
Marital Rape

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Abstract

In this work, the comprehensive review of origin, genesis and nature of the phenomenon of marital rape is being critically reviewed with reference to development of the concept of marital rape, its various forms, and legislative measures. A comparative analysis of rape laws, specifically marital rape in India in being discussed with reference to developed societies such as United Kingdom, United States of America. Women are being violated of their dignity when it occurs within four-walls of matrimonial home, it reduces the woman to the status of an object used merely for sexual gratification. There is an immediate need for a distinct law on marital/spousal rape in India at par with the accepted international norms.

Rape within marriage is the most inhuman violence perpetrated against woman that torments the wife to the core of her mind and body. This has been done to inflict a sense of insecurity socially and economically in the minds of the married women. Further, this act of husband serves as silent but potent tool to oppress his wife. This self-enforced silence has detrimental effect on the emotional, psychological and mental stability of women and affects her rational thinking. The lack of laws and abundant social stigmas against the act of marital rape is one of the primary reasons evil of marital rape is still hidden behind the sacrosanct of marriage. The religious texts, cultural lineage imparted prevents women to speak against this form of sexual violence as the religious teachings supports centuries of subjugation of women by men and when the perpetrator of her bodily integrity is her own husband, protection is withdrawn by the legislators since it was reinforced by religious doctrine.

It is undeniable fact that wife has to have sex with her husband irrespective of her will, consent, health, etc, which is absolutely unacceptable to a civilized society and there is no justification of the notion of marital exemption in the current times. It is true that mere criminalization of marital rape in India will not end the problem for social reasons, but it sure is an important step towards changing women's experience of sexual violence in marriage.

Women are reluctant to report incidents because of family loyalty, fear of their abuser's retribution, inability to leave the relationship, safeguarding the future of their children, or the fact that there are no stringent laws in force protecting the victims of marital rape. Marital rape is the worst kind of rape, because the perpetrator is someone she trusts and loves and hence betrayal is harder to deal with.

In view of recent landmark decision of Hon'ble Supreme Court of India in Independent Thought case decided in favour of married women under 18 years, should be extended to all women to protect their safety, dignity and equality. Concerted civil movement is necessary to highlight the need for awareness on marital rapes and to call for legislation in removing the marital rape exemption provided in IPC.

Key Words: Marital Rape, Dignity, Consent, Spousal rape, Sexual Gratification.

Research Problems

- Why is marital rape still not a punishable offence in India?
- What is the difficulty faced in proving marital rape and its contentions?
- Making marital rape a punishable offence, change the hardships faced by women after marriage?

Hypothesis

“The legal apparatus of criminal law fails to voice marital rape in India.”

Objectives

- To critically analyse the real problem faced by the married woman in India.
- To know the reason for delay of the legislature in penalising marital

1. Review Of Literature

In this work, majorly there has been use of articles, books, research paper about marital rape. Also, statutory laws have been read thoroughly, of India and various other nations like US and UK. Books by prominent authors (Indian penal code KD Gaur, Nelsons) on marital rape have been referred. Also reports of commission (LCI, NCRB), records bureau has been referred. “When seen at from various aspects, the views of eminent jurists have helped a lot in understanding the topic better and also in critically analyzing the past, present and future of the recognising rape within marriage in our country”.

Methodology

“This research is based on the doctrinal and non-doctrinal method of research. Majority part of this research revolves around the doctrinal method, references of the research are taken from various sources like book, journals, articles, statutes, internet sources and various prevailing law commission reports. A non- doctrinal research is also conducted which includes questionnaire on marital rape from various people”.

Limitations

This research is entirely based on marital rape and the laws relating to sexual violence against women in India.

Introduction

Rape *per se* is an offence against human perpetrated by another human individual if it is committed singly. Rape by two or more individuals as a group addressed popularly as gang rape.

