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MARITAL RAPE AND THE INDIAN PENAL CODE**Shreya Singh¹ and Anshuman Kar²****ABSTRACT**

Raising a hypothesis regarding the dire need for reform in the Indian Penal Code is a need of the hour today. The given paper focuses on the same, highlighting events that led to us even thinking about why reforms might be sought after in the legal aspect, when laws regarding rape and marital rape exist within the country. Marital rape has marked its presence since quite a while in society now, whatever be the religion, caste, etc. of the person since the male asserts dominance due to higher physical strength, coupled by the injustice and discrimination provided by the law on grounds of rape, distinguishing between married and unmarried women when it comes to rape. Setting such grounds would further ease the access of patriarchal norms to dig its roots deeper in the system, thereby spreading the already sinking notion of equality to the core. Stating certain examples through case laws in the past and the present day regarding marriage and rape, this paper also focuses on the age of marriage, relating it with rape. It shares the link between the issue of marital rape and the Indian Penal Code, and a check maintained by the judiciary on the same.

INTRODUCTION

The very sanctity of marriage as a construct has always been considered a highly valued asset in the Indian household. Narrowing it down to societies, communities, and households, one could easily see how widely acclaimed marriage is, as a symbol of a new-formed, relation of purity, or the declaration of the bond of love, where two individuals are bound together for an indefinite period, with their vows serving as their proof of duty towards each other.

Established as an institution of purity and that of an eternal bonding, marriage was and still is one of the most important events an Indian household looks up to. Marriage has its own repercussions, be it good or bad. Yet, the negative aspects of the same institution are always looked over, when it comes to marrying off one's daughter to a different household, where her

¹ The author is a student at Symbiosis law School Hyderabad.

² The co-author is a student at National Law University, Orissa.

husband shall reside, bringing in arguments that marriage brings prosperity. It sure does so, but at what cost?

RAPE AS AN INSTRUMENT IN THE MARITAL INSTITUTION

Before trying to correlate rape and marital institutions, it is important to understand what both of these actions are. The institution of marriage is not necessarily being demonised in this article, rather an infamous construct of it is being criticized, which is not much talked about. Marital rape, which is an everyday ordeal countless number of women face in society, is what pushes our society downward, every single day. Yet, the legal system fails to acknowledge the same, with arguments that would aggravate anyone's emotions.

The officer of the United Nations Human Rights department defines rape as a type of gender-based violence that may constitute a human rights violation against women and girls under international human rights law, notwithstanding widespread impunity for offenders. In the instance of mass rape, it can amount to torture and cruel, inhuman, or humiliating treatment, as well as a war crime or genocide.³ Yet, rape in the Indian construct is an almost everyday, rather every hour issue, with one rape happening at an interval of every sixteen minutes⁴ on an average in the country. Yet, the acknowledgement of the same is next to nil. The case has been reduced to a situation where such is the plight of a woman that she isn't even safe at home even, be it even from her own father. However, if any such case of violence against a member of the family, or stranger is reported, there are chances of conviction on the basis of evidence.

When we refer to marriage however, this provision does not exist in the Indian laws. Unwanted sexual intercourse between a husband and a wife above the age of fifteen is exempted from the definition of "rape" by Exception 2 of Section 375⁵ the IPC, which therefore protects such actions from prosecution. After entering into marital intercourse, a woman is believed to give her husband everlasting agreement to have sex with her. While virtually every nation in the world recognizes unwanted sexual contact between a husband and a wife as a crime, India is one of the thirty-six countries that has yet to prosecute marital rape. Let alone punishment, the

³ International day on the elimination of violence against women 25 November 2019, OHCHR, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340> (last visited Aug 27, 2021).

⁴ India.com News Desk, One rape every 16 minutes in India, NCRB Data HIGHLIGHTS Country's Deteriorated Law & Order India News, Breaking News | India.com (2020), <https://www.india.com/news/india/no-country-for-women-one-rape-every-16-minutes-in-india-ncrb-data-highlights-countrys-deteriorated-law-order-4159540/> (last visited Aug 27, 2021).

