

MARITAL RAPE: A LESSON TO BE LEARNED¹

INTRODUCTION

Marital rape is being practiced for over a large period of time, the main issue regarding marital rape is that many people don't know that they are being raped by their spouse and they also believe that husband is the superior power in their family and they have to bind to the orders from her husband. This was the situation of married couples in many countries especially in India women's were dominated by their husband and family members. Only nowadays women were given some empowerment by the government. The history of marital immunity for rape prosecution was introduced by Sir Matthew Hale in The History of the Pleas of the Crown 1736. In which he wrote, "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath give up herself in this kind into her husband which she cannot retract."² The words of Sir Matthew Hale was used as a precedent and based on his books common laws were established and these laws were also implanted in their British colonial countries and by this, in India, the married men get marital immunity from marital rape. The important fact that needed to be noted here is many colonial countries amended these laws but in India, these laws were not amended and they are still in practice. Many people claim that marriage is a sacramental institution and it should be consummated in a way in which the husband is satisfied. The main problem in this point is how an act can be considered sacramental if the act is done against the wish of the women. If men were allowed to rape their wife then the whole concept of sacramental institution will be destroyed and this part was failed to get noticed by the legislators, at the same time we cannot blame the legislators alone for the purpose of giving immunity because at the time of drafting these laws the country was dominated by men's and women were not treated equally and therefore provided immunity to the husband. But now in our society, we give equal importance to women as well so the law has to be changed in order to protect the life of the women's who are being exploited by their husband.

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² Sir Matthew Hale, The History Of The Pleas Of The Crown 629 (1736).

IMPACT OF MARITAL RAPE IN OUR SOCIETY

The concept of marital rape has been injected in our society in a very negative way, many men in our society consider that marital rape as a privilege given to them to dominate their wife to seek sexual pleasure, and by using this immunity the men in our society abuses their wives both physically and mentally. The main issue faced by the women is that they have to be depended upon the earnings of her husband for her livelihood so the affected women won't be able to raise her voice against the crime. This gives an upper hand for the husband to continue the mistreatment towards his wife. The impacts can be classified into two classes

- **Physical impacts**

In the case of physical impact, the wife can suffer from severe injuries due to the violent act by her husband, in this situation, she is also depended upon her husband's support to receive treatment.

- **Mental impacts**

In case of the marital rape, the wife is supposed to live with her husband even after the terrible act which itself causes a mental agony to her.

When rape is committed the victim has to live with horrifying memory but in this situation, she has to live with the one who committed the act.

CONSTITUTIONAL VALIDITY OF MARITAL RAPE

VIOLATIVE OF ARTICLE 14

Article 14 of our Indian Constitution says "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."³

As the provision clearly states all the subjects should be considered equal before the law. At the same time, the state has the power to make reasonable restriction in this regard. But in order to make a reasonable restriction, the state has to ensure that the step will not affect other rights of the public. And the restriction can be made only for the welfare of the public. If it satisfies all these conditions the state can put forth those restrictions. But in this case, the question arises whether the discrimination of married and unmarried person under section 375 of Indian Penal

³ INDIA CONST . art. 14.

Code comes within the purview of reasonable restriction. The section classifies the rape victims into three categories based on their marital status (1) married (2) unmarried and (3) married but separated. Section 375(2) of Indian Penal Code stays as an exceptional clause to rape based on the marital status of the victim, at the same time section 376B of Indian Penal Code, says that in case of rape of separated wife, then the husband shall be punished with imprisonment of not exceeding seven years and also liable for fine. This section is linked with section 198B CrPC where the section explicitly states that the court is barred from taking cognizance of rape of a woman by her separated husband until the prima facie of the facts are being satisfied. And another big flaw in this provision is that it is a bailable offense. An offense with such serious outlash in nature and that offense is being a bailable offense will be a threat to the victim.

