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Marriage: Not a consent for indiscriminate sex.

Abstract

Marriage is considered as a sacrament ceremony in our society. Hence the forced intercourse by the husband over his wife is still not a crime in country. Section 375 of IPC deals with the crime of rape but it exempts marital rape. This paper tries to seek to bring out the existing provisions related to the matter and the remedies available to the victim if she is married and the crime is committed by her own husband. And this research paper also checks the constitutional validity of the existing laws and the judicial stand over the cases of marital rape. The paper concludes with need to bring amendments in the laws or bring some legislation so that marital rape can be brought in the ambit of crime.

Keywords- Marital Rape, remedies, constitutional validity, crime.

Introduction

The meaning of the word 'rape' which is derived from the term 'rapio' is 'to seize'. Rape is forceful seizure of woman without her consent by force fear or fraud. The supreme court of India has described it as "deathless shame and the gravest crime against human dignity".¹

If we look at the history of most of the societies, it has been seen that husband is always considered superior to his wife and it is also acceptable for them to force their wives to have sexual relationships against their will. The ceremony of marriage has provided the husband an exemption from prosecution for raping their wives.

The root of this exemption can be seen back to statements made by Sir Mathew Hale, Chief Justice in 17th Century England. Lord hale said that:

'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract'.²

There are many others traditional arguments and justifications for marital rape, the common law doctrines that considered woman as the property of her husband and the legal presence of the woman was ‘incorporated and consolidated into that of a husband’.³

Though we have progressed in every filed, marital rape is still not considered as an offence in India. In spite of development in the law through amendments, legislations and various commission Despite of various amendments, new legislations and law commissions, one of the most humiliating and crippling act is not an offence in India.

The final draft of section 375⁴ of Indian Penal Code, in its exception clause-“Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.” Section 376 of IPC mentions punishment for rape. This section states that the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years, which may extend to life or for a term extending up to 10 years and shall also be liable¹ to fine unless the woman raped is his own wife and not under 12 years of age in which case he shall be punished with imprisonment of either description for a term which may extend up to 2 years with fine or with both. This sections deal with sexual assault in very narrower way when it comes to married woman. In marriage the offence is said to be committed only if the wife is less than 12 years of age, and if she is between 12-15 years, crime is committed but less severe and milder punishment is given. And once the age crosses 15 years there is no legal protection provided to the woman against marital rape.

How can the same law which provides the age of consent for marriage is 18 years and at the other hand protecting from sexual abuse only those who are up to 15 years of age? And beyond 15 there is no legal remedy available to women against such marital rapes.

In 1983, The Indian Penal Code was amended to make the marital rape committed during the period of judicial separation as illegal.⁵

Marital rape shows the mentality and perversity of an individual. Marital rape is not just the rape of a woman’s body it’s also the rape of her love and trust. Being subject to sexual abuse

¹ Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922.

² Hale, Mathew, 1 History of the Pleas of the Crown, p.629. 91736, London Professional Books, 1972).

³ “To Have and to Hold- The Marital Rape Exemption and the Fourteenth Amendment”, 99 HARV .L: REV .1255, 1256 (1986) p.442.

⁴ The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

⁵ The Indian Penal Code, 1860, § 376- A, No. 45, Acts of Parliament, 1860 (India).

⁶ The Indian Penal Code, 1860, § 376- 1, No. 45, Acts of Parliament, 1860 (India).

⁷ *Ibid*

by her own husband covers her in the sense of insecurity and fear. The IPC deals with this very lightly.

Marital rape is mainly divided into three categories: rapes which involve the degree of violence, those rapes where enough force is used to control the victim, known as ‘force only’ rapes and sadistic rapes.

Remedies and amendments required in laws

As per the section 375 of IPC, the circumstances where the husband can be legally prosecuted for an offence of marital rape are as under:

1. When the wife is between 12-15 years of age, he is punishable with imprisonment up to 2 years or fine or both;⁶
2. When the wife is below 12 years of age, offence punishable with imprisonment of either description of a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.⁷
3. Rape of judicially separated wife, offence punishable with imprisonment up to 2 years and fine;⁸
4. Rape of wife of above 15 years in age is not punishable.⁹

There is no remedy provided to the married wife above 15 years in age in section 375 of Indian Penal Code.

However, the section 498A of IPC deals with cruelty against married women. But this section is inadequate to deal with sexual abuse of married women since there is a big difference between being subjected to cruelty and being raped. This section does not deal with cases of rape.