In general, rape is a type of assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without that person's expressive or implied consent. The act may be carried out by physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent, such as one who is unconscious, incapacitated, has an intellectual disability or is below the legal age of consent.¹The term rape

¹World report on Violence and Health, Sexual Violence, 6th Chapter, World Health Organization, 2002 Retrieved 9 September 2017

is sometimes used interchangeably with the term sexual assault.² The expression ‘Sexual Violence’ denotes much wider meaning and it includes acts that range from verbal harassment to forced penetration, and an array of types of coercion, from social pressure and intimidation to physical force.³

Sexual violence includes, but is not limited to:

- i. rape within marriage or dating relationships;
- ii. rape by strangers or acquaintances;
- iii. unwanted sexual advances or sexual harassment (at school, work etc.);
- iv. systematic rape, sexual slavery and other forms of violence, which are particularly common in armed conflicts (e.g. forced impregnation);
- v. sexual abuse of mentally or physically disabled people;
- vi. rape and sexual abuse of children; and
- vii. ‘customary’ forms of sexual violence, such as forced marriage or cohabitation and wife inheritance.

Origin of the term “Rape”

The root of the generic term “rape” can be traced from the Latin term “Raptus”, which literally means “to seize” and in Roman law, it was used to imply violent theft, in relation to both property and person.⁴ Since, historically, a woman was also considered a property, rape was synonymous with abduction and a woman’s abduction or sexual molestation, was merely the theft of a woman against the consent of her guardian or those who had lawful custody of her person. The injury, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries. Such was the appalling status of women.

Also, the word ‘rape’ has been derived from the term ‘*rapio*’, which means ‘to seize’. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non - consensual sexual intercourse with a woman. Rape can be viewed as an act of violence of the private person of a woman, an outrage by all

²Petrak, Jenny; Hedge, Barbara, eds. (2003). The Trauma of Sexual Assault Treatment, Prevention and Practice. Chichester: John Wiley & Sons. p. 2. ISBN 978-0-470-85138-8.

³Understanding and Addressing Violence Against Women, Sexual Violence, World Health Organization, 2012 Retrieved 9 September 2017

⁴ Michael Anthony Benitez, The Discursive Limits of “Carnal Knowledge”: Re-Reading Rape in Elizabethan, Jacobean, and Restoration Drama, August 2015. Retrieved 30 August 2017 at <https://search.proquest.com/openview/49037f4b36e7539679c0256ed150f18d/1?pq-origsite=gscholar&cbl=18750&diss=y>

means. It is the ultimate violation of the self of a woman. The Supreme Court of India has aptly described it as ‘deathless shame and the gravest crime against human dignity’.⁵ Rape is not merely a physical assault, but is destructive of the whole persona of the victim.

Law and Rape: Indian Approach

“Section 375 of the Indian Penal Code defines the crime of rape in six different ways. In some detail, it sets out the different situations in which consent is non-existent, or is vitiated”. At the end of the provision comes an exception. It states, simply enough: “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”⁶

“Late last year, the Delhi High Court began hearing a constitutional challenge to the marital rape exception. It was argued that the exception’s distinction between married and unmarried women was arbitrary and artificial, and violated Article 14 of the Constitution, which guarantees the equal protection of laws. It was also argued that in specifically disadvantaging married women (by denying them the protection of Section 375), the marital rape exception violated their right to autonomy and privacy under Article 21, and their right to non-discrimination under Article 15(1). Arguments are expected to finish soon, and a judgment is expected in the foreseeable future”.⁷

“Four arguments are normally raised in support of the marital rape exception. First, that allowing wives to complain about rape will destroy the family; second, that by definition, sex within marriage can never amount to rape; third, that the criminalisation of marital rape would violate the privacy of marriage by (to put it euphemistically) “allowing the State into the bedroom”; and last, that it would become a weapon of abuse in the hands of unscrupulous wives”.⁸

“Each of these arguments is a non-starter. The belief that the institution of marriage would wither away if marital rape were made criminal appears to rest upon the bizarre assumption

⁵Bodhisattwa Gautam v. SubhraChakraborty AIR 1996 SC 922.

