

Marital Rape: Recent Position with The Criminal Law Amendment Act 2013

Rajni Nanda¹

Abstract

“A Murderer Kills the body but a Rapist Kills the soul”

Justice Krishna Ayer

Rape is a stigma which exists in the society for a long time. The dictionary meaning of rape is, “The Ravishing or violation of a women”. It is defined as the unlawful carnal knowledge of a women, without her consent. Carnal knowledge was defined as sexual intercourse. Today, in addition to the requirement of carnal knowledge, most rape statutes requires force or threat of force against the will and without the consent of the victim. Rape within marriage is a concept that agonies the wife to the very core. The offence against women, violating her dignity and self respect and when it occurs within four walls of matrimonial home, it reduces the women to the status of an object used merely for sexual gratification. Marital rape is not a criminal offence in India unless the victim is separated from perpetrator. The protection of women from Domestic Violence Act 2005, provide protection against marital rape under statutes of Domestic violence. The lack of laws and abundant social stigma against the act of marital rape is one of the primary reasons that the evil of marital rape is still hidden behind the sacrosanct of marriage. In this article, rape is discussed in concept of marital rape and implementation of the laws in the strict manner in the context of Criminal Law Amendment Act, 2013.

Introduction of Marital Rape

Marital Rape is the most common and repugnant form of masochism in the Indian society, it is well hidden behind the iron curtain of marriage. Rape is the unlawful compelling of a person through physical force or duress to have sexual intercourse. Rape in India is one of the most common crimes against women² and serious national problem. It is most gruesome and barbaric act of violating bodily integrity and honor of a women. It destroys the enter physical and mental composure and pushes the victim into a deep emotional crises and reduces her to a living corpse. Marital rape is particularly complicated because the complex, personal nature of marital relationships make it hard for the victim to even see herself as a victim, led

¹ Assistant Professor, University Institute of Legal Studies, Punjab University Swami Sarvanand Giri Regional Campus, Hoshiarpur.

² Kumar R. New Delhi: Zubaan 1993, The History of doing :An Account of women’s Rights and Feminism in India, P.128

alone reporting the offending act to the authorities which is why Marital Rape is one of the highly under –reported violent crimes. Even the women who do consider themselves victims are disinclined to approach the authorities because they are financially dependent upon their husbands, and reporting the matter could very well result in withdrawal of financial support leaving them and their children without food and Shelter.

The Supreme court of India has aptly described it as, “Deathless shame and the gravest crime against human dignity³. Rape is not merely a physical assault, but is destructive of the whole persona of the victim. There have been plenty of legislation and enactments passed in India in regard to violence against women in her own house like laws against dowry, cruelty, domestic violence and female infanticide. However the biggest and the most shameful wrong within a marriage, where a husband force himself upon his wife thinking that it is his nuptial right to have sex with his wife, ‘marital rape’ has failed to gain recognition as a crime in the eyes of policy makers.

Historical Overview

Rape or molestation has had a presence in the society since ancient times. The rape of women or youths is a common theme in Greek mythology. Historically, “Raptus” the generic term of rape was to imply violent theft, applied to both property and person in the Roman Culture. It was synonymous with abduction or kidnapping and sexual assault, was merely the theft of a women against the consent of her guardian or those with legal power over her.⁴ Although Roman law in the Historical period recognized rape as a crime, the rape of a women is a pervasive theme in the myths and legends of early Rome.⁵ Rape in the English sense of “Forced Sex” was more often expressed as stuprum, a sex crime committed through a violence or coercion (cum vi or per vim). The history of Rape laws in India begins with the enactment of the IPC in 1860 (45 of 1860) covered under section 375 and 376 Indian Penal Code. According to the original provision as in Section 375, a man is said to have committed rape who, except in the case hereinafter excepted, has sexual intercourse with a women under circumstances falling under any of the five following descriptions: (1) Against her will, (2) without her consent, (3) with her consent, when her consent has been obtained by putting her in fear of death or of hurt, (4) with her consent when the man knows that he is not her

³ Bodhisattwa Gautam Vs. Shubra Chakraborty AIR 1996 SC 922.

⁴ Gillion .C. Vol 3. Oxford University Press; 1993, Women in late Antiquity: Pagan and Christian life styles

⁵ Moses DC. Dumbarton. Dumbarton Oaks; 1993, livy’s lucretia and the validity of coerced consent in Roman Law, in consent and coercion to sex and marriage in Ancient and medieval society; P. 50.

husband and her consent is given because she believed herself to be lawfully married and, (5) with or without her consent when she is under 16 years of age. This Definition explains that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. It given an exception that sexual intercourse by a man with his own wife, the wife not being under 15 years of age will not constitute rape.