And also to be charged under section 498 the act has to be done repeatedly or for long period of time.¹⁰ hence it is not possible to charged when the act of forced sexual intercourse is done one or two times. The maximum punishment which is prescribed under section 498A is just three years with/without fine. While the maximum punishment for rape is life imprisonment.¹¹ This difference in the punishment can show that the concept of cruelty in no manner can deal with the offence of rape.

The law commission in its 42nd report put forward that marital rape should be kept out of the jurisdiction of section 375 and should call it rape in technical sense and punishment may given for this offence in a separate section.

Even the 172nd law Commission report¹² has made the certain recommendations for change in the law regard to rape. These recommendations are;

- a. 'Sexual Assault' should be used in place of 'Rape'
- b. Sexual intercourse in section 375 of IPC should include all forms of penetration.
- c. Sexual assault on any body part should be considered as rape.¹³
- d. Laws on rape should be gender neutral as custodial rape of young boys has been ignored by law.
- e. Section 376E should be inserted with the title 'unlawful sexual conduct'.
- f. Section 509 of the IPC should also be amended and severe punishment should be given where the offence is committed with sexual intent.
- g. Marital Rape: explanation (2) of section 375 of IPC should be struck down.

The 172nd Report of the Law Commission was submitted about 9 years ago to the government urging the legislators to replace the present definition of rape with broader definition of sexual assault which does not discriminate on basis of age and gender but nothing has been done till date.

Constitutional validity of Section 375

The constitution of India provides for the basis fundamental features which cannot be violated by the parliament while making any legislation. The law should be according to the principles and ideas enshrined in the constitution of India. And any law which does not meet this standard is considered ultra vires and can be stuck down by the courts and declared unconstitutional.

Now we will look how the doctrine of marital exemption to rape in section 375 of Indian penal Code, 1860 completely fails to meet the provisions of Article 14 and 21 of the constitution of India.

Article 14 provides a fundamental right of equality before the law and equal protection of laws to each and every citizen of india.¹⁴ However, article 14 does not say every individual to be treated equally in every circumstance but says equals within a society should be treated equally and that the unequal of the society should not be treated equally. The two valid classifications were laid down by the SC in 1952:-

- a. The classification must be founded on an intelligible differentia which distinguishes those that are kept together from others; and

- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.¹⁵

Thus any law which makes classification which is unimportant or irrelevant to the purposes of the legislation is deemed to be beyond the constitution.

Section 375 of the IPC deals with the offence of rape and provide protection to women against forced sexual intercourse without her consent. Thus the section provides protection to woman against criminal assaults and shows the interest of the state in punishing those who violate the bodily autonomy of woman. Therefore no doubt that section 375 of IPC protects the women from the sexual violence.

However, ironically, Section 375 of the IPC does not include forceful sexual intercourse within a marriage as rape. It exempts marital rape from the punishment. This exemption waives the protection provided in section 375 of the IPC from a married woman on the ground of their marital status. This classification is based on the assumption that the married woman unlike any other persons does not want the state to provide them protection against violent and sexual assault. The assumption further stems from the fact that in a marriage, the women is presumed to have given consent to sexual relationships with her husband. This assumption is completely wrong, irrational and not based on intelligible differentia.

Married women exactly like any other men or unmarried women need protection from such violent and sexual acts even in their private spheres. Therefore the classification done in section 375 is unnecessary, unintelligible and violates article 14 of the constitution. Waiving of protection from the victims of the crime of rape on the basis of their marital status with the person is irrelevant and violates the test of classification under article 14.

Also the article 21 of the constitution provides the right to life and personal liberty.¹⁶ this article confers on all persons the fundamental right of life and personal liberty. After the case of *Maneka Gandhi v. Union of India*¹⁷ this article has become the source of all forms of rights which aims to provide life and liberty. This expanded the sphere of life and can be summed up in the words of Field J. in the famous judgement of *Munn v. Illinois*¹⁸, in which he said that life means ‘something more than mere animal existence’, which was later affirmed by the supreme court of India in the case of *Bandhua Mukti Morcha v. Union of India*.¹⁹

Even with the expansion of jurisprudence of article 21, the exemption of marital rape from section 375 of IPC, violates the rights of married women which she got from the expression ‘right to life and personal liberty’ under article 21. This is complete violation of article 21.

The supreme has held in the series of cases that the crime of rape violates the victim right to life and right to live with human dignity.²⁰ The crime of rape is not only offence under IPC but it is also a crime against the entire society. Rape is an act of cruelty which degrades and humiliates the women.²¹ thus the marital exemption doctrine is violation of women's right to live with human dignity. In fact any law which legalise the right of a husband to force the wife to have sexual intercourse against her will and without her consent goes against the article 21 and hence it is unconstitutional.