⁶Gautam Bhatia, The arguments made against making marital rape a criminal offence are not valid, available at <https://www.hindustantimes.com/analysis/the-arguments-made-against-making-marital-rape-a-criminal-offence-are-not-valid/story-Hsa5Esr4n8hKaCEhiYthHK.html> (last visited on May 5th, 2020)

⁷Id.

⁸Id.

that coerced sex is essential to marriage. If that assumption is false, then nothing more needs to be said. If it is true, then we must ask whether an institution that depends on coercion for its very existence is worth saving in the first place”.⁹

When such are the notions of men in the society it really is no wonder that people get startled by the idea of criminalising marital rape. Thus, the general arguments against the criminalisation of marital rape in different societies are as follows: International Journal of Pure and Applied Mathematics Special Issue 1443 Criminalisation would destroy the sacrosanct institution of marriage and disturb the balance of conjugal rights and obligations in a marriage.

Penalisation of rape within marriage would make the state "interventionist" and would be violative of the "right to privacy" understood to be granted under the Constitution. It would deny the husband the right to have sex with his wife and would lead to encouragement of the offence of adultery as the husband would need to satisfy his sexual needs outside the marriage. It would give an opportunity to the women to avenge their husbands by threatening to file a complaint of marital rape against them. The law would also have to rely upon the word of the wife, which complicates matters further since the wife could misuse the laws i.e. similar to the misuse of dowry laws and other rape laws. Since the husband is no stranger to the wife, it will not have any devastating effect on her. Now, the researchers would like to differ from this perception of the society as most of the above arguments for not criminalising marital rape seem ridiculous, and suffer from serious drawbacks. An analysis of the flaws is as follows: Firstly, a marriage in which the wife has no say and the husband inflicts injuries on her is not worth being preserved and as a matter of fact recognising marital rape would only correct the imbalance that has been created by "men" in conjugal relations and thus, improve the wife's otherwise powerless situation. The second argument is very obviously an excuse for the simple reason that the state does not shy away from intervening in the bedrooms of homosexuals and in any case arguments like these should not be used to let the criminals go scot free. Therefore, there is no reason why an exception should be made with respect to marital rape. The next argument relating to the misuse of laws is definitely a genuine concern as there needs to be a mechanism to make the justice delivery system effective. But again, the state should not be allowed to hide behind the excuse that marital

⁹Id.

laws will be misused. As a matter of fact, any law can be misused and by the above logic we should have no laws at all. Finally, we would like to submit that the last argument is also frivolous because it has been revealed in researches and studies that acquaintance rape is as devastating as stranger rape, if not more. Therefore, it is evident that all arguments against criminalisation are mere excuses and the underlying objective is basically to protect the hegemony of men. Furthermore, such an attitude also reflects on how our understanding of marriage is still rooted in archaic and patriarchal notions of subjugation of women.

The Centre told the Delhi High Court that marital rape cannot be considered a crime in India because it will hurt the institution of marriage and we should not follow western traditions blindly. It added that the main problem lies with determining the value of evidence. Earlier, the Supreme Court had said after the Parliament's decision that forced marital intercourse and sexual acts are not rape, hence, cannot be considered as a criminal offence. There are two main issues with the government's reasons for not considering marital rape as a crime. Firstly, the so-called pedestal of sanctity that the government has put marriage upon ceases to exist the moment a husband forces himself upon his wife.

Secondly, recognition is the first step for any solution. Only when we acknowledge that marital rape is a long-standing issue, we can fight it. Calling it as "an act against the institution of marriage" and terming it "western" is an attempt to belittle the crime and dodge responsibility. And lastly, "no lasting evidence in case of sexual acts between a man and his wife" cannot be a justification for not making it illegal. A crime which is difficult to prove is still a crime.

How Can Evidence be Gathered for Marital Rape in India?

