
CONJUGAL RIGHTS OF HUSBAND VIS-À-VIS MARITAL RAPE: A STUDY OF INDIAN LAWS

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Abstract: Marriage is the holy union of man and woman, which gives them the status of husband and wife. Though Conjugal Rights are recognized under personal laws, under no system of law in this country, whether Hindu or Mohammedan, a husband has absolute right to enjoy the person of his wife without regard to the question of safety to her.

This paper points out whether this right can be enforced with force without regard to the consent of the woman or whether it should amount to rape under the wide interpretation of Art. 21 of the Constitution of India and Section 375 of India Penal Code, 1860. The personal laws of the country give a remedy to the married couple in the form of restitution of conjugal rights if either the husband or wife has, without reasonable excuse, withdrawn from the society of the other. This empowers the husband to secure his wife's consent to sex and if she refuses, gives him right to divorce her on the ground of cruelty. The Code of Civil Procedure under O 21 Rule 32 reinforces this by providing that violation of decree of conjugal rights could be punished with penalty. This paper has tried to find out whether marital rape can be considered a reasonable excuse for the wife to withdraw from the society of the husband, or whether it is wife's conjugal duty to protect marital rape.

Marital rape is very complicated and it is very personal in nature. It is also very difficult to explain and describe sexual acts between two individuals, husband and wife. These are of such an extreme private nature that neither can there be evidence of consent nor any long lasting record of any evidence of any consent between husband and wife. Although many countries still permit husbands to rape their wives with little or no consequence, yet perception is growing that marital exemption to rape is unjust and has no place in a civilized society. The purpose of this paper is to find out whether the exception provided to sec. 375 of IPC, i.e. sex without the consent of wife above the age of 15/16 yrs. should be removed in the light of report of Law Commission and Justice Verma Committee Report.

Keywords: Conjugal Rights, Marital Rape, Safety, Right To Life, Law, India Penal Code.

Introduction: The relationship between man and woman is human relationship and not legal relationship. The human aspects of which are more vital. Sexual urge or passion for sexual intercourse is a natural human instinct of both sexes after a certain variable age, which continues for a long period in human life. Restriction and control of passion is a part of civilization. Where restraint falls short and passion becomes uncontrollable, beastly quality in man or woman is revealed. Even permissible sexual acts on account of marital relationship between husband and wife are subject to such restraint and is put on such relationship by social customs.

While tracing the history of women through the ages, one finds that except for a short period during Rigveda, when they enjoyed equality, freedom and place of honour, mostly their position has been of inequality and subservient. They were considered inferior creatures, not allowed independence, had no rights to inherit properties and were not given opportunities to attain education and develop their personality. After marriage, the woman was totally under the control of her husband and his relatives who put many unreasonable restrictions on her freedom and movements. Some of them doubted their wives to such a great extent that they put inhuman restrictions on them.¹

Marriage is the holy union of man and woman, which gives them the status of husband and wife. Under no system of law in this country whether Hindu or Mohammedan, a husband has absolute right to enjoy the person of his wife without regard to the question of safety to her. Sexual offences cause injuries to the woman's body and honour and hence such offences are treated as the most violent and heinous in nature. The sexual offence like Rape leaves a permanent scar on the mind of the victim whether committed by a stranger or one's own husband.

The offence of rape in its simplest term is the "ravishment of a woman without her consent, by force, fear or fraud" or as "carnal knowledge of a woman by force against her will". "Rape or Raptus" is when a man has carnal knowledge of any woman, above the age of particular year, against her will or of a woman child, under that age with or against her will. In the crime of rape, "carnal knowledge" means the penetration to any slightest degree of the organ alleged to have been carefully known by male organ of generation.² Marital rape refers to "unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent." It is a non- consensual act of violent perversion by a husband against the wife where she is abused physically and sexually.³

Legal Provisions in India: Rape is sexual intercourse without consent. It is a punishable crime under Indian Penal Code 1860. The original draft of the Indian Penal Code, as prepared by Macaulay's Commission, Exception in Clause 359 had stated: "Sexual intercourse by a man with his wife is in no case rape." However, finally, the clause, incorporated as section 375 in the Indian Penal Code in 1860, laid down Ten years as the minimum age for giving valid consent by a woman and also for the exception which permitted husband to have sexual intercourse with his own wife without her consent or against her will.