⁵ S. 375(2), The Indian Penal Code, 1960.

provision of marital rape laws do not even exist in the Indian Penal Code, which should have at the least, acted as a valid ground for divorce.

Marital rape as a violation of Article 14

Article 14⁶ of the Indian Constitution falls under the ambit of Fundamental Rights enshrined in part III of the Indian Constitution, and mentions how equality before the law shall prevail, and that the constitution guarantees no discrimination by the law on the basis of caste, religion, sex, race, or place of birth. Through “sex”, the statute necessarily announces that no discrimination on the basis of gender shall be carried out and that equal rights would be provided to all, be it man or woman.

However now, taking into context the provisions of the IPC and about how they are different for men and women, it is evident how the sections and exceptions in the given Code do not follow gender-neutral guidelines. Let alone gender-neutral, the provisions under Section 375 clearly discriminate amongst married and unmarried women, where provisions for granting justice to rape victims are divided, too. While necessarily the laws were formed by the British originally, there are urgent requirements to bring about reforms, especially in the IPC, which shall be evident from the case cited herewith.

MARITAL RAPE: JUDICIAL CHECK

Initially, forceful sex with wife above 15 years of age was not considered to be under the canopy of rape. But, In “**Independent Thought v Union of India**”⁷, the Supreme Court refused to consider the issue of marital rape while considering an exception to Section 375 (rape) of the Indian Penal Code, which permits a man to force sex on his wife if she is over the age of 15. “The Supreme Court, in its decision declaring that sexual intercourse with a girl under the age of 18 is rape regardless of whether she is married or not”⁸, also “noted that the legislative immunity granted to marital rape stemmed from the “outdated notion that a wife is no more than a subservient chattel of her husband.”⁹

⁶ India Const. art. 14

⁷ INDEPENDENT THOUGHT V UNION OF INDIA, W.P. (c) No. 382 (2013).

⁸ CENTRE FOR LAW AND POLICY RESEARCH, <https://clpr.org.in/litigation/independent-thought-vs-union-of-india/> (27-08-2021, 10:55 A.M).

⁹ Krishnadas Rajagopal, *Courts continue to differ in views on marital rape*, THE HINDU (29-08-2021, 17:52), <https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece>.

But, “a contradicting judgement is encountered by Allahabad High Court in August 2021, wherein the minor wife faced marital rape and harassment for dowry and filed the case against her adult husband on 8th September 2020”¹⁰. As, by “Criminal Law amendment act, 2013, the Section 375 of the I.P.C was amended and the age bar was increased from 15 years to 18 years. However, no efficient amendment was done over the Exception II of Section 375, where the statement is mentioned that any married women above the age of 15, won’t get the remedy as provided in crime, in case of a forceful sex by husband.”¹¹

The judgement considered all the facts that there was no unnatural intercourse between the partners, thus conclusively the husband was left from being criminalised for the charges of rape on the above-mentioned grounds.

“But, In the year 2017, a two-judge bench of Supreme Court efficiently mentioned that having forceful sexual relationship with wife would amount to be marital rape if the wife is a minor (Below the age of 18 years).”¹² Thus, the conflicting opinion of Allahabad High Court and Supreme Court could be looked upon in the respective case.

Recently, one of the very shocking judgement was delivered by Chhattisgarh High Court in “**Dilip Pandey & Ors. V State of Chhattisgarh**”¹³ on 23rd August 2021. “The Chhattisgarh High Court has cleared a man of the accusation of marital rape, ruling that sexual intercourse or any sexual act between a husband and his legally married wife is not rape, even if it is done against her will or by force.”¹⁴

The Court, on the other hand, proceeded to file charges against him under section 377 of the Indian Penal Code after noticing that his act of having an unnatural physical relationship with his wife triggered the offence.

In the given case, the petitioner was harassed by her in-laws in context of dowry and specific allegations against the husband was made by her, wherein she stated about the atrocity she encountered in the form of unnatural sexual relation when she faced insertion of radish and finger in her vagina despite her protest.

¹⁰ KHUSHABE ALI VS STATE OF U.P, Cri. M.B.A/3179/2021.

