

Marital Rape: - Current Legal Framework in India and the Need for Change

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Abstract

Rape *per se* is an offence against woman, violating her dignity and self-respect and when it occurs within the four-walls of a 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, which should be at par with the accepted international norms on this issue.

Rape within marriage is a concept that agonizes the wife to the very core. The dread of having to face it and still have to silently suffer through it is an unbearable thought that affects the psyche of the women. This self-enforced silence has a very detrimental effect on the emotional, psychological and mental stability of women. However, this silence is not exactly self-enforced. The lack of laws and abundant social stigmas 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.

The woman has been given the right to fight for protection when the violators are outside entities, but when the perpetrator of her bodily integrity is her own husband, who she married with all the pomp and show, such protection is withdrawn by the legislators.

In light of this, the idea that a woman (wife) has to have sex with her husband irrespective of her will, consent, health, etc, is absolutely unacceptable to a civilized society. Therefore there is no justification or applicability 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, but it sure is an important step towards changing women's experience of sexual violence in a marriage. It is high time that the concept of "rape is rape, irrespective of the relationship between the victim and the perpetrator" is recognized by the law and put strictly to force.

Marital Rape – An Understanding

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When one mentions the word rape, the tendency is to think of someone who is a stranger, a malicious person. Usually one does not think of rapes in the context of marriage. Women themselves find it difficult to believe that a husband can rape his wife. After all, how can a man be accused of rape if he is availing his conjugal rights. It is indicative that a woman has no right to her own body, and her will is subject to that of her husband. Though 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. While the legal definition varies, marital rape can be defined as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent. Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole.

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 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'.³ Rape is not merely a physical assault, but is destructive of the whole persona of the victim.

The law did not conceptualize it as an offence against the person of the woman, one that destroys her freedom; rather, it conceived rape as an instrument for protecting a man's property from the sexual aggressions of other men. Therefore the act of rape within marriage was not recognized as an offence as woman was considered the property of the husband, and a man could not be perceived to violate his own property.

Marital rape is particularly complicated because the complex, personal nature of marital relationships makes it hard for the victim to even see herself as a victim, let 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.

³ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922.

Today there are many countries that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand did so in 2007. The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights. In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries and India is not one of them. Even though marital rape is prevalent in India, it is hidden behind the sacrosanct curtains of marriage.

There have been plenty of legislations and enactments passed in India in regard to violence against woman 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 forces himself upon his wife thinking that it is his nuptial right to have sex with his wife (with or without her consent), 'marital rape', has failed to gain recognition as a crime in the eyes of policy makers.

Women who are raped by their husbands are likely to be raped many times. They experience not only vaginal rape, but also oral and anal rape. Husbands often rape their wives when they are asleep, or use coercion, verbal threats, physical violence, or weapons to force their wives into having non-consensual sex with them⁴. Marital rape is a serious problem that millions of women worldwide have to suffer and face such abuse on a day-to-day basis. It is difficult to obtain accurate data and rape and violence against women within the family, in part because women are reluctant to report incidents, as women raped by their husbands may hesitate to report 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. Despite underreporting, marital rape unquestionably has an enormous impact on the lives of women who experience it. By way of comparison, the best available statistics on marital rape in the United States suggest that one out of every seven or eight married women has been subjected to rape or attempted rape by her husband.⁵ According to

⁴ <http://www.taasa.org/library/pdfs/TAASALibrary104.pdf>

⁵ Box, S., *Power, Crime and Mystification*, (London Tavistock Publications, 1983), p.122.

another estimate, approximately 10% to 14% of the married women experience rape within marriage.⁶ Marital rape is preferably the worst kind of rape, because the perpetrator is someone the woman knows, trusts and loves and that makes it the worst betrayal and harder to deal with.

MARITAL EXEMPTION – ORIGIN AND RATIONALE

Throughout the history of most societies, it has been acceptable for men to force their wives to have sex against their will. The traditional definition of rape in most countries was ‘sexual intercourse with a female not his wife without her consent’. This provided the husband with an exemption from prosecution for raping their wives—“a license to rape”.

The foundation of this an exemption can be traced back to statements made by Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote 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’.⁷

It is very surprising to note that Lord Hale did not offer any argument, case law or legal basis to support his assertion. He asserted that, upon marriage, the wife automatically hands over her legal person to the husband and consents to all sexual acts, which cannot be retracted at any later date for no reason whatsoever. He introduced within the marriage, a notion of ‘*implied consent*’ that started at the time of the marriage and continued for the entire course of the marriage, and such consent was deemed irrevocable by Lord Hale. This established that once married, a woman does not have the right to refuse sex with her husband. Due to construction of sex as a woman’s duty within a marriage, there is always a presumption of her consent.