The incident of death of *Phulmonee Dasse*, minor girl of 11 years who died on the bed of her husband, shocked every one who was concerned with women's welfare. She died because of bleeding caused by a ruptured vagina. The public outcry ultimately led the legislature to increase the age for having sexual intercourse by a man with his wife without her consent or against her will. Accordingly, in 1891, the age for giving valid consent by a woman as well as for the exception in section 375, which enabled the husband to have sexual intercourse with his wife without her consent or against her will, was increased to 12 years. In 1925, the age for giving valid consent by a woman was raised to 14 years. In 1949, the age of consent was further increased to 16 years and for the exception it was increased to 15 years. Since then there is no change and at present, under section 375, IPC, the age for giving valid consent by a woman for sexual intercourse is 16 years and in case of a husband, the exception in section 375 allows him

¹ Dalbir Bharti, *Women and the Law*, APH Publishing corporation, New Delhi (2008)

² V.K Dewan., *Laws relating to offences against women*, Asia Law System, Eastern Law House, Kolkata, pg. 343 (2004)

³ Nimeshbhai Bharatbhai Desai Vs. State of Gujrat

to have sexual intercourse with his own wife without her consent or against her will if she has completed 15 years of age.

Interestingly it is noteworthy that in 1949 the minimum age for a girl's marriage, as per the Child Marriage (Restraint) Act, 1929, was 15 years and 1978 it was increased to 18 years. But, while increasing the age of marriage for girls from 15 to 18 years in 1978, the age for giving consent by a woman for sexual intercourse was not increased from 16 years and the age of wife for the purpose of exception under section 375 was also not increased from 15 years.

Meaning of Consent: The cause of the offence of rape is sexual intercourse against the woman's will and without her consent. Consent is **an act of reason accompanied by deliberation**. A mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be "consent". Consent means **active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done**. This is essential to amount to consent to an act. As held in the case of *Tukaram V. State of Maharashtra*⁴ mere passive surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition.⁵

The definition of rape under section 375, IPC, uses the phrases "against her will" and "without her consent". Section 90 of the IPC says: "*A consent is not such a consent as is intended by any section of this code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.*" As far as the age of the person giving consent is concerned, sec 375 further mentions the age of sixteen years for making the consent valid under that section. Thus, by a constructive reading of both the sections 375 and 90 one can make out as to what actually amounts "consent" and what does not amount "consent" for the offence of rape.

In case where the woman was above 16 years of age at the time of the alleged incident of rape and the accused takes the plea that the sexual intercourse was a consensual act, the foremost requirement for the success of the prosecution case is to prove that there was no consent or that the consent was not a valid consent. In such cases once it is established that there was consent of the woman, the whole case comes to an end because as per the provisions of section 375 a sexual intercourse with consent does not amount to Rape, if the consenting woman was not under 16 years of age at the time of the incident.

Thus, an offence of rape within marital bonds stands only if the wife is less than 12 yrs. of age. If she is between 12 to 16 yrs., an offence is less serious, attracting milder punishment. Once the age crosses 16 years there is no legal protection accorded to the wife, which is in direct contravention of human rights regulations.

⁴ AIR 1979 SC 185

⁵ Also in *Shivanath V. State of M.P.*, 1998 Cri.L.J. 2691(M.P.),

The Protection of Women from Domestic Violence Act, 2005 created a civil remedy for victims, but it did not criminalize marital rape. The Prohibition of Child Marriage Act 2006 prescribes legal age for marriage but does not prohibit for such violence.

Law Commission and International Documents on Marital Rape: In its 172nd Report (2000), the Law commission of India tackled the issue of marital rape while addressing other proposals for reforming the provisions relating to rape as under:

“Where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 yrs. We are not satisfied that this exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship.”

Marital rape is very complicated and it is very personal in nature. It is also very difficult to explain and describe the sexual acts between two individuals, husband and wife. These are of such an extreme private nature that neither can there be evidence of consent nor any long lasting record of any evidence of any consent between husband and wife.

While giving the report, Justice J. S. Varma Committee on Review of Rape Law considered 172nd report of Law Commission; the criminal law (Amendment) Bill, 2012, and the Report of Justice J. S. Varma, and the committee deliberated the amendment to section 375 of IPC at para 5.9 of the report including the issue of marital rape. Law Commission of India also took up the matter for examination in October 2013.⁶

Not only the marital rape should be recognized as an offence under the law, but a reform of personal laws is also required to ensure gender equality. There is no gain saying that each incident of sexual harassment, results in violation of the fundamental right to gender equality and the right to life and liberty. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) directs all state parties to take appropriate measures to protect the honor and dignity of women. The UN Declaration on the Elimination of Violence Against Women, 1993, recognizes the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings. It observes that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation of women on equal terms with man in political, social, economic and cultural life of their countries; hampers the growth and prosperity of society and the family and makes more difficult the full development of the potentialities of the women in the service of their country and the humanity. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, claims that all human beings are born free and equal in dignity and rights.

Common Rule of Law of Marital Exemption: Definition of Rape in section 375 is based on the common law rule. In the exception to sec. 375 IPC, sexual intercourse by a man with his own wife, the wife not being under 15 yrs of age, is not rape. The wife’s consent is also based on the common-law rule of marital exemption. This exemption was based upon a belief under which the wife was regarded as the husband’s chattel (property). She was supposed to have given a general consent to her husband as a natural implication of the marriage.

