

Judicial Analysis of marital rape laws in India

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Abstract

Marital rape is a complex issue; it is definitely one of the most severe forms of crime. Often times, married women are victims of rape by their husbands. It poses one of the greatest dangers to India's gender justice system. It is one of those social illnesses that has been in India from ancient times and still has a negative impact on society. Indian society has never viewed marital rape adversely. In Indian culture, it is seldom opposed by anybody for a variety of reasons. In this way, the stance of the Indian legislative is similar. The Indian Constitution has given the Indian legislature the difficult responsibility of passing laws for the protection, security, and progress of the nation. However, the legislature has little interest in making marital rape a thing of the past. The Indian courts express some hope in this regard, but it is bound by the fact that law is made by the legislature, not the judiciary. There are no effective laws in India to prevent marital rape. Whatever regulations exist in India, they are insufficient to stop a horrible crime like marital rape. There must be strict laws put in place in India to deter marital rape.

Keywords: marital, rape, judiciary, appeal, SC, HC.

Introduction

India has dealt with a number of social issues ever since the beginning of time. "Sati Pratha, child marriage, forced marriage, the Devdasi System and Purdah System" are examples of these social issues. While many of these social evils are no longer prevalent in India, others are still very much so and continue to be a source of issues for the nation. Marital rape is one of these societal ills; it has been a problem in India both historically and now. It is one of those difficult societal ills that, despite the passage of time, has not vanished from India's landscape and is still a pervasive occurrence there. The threat of marital rape is treated with a fair amount of indifference by Indian culture and the government. However, as seen by its several landmark rulings, the Indian court is not so apathetic to

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the horror of marital rape; rather, the Indian judiciary as a whole is in support of its criminalization. However sadly in India, there are no effective laws to address the issue of marital rape.

Laws in India regarding Marital Rape

Even though we have made unimaginable advancements, marital rape is not a crime in India. It is evident that the regulations have been either nonexistent or vague when one considers the possibilities accessible to a woman in a marriage. How the courts have read them has been crucial to how everything has turned out. Clause 359 of Macaulay's Draft Penal Code was improved after discussions in the Select Committee, becoming Section 375 of IPC. The exception clause of Section 375, which addresses rape, recalls very out-of-date ideas - "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."⁶ The punishments for rape are outlined in Section 376 of the IPC. Rape within marital ties is only a crime if the wife is under 12; if she is between the ages of 12 and 15, the crime is less serious and has a lesser punishment. The wife has no legal protection after the age of consent surpasses 15, which is against the law and clearly violates human rights regulations.⁷ In 1983, IPC was amended to make "marital rape" that occurs during a "judicial separation" an offence.⁸

According to IPC, the following instances warrant criminal prosecution of the spouse for the crime of marital rape:

1. If wife is between 12 to 15, the crime carries a maximum sentence of two years in prison, a fine, and both.
2. If the wife is under 12, the crime is punishable by imprisonment for a minimum of seven years, up to 10 years, or life, and a fine.
3. Raping a judicially separated wife carries a two-year prison sentence and a fine.
4. The rape of a wife older than 15 is not punishable.

⁶KD Gaur, "The Indian Penal Code" (4th ed Universal Law Publication Co., 2011).

⁷Ibid.

⁸Ibid.

Marital rape wasn't a crime at all until the PWDVA, 2005; however it was still simply regarded as a kind of "domestic violence."⁹ A woman who has been the victim of marital rape may petition the court for a judicial separation from her husband in line with this Act. Marital rape is a reflection of a person's perversity. Not only is a woman's body being violated, but also her affection and trust. She is paralyzed with dread and in security as a result of her own spouse haphazardly by the Indian Penal Code. The IPC's several sexuality-related clauses both uphold Victorian morality and women's lack of autonomy. It is clear from this that the law, which is seen as the saviour of the victims, is unable to safeguard the rights of people who have been victimized by marital rape.¹⁰

Law Commission Reports on Marital Rape

The Law Commission of India argued that Section 375 should not apply to marital rape in its 42nd report and that a separate provision should be formulated for it¹¹. The exemption clause in Sec 375 of IPC, which says that "sexual intercourse by a man with his own wife, the woman not being under fifteen years of age, is not rape," has been demanded to be removed by several women's groups and even the NCW. The Woman and Child Department of GOI, which constituted the Task Force on Women and Children, thought that a more extensive discussion of this topic was required. All current legislation and programs pertaining to women were to be reviewed by the Task Force. The definition of rape is the most significant of the Task Force's four recommendations on rape as it is defined under the Indian Penal Code. It made the case that all types of sexual abuse should fall under the definition of rape. It was claimed that the language "sexual assault" instead of the current definition of rape in Section 375 IPC should be used since "it is full, complete, and adequate." Contrary to the Law Commission, the Task Force opposed include marital rape in the revised definition.¹²

The following proposals for a significant change in the legislation regarding rape were included in 172nd Law Commission report:¹³

⁹Ravneet Kaur and Suneela Garg, "Addressing Domestic Violence Against Women: An Unfinished Agenda", NCBI (January 17, 2023) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/>

¹⁰Ibid.