Also the supreme court has recognised the right to privacy is included under article 21 of the constitution.²² any form of forced sexual intercourse violates the right of privacy. And hence the doctrine of marital exemption to rape violates the right of married women.

In the case of *state of Maharashtra v. Madhkar Narayan*²³ the apex court has held that each woman is entitled to have sexual privacy and it is not open for any person to violate against her wish. In the case of *Vishakha v. State of Rajasthan*²⁴, the Supreme Court has extended the right of privacy to workplaces. Along the same line there exists a right to privacy to enter into sexual relationship in the marriage. Hence decriminalizing rape within the marriage, violates right to privacy and hence unconstitutional.

Another strong argument against the doctrine of marital exemption to rape is that it also violates the right to good health of the victim of such crime. The right to good health is the part of right of life under article 21.²⁵ Such a right is very essential for the intellectual and spiritual well being of a person. The marital exemption doctrine violates the right to good health of a victim as psychological and physical harm is caused to them when any such crime is committed. Hence the marital exemption doctrine violates the woman right to good health and hence unconstitutional.

Judicial Stand on Marital Rape

If we look at the history of judicial judgements on infliction of serious injury by the husband on the wife the court in *Queen Empress vs. Haree Maythee*²⁶, said that in case of married woman, the charges of rape cannot be applied on man if the woman is above the age of 15.

In *Emperor vs. Shalu Mehrab*²⁷, the husband was punished under section 304A of IPC for causing death of his child-wife by negligent act of sexual intercourse.

If state enforced sexual intercourse between husband and wife is a violation of the right to privacy then definitely in case of sexual intercourse without the consent of woman is a

violation of her right to privacy. The right to privacy cannot be lost by any marital association.

The supreme court in *State of Maharashtra vs. Madhukar Narayan Mandikar*²⁸ has said that one has right to privacy over his/her body. This case has decided that prostitutes have right to refuse sexual intercourse. And it is really said to know that all rapes are criminalized and all women except the married one's have been given right to privacy over their bodies and hence it waives their right to refuse sexual intercourse if asked by their husbands.

In *Sree kumar vs. Pearly Karun*²⁹, the Kerela high court said that since the wife was not living separately from her husband under a decree of separation or under any custom or usage, and she is subjected to sexual intercourse against her will and without his consent then it is offence under Section 376A. There was the dispute on divorce between the parties. There after a settlement was reached between the two and they decided to reside together. Wife stayed with the husband for two days during which she was subject to sexual intercourse without her will and consent. But the husband was not held guilty of raping his wife though it was very clear from the facts that he is guilty of doing so.

The Delhi high court has also declined the plea seeking direction to the government to frame guidelines regarding the registration of FIR for marital rape and laws to make it a ground for divorce. Since marital rape is not a ground for divorce under Hindu Marriage Act, 1955, Muslim Personal Law (Shariat) Application Act, 1937 and Special Marriage Act, 1954, and therefore cannot be used as valid reason for divorce and cruelty against husband. The court said that the issue of marital rape should be dealt through legislation and not through judiciary.³⁰

And also the problem is this that it has been accepted that marital relationships are sacred. And the wife is required to respect his husband in each circumstance. But just think once how traumatic it is being the victim of rape by someone known, and the worse you have to cohabit with him. How blindly law can ignore the fundamental right of freedom of any married woman, the right to her body, privacy and right to protect her from any abuse?

Conclusion

The continuing exemption of marital rape from the sphere of criminal law prevails the assumption that the wife is just mere property of her husband. To protect the married woman from sexual abuse it is important that marital rape should be criminalized in India and this can only be achieved by giving women's their individual rights. Indian women's organisation

have achieved to spread public awareness and to make parliament pass legislation on domestic violence, but the marital has not been fully criminalized and still there is a distinction between marital rape and stranger rape. And this cannot be achieved until legislators and society acknowledge women's rights within the marriage.

To bring the positive change in the existing law we can use an individual rights rhetorical approach in criminalizing marital rape India, because until society and legislators will not understand the importance of individual rights with in the marriage till then it will not become the concern of the state. The studies indicate that women who are raped by their own husbands are more likely to be exposed to several assaults and usually suffer long lasting physical and emotional consequences. This is even more harsh than the stranger rape as victim has to live in constant terror of being abused at any time.

Though a husband's violence and sexual abuse entitle a woman to bring legal action for criminal assault, inquiry or matrimonial relief, what is required is the incorporation of liability of husband in marital rape in our penal laws. As not only child-brides but all woman need legal protection from being raped by their husband.

It's the high time where state should entertain this matter as it has already does in the cases of cruelty, divorce and dowry, then why to leave this which is one of the most heinous crime.