“A female slave has an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife. However brutal a tyrant she may unfortunately be chained to... he can claim from her and enforce the lowest degradation of human being, that of being made the instrument of an animal function contrary to her inclinations”⁸. As long back as in 1869, John Stuart Mill observed that marital rape is never welcome to women for it represents a surrender of dignity so absolute in nature, that it lowers the stature of the wife beneath that of a slave. The basic premise for this assumption lies in the fiction that the wife is considered to have given her irrevocable consent to sexual intercourse to the husband at the time

⁶ Diana. E. H. Russell, *Rape in Marriage*, Indiana University Press, Bloomington, 1990.

⁷ Hale, Matthew, 1 *History of the Pleas of the Crown*, p. 629. (1736, London Professional Books, 1972)

⁸ Mill, J.S., *The Subjection of Women*. S.M. Okin, Indianapolis, Hackett, 1988, p. 33.

of the marriage and hence the husband cannot be held guilty of rape, which he may commit upon his wife.

The tenets of the marital rape exemption were based on the notion of ‘irrevocable implied consent’. As per this notion, once a woman is married to a man, there is believed to be implied consent to sexual intercourse, which is irrevocable in nature.

The other traditional justifications for the marital exemption were the common law doctrines that a woman was the property of her husband and that the legal existence of the woman was ‘incorporated and consolidated into that of a husband’.⁹

Marital Rape and Laws in India

Though we have advanced in every possible field, marital rape is not considered as an offence in India. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

The final version of section 375 of the Indian Penal Code, which emerged after deliberations in the Select Committee, is a crystallized form of Clause 359 of the Macaulay’s Draft Penal Code. Section 375¹⁰, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as 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 provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than

⁹ “To Have and to Hold- The Marital Rape Exemption and the Fourteenth Amendment”, 99 HARV. L. REV. 1255, 1256 (1986) p. 442.

¹⁰ The section 375 of the Indian Penal Code (45 of 1860) reads: —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

First.— Against her will.

Secondly.— Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation

Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both. This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 15 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 15, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 15? Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation.¹¹

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;¹²
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.¹³
3. Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine;¹⁴
4. Rape of wife of above 15 years in age is not punishable.¹⁵

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.¹⁶ Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial

¹¹ Indian Penal Code (45 of 1860), Section 376A. Intercourse by a man with his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine

¹² Indian Penal Code (45 of 1860), Section 376(1).

¹³ *Ibid*

¹⁴ Indian Penal Code (45 of 1860), Section 376A.

¹⁵ Indian Penal Code (45 of 1860), Exception to Section 375.

¹⁶ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

separation 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 woman'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.¹⁷

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.¹⁸

The very definition of rape (section 375 of IPC) demands change. The narrow definition has been criticized by 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 nay constitutional provisions, natural justice or equity. Even international law now says that rape may be accepted as the "sexual penetration, not just penal penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight." *Article 2 of the Declaration of the Elimination of Violence against Women* includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just

¹⁷ 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.

¹⁸ Shroff, Aditya & Menzes, Nicole, "Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer", Student Advocate, Vol. 6.

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? 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.

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 rape even in technical sense. The punishment for this offence may also be provided in a separate Section.¹⁹

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*”. However, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes pertaining to women. Of the four recommendations made by the Task Force vis-à-vis rape under the Indian Penal Code, the most significant pertains to the definition of rape. It took the position that the definition of rape ought to be broadened to include all forms of sexual abuse. 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 report²⁰ 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’.

¹⁹ http://www.siu.edu.in/Research/pdf/Shaila_Daware.pdf

²⁰ 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

- 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*²¹, '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 IPC 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 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 (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

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, nothing has been done till date.

CONSTITUTION OF INDIA viz-a-viz MARITAL EXEMPTION TO RAPE

The Constitution of a country is the text that reflects the soul of the nation. The Indian Constitution organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the cultures and experiences of the country and operates as a vehicle for national progress and unity.²²

As per the Indian constitution, every law that is passed in the country has to be in conformation with the principles and ideas enshrined in the Constitution of India. Any law that fails to meet this standard is considered *ultra vires* and is liable to be struck down by the Courts and declared unconstitutional.

²¹ 2004 (5) SCC 518.

²² Roy, Sudhanshu & Jain, Iti, "Criminalizing Marital Rape in India: A Constitutional Perspective", Criminal Law Journal, Apr 2008, p. 81-92.

Now it will be seen as to how the doctrine of marital exemption to rape fails to meet the standard of conformity with the provisions of Article 14 and Article 21 of the Constitution of India.

