

CRITICAL EVALUATION OF THE LEGALITY OF MARITAL RAPE IN INDIA: AN OVERVIEW

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Marriage is one of the universal social institutions. It is established by the human society to control and regulate the sex life of man. It is closely connected within the institution of family. In other words marriage denotes those unequivocally sanctioned unions which persist beyond sensuous satisfaction and thus come to underline family life.¹ It involves the social sanctions generally in the form of civil or religious ceremony authorizing two persons of opposite sexes to engage in sexual and other consequent and correlated socio-economic relations with one another.² Thus, marriage is a sanctioned relationship in between the man and a woman by the society at large and governed by certain rules and regulations as framed from time to time by the state. In other words marriage is considered to be a powerful instrument of regulating the sex life of man. Sexual impulse is powerful inhuman beings. She is exposed to its influence throughout her life. It is an urgent and an irresistible need of man. Hence, marriage is often called the license for sexual life. Presently, the physical and

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¹ S.R, Myneni; Sociology (2007), at p. 232.

² *Id*, at p. 233.

sexual abuse of women in a public domain has become widely recognized but the sexual relations within married couples are less discussed and scantily researched issue in India. There is a curious silence surrounding sexual violence towards wives. Sexual violence or marital rape is still regarded as a taboo. Marriage has always been known as a sacred institution but, wonder how much of it exists today. This paper is an attempt by the authors to critically examine the concept of marital rape and to find out logical reasoning why Indian legal system still remain reluctant to address this sensitive issue.

Meaning, Definition and the Concept of the Term “Marital Rape”

The word „rape“ is derived from the Latin term *Rapio*, which means to seize. Rape literally means a forcible seizure and that is the essential characteristic of the offence. It means the violation of one's esteem. Section 375 of Indian Penal Code, 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.³ The same is now being amended in 2013 after the heart breaking incident in Delhi in December 16 forced the government to amend Indian Penal Code, 1860 an all most 161 years old Act and include certain new acts as crimes. It replaced the word rape with the term sexual assault.

³ Dalbir, Bharti; *Women's and Law* (2008), at p. 111.

Marital Rape is also known as spousal rape is non-consensual sex in which the perpetrator is the victim's spouse. It is a form of partner rape, of domestic violence and of sexual abuse. It can be equally, if not more, emotionally and physically damaging than rape by a stranger. The term Marital Rape is contentious and creates confusion for rape is widely regarded as a sexual transgression, and marriage is perceived as socially sanctioned sex. 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. Marital Rape could be by the use of force only a battering rape or a sadistic/obsessive rape. It is an on-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.⁴

Not only in India but over the world there is a „spousal exception clause“ in rape laws. The exclusion of married women raped by their husbands reflects the law's view of a wife as being her husband's private property rather than an autonomous self-determination person, consequently husbands are provided with a license to impose themselves on their wives whenever they choose. As far as the Indian legal system is considered it is based on the understanding that a husband can not commit rape on his wife. The basic premise of this assumption lies in the fiction that

⁴ Kirti, Madan; Marital Rape in India, <http://www.jurisonline.in>, Visited on 21st April. 2014 at 06:00 am

the wife is considered to have given her irrevocable consent to sexual intercourse to the husband on marriage and hence, the husband cannot be held guilty of rape which he may commit upon his wife. Even the judiciary is not recognizing marital rape as an offence under Indian Penal Code, 1860 and was criticized after its verdict in Sakshi's case, when it provide that there is absolutely no doubt or confusion regarding the interpretation of the provisions of Section 375 and the law is very well settled.

International Perspective to Deal with the Concept of Marital Rape

After the identification of the offence of marital rape at international platform now many counties have made it punishable offence under their respective criminal laws. Although most states have modified their laws over the past thirty years to allow husbands to be prosecuted for raping their wives, many states still retain the marital exemption clause in their rape laws. From the beginning of the 19th century women's movement, activists challenged the presumed right of men to engage in forced or coerced sex with their wives. In the United States, "The Nineteenth Century Women's Rights movement fought against a husband's right to control marital intercourse in campaign that was remarkably developed, prolific and insistent given nineteenth-century taboos against the Public mention of Sex or Sexuality.⁵ The Criminalization of marital rape in the United States in the

⁵ http://www.wikipedia.org/wiki/Marital_Rape, Visited on 19th March, 2014 at 09:00 pm.

mid-1970s and by 1993 marital rape became a crime in all states, under at least one section of the sexual offences codes. Never the less, in most states there were significant differences between the way marital rape and other forms of rape were treated. The law has continued to change through the 1990s and 2000s, in order to bring marital rape laws in line with non-marital rape, but even today there remain differences in some states.

In wider context, marital rape includes couples who are legally married, separated, divorced or cohabiting with the understanding that the dynamics of sexual violence in a long term cohabiting relationship are similar to those of a married couple. If this broader definition is accepted then the documentation of marital rape will include women who are raped by their current marital partners, previous marital partners and cohabiters. In some states there are still some exemptions given to husbands from rape prosecution. The perpetrators may be charged with related crimes such as assault, battery or spousal abuse. The existence of some spousal exemptions in the majority of states indicated that rape in marriage is still treated as lesser crime than other forms of rape. This perpetuates marital rape by conveying the message that such acts of aggression or somehow less reprehensible than other types of rape.