Marital Law in India and its amendments:

The rape law under IPC had gone through a lot of amendment in 1983 amendment was made and Section 376(2), that is custodial Rape and Section 376A that is, marital rape and Section 376 (B to D), that is, sexual Intercourse not amounting to rape were added as per the criminal law amendment Act (1983), revealing the identity of a rape victim is an offence. Though this act maintains more or less the same definition of rape it introduces many new categories of offence of sexual intercourse by person in custodial situation such as superintendent of hospitals, remand home, persons, and police official-with women in their custody. In cases of custodial rape, burden of proof lies with men and if a women victim makes a statement that she did not consent, the court would believe that she did not consent. The supreme court verdict of (2012)⁶ says that the rape trials must end within 2 months as stipulated under law. The Supreme Court also directed trial courts to “strictly adhere” to existing norms while asking them to rule out the possibility of “maneuvering” through undue long adjournments. In cases that come under section 376 (rape) and related offences under section 376 A to D of the IPC, the Cr.P.C. stipulates that “the inquiry or trial shall, as far as possible, be completed within a period of 2 months from the date of commencement of the examination of witness.” The victim of rape suffers mental and psychological trauma, which must be addressed to provide a helping hand to enable her to cope with the trauma suffered and to tide over her immediate and long-term needs so that she is able to lead a dignified and meaningful life.

The provision of rape laws in the IPC (Section 375 and 376, IPC) echoes very archaic sentiments, when it mentions as its exception clause- “*Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.*” Law bestows an absolute immunity on the husband in respect of his wife, solely on the basis of the marital relation. It is a nonconsensual act of violent perversion by a husband against the wife where she is physically and sexually abused. Marital rape is far too common in

⁶ Supreme Court norms on rape trial not being followed strictly: Expert. The Economic Times. 2012 PTI Dec30.

Indian society. The UN Population Fund⁷ states that more than two-third of married women in India, aged 15-49 have been beaten, raped, or forced to provide sex. Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women.

Roots of 'marital rape' can be traced in the statement of Sir Mathew Hale, England's chief justice during the 1600s, "*The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.*"⁸

The definition of rape (Section 375 IPC) has been criticized for other reasons as well by the Indian and international women's and children organizations, who insist that including oral sex, sodomy, and penetration by foreign objects within the meaning of rape would not have been inconsistent with new constitutional provisions, natural justice, or equity. Even international law now says that rape may be accepted as the "sexual penetration, not just penile penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight." Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent. Marital rape: Explanation (2) of section 375 of IPC 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 376 A was to be deleted. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

The Domestic Violence Act, 2005 (DVA) provides civil remedies to what the Section 498A of IPC provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Though Section 498-A deals with cruelty, to protect women against perverse sexual conduct by the husband, there is no 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

⁷ The United Nations Population Fund: Assault on the World's-People [2008 Jun 24].

⁸ Barton JL. The story of marital rape. Law Q Rev. 1992;108:36-7.

consent a sine qua non? Is marriage a license to rape? These are some of the questions need to be answered. Section 3 of the Domestic Violence Act, among other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., mental, physical, or sexual.

It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom of decision of a women's wants. It is about the fundamental design of the marital institution that despite being married, she retains an individual status, where she does not need to concede to every physical overture even though it is only her husband.

Section 122 of the Indian Evidence Act prevents communication during marriage from being disclosed in court except when one married-partner is being persecuted for an offence against the other. Since, marital rape is not an offence, the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove offence of marital rape in court, combining the provisions of the Domestic Violence Act and Indian Penal Code will be a nearly impossible task.

As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:-

1. When the wife is between 12-15 years of age, offence punishable with imprisonment upto 2 years or fine, or both.⁹
2. When the wife is below 12 years of age, offence punishable with imprisonment of either description for 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.¹⁰
3. Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine.¹¹
4. Rape of wife of above 15 years in age is not punishable.¹²

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence.¹³ Under this Act, if women has undergone marital rape, she can go to the court and obtain judicial separation

⁹ Indian Penal Code (45 of 1860). Section 376(1).

¹⁰ *Ibid*

¹¹ Indian Penal Code (45 of 1860), Section 376A.

