
MARITAL RAPE: NEED TO DECLARE AN OFFENCE AGAINST SOCIETY

Dr. Bhavana Sharma

Associate Professor, Faculty of Law, SGT University, Gurugram

Received: Apr. 2019 Accepted: May 2019 Published: Jun. 2019

Abstract: “Women continue to suffer from womb to tomb”

-- Justice V. R. Krishna Iyer

According to The Protection of Human Rights Act, 1993, “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

Article 21 of Indian Constitution gives us right to live with human dignity. Marital rape is in total violation of that very human dignity bestowed upon by Article 21. Numerous women suffer various act of humiliation, assault, torture and sexual act without consent which would be rape if done with any other woman but she suffers the same act which depletes her self-worth. No legal remedies are available to her. She is denied justice just by the virtue of marital relationship, which is clear denial of her right to live with human dignity.

Marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized. Rape is a monstrous burial of the dignity of any woman, whether married or not. It 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.

This research paper will analyze the need to declare marital rape as a crime in India.

Keywords: Indian Penal Code, Marital Rape, Dignity, Constitutional Right, Human Rights.

Introduction: Rape is one of the wildest and greatest form of criminal act suffered by the women's. Black's law dictionary define rape as "the unlawful carnal knowledge of a woman by man forcibly and against her will."

People in India are free from crimes committed in the streets but the women have not been safe from crimes inside their homes which get unnoticed by anyone. There are many laws for the protection of married women’s right but the area of marital rape is still to be considered.

Marital rape is the total violation of that very human dignity bestowed upon by Article 21. Numerous women suffer various act of humiliation, assault, torture and sexual act without consent which would be rape if done with any other woman but she suffers the same act which depletes her self-worth. No legal remedies are available to her. She is denied justice just by the virtue of marital relationship, which is clear denial of her right to live with human dignity.

An intercourse between a husband and his wife which is done without her consent or consent obtained by force, threat or mental torture is said to be considered as marital rape.

World is changing and we are living in the era where we value the ability of a human being to make their choices regarding our body, our lives and the way we want to the world to be. These are the rights we all cherish as human beings. Constitution of India provides various fundamental right such as the one provided by Article 21 ie Right to life and liberty.

Criminalizing the marital rape was suggested by Justice Verma committee. Committee in its report¹ recommended that:

- i. The exception for marital rape be removed.
- ii. The law ought to specify that:
 - a) A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
 - b) The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
 - c) 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.

Though the definition of rape was amended but the government refused to make any changes for the purpose of marital rape.

Marital rape has been impeached in approximately 106 countries and is documented as a desecration of human rights. Among the 106 countries, 32 consider it as a special criminal offence, and the remaining 74 include it in the general rape provisions. Even though many countries around the world have taken such strong and progressive steps, India is one of the 36 countries where it is still not a criminal offence and is untouched by the lawmakers of our country.

Marital Rape and International Perspective:

- According to Declaration on Elimination of violence against women, "violence against women" means any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.²

According to article 3 of Declaration on Elimination of violence against women, "Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. These rights include, inter alia:

- The right to life;
- The right to equality;
- The right to liberty and security of person;
- The right to equal protection under the law;
- The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

¹Report of the Committee on Amendments to Criminal Law, 23 January, 2013

² Article 1

- Doctrine of marital rape, for the first time, was discussed in the Appellate Court of England in the **R v Clarence**³ case. Though the defendant was not charged with rape, the case became a precedent for a wife to protect herself from non-consensual sex. Finally, in the case of **R. v R**⁴, it was stated that the marital rape exemption was illogical and it was held that “the fiction of implied consent had no useful purpose to serve today in the law of rape”. Consequently, R’s appeal was dismissed and he was convicted for committing rape. That was the beginning of criminalization of marital rape in the English laws.
- European Commission of Human Rights in **C.R. v U.K.**⁵, endorsed to the conclusion that rapist remain rapist regardless of his relationship with the victim. It acknowledged that this change in common law was in accordance with the fundamental objectives of the Convention on Human Rights.
- Canada, South Africa, and Australia have also changed their law regarding the marital rape. The concept of immunity for husband in case of marital rape goes beyond all understanding of principle of dignity, justice and equal protection of law for all citizens regardless of the gender, class or racial difference.
- According to **The Protection of Human Rights Act, 1993**: “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

Rape Laws: Position in India: Section 375 of the Indian Penal Code, defines Rape and section 376 provides punishment for the offence of Rape. But the Act has failed to protect the married women who are subjected to rape by their own husband.