¹¹ OPINDIA, <https://www.opindia.com/2021/08/sex-with-wife-above-the-age-of-15-is-not-rape-allahabad-high-court-grants-bail-to-accused-ali/>, (29-08-2021, 11:00 A.M).

¹² LATEST LAWS, <https://www.latestlaws.com/latest-news/sex-with-wife-aged-15-and-above-not-rape-says-high-court/> (28-08-2021, 10:11 P.M).

¹³ DILIP PANDEY & ORS. V STATE OF CHHATTISGARH, CR R 177 (2021).

¹⁴ THE INDIAN EXPRESS, <https://indianexpress.com/article/india/marital-rape-chhattisgarh-hc-section-377-7471940/> (27-08-2021, 05:25 P.M).

Justice N.K Chandravanshi relied upon the exception II of Section 375 of IPC, and stated that sexual intercourse or sexual act between a man and his own wife who is not under the age of eighteen is not rape. Because the complainant is the lawfully married wife of applicant No. 1, sexual intercourse or any sexual act with her by the applicant No. 1/husband would not be considered rape, even if it was done against her will. Furthermore, an observation was made in the same respect wherein a statement was recorded that any act where insertion of radish or finger in the private part of a women happens, charges could be framed under the Section 377 of I.P.C which gives a reference of unnatural physical relationship. Thus, “any such act which evidently advocates about the dominant intention of the offender to derive sexual satisfaction by unnatural ways would thereby result in the constitution of carnal intercourse in a unnatural order, and conclusively attract the offences under Section 377 of the I.P.C.”¹⁵

But the Court decided to free him from the charges under Section 376 of I.P.C as Marital Rape is not an offence in India and exempted from the Section 375 of the referred Act.

Also, a reference was provided about the “**Momina Begum V. UOI**”¹⁶, while framing the charged. In the particular case, an observation was made by Gauhati High Court that if the offender has a dominant motive of deriving sexual pleasure in an unnatural way, it could be tagged under the category of offense under Section 377 of the I.P.C against the husband.

At the end, the charges under Section 377, 498A and 34 of IPC was upheld and all the charges under section 376 of IPC was discarded.

Another surprising reference could be provided by looking forward upon the grant of Bail Plea by Mumbai High Court in August month of 2021 itself, in the case of “**Sushant Jyoti Vardhan Jadhav and Ors. V. The State of Maharashtra**”¹⁷. The anticipatory bail was granted specifically on 10th August 2021 to the Husband by stating that a forcible intercourse would not amount to be illegal as he is the husband.

In the respective complaint, the woman said in her lawsuit that the accused began imposing restrictions on her shortly after their marriage in 2020, mocking and assaulting her. They also wanted money, according to her. The woman further claimed that her husband had intercourse with her against her will a month after they married. The woman claimed she became ill after

¹⁵ Indian Penal Code, 1980 § 377, Acts of Parliament, 1860 (India).

¹⁶ MOMINA BEGUM V. UOI, CrI. Pet. No. 98 (2012).

¹⁷ SUSHANT JYOTI VARDHAN JADHAV AND ORS. V. THE STATE OF MAHARASHTRA, ABA-1075 (2021).

he did it the second time. She filed the complaint after a doctor informed her that she has paralysis from the waist down.

On the contrary, the advocate from the side of the husband, SK Zende argued effectively that these were just a bunch of false claims and accusations and there was no such demand of dowry from the side of Husband or his family. By listening to both the sides, Court stated that a specific information for the demand haven't been provided, consisting of all the details. And, a man having sex with his wife couldn't be constituted under the cover of rape or illegal act, despite of it being forceful.

Also, the court stated the happening of paralysis as 'unfortunate'. Conclusively granting an anticipatory bail to the man and his family under Sections 498-A, 504, 323, 506(II) r/w 34 of I.P.C

CONJUGAL RIGHTS: THE CATALYST?

Have you ever noticed upon the legislative reasons behind the happening of Marital Rape? Let's talk about the Conjugal Rights for a better understanding of the same.