Importantly, the existence of any sexual exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is an

entitlement to sex. The states that make no distinction between marital rape and rape are⁶ Colorado, Delaware, Florida, Georgia, Indiana, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Texas, Utah, Vermont Wisconsin and District of Columbia and in all other states marital rape is lesser offence.

Constitutional Perspective to Deal with the Concept of Marital Rape

The Constitution of a country is a mirror reflecting the national soul. The Constitution of India is one such document. It organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the culture and experiences of the country and operates as a vehicle for national progress and unity.⁷ Every law that is passed in this country has to be in conformity with the principles and ideals enshrined in the Constitution. Any law which fails to meet this standard is liable to be struck down by the courts and declared unconstitutional. Doctrine of marriage exemption to rape fails to meet this standard as it violates Articles 14, 15 and 21 of Constitution of India. Sexual abuse whether in marriage or outside it, has been recognized as a part of gender inequality and a serious violation of women's dignity.

⁶ Shobha Ram, Sharma; Marital Rape Law in India: Need to Change the Law, *Criminal Law Journal* 2010, at p. at Pp. 136- 137.

⁷ Sudhanshu, Roy; and Iti, Jain; Criminalizing Marital Rape in India: A Constitutional Perspective, *Criminal Law Journal* 2008, at p. 85.

Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Social practice and legal codes in India mutually enforce the denial of women's sexual agency and bodily integrity, which lie at the heart of women's human rights. The Upanishads provides that husband can force his wife to have sex with him⁸. Thus, the marital rape exemption also got its validity from the cultural assumptions about men, women, and the marital relationship. Thus, the assumptions ignore the individual interest of women with in marriage.

Moreover, Article 21 of the Constitution of India, 1950 provides two rights i.e. Right to Life and the other is Right to Personal Liberty, which includes various other rights in its preview cause of the liberal interpretation of the Apex on India.

It is submitted that in light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host right to life and personal liberty under Article 21. Indeed, an obvious and blatant violation of Article 21 is hard to imagine. In this part of chapter an attempt is made to show that how the exemption of marriage for the offence of rape under Section 375 of Indian Penal Code, 1860 is violative of Article 21 of the

⁸ There is explicit justification of forcible sex-violation of a woman by man, "if she should not grant him his desire, he should bribe her. If she still does not grant him desire, he should hit her with stick or with his hands, and overcome her, saying, with power, with glory I take away your glory ! Thus, she become inglorious.

Constitution of India. Article 21 of the Constitution of India includes in preview, Right to live with human Dignity, Right to Privacy, Right to Bodily self-determination and Right to good health.

i) Right to Live With Human Dignity

The concept of right to life under Article 21 includes the Right to live with human dignity. The more distressing fact is that a victim of „marital rape“ will have to face such behaviors in the future also and be constantly reminded of her violation by her husband. Hence, such exemption of „marital rape“ under Section 375 and the latter part of Section 376 (1) is in clear violation of the right to live with human dignity as is guaranteed by Article 21 of the Indian Constitution. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes against the very essence of right to life under Article 21 and hence Unconstitutional. It is further submitted that the law cannot make a distinction in case of married women the Fundamental rights to live with Human Dignity. To draw a distinction between rape victims on basis of their marital status is to say that married women do not have a right to live with Human Dignity in a marriage. This is surely not what our Constitution mandate.⁹

⁹ Vasundhara, Goel; Role of Judiciary in Untying The Knot: Judicial Process and Unconstitutionality of the „Marital Rape“ Exemption Under Indian Penal Code, Criminal Law Journal 2007, at p. 233.

ii) Right to Privacy

The right to privacy is not mentioned in the Indian Constitution. Nevertheless, in a series of cases, the Supreme Court has recognized that a Right to privacy is Constitutionality protected under Article 21. The Right to privacy under Article 21 includes a right to be let alone. Any form of forceful sexual intercourse violates the right of privacy. Privacy may be defined as that right which protects the individual's thoughts, body, personal life, dignity and privileged information from others. The right to privacy assumes a place of paramount importance while analyzing Constitutional questions of values and moral.¹⁰

iii) Bodily Self-Determination

The right of self-determination is based on the belief that the individual is then ultimate decision maker in matters closely associated with her/his body or well being and the more intimate the choice, the more robust is the right of individuals to be the authors of their own fate. Consent to sex is one of the most intimate and personal choices that a women reserves for herself. A married woman has the same right to control her own body as does an unmarried woman. The Court held that striking down of the exemption of „marital rape“ did not create a new crime, though it did result in expanding the scope of the criminal statute. It held that the remedy chosen by our opinion is to extend the coverage of

¹⁰ Rahul, Saha; and Trithankar, Datta; The Supreme Court on Privacy, Civil and Military Law Journal (Vol. 42) 2006, at p. 65.

the provisions for forcible rape to all those to whom these provisions can constitutionally be applied.