¹¹Refer to: <https://criminallawreforms.in/reports/lci-reports/42nd%20Report%20on%20the%20Indian%20Penal%20Code.pdf>

¹²Supra note 4.

¹³Refer to:

<https://archive.pib.gov.in/archive/releases98/lyr2002/rjan2002/04012002/r040120023.html#:~:text=The%20Law%20Commission%20of%20India,to%20make%20it%20gender%20neutral.>

- "Sexual assault" should be used in lieu of the word "rape."
- According to sec 375, "sexual intercourse" should include all forms of penetration.
- According to Sakshi v. UOI¹⁴, any kind of sexual attack on a body part should be included within the definition of rape.
- Rape laws should be made gender neutral since custodial rape of young boys has gone unpunished by the law.
- Section 376E, or "unlawful sexual behaviour," should be added as a new crime.
- An amendment to Section 509 of the IPC was also requested, which would have increased penalties for offenses committed with sexual intent.
- Section 375 IPC's explanation (2) should be removed.
- If a victim is reported to have given permission to a sexual act but denies it, the court must assume that the victim did. This is in accordance with the Indian Evidence Act (IEA).

Despite the Law Commission of India's 172nd Report, which was delivered to the Government of India over nine years ago and urged Parliament to replace the current definition of rape under Section 376 IPC with a more inclusive definition of sexual assault that is age and gender neutral, nothing has been done to date.

Constitutional Analysis

At the start, legislation is only lawful if it passes the constitutionality test. The rape exclusion provision in the Indian constitution breaches the basic rights of a person. In the Indian constitution's Preamble, it is stated that justice, freedom of opinion and expression, and equality of status are to be guaranteed to all people, however in fact, India falls far behind in its implementation. Individuals are guaranteed equality before the law and equal protection under the law under Article 14. It permits reasonable classification based on logical connection and intelligible differentiation.¹⁵ Because there is no meaningful difference or logical connection between a non-consensual forcible sexual intercourse when the perpetrator is a third party in one case and the woman's husband in another case, the state grossly violates article 14 by keeping the

¹⁴WP (crl.) 33 of 1997.

¹⁵VN Shukla, "The Constitution of India, 1950" (14th ed EBC Webstore, 2023).

exception to section 375 of the IPC and criminalizing the former offender while protecting the latter when the psychological trauma of both acts is the same. The appropriate categorization for women was not marriage. Furthermore, it is forbidden to engage in sexual activity with a kid under the age of 18 in accordance with the Protection of Children from Sexual Offences Act, 2012. However, if a girl is married and between the ages of fifteen and eighteen, section 375's exemption clause authorizes this. Nevertheless, the apex court took a dynamic move in the *Independent Thought v UOI*¹⁶ by deleting a part of exception to section 375 by criminalising non-consensual sexual intercourse between a man and his wife if her age is between 15 and 18, thus protecting minor irrespective of she being married or unmarried however not stretching hands to help victim of adult marital rape. Thus in accordance with this case the legislature should bring appropriate changes in IPC and not forbid women's right subsumed on the basis of marriage.

Article 21 of Indian constitution is given a wide interpretation by way of judicial activism following *Maneka Gandhi v UOI*¹⁷. The term 'Right to life and personal liberty' acknowledges the self-determination, bodily integrity, privacy including sexual privacy within itself. Thus article 21 has become the source of many substantive rights and procedural safeguards to the people. Its deprivation shall only be as per the relevant procedure prescribed in the relevant law, but the procedure has to be just, fair and reasonable. The Apex court, in *Kartar Singh v state of Punjab*¹⁸ held that the procedure contemplated by article 21 must be "right, just and fair" and not arbitrary, fanciful or oppressive. In order that the procedure is right, just, fair, it must conform to the principles of natural justice. Howsoever not criminalising marital rape solely on the rationale of archaic norm is erroneous and unlawful. In *Bodhisattwa Gautam vs Subhra Chakraborty*¹⁹, Apex court held that rape is a crime against the basic human rights and the violation of victim's right to life and dignity, thus violating article 21. Thus there is no real justification in making distinction between the act committed by one's spouse and a stranger. The Apex court in *State of Maharashtra v. Madhkar Narayan*²⁰ opined that every woman has the right to sexual privacy and no one can violate this right. Even women of easy virtue or a prostitute have right to say no to

¹⁶[2017] 10 SCC 800.