VIOLATIVE OF ARTICLE 21

Article 21 of our Indian Constitution says “No person shall be deprived of his life or personal liberty except according to procedure established by law.”⁴

This provision safeguards the basic right of a person by ensuring that he is leading his life without any sort of interference from any other person, here any other person includes his spouse too. As we can see there are many landmark judgments stating that rape is a heinous crime and the crime is not only against the victim but it is also a crime against our society at large. In the case of **Suchita Srivastava v. Chandigarh Administration**,⁵ the Supreme Court held that it is the personal right of the women to make reproductive choices and it falls within the ambit of “personal liberty” as ensured under Article 21 of our Indian Constitution. In this case, the court specifically mentions that it is not the proper method to differentiate between married women and unmarried women. It is the right which is available to women to choose irrespective of their marital status. The wide interpretation of Article 21 includes ‘Right to life’ also includes right to live a dignified life, if that is the case then it will be the responsibility of the state to ensure that takes place. Interestingly in the case of **Court On Its Own Motion (Lajja Devi v. State)**⁶ the court has expressed their dissatisfaction regarding the exception clause under section 375 of Indian Penal Code, the court raised a question when a man rapes his lawfully wedded wife who

⁴ INDIA CONST . art. 21.

⁵ Suchita Srinivasan v Chandigarh Administration, (2009) 14 S.C.R. 989 (India).

⁶ Court On Its Own Motion (Lajja Devi v State), (2012) 131 D.R.J. 225 (India).

is under the age of fifteen is amounts to rape at the same time if a man has sexual intercourse with a girl below the age of sixteen will amount to rape even if the intercourse was a consensual sex. This discrimination based on marital status is violative of Article 21 as well as 14 of our Indian Constitution. In the case of **Prahlad and Ors v. State of Haryana**,⁷ the court has mentioned that rape is an assault on human rights of the victim, so if anyone does this act he not only violates a penal provision but also the rights conferred in our constitution. These cases talk about the rape victim and for their protection of rights while the provision on the other side provides a way to the predators to legally rape his wife. Recently in the case of **Justice K.S. Puttuswamy (Retd.) v. Union of India**⁸, the Supreme Court held that right to privacy is a fundamental right and this right can be interpreted to includes his own rational decision to consummate the relationship with their spouse and it is violative of her fundamental right if she was forced to indulge in intimate relation with her husband.

FAILURE OF THE STATE TO CRIMINALIZE MARITAL RAPE

The 172nd Law Commission report listed the changes to be made in rape laws. And in that report, they have expressly stated that the exceptional clause under rape proviso should be struck down immediately as it causes a great injustice to the women in our societies. Even after the law commissions report the state did not take any initiative to strike down the unconstitutional provision.

After 2012 gang rape in Delhi, under the chairmanship of retired Chief Justice of India Justice Verma a committee was formed, the main object of the committee was to look in for possible amendments in criminal law to provide a quicker remedy and also to enhance the punishments for those committing serious sexual offenses against women. So the committee worked very hard and lists out many forms of sexual offenses like rape and sexual assault, sexual harassment at the workplace, trafficking of women and children, child sexual abuse and other offenses against women. So the committee comes out with the solution to all the listed crimes but even then the state fails to make those amendments. The committee said their points very clearly by citing foreign judgments and their reasoning. And taking all the matters into their consideration they came to a conclusion that the exception for marital rape should be removed. They validated their

⁷ Prahlad and Ors. v. State of Haryana, (2015) 8 S.C.C. 688 (India).

⁸ Justice K.S. Puttuswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 (India).

points by providing proper reasons such as the person cannot use the marital status or any other relationship with the victim as a defense against the crime of sexual violation. When an inquiry is to be made out the relationship between the complainant and the accused is not relevant as to determine the fact that whether it was consensual sex. Also, the relationship between the victim and the accused should not be considered as a justification to reduce the sentence for rape. These were the points stressed by the committee to amend on the provisions of the penal code. And later Criminal Law (Amendment) Act, 2013, was passed based on this report. But the act does not emphasis on all the matters prescribed by the Verma committee. The government takes our countries past history as a defense stating that “Marriage is sacred and criminalizing will create an imbalance in our society” we can agree to the point that the marriage is sacred but using that as a reason to sexually traumatize your spouse cannot be considered as a sacred. So the government should consider the commission reports regarding this matter and view this matter from a different perspective to provide a secured life to the women’s in our country.

INTERNATIONAL LAWS RELATING TO MARITAL RAPE

Justice Verma committee clearly mentions various countries and other international treaties which consider marital rape as a heinous crime. In the year 1993, the United Nations General Assembly adopted “**The Declaration on the Elimination of Violence against Women.**” The important aspect of this resolution was to strengthen the previously ratified international treaty of “**Convention on the Elimination of All Forms of Discrimination against Women.**” Popularly known as **CEDAW**, They main objective of both the treaties is to provide a safe and secure environment to women in the society. The committee has recommended widening the definition of the term rape and also they have mentioned striking down marital rape as an exception in rape provision. Even after ratifying the treaty the government did not make any changes in provisions relating to marital rape.