iv) Right to Good Health

Article 25 of the Universal Declaration of Human Rights 1948 states that everyone has the right to a standard of living adequate for the health, and well-being of himself and his family. The Preamble the Organization's (WHO) Constitution also declares that it is one of the fundamental rights of every human being to enjoy "the highest attainable standard of health". There are various provisions in the Constitution of India which direct the state to take appropriate steps in order to provide every citizen of country the right to good health. The Part IV of Constitution of India provides the same under Article 38, 39(e), 41, 42, 47, 48A. The ICPD recognized women's rights to reproductive and sexual health as being key to women's health. The basis for these rights can be found in various articles of the Convention on the Elimination of All Forms of Discrimination against Women. Rights to reproductive and sexual health include the right to life, liberty and the security of the person; the right to health care and information; and the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility.¹¹

¹¹ Carmel, Shalev; Right to Sexual and Reproduction Health – The ICPD and the Convention on Elimination of all forms of Discrimination Against Women, see <http://www.un.org/womenwatch/daw/csw/Shalev.htm>, Visited on 16th Sept. 2013, at 09:05 pm.

Such a Right is necessary for the continuous intellectual and spiritual well being of a person. The marital exemption of Doctrine violates the right of good health of a victim as it inevitably causes serious psychological as well as physical harm in the process. It destroys the psychology of a woman and pushes her into a deep emotional crisis. A more compelling argument can be made in cases where forceful sexual intercourse in a marriage leads to the communication of a sexually transmitted disease (STD) to the victim of the crime of rape. Surely, the Constitutional guarantee of right to life and good health must guard against such a situation.

Fundamental Duties

Fundamental Duties provided by Constitution of India under Article 51-A also provides a specific code of ten duties to be followed by every citizen of India, This new Part IV-A was added to the Constitution of India with the 42nd Amendment Act, 1976. One of the duties specified under 51-A(e) is, „to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the Dignity of Women.“

Position of Marital Rape under Certain Special Legislations

There is no doubt that we live in patriarchal society. This society vehemently denies social and economic autonomy of women and its appropriation of women as sexual property is only

too willingly protected by the state and its laws. Though we have advanced in every possible field, marital rape is not considered as an offence in India. Astonishingly, despite amendments, law commission and new legislations, one of the most humiliating and debilitating acts is not an offence in India.

Position under Hindu Marriage Act, 1955

Since Hindu marriages are considered sacramental not a contractual, the consent of parties do not occupy much importance. Sections 13 of Hindu Marriage Act, 1955 provide ground for divorce. „Cruelty“ is one of such grounds. Section 13

(1) (ia) the word “cruelty” has been used in the context of human conduct and behavior relation to matrimonial duties and obligations. A cruelty may be physical as well as mental. Physical Cruelty means physical violence by one spouse on the other which results in injury to body, limb or health etc.... What acts will amount to cruelty depend up on case to case? Mental Cruelty is defined metal cruelty as that conduct which inflicts up on the other party such mental pain and suffering as would make it not possible for that party to live with other. Persistent refusal to sexual intercourse with in marriage amounts to cruelty. In *Shakuntala v. Om Parkash*¹², Justice Lelia Seth, observed; “A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious, marriage. If this is not possible due to ill- health on the part of one of the spouses, it may not amount to

¹² 1981 Del. 53.

cruelty depending up on the circumstances of the case. But, willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty especially when the parties are young and newly married.” In case of Marital Rape cruelty is of both types Physical as well as mental. As per the definition provided in Russel’s case, „Cruelty“ means, an act or a conduct of such a nature that may cause danger to the life or health of the other party that may be physical or mental. The offence of marital rape not only physical damage to the body of the victim but it also gives her irreparable mental scars.

Rape by a spouse, partner or ex-partner is more often associated with physical violence. A nine-nation study within the European Union found that current or ex-partners were the perpetrators of around 25% of all sexual assaults, and that violence was more common in assaults by ex-partners (50% of the time) and partners (40%) than in assaults by strangers or recent acquaintances (25%).¹³ Woman who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape includes anxiety, shocks, intense fear, depression, suicidal ideation, and increased negative feelings about themselves. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after violence.

¹³ <http://www.wikipedia.org/wiki/marital-rape>, Visited on 24th Sep. 2013 at 07:30 pm.

Position under Indian Penal Code, 1860

The Criminal Law (Amendment) Act, 2013 is a legislation passed by the Lok Sabha on 19th March 2013, and the Rajya Sabha on 21st March 2013, which provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The Bill received Presidential assent on 2nd April 2013 and deemed to come into force from 3rd February 2013. It was originally an ordinance promulgated by the President of India, Pranab Mukherjee, on 3rd February 2013, in light of the protests in the year 2012 Delhi gang rape case.¹⁴ On 16th December 2012 a female physiotherapy intern was beaten and gang raped in Delhi. She died from her injuries thirteen days later, despite receiving treatment in India and Singapore. The incident generated international coverage and was condemned by the United Nations Entity for Gender Equality and the Empowerment of Women, who called on the Government of India and the Government of Delhi to do everything in their power to take up radical reforms, ensure justice and reach out with robust public services to make women's lives more safe and secure. Public protest took place in Delhi, where thousands of protesters clashed with security forces. Similar protests took place in major cities throughout the country. This new Act expressly recognized certain acts as offences which were

¹⁴ <http://www.wikipedia/wiki/criminalamendmentact2013>, Visited on 22nd Dec. 2013 at 06:00 pm.

dealt under related laws. These new offenses like Acid Attack, Sexual Harassment, Vogenism, and Stalking have been incorporated into the Indian Penal Code, 1860.