Rape as defined under section 375 of IPC talks about sexual intercourse with a woman against her will (firstly) and without her consent (secondly). It doesn't seem fair to make any exception to the very definition of the rape in generic terms which is the carnal knowledge of a woman by men against her will and without her consent.

Every act done “against the will” of a woman, is automatically said to be done “without her consent” but an act done “without the consent” of a woman is not necessarily “against her will”.⁶ The Supreme Court has explained that the expression “against her will” imports that the act of intercourse is done by a man with a woman in spite of the resistance and opposition of the woman to the doing of it.⁷

According to exception 2 of Section 375 of Indian Penal Code ‘Sexual intercourse or sexual act by a man with his own wife the wife not being under 15 years of age is not rape.’

The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years, does not amount to rape. It thus keeps outside the ambit of rape a coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of

³(1889) 22 Q.B.D 23

⁴(1992) A.C.599, House of Lords

⁵ C.R. v UK A/355-C, IHRL 2595 (ECHR 1995)

⁶R. v. Fletcher, (1859) 8 Cox. 131.

⁷ State of Uttar Pradesh v. Chhotey Lal, (2011) 2 S.C.C. 550

age and thereby allows a husband to exercise with impunity, his marital right of nonconsensual or undesired intercourse with his wife.

Constitutional Validity of section 375 of Indian Penal Code: According to article 14 of Indian Constitution “State shall not deny to any person ‘equality before law’ or ‘equal protection of laws within the territory of India”.

Right to equality is not only the fundamental right but it is also a basic feature of the Constitution and is a fundamental postulate of republicanism.⁸ It is a right that has been conferred and protected by several International covenants⁹ and finds place in almost all written Constitution that guarantee fundamental rights.¹⁰

Right to equality not only means the right to be not discriminated but also the protection against arbitrary and irrational act of the State.¹¹ Arbitrary action is described as one that is irrational and unreasonable.¹² Wherever we find arbitrariness and unreasonableness, there is denial of rule of law. Section 375 of IPC is violative of the right to equality guaranteed under Art. 14 of the Constitution on the following grounds:

- Section 375 of IPC provides irrational classification made between rape within marriage and rape outside marriage and there is no intelligible differentia for such classification.
- The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them. The aim of section 375 of IPC is the protection of women from the act of sexual intercourse done by a man onto her without the woman’s consent but this law has failed to prevent the act of marital rape.
- The classification of the class of the woman, on the basis of their status of being married or unmarried and on the basis of her age¹³ will not serve the objective of Section 375 IPC.

So, the section 375 of IPC plainly fails to meet the test of reasonable classification which is unjust, illegal and unconstitutional and completely violative of article 14 of the Constitution of India.

In the case of *Sri Meenakshi Mills Ltd Madurai v A.V. Vishwanath Shastri*¹⁴, the SC observed that article 14 guarantees to all person the equal protection of law while the Exception 2 of 375 IPC denies the same protection of law on the basis of marriage.

⁸Indira Nehru Gandhi v. Raj Narain, 1975AIR 865 S.C.

⁹ Art. 7 of UDHR provides that “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

Art. 26 of ICCPR provides that “All persons are equal before law and are without any discrimination to equal protection of the law.”

¹⁰ Irish Constitution 1937; West German Constitution 1949; Constitution of Malayasia, art 8(1); Constitution of Singapore, art 12(1); Constitution of Trinidad and Tobago, art 4(b); Cook Islands, art 64(a); Constitution of W Samoa, art 15(1); Constitution of Cyprus 1960, art 28; Japanese Constitution 1946, art 14; Constitution of Islamic Republic of Afghanistan, art 22; Constitution of Bhutan, art 7(15); Constitution of South Africa, art 9; Constitution of Sri Lanka, art 12; Constitution of Switzerland, art 8 and 9.

¹¹Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 S.C.C. 111.

¹²Om Kumar v. Union of India, A.I.R. 2001 2 SCC. 386.