EQUAL PROTECTION OF THE LAW

Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India.²³ However, Article 14 does not call for every individual to be treated equally in every circumstance but requires that the equals within a society are not treated unequally and that the unequals of the society are not treated equally. The two requisites of a valid classification were laid down by the Supreme Court, as early as in 1952: -

- a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and
- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.²⁴

Thus any law which makes a classification which is unnecessary or irrelevant to the purposes of the legislation is deemed to be outside the framework of the Constitution. As to what is reasonable, would always depend upon what the judges think and with every new generation of judges, would emerge a new understanding of law and reasonability thus making the Constitution a living document. It is essential to prevent the stereotyping based on gender in order to curtail the gender biased differential treatment. Therefore it is important when applying the test of equality, that care be taken so that the stereotyping enjoined by the patriarchal ideology does not predetermine what is reasonable classification.

Section 375 of the IPC criminalises the offence of rape and protects a woman against forceful sexual intercourse against her will and without her consent. Thereby the section grants protection to women against criminal assaults on the bodily autonomy and depicts the State's interest in prosecuting those who violate this bodily autonomy. Therefore it is right to say that Section 375 of the IPC seeks to protect the woman's right of choice as autonomous individual also capable of self-expression and also regards rape as a crime of violence which disregards all such rights granted to the individual.

However, ironically, Section 375 of the IPC makes a classification in terms of an exemption that does not regard a forceful sexual intercourse within a marriage as rape. The

²³ The Constitution of India, Article 14.

²⁴ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80.

exemption withdraws the protection of Section 375 of the IPC from a married woman on the basis of her marital status. The classification and differential treatment of married women rests on the assumption that married women, unlike any other persons, have no interest in receiving protection from the State against violent and sexual assault. The assumption further stems from the fact that in a marriage, the wife is presumed to have given an irrevocable consent to sexual relationships with her husband. It is submitted that such an assumption is wrong, irrational and not based on an intelligible differentia.

Married women, exactly like men and unmarried women need protection of the law in their private spheres. While the rest of the section 375 of the IPC is interested in protecting the right of a victim from the crime of rape, such a right is withdrawn on marriage and the focus of the law instead shifts to protecting, the perpetrator of the crime of rape. It takes away a woman's right of choice and indeed effectively deprives her of bodily autonomy and her personhood. Thus the classification is unnecessary, unintelligible and violates the mandate of Article 14. Withdrawing the protection of Section 375 of the IPC from the victims of the crime of rape solely on the basis of their marital status is irrelevant for the purposes of legislation and thus violates the test of classification under Article 14.

RIGHT TO LIFE AND PERSONAL LIBERTY

Article 21 of the Indian Constitution enshrines in it the right to life and personal liberty.²⁵ Article 21 although couched in negative language confers on all persons the fundamental right of life and personal liberty. Post the case of *Maneka Gandhi v. Union of India*²⁶ it has become the source of all forms of right aimed at protection of human life and liberty. The meaning of the term 'life', has thus expanded, and can be appropriately summed up in the words of Field J. in the celebrated judgement of *Munn v. Illinois*²⁷ where he held that life means 'something more than mere animal existence', which was further affirmed by the Supreme Court of India in the case of *Bandhua Mukti Morcha v. Union of India*.²⁸

In light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression 'right to life and personal liberty' under Article 21. There can not be a more obvious and blatant violation of Article 21. The marital exemption to rape violates the right to privacy, right to bodily self-determination and right

²⁵ The Constitution of India, Article 21.

²⁶ AIR 1978 SC 597.

²⁷ 94 US 113 (1877).

²⁸ AIR 1984 SC 802, 811.

to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time.

RIGHT TO LIVE WITH HUMAN DIGNITY

The concept of right to life under Article 21 of the Constitution includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings.²⁹ The right to live with human dignity is one of the most inherent qualities of the right to life which recognizes the autonomy of an individual.

The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape.³⁰ The Supreme Court has held that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society. Rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the women.³¹ Thus the marital exemption doctrine is also vocative of a woman's right to live with human dignity. 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 is hence unconstitutional.

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 21.³² 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 woman'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*³³ has held that every woman 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*

²⁹ Francis Corallie Muin v. Union Territory of Delhi, AIR 1981 SC 802.

³⁰ The Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.

³¹ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1196 SC 922.

³² Kharak Singh v. State of U.P. AIR 1963 SC 1295; Govind v. State of Madhya Pradesh, AIR 1975 SC 1378; Neera Mathur v. LIC, (1992) 1 SCC 286.

³³ AIR 1991 SC 207.

*Rajasthan*³⁴, 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 a sexual relationship even within a marriage. By decriminalizing rape within a marriage, the marital exemption doctrine violates this right of privacy of a married woman and is hence, unconstitutional.

RIGHT TO BODILY SELF-DETERMINATION

Though the Constitution does not expressly recognize the right of bodily self-determination, such a right exists in the larger framework of the right to life and personal liberty under Article 21. The right of self-determination is based on belief that the individual is the 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 the individuals to be the authors of their own fate. Consent to sex is one of the most intimate and personal choice that a woman reserves from herself. It is a form of self-expression and self-determination and a law that takes away the right of expressing and revoking such consent definitely deprives a person the constitutional right of bodily self-determination.