In fact, Section 376-A of the Indian Penal Code, provides that the rape of a women by her husband from whom she was judicially separated constitutes rape, and is punishable by up to two years imprisonment. The criminalization of marital sex is fairly minimal one. A husband is guilty only where there has already been a judicially recognized rupture in marital relationship. Thus, Section 376-A, Indian Penal Code, 1860 does not challenge Lord Hale's assumption that „the husband cannot commit rape on his lawful wife“ Section 376-A simply recognizes that the act of judicial separation revokes this concept. The protection is limited only to judicially separate legally married wife. Further, a conviction under Section 376-A carries a significantly lower penalty than other forms of rape. The mandatory minimum sentence in non-custodial rape cases is even seven years and ten in custodial rapes.

The relatively low sentence accorded to judicially separated men convicted of raping their wives clearly shows the patriarchal character of criminal law. It is clear from the exception to Section 375 read with Section 376-A, Indian Penal Code, 1860 that a man cannot be guilty of rape on his own wife when she is above the age of 15 years. On account of the matrimonial consent she has given at the time of marriage which she cannot retract

unless the parties are judicially separated, or separated under any custom or usage, or unless the court has issued an injunction forbidding the husband to interfere with his wife.¹⁵ The „Spousal exception“ clause in rape law has been vehemently, attacked by sociologists and feminist groups over the last decade or more. But, it is observed that the legislative changes have only covered legally separated couples not living together so that vast bulk of marital rape remains within the law¹⁶.

Moreover, Section 498-A in 1983, Indian Penal Code, 1860 as amended to introduce the crime of cruelty by the husband or his relatives to wife. This was the first time in criminal legal history when crime by husband against his wife was specifically defined and the husband and the in-laws were brought within the preview of criminal law. The Amendment Act introduced Section 498-A in the Indian Penal Code to fight violence against women in the relationship of husband and wife. Under the new Section, cruelty to a wife made a cognizable and non-bailable offence, punishable by up to three years imprisonment and a fine. The Concept of cruelty was redefined to include mental as well as physical harassment. This does not mean that every sort of act that

¹⁵ Chandra Subhash, Singh; “Marital Violence: A Pervasive Theme of Women’s Oppression”, Criminal Law Journal (Vol. 105) 1999, at p. 87.

¹⁶ Each year not less than 10 million married women experience violent episodes during which their husbands and in-laws inflict pain and injury on their person. Married women have already been strangled, kicked and burned with matches, cigarettes and hot iron. All these incidents can be termed as “wife-battering” in medico-legal sense.

disturbs the woman will amount to cruelty. To bring the case within the purview of Section 498-A, Indian Penal Code, 1860 the acts of cruelty must be grave, that they were persistent and that they had seriously disturbed the wife both physically and mentally.¹⁷ Cruelty by husband is one of the grounds on which a wife can get divorce as provided under The Hindu Marriage Act, 1955. The word “cruelty” has not been defined in the Hindu Marriage Act. Women so far have had recourse only to section 498-A of the Indian Penal Code, dealing with cruelty, to protect themselves against “perverse sexual conduct by the husband”. But, where is the standard of measure or interpretation for the courts, of „perversion“ or „unnatural“, the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn’t consent a sine qua non? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.¹⁸

Position under the Protection of Women from Domestic Violence Act, 2005

Domestic Violence is common all over the world in all cultures, classes and ages. Violence can take place between men and women, people of same sex or people of different ages like between child and adult, elderly and youth and vice-versa. Domestic violence can occur in many forms and take many dimensions. It can be physical, sexual, social, psychological or

¹⁷ For more details see Indian Penal Code, 1860; Section 354A.

¹⁸ P.C, Pant; Law of Marriage & Divorce and Other Matrimonial Disputes, 2nd edi. 2002, at p. 62.

economical. The intensity, nature and frequency of violence determine the mode and type of treatment required. Domestic violence can range from mild to moderate to severe and go up to level of homicide. The injury can be either temporary or permanent.¹⁹ Violence against women puts huge pressure on a nation's socio-economic fabric resulting in heavy losses in terms of productivity. According to an UN press report two-third of married Indian women are victims of domestic violence. Seventy percent of married Indian women between the age of fifteen and forty nine were proven victims of ugly incidences like rape, beating, forced or coerced sex (United Nations Population Fund Report) and each incident of domestic violence leads to the loss of seven working days for a woman in a country like India.²⁰

Sexual violence particularly needs to be recognized as a form of cruelty not only because of its high prevalence with in marriage but also because the definition of rape within Section 375 of Indian Penal Code, 1860 specifically excludes marital rape as an offence. Section 498A does not address different forms of violence specifically, addresses "cruelty" very generally. As a result, it often is at the discretion of police officer to assess whether the sexual abuse faced by a woman from her husband or in-laws would qualify as cruelty under Section 498A or not.²¹

¹⁹ Puja, Jaiswal; *Victimization of Women in the Home: Domestic Violence and the Law*, Civil and Military Law Journal 2009, at Pp. 13-14.

²⁰ *Id.*, at p. 15.

²¹ *Id.*, at Pp. 43-44.