¹³Exception 2 of Section 375 of Indian Penal Code

¹⁴1955 (1) SCR 787

According to article 21 of Indian Constitution “No person shall be deprived of his life or personal liberty except according to procedure established by law”.¹⁵ The term “Life” envisaged by the Court is something more and different from mere animal existence¹⁶.

Prior to the Meneka Gandhi’s decision, Article 21 guaranteed the right to life and personal liberty only against the arbitrary action of the Executive and not from the Legislative action . The State could interfere with the liberty of citizen if it could support its action by a valid law.

But after the Meneka Gandhi’s Case Art. 21 now protect the right of life and personal liberty of citizen not only from the executive action but from the legislative action also. In Meneka Gandhi’s¹⁷ case Supreme Court held that “the procedure which is established must satisfy the requirement of NATURAL JUSTICE ie it must be just fair and reasonable”.

It was also held that “right to life includes within its ambit the right to live with human dignity”, and this is also evident from numerous case laws that Supreme Court has expended the scope of article 21 by this liberal interpretation. Supreme Court has inserted as well as continuously inserting various rights under the umbrella of article 21 of Indian Constitution.

Rape is a crime against basic human rights and is also violative of the victim’s most cherished of the fundamental rights, namely, the right to life with human dignity contained in Article 21¹⁸ and punishable as well. It is obligatory on the part of State to protect right to life of person for it being a human right¹⁹. “It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality²⁰”.

By decriminalizing marital rape, the right to privacy and right to bodily integrity of a woman is infringed which cannot be compromised by taking marriage as its defence. An individual’s right not to be raped cannot be held hostage to an imposed conception of marriage. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. Forcible sexual intercourse with a woman even by her husband should be treated as a crime as it violates her right to live with dignity which is a part of her “Right to Life and Personal Liberty” guaranteed under Article 21 of the Constitution. **“Marital rape goes against her right to sexual privacy and right to bodily self-determination”**.

Sexual intercourse, which is considered to be an integral part of a marriage, should not transform into an excuse for committing a heinous crime of rape onto any woman. Consent or willingness of the wife must not be compromised just for the sake of safeguarding the institution of marriage. Marriage is a sacred ceremony where husband takes vows to keep his wife safe and sound. Though sexual intercourse is the core of marriage but it should be consensual.

¹⁵ Article 21 of Indian Constitution

¹⁶ Munn v. State of Illinois, 94 U.S. 113 (1876)

¹⁷ Meneka Gandhi v Union of India AIR 1978 SC 597

¹⁸ The Chairman, Railway Board v. Chandrima Das, A.I.R. 2000 S.C. 988

¹⁹ Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors., (2017) 10 S.C.C. 1

²⁰ Prahlad v. State of Haryana, (2015) 8 S.C.C. 688.

In *State of Maharashtra v Madhukar Narain*²¹ Supreme Court held that, a woman even of so called easy virtue (prostitute) was entitled to protect herself against unwilling sexual assault. This right is covered under article 21 of Indian Constitution and has extended under right to privacy.

In *Bodhisattwa Gautam v. Subhra Chakraborty*²², the Hon'ble 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.'

It is stated that "rape" or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. "Rape" not only lowers the dignity of a woman but also lowers her reputation. The plight of the woman and shock suffered by the victim can be well visualized. The victim of rape grows with traumatic experience and an unforgettable shame haunted by the memory of the disaster forcing her to a state of terrifying melancholia.²³

In *Vishaka v State of Rajasthan*²⁴ Supreme Court issued guidelines for sexual harassment of women at workplace.

In *Sakshi v Union of India*²⁵ Supreme Court refused to issue any guidelines regarding the various types of sexual act other than peno-vaginal penetration to be characterized as rape. This was eventually amended by the legislators after the shocking Nirbhaya case.²⁶

In *Shyam Narain v State (NCT of Delhi)*²⁷, Supreme Court held that, "Since rape is an assault on individuality and inherent dignity of a woman and a crime against whole body of a woman and the soul of the society.

In *State of Haryana v Janak Singh*²⁸, Supreme Court held that the offence of rape violates dignity of woman and reduces her confidence, hence it violates her right to life as given in article 21 of Indian Constitution.

In *Nimesh Bhai Bharat Bhai Desai v State of Gujarat*²⁹, Gujarat HC made following observation, "a woman in this country can protect her right to life and liberty, but not her body, within her marriage. If the husband lays an assault on her wife, then that would constitute an offence under the IPC. If the very same husband lays an assault and forces his wife to have sexual intercourse, he would be liable for assault but not for an offence of rape only because there is a valid marriage between the two." And hence there is no reason why a marital rape be treated any differently than rape."