One of the main reasons given by the Centre for not recognizing marital rape as a criminal offence in India was determining the value of evidence. "The question is what evidences the courts will rely upon in such circumstances as there can be no lasting evidence in case of sexual acts between a man and his wife," reads the affidavit submitted by the Centre in the Delhi High Court. Firstly, a crime cannot be ignored on a mere assertion that it is difficult to prove. Secondly, is marital rape difficult to prove? No. Proving rape is always based on

circumstantial evidence. Even when committed as per the popular belief, it might still difficult to prove because in most cases a woman/girl is raped by someone she knows.

If a woman is victim to marital rape, it would mean that she isn't raped once but there will be a history of sexual abuse, and this can be proved by forensic evidence. There will be evidence of physical violence in forced rape. Even if medical examination is inconclusive, it still cannot be used as an argument against criminalising the act as there are other methods to prove it – witness testimony, the wife recording her husband's admission of guilt via electronic communication. The Domestic Violence Act already recognizes sexual violence against the wife. How is the crime established there, and why can't the same method be used to criminalize spousal rape? Moreover, the Centre's argument that a law against marital rape will be misused is based on an absurd logic that vengeful wives are waiting to exploit the first opportunity they get to send their husbands to jail.

In 2015, a woman moved the apex court on the plea that she was raped and assaulted by her husband. She was also hospitalized due to her injuries, however, her husband was never prosecuted and the case was dismissed because our law does not consider rape by a spouse a penal offence. It is a distressing reality that an abuse faced by women across the nation is not recognised by the Indian law. After the gang rape of Jyoti Singh in 2012, the Justice J S Verma Committee¹⁰ had backed the long standing demand of women's activists that marital rape should be considered as a criminal offence. "The law ought to specify that marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation," the committee said in its report.

It is time that the government stops putting rape into different categories. A rape is a rape, whether committed by a stranger, an acquaintance, or even a husband. Indian law needs to remove the special provision given to some rapists and accept that marital rape is a reality that thousands of women suffer from.

Challenges, in implementing the Law, if Marital Rape is Criminalized?

¹⁰Justice J.S. Verma Committee

The woman will have to present her case in the session's court. She has to prove that on that particular night, sex was without consent, that she was not in the mood for it, or he had forced her after she had gone to sleep, or was ill. That will be a challenge.

Lawyers could abuse this too. They will expect huge amounts of money from the victim for filing such cases. That is what we are seeing happening today. This drains the woman economically. The lawyers also tell her that if she is filing charges for rape, the husband will choose to settle, but the husband often fights to try and prove her wrong.

Under 498(a)¹¹, if the complaint is proved false, men's groups are demanding that the woman has to pay compensation. That demand will come in the case of marital rape laws too. All this has not helped women at all.

The Vengeful Wife

That a law against marital rape would be misused is based on an overwhelming feeling that vengeful wives are waiting for an opportunity to send their husbands to jail.

Sudha Ramalingam says that in a country where perjury and contempt of court are not taken seriously, false allegations fly thick and fast, "We have to bear that in mind too."

"Yes, but the truth is that the number of false cases is highly exaggerated. No one is denying that there might be some false cases. And that should also be a reason to work towards better implementation, so that not only do we reduce the number of false cases, but more importantly, we do not fail the real victims, and let the real rapists walk free," says Ragamalika Karthikeyan, Programme Officer, Prajanya Trust.

Marital rape itself is a reality we cannot ignore. According to the UN Population Fund, two-thirds of married women in India in the 15-49 age-group have been beaten, raped or forced to provide sex by their husbands. According to the National Family Health Survey-III¹², one in 10 women in India have faced spousal sexual violence, including marital rape, at least once in their lifetime, Ragamalika points out. "The exaggerated possibility of misuse cannot take away from the real crime and injustice faced by lakhs of married women in the country."

Understanding Marriage

¹¹Indian Penal Code, 1860

¹²National Family Health Survey (NFHS)

The arguments against a law criminalizing marital rape often betray the lack of understanding of what a marriage is. Legally, or otherwise, a marriage is not a licence for a man to have sex with his wife. According to a general definition, “marriage is a state of being united to a person of the opposite sex as husband or a wife in a consensual and contractual relationship recognised by law. Marriage is a social contract in which a wife maintains complete autonomy over her body”.