Despite the unwillingness to recognize marital rape as a crime, the fact remains that marital rape is prevalent throughout society. Women's bodies are outraged, regardless of their educational qualifications, class or status. Women themselves don't make a noise about it or talk about their experiences. This is because cultures worldwide discourage their women from openly discussing sexual matters, let alone within marriage. Most women don't even think of rape by their husbands as marital rape. And even if any knocked the doors of the court than there are no provisions for helping her and to penalize her guilty husband.²² Thus, it is very clear that there are so many loopholes under Section 375 and 376 of Indian Penal Code, 1860 making it a high time to fill these gaps Rape laws framed so as to be free from all controversies. Some opine that rape cases under no circumstances should be tried by a male judge. There has to be reduction in procedural delays of rape cases. Whatever be the views, the definition of rape should be broadened to include all forms of sexual abuse including marital rape.²³

Law Commission Reports to address the issue of Marital Rape

In fact, it was only 42nd Report of the Law Commission that had taken a step forward in reforming the law relating to marital rape.²⁴ This report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope. But, the Joint Committee that reviewed the proposal dismissed the recommendations. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age. When a man marries a woman, sex is also a

²² Gairik, Guru; Women and Law, Law Z May 2007, at p. 42.

²³ *Id.*, at p. 43.

²⁴ *Supra* Note 10, at p. 85.

part of the package.²⁵ In its report, the commission had recommended two major changes in the then existing law of marital rape. Firstly, the commission recommended that marital rape should be removed from the scope of Section 375 and intercourse by a man with his minor wife be placed as a separate offence. Secondly, the commission also considered the position of legally separated wife vis-à-vis the offence of rape. It observed:- “under the exception, a husband cannot be guilty of raping his wife if she is above fifteen years of age. This exception is to take note of one special situation, namely when the husband and wife are living apart under a decree of judicial separation or by mutual agreement. In such a case, the marriage technically subsists and if the husband has sexual intercourse with her consent, he cannot be charged with the offence of rape.”²⁶

These recommendations were again reviewed by the Joint Parliamentary Committee and the Law Commission in its 84th report and based on their recommendations the Criminal Law (Amendment) Act was passed in the year 1983. For the first time an amendment that was passed recognized sexual intercourse with a minor wife (under 15 years of age) and a judicially separated

²⁵ *Id*, at p. 84.

²⁶ But unfortunately, the provisions remained un-amended as the bill could not be passed due to the dissolution of the Lok Sabha (Lower House) in 1970. Many women’s organizations and the National Commission for women have been demanding the deletion of the exception clause in Section 375 of the Indian Penal Code, 1860 which states that “sexual intercourse by a man with his wife, the wife not being under the fifteen years of age, is not rape”

wife as an offence. However, this was only a piecemeal legislation and much more was required to be done by Parliament as regards the issue of marital rape. But since then, no changes have been effected as successive law commission have mysteriously stopped short of recognizing marital rape on the same footing as non-marital rape.²⁷

Again commission recommended that marital rape should be removed from the scope of Section 375 and placed as a separate offence. The commission observed: “The exception in Section 375 provides that sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape. The punishment for statutory rape by the husband is the same when the wife is under 12 years of age but when she is between 12 and 15 years of age the punishment is mild, being imprisonment up to two years, or fine or both. Naturally, the prosecutions for this offence are very rare. We think, it would be desirable to take this offence altogether out of the ambit of Section 375 and not to call it rape even in a technical sense. The punishment for the offence also may be provided in a separate section.”²⁸

Even the 172nd Law Commission report which submitted in March 2000 had made the recommendations for substantial change in the law with regard to rape. This report was submitted

²⁷ *Ibid.*

²⁸ Law Commission Report 156th, Chapter IX Offence Against Women and Children (Para 9.03), at p. 156.60.

pursuant to writ petition filed in the Supreme Court by SAKSHI, an organization involved in issues on women and children asking for directions concerning the definitions of rape in the Indian Penal Code, 1860.

The Law Commission in its report that the exception (2) of Section 375 of Indian Penal Code, 1860 should be „deleted“. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, Section 376A was to delete.

Judicial Attitude towards the Concept of Marital Rape

Rape is a word of fearsome connotations. It calls forth vision of men who lurk in dark alleys. It has become now a major problem for administration all over the world. The crimes of rape in country are also increasing fast.²⁹ *Tukaram v. State of Maharashtra*³⁰, also known as the Mathura Case, movements is a landmark in women's movement in India. In 1983 important changes were made in criminal law in India by insertion of Section 498A (Cruelty of wife by Husband or Relative of Husband) and Section 304B (Dowry Death) in Indian Penal Code, 1860. In another landmark case of *Vishaka v. State of Rajasthan*³¹, the Supreme Court laid down guidelines to prevent harassment of women at workplace by invoking Article 14, 19 and 21 of the

²⁹ Paripurnanand, Verma; *Sex Offences in India and Abroad*, (1979) at p. 35.

³⁰ AIR 1979 SC 185.

³¹ AIR 1997 SC 3011.