¹² Indian Penal Code (45 of 1860), Exception to Section 375.

¹³ The Protection of Women horn Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

from her husband. This is only a piecemeal legislation and much more needs to be done by the Parliament in regard to marital rape.

Marital rape reflects the perversity of an individual. It is not only the rape of a women's body but a rape of her love and trust as well. Being subject to sexual violence by her own husband envelopes her in a sense of insecurity and fear. Her human rights are sacrificed at the altar of marriage. The Indian Penal Code has dealt with this form of rape in a very piecemeal manner. Various provisions of the IPC relating to sexuality reinforce not only Victorian morality but also the non-agency of women.¹⁴

Thus, it is visible that the law which is considered as the saviour of the victimized is inadequate and insufficient to protect the interests of those afflicted with the ill of marital rape. The basic argument which is advanced in favour of these so-called 'laws' is that consent to marry in itself encompasses a consent to engage into sexual activity. But, an implied consent to engage into sexual activity does not mean consent to being inflicted with sexual violence. It is often felt that as in sadomasochistic sexual acts, in marital rape women are presumed to have consented to the violence. However Rape and sex cannot be distinguished on the basis of violence alone. Violence creates a sense of fear and insecurity and this causes the women to submit to sex and this cannot be construed as consenting to sex. This fear may be compounded by her feeling of not having fulfilled her husband's desire. The distinction between consent and non-consent in contradistinction is fundamental to criminal law.¹⁵

The importance of consent for every individual decision cannot be over emphasized. A women can protect her right to life and liberty, but not her body, within her marriage, which is just ironical. Women so far have had recourse only to section 498-A of the IPC, 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? There is no answer, because the judiciary and the legislature have been silent.

42nd LAW COMMISSION REPORT

The Law Commission of India in its 42nd report put forward the necessity of excluding marital rape from the ambit of Section 375. In their words 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 call it

¹⁴ Kumari, Ved, "Gender Analysis of the Indian Penal Code in Engendering Law: Essays in the honour of Lotika Sarkar" (Amita Dhanda & Archana Parashar eds.), p. 143.

¹⁵ Shorff, Aditya & Menzes, Nicole, "Marital Rape as a Socio-Economic Offence: A concept or a Misnomer", Student Advocate, Vol.6.

rape even in technical sense. The punishment for this offence may also be provided in a separate Section.¹⁶

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 which states that '*sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape*'. As per the recommendation, the Law Commission's proposed definition of "*sexual assault*" could be adopted in place of the existing definition of rape in Section 375 IPC as "*it is wide, comprehensive and acceptable*". However, like the Law Commission, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition.

172nd LAW COMMISSION REPORT

Even the 172nd Law Commission report¹⁷ which was passed in March 2000 had made the following recommendations for substantial change in the law with regard to rape.

- a. 'Rape' should be replaced by the term 'sexual assault'.
- b. 'Sexual intercourse as contained in section 375 of IPC should include all Forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- c. In the light of *Sakshi v. Union of India and Others*,¹⁸ 'sexual assault on any part of the body should be construed as rape.
- d. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- e. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
- f. Section 509 of the JPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- g. *Marital rape: explanation (2) of the section 375 of IPC 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 376 A was to be deleted.
- h. Under the Indian Evidence Act, when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

¹⁶ http://www.siu.edu.in/Research/pdf/Shaila_Daware.pdf.

¹⁷ 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1.

¹⁸ 2004 (5) SCC 518.

Notwithstanding the 172nd Report of the Law Commission of India submitted over nine years ago to the Government of India urging that Parliament should replace the present definition of rape under Section 376 IPC with a broader, definition of sexual assault, which is both age and gender neutral. Current Status in The Criminal Law (Amendment) Act 2013 also known as Anti Rape Act. This act has improved amendment which provide for death or natural life term for repeat assault offenders, and includes new offence such as stalking and voyeurism. According to Section 376 B Sexual intercourse by husband upon his wife during separation: whoever has sexual intercourse with his own wife, who is living separately, whether under a decree separation or otherwise, without of her consent shall be punished with imprisonment of either description for a term which may extend to seven and shall also be liable to fine.

Explanation : in the section “*sexual intercourse*” shall mean any of the act mentioned in clause (a) to (d) of Sec. 375.