The question which then arises is this: “how is marital rape different from any other rape”?

By definition, rape is the lack of consent in a sexual act. The marital rape exception in Indian law traces its history to the 1600s, when a woman was considered the property of her husband. The then Chief Justice of England, Sir Mathew Hale said, “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.”

While married men are exempt from prosecution, even a man judicially separated from his wife is given a lower punishment. In fact, in a country where child marriage has been apparently abolished, a man who rapes a girl between the ages of 12 and 15 will get a lower punishment if he was ‘married’ to her.

What About Evidence?

Coming back to the question of evidence, and the second argument of burden of proof.

Firstly, that something is difficult to prove cannot be an argument to ignore a crime.

“Even in cases of rape by someone who knew the girl, it is difficult to prove rape. Proving rape is always based on circumstantial evidence,” points out Dr Prasanna Gettu, CEO of International Foundation for Crime Prevention and Victim Care. While in popular imagination, ‘rape’ means a stranger assaulting a woman, in 96% of the registered cases in India, the rapist is known to the victim.

Dr Gettu further points out that marital rape cases will present a different scenario, unlike other rape cases which could be single incidents. “Marital rape will not happen in isolation, there will be a history of violence and physical abuse, and will fit into the larger picture of domestic violence. We have to look at it from that perspective,” she says. Dr Gettu also

points as to how even workplace sexual harassment is often difficult to prove, but we have still have laws against it.¹³

Arguments against criminalising marital rape focus on forensic evidence, or the ‘lack of’ it. How can you prove that the act was not-consensual using DNA samples as evidence? The answer is in the judgment of Supreme Court in Sheik Zakir vs State of Bihar, case, where it ruled that the absence of a medical record would not be of much consequence if the other evidence on record is believable.

Even so, Akila RS, a lawyer based in Chennai, points out the relevance of medical evidence in cases of marital rape too, “A history of physical violence, results of a rape-kit and medical examination of the wife, witness testimony and possible admission of the husband in electronic communications could be ample evidence to prove his guilt,” she says. Timely medical examination can differentiate between consensual sex and forced sex.

“Yes, there is some difficulty in the criminal jurisprudence here, but we have to develop it. And at least, in cases where there is enough proof for proving marital rape, the law will help punish the husbands,” says Akila. A case in point being the woman who reached out to Sudha Ramalingam few years ago.

"Let's get one thing clear: those of us arguing for criminalising marital rape are not asking for a 'special provision' for married women. What we are asking for is the special status accorded to some rapists to be removed. We cannot have 'good rape' and 'bad rape', there cannot be gradations based on the relationship between the victim and the perpetrator," says Ragamalika.

3.5-CASES:

“The primary aim of the 2013 amendment was to make much needed changes to the definition of rape and to improve women's access to the legal system. The amendments to the Criminal Penal Code and the Evidence Act were aimed at ensuring that women are not re-victimized when they approach the legal system after an act of rape against them.”

“Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that this sort of

¹³ The Hindustan Times

discrimination against women violates the principles of equality of rights and respect for human dignity.”

“That Article 21 of the Indian Constitution, incorporates the right to live with human dignity and is a standout amongst the most fundamental components of the right to life which perceives the independence of a person.”

“In *Bodhisattwa Gautam v. Subhra Chakraborty*¹⁴ the court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim.”

“In the landmark case of *The Chairman, Railway Board v. Chandrima Das*¹⁵, the Hon'ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved.”

“That the case of *State of Maharashtra v. Madhkar Narayan*¹⁶ the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished.”

“In the landmark case of *Vishakha v. State of Rajasthan*¹⁷ the Supreme Court extended this right of privacy in working environments also. Further, along a similar line we can translate that there exists a right of privacy to get into a sexual relationship even inside a marriage.”