Conclusion: Marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized. Rape is a monstrous burial of the dignity of any woman, whether married or

²¹ AIR 1991 SC 207

²² (1996)1 SCC 490

²³ State of Andhra Pradesh v. Bodem Sundara Rao, (1995) 6 SCC 230

²⁴ (1997) 6 SCC 241

²⁵ AIR 2004 SC 3566

²⁶ Mukesh & Anr vs State for NCT of Delhi & Ors (2013) 2 SCC 587

²⁷ 2013 (7) SCC 77

²⁸ (2013) 9 SCC 431

²⁹ 2018 SCC Guj 732

not. It 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. Though a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, the incorporation of the principal of liability for marital rape in our penal laws is not present. This prima facie violates Article 14 and 21 of the Indian Constitution. Cases of marital rape is not just about the practice of conjugal right but about the humiliation faced by the women with the hand of an abusive husband.

Women suffer various act of humiliation, assault, torture and sexual act without consent which would be rape if done with any other woman but she suffers the same act which depletes her self-worth. No legal remedies are available to her. She is denied justice just by the virtue of marital relationship, which is clear denial of her right to live with human dignity. Unfortunately Supreme Court has totally expressed their helplessness to extend the very natural and obvious protection of law in cases of marital rape.

Criminalizing marital rape is not asking for a 'special provision' for married women. There cannot be 'good rape' and 'bad rape'; there cannot be gradations based on the relationship between the victim and the perpetrator.

Thus, for the interest of justice & equity in good concise, the marital rape should be declared a criminal offence and protection of law provided to husbands under Section 375 Exception 2 of IPC be declared as unconstitutional.

References:

1. Report of the Committee on Amendments to Criminal Law, 23 January, 2013
2. Article 1
3. (1889) 22 Q.B.D 23
4. (1992) A.C.599, House of Lords
5. C.R. v UK A/355-C, IHRL 2595 (ECHR 1995)
6. R. v. Fletcher, (1859) 8 Cox. 131.
7. State of Uttar Pradesh v. Chhotey Lal, (2011) 2 S.C.C. 550
8. Indira Nehru Gandhi v. Raj Narain, 1975 AIR 865 S.C.
9. Art. 7 of UDHR provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law."
10. Art. 26 of ICCPR provides that "All persons are equal before law and are without any discrimination to equal protection of the law."
11. Irish Constitution 1937; West German Constitution 1949; Constitution of Malayasia, art 8(1); Constitution of Singapore, art 12(1); Constitution of Trinidad and Tobago, art 4(b); Cook Islands, art 64(a); Constitution of W Samoa, art 15(1); Constitution of Cyprus 1960, art 28; Japanese Constitution 1946, art 14; Constitution of Islamic Republic of Afghanistan, art 22; Constitution of Bhutan, art 7(15); Constitution of South Africa, art 9; Constitution of Sri Lanka, art 12; Constitution of Switzerland, art 8 and 9.

-
12. Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 S.C.C. 111.
 13. Om Kumar v. Union of India, A.I.R. 2001 2 SCC. 386.
 14. Exception 2 of Section 375 of Indian Penal Code
 15. 1955 (1) SCR 787
 16. Article 21 of Indian Constitution
 17. Munn v. State of Illinois, 94 U.S. 113 (1876)
 18. Meneka Gandhi v Union of India AIR 1978 SC 597
 19. The Chairman, Railway Board v. Chandrima Das, A.I.R. 2000 S.C. 988
 20. Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors., (2017) 10 S.C.C. 1
 21. Prahlad v. State of Haryana, (2015) 8 S.C.C. 688.
 22. AIR 1991 SC 207
 23. (1996)1 SCC 490
 24. State of Andhra Pradesh v. Bodem Sundara Rao, (1995) 6 SCC 230
 25. (1997) 6 SCC 241
 26. AIR 2004 SC 3566
 27. Mukesh & Anr vs State for NCT of Delhi & Ors (2013) 2 SCC 587
 28. 2013 (7) SCC 77
 29. (2013) 9 SCC 431
 30. 2018 SCC Guj 732