A long legal and judicial journey is encountered in the Nation, one of the landmark judgements stands to be of "**T. Sareetha v. T. Venkata Subbaiah**"¹⁸ in the year 1983, where Andhra Pradesh High Court ruled that Section 9 of the Hindu Marriage Act, which allows for the restitution of conjugal rights, is unconstitutional because it is in violation with Article 14 since it discriminates against women and not men, making it gender-specific. Furthermore, having a sexual relationship against her will with an unwilling partner nullifies the mind and body of the next individual.

Also, the section 9 i.e., Conjugal Rights invoke the applicability of Article 14 as the section fails at satisfying the traditional classification test and although it makes the remedy for both the respective genders, its applicability is certainly used one-sided. Also, it does not provide any legitimate social welfare or public benefit at a larger level thereof.

But, the same judgement was in the view point of several people. Which further lead to the putting forward of the question before the Delhi High Court in a tenure of less than an year in the "**Harvinder Kaur vs. Harmander Singh**"¹⁹, 1984 wherein the judgement stood

¹⁸ T. SAREETHA V. T. VENKATA SUBBAIAH, AIR 1983 AP 356.

¹⁹ HARVINDER KAUR VS. HARMANDER SINGH, AIR 1984 Del 66.

completely dissented to the former judgement and stated that restitution does not solely aims at the pointer of sexual intercourse but also at cohabitation and consortium.

With an alike opinion, the Supreme court held in the case of “**Saroj Rani vs Sudarshan Kumar**”²⁰, that provisions provided under the respective section of the Act does not equates to be conflicting with Article 14 and 21 of Indian Constitution, further saying that in a country like India, the rights of the husband and wife towards the society doesn’t merely revolves around the respective statues but rather lies in the basic structure of the marriage. And, people need to emphasize more upon the decree of restitution of conjugal rights in a proper perspective and thus conclusively stating the same to be a preventive aid for the marriages and avoid the increase in count of break-up of such marriages.

Thus, the previous ruling was overruled and the effectivity of Conjugal Rights still hold its position in the society. In addition, the same could be said to behave as a catalyst in the happening of marital rape cases. As the basic societal reasons provide the ignition to the act, but the rights to do so, acts as a catalyst to enhance its frequency and speed thereby.

A RAY OF HOPE: KERALA HIGH COURT JUDGEMENT AND MORE

At one hand, there are many judgements keeping the exception II of Section 375 of I.P.C in mind. On the other hand, many judgements by respective courts have stood for the miserable victims of marital rape. One of such notable judgement was delivered in the year 2018, “**Nimeshbhai Bharatbhai Desai vs State of Gujarat**”²¹, wherein Gujarat High court stated that Marital rape needs to be penalized as soon as possible, and considered it to be a ‘destructive attitude, which efficiently promotes the increase in count of rapes under the shadow of marriage. Also, stated the law to be unfair as it does not amount to be equal for both married and unmarried women.

Recently, A husband brought a case to the Kerala High Court, opposing his wife's application for divorce in the family court on the grounds of marital rape, and the Family Court gave the judgement, holding it as a valid ground for divorce because a marriage cannot be supported on a foundation of cruelty. The High Court noted that a husband cannot claim superior rights over his wife and supported the Family Court's decision, stating that marital rape, while not

²⁰ SAROJ RANI VS SUDARSHAN KUMAR, AIR 1984 SC 1562.

²¹ NIMESHBHAI BHARATBHAI DESAI VS STATE OF GUJARAT, R/CR.MA/26957/2017.

punishable in India, is a valid reason for divorce and falls under the category of physical and mental abuse.

“The Kerala High Court decision on 30th July, 2021 has taken a step forward in this regard, stating explicitly that the ‘Right to Respect’ is a fundamental component of a woman's existence that is severely harmed when a marital rape occurs. The ruling also condemns the infringement of individual autonomy, describing marital rape as a sexual act committed against one's choice. Any violation of a person's bodily integrity is considered a violation of their autonomy. And regarded 'marital rape' as a valid reason for seeking and receiving a divorce.”²²

NEEDED REFORMS: IPC

With this excellent decision, the Kerala High Court has once again thrust the issue of marital rape into the spotlight. And it is past time for our legislature to recognise this flaw and develop legislation to address it by eliminating this flaw and criminalising marital rape.