¹⁷AIR 1978 SC 597.

¹⁸1994 SCC (3) 569.

¹⁹1996 SCC (1) 490.

²⁰AIR 1991 SC 207.

have sexual intercourse. This right has to be extended in a progressive way to married women and it is the obligation of state to enforce and protect it. This decision included the article 21 right to sexual privacy, which should not be denied to women on the grounds of marriage. The recognition of everyone's right to live with dignity, as affirmed in Francis Coralie Mulin v. Administrator, UT of Delhi, is another crucial aspect of Article 21²¹.

In *Chairman, Railway Board v. Chandrima Das*²², the Honorable Court determined that rape is a deprivation of fundamental rights in addition to the deprivation of basic rights. When a woman is raped, it is a crime against not just her but also the community. This is a crime against basic human rights since it compromises the victim's most fundamental right: the right to life, which is expanded to include the right to live with respect for one's own dignity under Article 21. Reading the aforementioned rulings and cases, as well as others, makes it abundantly clear that an exception like marital rape violates the fundamental principles on which our entire legal system is based, harms women's rights to live in dignity, and encourages society to commit crimes against women, all of which are unjustified and contrary to the cornerstones and fundamental principles of the Constitution.

Recent Developments

The issue of decriminalization of marital rape has come up before the courts again and again. The most recent judgment on same was delivered by the Delhi HC in *RTI Foundation v. UOI*²³. However, the split verdict by the 2 judge bench did not solve the issue and rather complicated it further. J. Shakti Singh said: “The right to withdraw consent at any given point in time forms the core of the woman’s right to life and liberty which encompasses her right to protect her physical and mental being.....While marital rape leaves physical scars, it inflicts much deeper scars on the psyche of the victim which remain with her years after the offence has occurred.”²⁴

²¹1981 SCR (2) 516.

²²(2000) 2 SCC 465.

²³W.P.(C) 284/2015.

²⁴ “Delhi HC delivers split verdict on criminalisation of marital rape”, *The Indian Express* (May 18, 2022) <https://indianexpress.com/article/cities/delhi/delhi-high-court-split-verdict-petitions-seeking-criminalisation-of-marital-rape-7911335/>

The 2 judges disagreed on factors like

- “the availability of evidence
- importance of consent
- whether the court or the legislature could adjudicate on the issue of marital rape
- whether the State's concerns about safeguarding the institution of marriage were valid or not
- Whether women survivors of spousal violence had recourse under laws such as the domestic violence law.”

One court claimed "legitimate anticipation of sex" is "inexorable" in marriage, while another said "the ability to withdraw permission at any time is vital to a woman's right to life and liberty." Males who have non-consensual sexual intercourse with their spouses are protected from prosecution under IPC section 376, according to Justice Rajiv Shakti. (As a rape penalty) He said the exemption is "rooted in sexism and misogyny" and that the categorization is "irrational and clearly arbitrary" since it says forced sex outside of marriage is "true rape," but not rape inside marriage.²⁵ Justice C Hari Shankar disagreed saying, “the Exception II clause of IPC section 375, which defines rape, does not contravene Articles 14 and 21 of the Constitution, which provide equal protection under the law and life and liberty.” Both judges decided to let the petitioners appeal to the Supreme Court, citing substantial legal concerns. What divides wife and husband from other woman-man partnerships is a legitimate expectation of sex, Justice Hari Shankar observed in his ruling. "Sex between a woman and husband is sacred," the court declared. "Introducing the concept of a husband being labelled the wife's rapist if he has had intercourse with her without her consent on one or more occasions would be completely adverse to the institution of marriage in our country, both in fact and in law," he continued. The daughter would have been raped if the petitioner's claims were true. Her mother refused to have intercourse with her father, despite the fact that the kid was born out of wedlock and during a legal sexual act. "If her mother was charged, her rapist father would be charged under Section 376," he concluded.²⁶ Exception II was "in the public interest," according to Justice Hari Shankar. A spouse having sex with a hesitant wife, he compared to "a stranger ravishing." He discovered that the husbands' exemption "effectively immunizes the marital link from the stigma of rape, and the shame that comes with it, whatever the nature of the sexual activity inside the

²⁵Supra note 18.