“In *Sree Kumar vs. Pearly Karun*¹⁸, the Kerala High Court watched that the offense under Section 376A, IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition or under any custom or use, regardless of the possibility that she is liable to sex by her better half without wanting to and without her assent. For this situation, the spouse was subjected to sex without her will by her husband

¹⁴1996 AIR 922, 1996 SCC (1) 490

¹⁵2000 2 SCC 465

¹⁶AIR 1991 SC 207

¹⁷(1997) 6 SCC 241

¹⁸1999 (2) ALT Cri 77

when she went to live with her husband for 2 days as a result of settlement of separation procedures which was going on between the two parties. Subsequently the spouse was held not liable of raping his wife even though he had done so”.

Hearing petitions demanding criminalisation of marital rape, the Delhi High Court reportedly asserted that marriage does not mean that the wife should always be willing to consent to have physical relations with her husband. The observation was made by a Bench comprising Acting Chief Justice Gita Mittal and Justice C. Hari Shankar, on a Petition by the **RIT Foundation**, with the All India Democratic Women’s Association (AIDWA) and a marital rape victim. “Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party,” the Bench was quoted as saying. As per an Indian Express report, during the hearing on Tuesday, the Court disagreed with the submissions made by the NGO Men Welfare Trust, which has joined in as an intervenor, opposing the plea for criminalising marital rape asserting that this would serve as a tool to harass men. The Court refused to accept the argument advanced by the NGO that wives are already protected from sexual violence in a marriage under the available laws, including the Protection of Women from Domestic Violence Act¹⁹, 2005.

The Woman and Child Development Minister Maneka Gandhi on Thursday told Rajya Sabha that ‘the concept of marital rape can’t be applied to India’.

She added that a country like India is not ready for the change due to factors like poverty, illiteracy and religious beliefs. “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious

¹⁹Protection of Women from Domestic Violence Act, 2005

beliefs, mindset of the society to treat the marriage as a sacrament.” – was Maneka Gandhi’s response to various rising questions on charging a criminal offence on marital rapes. Her comments, angered several activists throughout the country as it contradicted her own statement sometimes back; she was reportedly to have said “My opinion is that violence against women shouldn’t be limited to violence by strangers. Very often a marital rape is not always about a man’s need for sex; it is only about his need for power and subjugation. In such cases, it should be treated with seriousness.”

Independent thought v. Union of india²⁰

Under this case, the petitioner is a society which is registered provides support to the NGO’s has filed a petition under Article 32 of Constitution of India challenging the discriminatory section “375 of IPC”. “According to the law” of crimes in India any person who have sex with a girl below 18 years is said to be an offence of rape. But according to the petitioner, “by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC. Learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by W.P. (C) No. 382 of 2013 this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is

²⁰“WRIT PETITION (CIVIL) NO. 382 OF 2013”

married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.”²¹

If the minimum age of getting in to a marital relationship is changed to 18 years then our penal code must also reflect as our society and laws have changed now and hence the marital rape between 16-18 years must also be treated as an offence. After all the hearings in the court it “has criminalized sexual intercourse with a minor aged between 15 to 18 years, but has refrained from making any observation regarding the marital rape of a woman who is above 18 years of age”.²²

JUDGEMENTS:

“*Nimeshbhai Bharatbhai Desai v. State of Gujarat*”²³

“making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape; however, due to non-recognition of marital rape as a crime under the Indian

²¹“Law Commission of India – 84th Report”

²² “Sumedha Choudhary, Why is criminalization of Marital rape is still a distant dream in India, available at https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html (last visited 21st April, 2020)”

²³“R/CRIMINAL MISC.APPLICATION NO. 26957 of 2017”

legal framework, the court held that the husband is liable only for outraging her modesty and unnatural sex”.²⁴

“Queen Empress vs. Hurry Mohun Mythee Or Phulmani Case”²⁵

“In 1890, eleven year old Phulmani died of marital rape by her twenty nine year old husband Hari Maiti. Her mother Radhamonee’s account of seeing her daughter lying in blood and succumbing to the injuries of forced intercourse paved the ground for the age of consent to a debate. Hindu norms mandated sexual intercourse on men when their child wives attain puberty and the colonial law only penalized marital rape when the child wife was under the age of ten then. Since Phulmani was older, Hari Maiti was not accused of marital rape and murder and charged for rash acts. However, this case pushed the colonial government to rise the age of consent for marriage of girls to twelve. More importantly this case raised questions whether families or communities had the right to inflict pain or suffering on women using the plea of tradition. Both these cases paved the ground for not only raising the age of marriage of girls but more importantly confront issues of choice and consent of women in marriage. These cases in the 19th century were precursors to later discussions and legal interventions on child marriages in 20th century in India”.