⁶ [http:// m.firstpost.com/india/marital rape](http://m.firstpost.com/india/marital-rape) last seen on 16/12/16

According to Hobbes: “Of things held in propriety, those that are dearest to man are his own life and limbs; and in the next degree, in most men, those that concern **conjugal affection** and after them riches and means of living.”

According to Locke: “Every man has a property in his own person.” Every individual has a right to preserve “his property, that is, **his wife**, liberty and estate”.

In the common law of the UK, Australia and US, Rape traditionally describes the act of one party forcing another to have sexual intercourse with him or her. Until the late twentieth century, a husband forcing sex on his wife or a wife forcing sex on her husband was not considered ‘rape’, since the woman or man for certain purposes was not considered a separate legal entity with the right of refusal, or sometimes was deemed to have given advanced consent to a life-long sexual relationship through the wedding vows. However, most western common law countries as well as civil law countries, have now legislated against this exception. They now include spousal rape and acts of sexual violence, such as forced anal intercourse which were traditionally dealt with under sodomy laws, in their definition of ‘rape’.

On ‘marital exemption’, there was a landmark judgment in *R.Vs. Clarke*. In this case, the wife, after eleven years of her marriage, obtained an order from the court, which stipulated that the wife was no longer bound to cohabit with her husband. But within two weeks of court’s order, the wife was allegedly raped by her husband. While delivering the judgment, Justice Byrne opined that a husband could not generally be guilty of raping his wife but held that when a wife had been granted a legal separation, her implied consent to marital intercourse was revoked.

Historically, many cultures have had a concept of spouses’ conjugal rights to sexual intercourse with each other, which persists till today in almost all civilizations. Earlier the very concept of marital rape was treated as impossibility. It is a myth that rape committed by one’s partner has less detrimental effect as compared to the one by strangers. In a country if a woman is not safe in her home then what protection can be thought of outside.

Although many countries still permit husbands to rape their wives with little or no consequence, yet perception is growing that marital exemption to rape is unjust and has no place in a civilized society. It is not surprising that some countries are already treating spousal rape (or marital rape) a crime. Woman is becoming more aware of their sexual rights.

Marital rape is same as the offence of rape, the only difference being that the offender, instead of being stranger, is one’s own husband. Though it is just an extension of domestic violence, presence of one’s husband makes it lesser offence.

In *R.Vs. R*⁷, the House of Lords widened the scope of criminal liability by declaring that a husband could be charged as the principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. Marital rape is now an offence in the US, Sweden, UK, Denmark and Australia.

⁷ (1992) AC 599

Conclusion and Suggestions: The purpose behind the criminalizing of rape was protecting the dignity of woman, as it is a human right. However, the very purpose of criminalizing rape is reduced in the concept of marital rape. The marital rape violates a woman's right to health as per the UDHR regulations. Marriage does not give license for committing rape with the wife, minor or major. The study points out that married women are being raped frequently by their husbands. While official data on marital rape is meager, activists and lawmakers maintain there is plethora of evidence to imply it is on the rise.⁸ Therefore, Sec. 275 of IPC should be amended as per the report of Law Commission and Justice Varma Committee in the tune with other countries like UK, Sweden, Denmark and the USA. It also should be made a ground of divorce and judicial separation. Plea of conjugal rights also should be rejected on this ground.

Normally such kinds of harassment against the wife come to the light as an incident of cruelty only when there is a family dispute and when wife has made up her mind to divorce her husband. Rape is a non-compoundable offence. If marital rape is also made non-compoundable offence, it is feared that it has the potential of destroying the institution of marriage. The act of rape itself destroys the institution of marriage. However, while criminalizing marital rape, it should be made a compoundable offence and certain methods of conciliation and mediation should be applied to save marriages by bringing conciliation between the parties. Thus, misuse of such kind of provisions by wife can also be avoided while safeguarding her rights. Inculcation of the moral values and sexual knowledge to the couple as a preventive measure is also the need of time to avoid such heinous incidences. The Law Commission in its 172nd Report on "Review of **Rape** Laws" (2000) recommended that the age of consent for both unmarried and married women should be 16 years, below which sexual intercourse should be considered **rape** and punished accordingly.⁹

In the case of *Independent thoughts vs. U.O.I*, the issue before the court was whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Hon'ble Court held that sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not.¹⁰ Further in the case of *Nimeshbhai Bharatbhai Desai Vs. State of Gujrat*,¹¹ the question before the court was whether a wife can initiate prosecution against her husband for unnatural sex punishable under sec. 377 of the Indian Penal Code?.

In above cases¹² court has rightly observed, "Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice." Exception to Section 375 needs correction because rape is rape there can be no exception to it. A rapist remains a rapist regardless of his relationship with the victim.

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