Constitution and using Article 141 to fill the gap when no law exists to deal with a particular situation. The said judgment also reoffered to the convection on the Elimination of All forms of Discrimination against Women, 1979. In Vishal Jeet v. Union of India³², the Apex Court while rejecting the prayer for CBI enquiry for exposing sexual exploitation of children issued various discretions to the State Government and Union Territories. In Gaurav Jain v. Union of India³³, the Apex Court gave directions to prevent induction of women in various forms of prostitution, rescue of child prostitutions and Children of fallen women and their rehabilitation through various welfare measures so as to provide them dignity of person, means livelihood and socio- economic empowerment. It is evident that of the various crises witnessed by the civilized society, nothing is as disturbing to people more as family violence. Among the crimes the married women experience, are Dowry deaths, marital rape, Forced suicide, Physical assaults, mental torture and Humiliation by their husbands, in-laws and other family members.³⁴

The spousal exception clause in rape law has been vehemently, attacks by sociologists and feminist groups over the last decade or more. But, it is observed that the legislative changes have only covered legally separated couple not living together so

³² AIR 1990 SC 1412.

³³ AIR 1997 SC 3021.

³⁴ Subhash Chandra, Singh; Marital Violence: A Pervasive Theme of Women"s Oppression, Vol. (105) 1999, at p. 86.

that vast bulk of marital rape remains within the law.³⁵ Usually, a wife surrenders to her husband under the implicit threat if she resists she will lose her husband's financial support and physical protection. It is true when a woman marries she gives a general consent to all the natural incidents of marriage, but there must be some limit.³⁶ The crime of rape is regarded as the highest torture inflicted upon virginity, youth, motherhood and womanhood itself. It causes not only physical torture to the body of a woman but adversely affects her mental, psychological and emotional sensitivity. Therefore, rape is the most hated crime against the very basic human right to life.³⁷ It's not just against the Right to life but also violative of Right to Privacy, Right to Live with Human Dignity, Right to self-determination, Right to Life and Personal Liberty.

*Neera Mathur v. L.I.C*³⁸, the court held that modesty and self-respect of a woman might preclude the disclosure of such information as to whether her menstrual period is regular or painful, the number of conceptions that have taken place, how many have gone full term and so on. Any query with respect to the above nature would attract to Right to Privacy of a woman. In *Suo*

³⁵ *Id.*, at p. 87.

³⁶ *Ibid.*

³⁷ Vasundhara, Goel; Role of Judiciary in Untying the Knot: Judicial Process and Unconstitutionality of the „Marital Rape“ Exemption under Indian Penal Code 1860; Criminal Law Journal 2007, at p. 230.

³⁸ AIR 1992 SC 392.

*Moto v. State of Rajasthan*³⁹, in the context of the offence of „marital rape“, the judiciary has turned a blind eye to the very ideology which is adopted by it in the context of „non-marital rape“. Such a conservationist stance of the judiciary has to do, primarily with its perception of its role as an institution whose role is limited to merely effectuating the world of the law, by giving strict interpretation of the text. Judiciary confines its role to not going beyond the word of the law. For example, in the case observed that because wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subjected to sexual intercourse by her husband against her will and without her consent, offence under Section 376 A will not be attracted. Hence, the husband was not held guilty of having raped his wife even though he was de-facto guilty of having done so. The judiciary seems to have completely relegated to its conscience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist.⁴⁰ On the one hand Judiciary seems un-interested in recognizing the offence of marital rape and continuing with the exemption of marriage to the offence of rape and on the other hand it follows the trend to get victim of rape married to the rapist.

³⁹ Vasundhara, Goel; Role of Judiciary in Untying the Knot: Judicial Process and Unconstitutionality of the „Marital Rape“ Exemption under Indian Penal Code 1860; Criminal Law Journal 2007, at p. 230.

⁴⁰ *Id.*, at 231.

The useful reference can be made to the trial of a ghastly rape, at a sessions court in Delhi, wherein the rapist during the trial proposed to marry the victim “to wash off her stigma and re-establish her in society.” Very surprisingly, the Additional Sessions Judge, J.M Malik instead of having rebuked the rapist, accepted the offer and delayed the judgment to afford the victim time to “Consider” the proposal.⁴¹ This attitude of Justice Malik is a reflection of the deeply ingrained patriarchal prejudices, in the judiciary. The victim, however, in response to the rapist’s offer termed marriage as “Second Rape” and said how could she marry the person who had “handicapped my very sense of being, more than my physical self.”

In fact, this attitude of judiciary gets it backing from the exemption provided by Section 375 of Indian Penal Code, 1860 which says that the person cannot be guilty for raping his wife, but the attitude shows that the rapist can be relieved of his liability by marrying the victim. But, this attitude has now changed. Recently Justice R.V Easwar observed, “Having sexual relations with a woman against her consent also amount to rape under Indian Penal Code, 1860, if the context was obtained on false assurance or promise of marriage, the consent cannot be considered to be full and free and it would be a case of rape.” The court made the observation while rejecting the anticipating bail plea of Abhishek Jain in a case lodged by his wife alleging that he had sex with her

⁴¹ *Id.*, at p. 230.

prior to their marriage on the promise that he will marry her. She persuades the complaint on 25th Feb 2013 and in order to avoid the punishment for rape Abhishek Jain married her in March 2013.⁴² As per the observation so made provides that now even if the accused marry the victim his cannot let go the crime he committed and the person will face the punishment for his crime under 375 of Indian Penal Code, 1860.