²⁶Supra note 18.

four corners of the union, and whether the behaviour is consenting or non-consensual."He claims that every case of a male engaging in non-consensual sexual activity with a woman is not rape. "To claim that rape is by definition non-consensual intercourse between a man and a woman is as foolish as to say that murder is the taking of one man's life by another," he said in the decision. He claims that there is a "intelligible difference" between sexual activities carried out inside the confines of marriage and those carried out between strangers. "No one can deny that what he's doing is wrong," Justice Hari Shankar said, differentiating rape from a husband having sex with his unwilling wife. "In a married relationship, the woman has deliberately and intentionally entered into a partnership with the man in whom sex is a vital component... However, by marrying him, she has given the man the right to expect extensive marital contact with her." "However one may condemn the conduct, it cannot be compared with the act of ravishing by a stranger," Justice Hari Shankar stated, if the man exercises "a right that vests in him by marriage" and wants his wife to fulfil "a responsibility that, too, vests in her by marriage." He says a spouse may "sometimes convince his wife" to have sex with him. He asked whether "her experience" is equivalent to "a woman ravaged by a stranger" and if a wife "in a surviving marriage" would sue her husband for rape. From a victim's viewpoint, it would be "equally ridiculous" to suppose a wife whose husband forced sex "would suffer the same level of violation as a woman traumatized by a stranger." "Acts that cause much greater anguish and grief when conducted by strangers cannot have the same effect when committed by one's spouse," the court said. He said the court can't overturn the legislature's choice to safeguard marriage with an exception. It would be like substituting our value judgment for the legislature's, which, in a democracy, is the voice of the people, he continued. "A court's subjective view that an act is criminal and should be punished as such is no grounds for striking down a law that deems the behaviour noncriminal. If that occurs, the legislature and court are merged, the judge said.²⁷J. Hari Shankar said "IPC section 375 does not permit sexual abuse of spouses. If some spouses feel encouraged, it's because to their twisted predilections, not the disputed Exception." The judgment is now in appeal before the SC.²⁸

In *X v The Principal Secretary Health and Family Welfare Department, Delhi NCT Government*²⁹, the SC said that, "for the purposes of the Medical Termination of Pregnancy

²⁷Supra note 17.

²⁸Supra note 17.

²⁹SPECIAL LEAVE PETITION (CIVIL) No 12612 of 2022.

(MTP) Act, marital rape has to be considered as falling within the meaning of 'rape' in order to save women from forceful pregnancy.” A Bench of Justices DY Chandrachud, AS Bopanna, and JB Pardiwala said that, “any pregnancy alleged by a pregnant woman to be caused by force is rape notwithstanding the exception to marital rape under Indian Penal Code (IPC).” The Court emphasised that married woman can also be rape survivors. “Rape means sexual intercourse without consent and intimate partner violence is a reality. In this case also woman may get forcefully pregnant,” the top court said in its judgment. For the purposes of the MTP Act and any rules and regulations created under the Act, the Court emphasized that the definition of rape must be interpreted to include marital rape. However, the Court made it clear that reading "rape" under the MTP Act and the guidelines to include marital rape has no bearing on whether Exception 2 to Section 375 IPC should remain or the parameters of rape as defined in IPC.

Concluding Remarks

So, after this elaborate and threadbare discussion on each and every aspect of marital rape one thing is crystal clear that marital rape is a necessary social evil which has strongly engulfed India. There is urgent need to eliminate the same from the country. Following are some of the vital suggestion to achieve that objective:

1. Marital rape must be fully criminalized in India.
2. Both minor as well as major married women must be legally protected against marital rape. There must not be any differentiation between the two in this regard.
3. The punishment for rape and marital rape must be same.
4. In order to prevent marital rape from being considered as an exception to the crime of rape, Exception 2 of Sec 375 IPC must be removed.
5. The provisions of Indian Evidence Act must apply to marital rape in the same way as they apply to rape.
6. Marital rape must be made a gender neutral offence.
7. Adequate safeguards must be attached to marital rape laws so that they are not misused by anyone like the husband must not be arrested straightaway on the allegation of marital rape by his wife unless proper investigation is done in this regard, the family members of accused husband must not be harassed in such cases etc.

8. There must also be a provision of penalty on the accuser in marital rape laws for leveling false charges of marital rape.

9. Marital rape can also be made a specific ground of divorce.

10. Special fast track courts with female judges and female staff must be established all over India to deal with the cases of marital rape. Media trial of such cases must not be allowed.

The judiciary has a much more progressive approach when it comes to the issue of marital rape but since its job is to interpret laws and not to make laws, it can show its progressive side up to a particular extent also. However, the SC judgment on inclusion of marital rape under MTP Act reflects of the Apex Court's perception on the issue. However, much clarity will only occur when the pending appeal to the Delhi HC's judgment will be heard and decided upon.

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