It is submitted that the marital exemption doctrine effectively deprives a married woman her right to bodily to self-determination in respect of one of the most intimate and personal choice, i.e., consent to sexual intercourse, and is hence, unconstitutional.

RIGHT TO GOOD HEALTH

Another argument against the doctrine of marital exemption to rape is that it violates the right to good health of the victim of such crime. The right to good health has been recognized as a part of the right of life under Article 21.³⁵ Such a right is necessary for the continuous intellectual and spiritual well being of a person. The marital exemption doctrine violates the right to 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.³⁶ A more compelling argument can be made in case where forceful sexual intercourse in a marriage leads to the communication of a sexually transmitted disease (STD) to the victim of crime of rape.

The marital exemption doctrine effectively deprives a married woman of her right to good health and is hence, unconstitutional.

³⁴ AIR 1997 SC 3011.

³⁵ CESC Ltd. v. Subhash Chandra, (1992) 1 SCC 441; Regional Director, ESI Corpn. v. Francis de Costa, 1993 Supp (4) SCC 100.

³⁶ *Supra note*. 28.

In addition to being violative of the doctrine of classification under article 14 and various rights emanating from Article 21, the doctrine of marital exemption to rape also does not pass the test of “just, fair and reasonable” law and hence is violative of both Articles 14 & 21 of the Indian Constitution. It has been held by the Supreme Court in a catena of cases that any ‘law’ which is subject to scrutiny under Article 14 or Article 21 must satisfy this test of reasonability to be called within the framework of the Constitution. Even if the doctrine of marital exemption to rape passes through the test of classification under Article 14, it still has to survive the test of “just, fair and reasonable” law to be called constitutional.³⁷ Similarly in the context of Article 21, it must be possible to argue that since a person can be deprived of her/his right to life and personal liberty through a ‘procedure established by law’ and since the marital exemption doctrine is a ‘procedure established by law’, it is within the framework of the Constitution. But, this is an old and miserable argument and the Supreme Court has held in a number a cases that ‘Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful’.³⁸

JUDICIAL STAND

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*³⁹, 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*⁴⁰, 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 Subbaih*⁴¹, 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”

³⁷ Ajay Hasia v. Khalid Mujib, AIR 1981 S 487.

³⁸ Munn v. Illinois, 94 US 113 (1877) and *Supra note 28*.

³⁹ [(1891) ILR 18 Cal. 49].

⁴⁰ [AIR 1917 Sind 42].

⁴¹ [AIR 1983 AP 356].

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.⁴²

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*⁴³, 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 Karun*⁴⁴, 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 a ongoing dispute on divorce between the parties. Thereafter, a settlement was 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 a marital relationship is practically sacrosanct. Rather than, making the wife worships the husband's every whim, especially sexual, it is supposed to thrive, mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

CONCLUSION

⁴² *Ibid.*

⁴³ AIR 1991 SC 207.

⁴⁴ <http://indiankanoon.org/doc/486164/>

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”.⁴⁵

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.

Ideas about women's sexuality, and therefore ideas about non-marital and marital rape in Indian society, originate in concept of gender, shame and family honour, rather than women's rights and individual autonomy. If the reformers see rape as a crime against a woman and her person and bodily integrity and humanity, then marital rape and its punishment would be a legal possibility. To bring a change in the existing policy, we may use an individual rights rhetorical approach in working towards criminalizing marital rape in India, because marital rape will not be a State concern until the society and legislators understand women to have individual rights within marriage. In western countries, activists have operated within the individual rights framework in seeking to challenge cultural assumptions about marital relationships. The individual rights paradigm may have a similar role in India, where cultural assumptions prevent communities and even women's organizations from talking about the evil of marital rape.

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

⁴⁵ Donovan, Katherine O., *Family Law Matters*, 1, London: Pluto Press, 1993.

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.

Though a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, inquiry or matrimonial relief, what is needed is the incorporation of the principle of liability for marital rape in our penal laws. Not only child-brides, but all wives need legal protection from rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person must be recognized.

Can the State really enter the realm of the home? The answer to this is a "yes". It already does, in the cases of cruelty, divorce and dowry demands, then why leave the most atrocious and heinous crime outside the ambit of the State and laws. Why must the area of marital rape remain beyond its pale? The State which does not involve itself at the time of the marriage but acts as an arbitrator during divorce must protect a woman's right to her body.

The woman has and still continues to be victimized by man and society. 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. The patriarchal power structures have deemed marriage to be a license to legal unwilling sex. There is a total negation of the self worth of a woman.