“As I have already discussed above that Indian Law doesn’t recognize Marital Rape so, hardly there is any case relating to it. Most of the times, any complaint relating to it is filed under Section 498 A of I.P.C. or in hurt or grievous hurt depending on the situation”.

“Shyam Narain v. State”²⁶

“Since rape is an assault on individuality and inherent dignity of a woman and a crime against whole body of a woman and the soul of the society hence, it demands just punishment from court”.

“State of Haryana v. Janak Singh”²⁷

²⁴ “Sumedha Choudhary, Why is criminalization of Marital rape is still a distant dream in India, available at https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html (last visited 21st April, 2020)”

²⁵ “(1891) ILR 18 Cal 49”

²⁶“(2013) 7 SCC 77”

²⁷“(2013) 9 SCC 431”

“Since offence of rape, violates dignity of a woman and erodes her honour, dwarfs her personality and reduces her confidence level hence it violates her right to life guaranteed under Article 21 of Constitution”.

“Deepak Kumar v. State of Haryana”²⁸

“Crime against women and children violates human rights and it’s a crime against society as it causes psychological, physical harm and degrades and defiled victim’s soul, honour and dignity and leaves a permanent scar on life”.

“State of Maharashtra v. Madhukar Narain Mardikar”²⁹

“In this case, the question before the Supreme Court was that whether a prostitute has a right to privacy and to protect herself from sexual assault? In this case, a police inspector was dismissed from service on his proved involvement in the act of rape. The High court of Bombay quashed his dismissal on the ground that the woman, whom he was alleged to have raped, was a woman of easy virtue”. “On appeal, the Supreme Court overruled the decision of the Bombay High court. Speaking on behalf of the Court, Ahmadji, J. held that a woman even of so-called easy virtue was entitled to protect herself against unwilling sexual assault”. “This was part of her personal liberty, which is included in the right to privacy”. Learned Judge observed: “She was honest even to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.”

“Sakshi v. Union of India and Ors”³⁰

“In this case, Sakshi, an NGO was focusing on violence against women, filed a petition before Supreme Court of India to include all forms of forcible penetration as rape. Later after this case, in 172th Law Commission report, rape law in India under section 375 was amended

²⁸ “(2012) 4 SCC 629”

²⁹ “(1991) 1 SCC 57”

³⁰ “AIR 2004 SC 3566”

and included all forms of sexual assault. But marital rape in all cases is still not recognized as crime”.

However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage amounts to rape.³¹

“In Saretha V. T. Venkata Subbaih”³²

“ it was held that, rights and duties in a marriage, is like a creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by marital Association. hence there is no punishment for marital rape and the remedy lies with her.”

Conclusion

In the changing times, it is best understood that implied consent for sexual intercourse on account of marriage is not irrevocable. Almost all but 36 countries including India has criminalized marital rape. Though, the Government of India is opposed to the removal of exemption provided in IPC in regards to marital rape, it is certain that in view of recent landmark decision of Hon’ble Supreme Court of India in Independent Thought case, the Hon’ble Delhi High Court in the pending cases, would be expected to decide in favour of married women to protect their safety, dignity and equality. At the same, concerted civil movement is necessary to highlight the need for awareness on marital rapes and to call for legislation in removing the marital rape exemption provided in IPC.

³¹ Bhupinder Singh V. Union Territory of Chandigarh (2008) 8 SCC 631, (2008) Cr LJ 3546 (SC)

³² AIR 1983 AP 356