies love and respect in a marriage. It is a crime. And most importantly it is high time that every woman starts taking stands and raise their voices against injustice. Therefore, there is an urgent need of criminalization of rape in the secrecy of marriage.

## SUGGESTIONS

1. Empowering and educating women to stand up against any inhumane acts.
2. The amendment of section 375 of IPC, 1860 and also section 376E should be added to describe the punishment specifically for marital rape as recommended in 172nd Law report.
3. Awareness for the society to curb out social stigma to give and provide opportunity to women.
4. The woman should be entitled for a decree of divorce if the charge of marital rape is proved against her husband.