An exception has been provided in the section 375 of Indian Penal Code, wherein it clearly specifies that “any act of sexual intercourse between husband and wife, considering the wife above 18 years of age would not be considered as ‘rape’.”²³ Also, “the origin of this exception can be traced back to a statement made by Sir Mathew Hale CJ in History of the Pleas”²⁴ of the Crown: "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for the wife has given herself up in this kind unto her husband by their mutual matrimonial consent and contract, which she cannot retract."

In the same context, “**State of Maharashtra vs. Madhukar Narayan Mardikar**”²⁵ case could be looked upon, which stated that every woman holds an entitlement over her privacy and choices, and no-one could violate the same against her choice, as protected under law. But the question is whether a ‘wife’ also hold such powers, same as any unmarried women. If yes, then I don’t think the exception of I.P.C holds any position in Indian Legal System and certainly needs to be amended.

²² XXX and Ors v. XXX and Ors., MANU/KE/1890/2021.

²³ Ashok Kini, *Unconstitutionality Of Marital Rape Exception In Indian Penal Code*, LIVELAW, (27-08-2021, 10:40 A.M), <https://www.livelaw.in/columns/unconstitutionality-marital-rape-exception-indian-penal-code-179324>

²⁴ Tan Cheng Han, *MARITAL RAPE – REMOVING THE HUSBAND'S LEGAL IMMUNITY*, 31, MAL.LAW.REV., 112, 112-128, [1989].

²⁵ STATE OF MAHARASHTRA VS. MADHUKAR NARAYAN MARDIKAR, AIR 1991 SC 207.

CONCLUSION

While it can be argued that the laws are gradually progressing in our nation, it cannot be evidently ignored that certain laws from the era of the British still hold us back as a society. With the quashing of homosexuality as a criminal offence under “unnatural factors” under Section 377²⁶ of the IPC, Justice Dipak Mishra had indeed proved through judicial measures that reforms could be brought about in Indian society. Yet, primitive laws, far from the past still have us under the shackles of the patriarchal norms followed by the British, back when India was not even independent. When we refer to judgements like the one passed in the Chhattisgarh High Court,

We see how the IPC upholds unjust British practices, which need to immediately be done away with, for the true sense of the Indian Constitution to prevail, for a necessary provision of the constitution is the provision of fundamental rights, specifically those related to equality.

Further, distinctions under statutes like Section 372 do not necessarily just discriminate amongst married and unmarried women, but they also violate a number of their fundamental rights, prima facie being “Article 14”²⁷, “Article 15”²⁸ and “Article 21”²⁹ of the Constitution. It would be hypocritical hence, to say that the law is equal for all, when the law itself decides to discriminate and distinguish between who it values as “worthy” of being “equal” under the sections it specifies.

Thus, it is high time to legalize the marital rape. 150 countries including South Africa, Australia, Armenia etc, throughout the world have taken this desired step and criminalized marital rape. And, there is an utter need of India to be included in the list of these countries. Rape can't be entertained, irrespective of the marital status. “As stated in the judgement of “**State of Punjab V. Gurmit Singh**”³⁰ case, an act of murder harms and destroys the physical feature and body of the victim, but an act of Rape degrades the very soul of the helpless victim, expressing the level of pain endured by a rape victim.”³¹ Conclusively, an accused of marital rape needs to be charged with the offense of crime and no exception needs to be provided to

²⁶ S. 377, The Indian Penal Code, 1960.

²⁷ INDIA CONST. art. 14

²⁸ INDIA CONST. art. 15

²⁹ INDIA CONST. art. 21

³⁰ STATE OF PUNJAB V. GURMIT SINGH, 996 AIR 1393.

³¹ Krishnadas Rajagopal, Courts continue to differ in views on marital rape, THE HINDU (29-08-2021, 17:52), <https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece>.

them, which will certainly result in the betterment of many women's life, who suffer a lot in their bedrooms but never get the courage to open up in the lack of any legislation for the same.