1. CANADA

In 1983 they repealed the provision which provided immunity in marital rape cases and now it is a crime when husband rapes his own wife. In the case of **R v. J.A.**,⁹ the court held that the relationship status between the accused and the victim shall not be considered as a fact. So the

⁹ R v. J.A., (2011) 2 S.C.R. 40 (Canada).

defendant cannot argue that consent was implied by circumstances, or by the relationship between the victim and the accused.

2. AUSTRALIA

Australia is a common law country and the country strike down the marital rape provision in all jurisdictions in 1976. In the case of **R v. L**,¹⁰ the court emphasized on a point that if the common law suggested that wife has given an irrevocable consent to her husband for sexual intercourse then it is no longer considered to be the common law. Also, the court ensured that the husband can be punished if it is found out that he was guilty of raping his wife.

3. UNITED KINGDOM

The House of Lords interpreted the marital rape in the case of **R v. R**,¹¹ in 1991, the court held that marriage is nowadays considered to be equal and the concept where the husband can dominate his wife should be considered as an offense. And the court struck down the exceptional clause, and later in the year 1994 the legislators also struck down the marital rape clause in their penal provisions.

4. EUROPEAN COURT OF HUMAN RIGHTS

In the case of **C.R. v. UK**,¹² the court stressed on the point, where the relationship between the parties should be considered in the rape cases, though they raised a defense of common law the court held that when an issue affects a person's fundamental right then it should be given first priority as that is also the objective of common law to ensure the rights of the subject. Also in the case of **SW v. UK**,¹³ the court pointed out that the concept of providing immunity to the husband from prosecution for rape against his own wife, it affects the victim's dignity and freedom.

5. SOUTH AFRICA

During 1993 South Africa criminalized marital rape, by making changes in common law and ensuring that the husband can be made liable for the offense of raping his own wife. In the case

¹⁰ R v. L, (1991) H.C.A. 48 (Australia).

¹¹ R v. R, (1991) U.K.H.L. 12 (United Kingdom).

¹² C.R. v. UK, (1995) E.C.H.R. 52 (European Court of Human Rights)

¹³ SW v. UK, (1995) 21 E.H.R.R. 363 (European Courts of Human Rights).

of **S v. Modise**,¹⁴ irrespective of the criminal nature there is a risk that judge might award lenient sentences, so to overcome that South African Criminal Law (Sentencing) Act of 2007 was passed, and the act clearly states that the relationship between the accused and the victim should not be taken into consideration as “substantial and compelling circumstance” in order to levy a lenient sentence for the crime committed.

6. BELGIUM

In 1979 the apex court of Belgium decided in a case that a husband used a severe force against her wife and coerced her to indulge in sexual intercourse against her wish, but the court construed this act as rape and found guilty for commission of rape. So the court held that though the husband has the “right” to have intercourse with his wife, he is not supposed to use physical force to claim the right. Later in 1989 the legislators broadened the definition of rape and included marital rape as an offense as of other types of rape.

It is also the duty of the government to fulfill its obligation under International Law, In the case of **NALSA v. Union of India**,¹⁵ the supreme court stated that the duty of the state also extends to fulfill their obligations assures under international conventions. The court also stated that when the international conventions correlate with our fundamental rights then the duty of the state is to abide by the principles mentioned in the covenants.

CONCLUSION

In our country marriage is considered as a sacramental act and the marital rape itself disgraces the concept of sacramental. Though our constitutional provisions clearly try to protect the rights of the women, the penal law still provides protection to the predators. The important matter to be noted is that at the time of drafting the penal statues we had a different scenario where there was a male dominance in our society and female subjects were not considered as equal to them but now the situation has changed so it is the correct time to make the changes and to ensure the rights of the affected women’s in our society. We can see that many countries are taking steps to ensure that frame marital rape as a crime and the husband should not be given any immunity based on his marital status so now it is the time for us ensure that the women in our society to

¹⁴ S v. Modise, (2007) Z.A.N.W.H.C. 73 (South Africa).

¹⁵ NALSA v. Union of India, (2014) 5 S.C.C. 438 (India).

lead a safe and secure life. Though there may be counter-arguments claiming that affects the institution of marriage and possibility of being misused by them. The main issue to be noted here is that women's right is stake in this matter and only by ensuring a law to criminalize such an inhuman activity only will be the solution against the inhuman activities.