RIGHT TO SEXUAL PRIVACY

Right to privacy is not mentioned in the Indian Constitution. Nevertheless, in a series of cases, the Supreme Court has recognized that a right of privacy is constitutionally protected under Article 21.¹⁹ The right of privacy under Article 21 includes a right to be left alone. Any form of forceful sexual intercourse violates the right of privacy. It is submitted that the doctrine of marital exemption to rape violates a married women's right to privacy by forcing her to enter into a sexual relationship against her wishes.

The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*²⁰ has held that every women was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v. State of Rajasthan*,²¹ the Supreme Court extended this right of privacy to workplaces. Further, along the same line that there exists a right of privacy to enter into sexual relationship even within a marriage. By decriminalization rape within a marriage, the marital exemption doctrine violates this right of privacy of a married women and is hence, unconstitutional.

JUDICIAL INTERPERATION

¹⁹ Kharak Singh Vs. State of UP. AIR 1963 SC 1295.

²⁰ AIR 1991 SC 207.

²¹ AIR 1997 SC 3011.

Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court in *Queen Empress vs. Haree Mythee*,²² observed that in case of married women, the law of rape does not apply between husband and wife after the age of 15; even if the wife is over the age of 15, the husband has no right to disregard her physical safety, for instance, if the circumstances be such that intercourse is likely to cause death. In the present case, the husband was convicted under section 338, Indian Penal Code, for rupturing the vagina of his eleven-year old wife, causing hemorrhage leading to her death.

In *Emperor vs. Shahu Mehrab*,²³ the husband was convicted under section 304A Indian Penal Code for causing death of his child-wife by rash or negligent act of sexual intercourse with her.

In *Saretha vs. T Venkata Suhhaih*²⁴, the Andhra Pradesh High Court held: "There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person"

If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman's right to privacy is equally violated in case of non-consensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association.

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*,²⁵ has referred to the right of privacy over one's body. In this case it was decided that a prostitute had the right to refuse sexual intercourse. What is sad to know is that all stranger rapes have been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby envisaging the right to withhold consent and refuse sexual intercourse. In *Sree Kumar vs. Pearly Karim*, the Kerala High Court observed that because the wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376A, IPC will not be attracted. In this case, there was an ongoing dispute on divorce between the parties. Thereafter, a settlement was

²² (1891) ILR 18 CAL. 49.

²³ AIR 1917 Sindh 42.

²⁴ AIR 1983 AP 356.

²⁵ AIR 1991 SC 207.

reached between the husband and wife and parties agreed to continue to reside together. The wife stayed with the husband for two days during which she alleged that she was subject to sexual intercourse by her husband against her will and consent. Hence the husband was held not guilty of raping his wife though he was de facto guilty of having done so.

The judiciary seems to have completely relegated to its convenience 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. The trouble is that it has been accepted that marital relationship is practically sacrosanct.

CONCLUSION

The continuing exemption of marital rape from the purview of criminal law sustains the assumption of the wife as exclusive property of the husband. As stated by Katherine O' Donovan:

"Its immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant familial ideology and female sexuality which: treats a wife as property and as having no sexual agency or decision making in sexual activity within the marital contract".

It is argued that marital rape should be criminalized in India, as this can be achieved by applying an individual rights approach to violence against women. Indian women's organizations have succeeded to achieve public awareness and to pass legislation on domestic violence, but marital rape has not been fully criminalized by abolishing the distinction between marital rape and stranger rape. But marital rape will neither be criminalized nor punished, until legislators and the society acknowledge women's individual rights within the marriage.

As aforesaid, marital rape is not fully criminalized in India. It is clearly a serious form of violence against women and worthy of public and State attention. The studies till date indicate that women who are raped by their husbands are more likely to experience multiple assaults and often suffer long-term physical and emotional consequences. In this context, marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault whether she is awake or asleep. Given the serious effects, there is a clearly an urgent need for criminalization of the offence of marital rape. India is moving in the direction of positive legal change for women in general, but further steps are necessary to ensure both legal and social change, which would culminate in criminalizing marital rape and changing the underlying cultural assumptions

about women in marriage. Although most Indian women feel protected under the Protection of Women from Domestic Violence Act, there are many loopholes in it, as the Act does not openly speak against marital rape. However, the enactment of a specific legislation against domestic violence has opened the door for a legislation criminalizing marital rape because it would signal a shift in the State's approach of non-intervention in family life

There is a need to acknowledge her as a human being, away from the ancient notion of her being a mere chattel, and give her respect and the dignity she deserves.