The court in *Queen Empress v. Haree Mythee*⁴³, observed that in case of married woman the law of rape does not apply between husband and wife after the age 15 years of age, the husband gets no rights to disregard her physical safety. After Independence Supreme Court in *Bobhisatiwa Gautam v. Subhra Chakraborty*⁴⁴, the victim filed case against appellant for developing sexual relationship with her on false assurance of marriage and latter secretly marrying her before God by putting vermilion on her forehead but after having impregnated her twice, compelling her to undergo abortion on both the occasions and ultimately deserting her.

*T. Sareetha v. Venkata Subbaiah*⁴⁵, the Andhra Pradesh High Court stated that forced sex like all other forced things leads to a denial of all joy. The fear and doubt concerning the allegation of judiciary's indulgence in rampant judicial adventurism, by

⁴² The Tribune, 19th June 2013.

⁴³ AIR 1917 Sind. 42.

⁴⁴ (1996) 1 SC 490.

⁴⁵ AIR 1983 A.P 356.

recognizing the offence of „marital rape“ can be set to rest in light of the observation made by the Apex Court in *Mithu v. State of Punjab*⁴⁶, that in light of the expanded scope of Article 21, “It is too late to contend that it is for the legislature to prescribe the procedure and for the courts to follow it: that it is for the legislature to provide the punishment and for the courts to improve it...” *Sakshi v. Union of India*⁴⁷, in this case the Supreme Court lost an opportunity to make marital rape a criminal offence and to make it punishable under Indian Penal Code, 1860. Representatives of Sakshi wanted to recommend the deletion of the exception of marriage for the offence of rape. The Government sought to defend the law by stating before the court that “Since it is against the Hindu religion, traditions and values that a husband rapes his wife by exercising threat, fear pressure and force, unlike what has been contended by the petitioner, the current law contains that provision.”

However, in an elaborated decision giving wide variety of reasons to declare the law as invalid, the court ruled out the objection of the Government stating that “Hindu religion and its literature stress on purity, cleanliness and behavior of good faith in conjugal life, it can be said that Hindu religion and traditions exempts the heinous act of rape of wife. Sexual intercourse in conjugal life is a normal course of behavior, which must be based

⁴⁶ (1983) 2 SCC 277.

⁴⁷ AIR 2004 SC 5566.

on consent. No religion may ever take it as lawful because the aim of good religion is not to hate or cause loss to anyone.⁴⁸ However, the legal position continues to remain the same where marital rape is still legal. It may be argued that the law to this regard has been diluted to certain extent by the enactment of Domestic Violence Act, 2005 which gives the right to women to prosecute perpetrators of violence in her matrimonial home. However how far would such a legal argument sustain on a charge of marital rape is doubtful.

Though the court have out ruled the arguments given by the Government to continue with the exemption but at the same time, the court in this case has adopted the doctrine of precedents as a phenomenon for confining itself from going beyond the mechanical application of the strict rule of construction. Though the court was aware of the importance of the fact that this exemption must be done away with but, by the adoption of strict construction lost the opportunity to give remedy to the grievous of married women.

The judiciary must act in complete regard to its duty to render justice and in order to do so, if necessary, it is perfectly legitimate on its part to assume an activist role without fear of being rebutted for having stepped into the domain of legislature. The formation of law does not end with the enactment of the

⁴⁸ http://www.legalprespectives.blogspot.in/2009/10marital_rape.hmt/,
Visited on 23rd Dec. 2013 at 12:00pm.

statute. It is an ongoing process which changes and develops according to the needs and demands of the community and hence the onus is on the judiciary as much as it is on the legislature, as wielders of trust reposed in them by public, to be accountable to the public by keeping the law upbeat with norms reflective of the concerns for the oppressed and the ignored.⁴⁹ Taking the steps further the Judiciary is now determined to finally recognize the office which can be seen in the latest judgments of the respective High Court.

In the recent judgment of the Karnataka High Court in case of *Harishikesh Sahoo v. State of Karnataka*⁵⁰, the Hon'ble High Court of Karnataka gave a significant judgment by rejecting the petition filed by the husband seeking to drop charges of rape under Section 376 of Indian Penal Code, 1860. The Court observed that the exemption can't be absolute. Observing further that the exemption of the husband on committal of such rape or assault, in the peculiar facts & circumstances of the given case, can't be absolute as in law no exemption is absolute. The Court opined that the exemption of marriage for rape is Regressive and will always run counter to right to equality under Article 14 of the Constitution of India. A single Judge Bench of Justice M. Nagaprasanna

⁴⁹ Vasundhara, Goel; Role of Judiciary in Untying the Knot: Judicial Process and Unconstitutionality of the „Marital Rape“ Exemption under Indian Penal Code 1860; Criminal Law Journal 2007, at p. 230 at p. 237.

⁵⁰ 2022 Livelaw (Kar.) 89 <https://www.livelaw.in/top-stories/marital-rape-exception-regressive-violates-article-14-husband-not-ruler-of-wifes-body-mind-karnataka-high-court-194834>, Visited on 30/03/2022 at 21:34PM

observed that, “The Constitution, a fountainhead of all statutes depicts equality. The code practices discrimination. Under the code every other man indulging in offences against woman is punished for those offences, but when it comes to Section 375 of IPC the exception springs. In my considered view, the expression is not progressive but regressive, wherein a woman is treated as a subordinate to the husband, which concept abhors equality.”

Some Critical Observations regarding Concept Marital Rape under Indian Legal System

To support there are some arguments that justify the concept of marital rape. There is no need to give legislative attention to marital rape, as it is quite uncommon.⁵¹ The prosecution of a husband for raping his wife will be detrimental to marital harmony and impede reconciliation efforts. Thus, any form of intervention by the state can be looked as intrusion into the private life of the married couple. The proponents of this view argue that marriage is a sacrament its integrity should be protected at all costs. Another argument in support of the marital rape exemption is that criminal law should not intrude into matters within a marriage.⁵² Due to the impossibility of proving marital rape, its criminalization would only serve as an increased burden

⁵¹ http://www.legalperspectives.blogspot.in/2009/10/marital_rape.html/, Visited on 24th Sep. 2013 at 08:41pm.

⁵² Sudhanshu, Roy; and Iti Jain; Criminalizing Marital Rape in India: A Constitutional Perspective, Criminal Law Journal 2008, at p. 90.

to the already overburdened legal system.⁵³ In other words to continue with the marital rape exemption the justification can be that it is difficult to prove and it may lead to false charges being leveled against questions that arise are : How to judge between sex and rape and the other is who will decide how much sex is not rape?

There is an implied consent to have sexual intercourse when a woman marries a man.⁵⁴ The most common ground on which the marital rape exemption is justified is that in a marriage, the wife is presumed to have given an irrevocable consent to sexual relationship with her husband. The most tenable argument in support of marital exemption comes from the school that a marital rape victim can pursue other remedies such as a charge of assault or a suit for divorce.⁵⁵

As far as Indian legal system is concerned a wife can file a case under Section 498A of Indian Penal Code, 1860 which amply covers the victims of marital rape since marital rape is a form of cruelty which is perpetrated by the husband on his wife. Section 498A was introduced by way of Criminal Law (Second Amendment) Act, 1983 with object of curbing the menace of dowry deaths and cruelty to married women by their husbands, in-

⁵³ Kirti, Madan; Marital Rape in India, <http://www.jourisonline.in/>, Visited on 23rd Sep. 2013 at 07:00 pm.

⁵⁴ *Ibid*

⁵⁵ Sudhanshu, Roy; and Iti Jain; Criminalizing Marital Rape in India: A Constitutional Perspective, Criminal Law Journal 2008, at p. 90 at Pp. 90- 91.

laws, relatives. The section reads, „willful conduct which is of such a nature as is likely to cause danger to health (whether mental or physical) of the woman“ accords ample flexibility to cover the cause of a victim of marital rape. The wife can also get divorce under Domestic Violence Act, 2005 which is a form of civil remedy. This may be one of the stronger arguments, for it is reasonable for criminal charges to align with the severity of the crime.

Contrary to this on the other side it is not believable that rape cannot occur in marriage. By protecting the perpetrator of the crime of rape instead of protecting the victim, the arguments get strength from the past where wife was considered as a private property and rape was regarded as a crime against the property. It does not even consider a married woman as a person, and takes away her Fundamental Rights. This argument that women are private property of their husbands does not hold good in modern times, because in modern democratic societies where individuals have various Fundamental Rights and all are treated equals. Today women are part of every sphere of society, this view does not hold good any more. Thus, the marital exemption to the offence of rape is patently redundant, unreasonable and arbitrary.

The another argument and the most common argument used to justify the exemption of marriage for the offence of rape is that, the wife is presumed to have given her irrevocable consent to have sexual intercourse. But this argument is fatally flawed since

in a marriage, there is no presumption of consent for any other purpose, including the marriage itself. Sexual intimacy is not the same as forced sex, by no imagination it can be believed that a person consents of violence by getting married.

Another justification given for the marital exemption is that marital rape is less serious and traumatic than non-marital as the offender is known to the victim. The rationale behind the argument is that a woman has a regular sexual relation with her husband a few instances of non-consensual sex are not as serious and traumatic as a rape by a stranger. However, on the other hand under Section 375 of Indian Penal Code, 1860 if a person have non-consensual sex with a woman to whom he is habituated to having sexual relations, without being married to be still criminalized. This position is protecting the offender and not the victim.

Despite the unwillingness to recognize marital rape as a crime, the fact remains that marital rape is prevalent throughout society. Women's bodies are outraged, regardless of their educational qualification, class or status. Thus, marital rape is a unique problem that encompasses both physical violence and psychological trauma of being raped by someone who has taken marriage vows to love and honor his/her spouse. Thus a comprehensive framework for marital rape must include aspects of the emotional and physical cruelty, as well as the exposure of family privacy, that often accompanies domestic violence.

Thus to conclude, after analyzing the Indian position, it is evident that marital rape is still legal in India. The critical evaluation of judgments of various courts further shows that even judiciary is reluctant to highlight marital rape as an offence though the position has changed in recent years but still there are a lot to be done. It is suggested that the marital rape should be recognized as an offence under Indian Penal Code, 1860. Corresponding amendments should be made in criminal and personal law as well as the same was suggested by the Justice Verma Panel appointed after Nirbhaya's Case.