



Marital Rape in India and its Constitutionality

1. Dr. Rakesh Kumar, Assistant Professor, Department of Law, Ch. Devi Lal University, Sirsa Haryana (India) email: rakeshkumar@cdu.ac.in
2. Neha, Student, Department of Law, Ch. Devi Lal University, Sirsa, Haryana (India) email: nehataneja5987@gmail.com

Abstract

India is one of the most religiously and ethnically diverse nations in the world, with some of the most deeply religious society having various culture. Marriage is one of those culture. The definition of marriage varies widely by culture, religion and jurisdiction. Marriage, a legally and socially sanctioned union usually between man and woman that is regulated by laws, customs and beliefs that prescribe the rights and duties of the partners and accords status to their offspring. Marriage is a bond between two individuals which eventually give them legitimacy for sexual intercourse. It is believed to be right atmosphere to engage in sexual relations and to build a family life. During ancient India marriage was considered as a sacrament, it was a medium to bringing together two distinct halves man and woman. They were not two separate entities. But as many laws enacted it becomes a contract. Marriage is said to be valid if there is consent between two individuals. Under article 16 of United Declaration of Human Rights, 1948 marriage shall be entered into only with free and full consent of the intending spouse. So here the question arises, consent exists for everything till the whole period of life or has any limit. To answer this question the paper has discussed status of Marital Rape in India and its Constitutional validity and historical background relating to status of women in India. We further discussed about a comparative analysis between laws in other countries and laws in India & advantages and disadvantages to criminalize the marital rape in India. The debatable point whether or not exception 2 of section 375 of Indian Penal Code should remain in statute. And particularly the investigation of question whether wife's consent for sexual relations is required or not?

Keywords:- Constitutional validity, Culture, Marriage, Sacrament, , Marital Rape, Religious Society, Sexual Intercourse etc.

Introduction:-

Marriage place a vital role in the society as it is an important factor of social institution. Indian society is based on religion so there is a conflict or confusion that marriage is sacrament union or a contract. Since very early marriage is considered as a sacrament. It is also believed that marriage is indissoluble in nature and ties remain even after the death. According to sacrament, marriage is obligatory. In the case of *Manmohini v. Basant kumar*¹ Delhi High Court held marriage is a sacrament not a contract. But the modern concept has changed the definition of marriage, it came to be considered as contractual union. In the case of *Muthuswami v. Masilamani*² it was held that marriage is undoubtedly a contract entered into for consideration with co- relative rights and duties. Marriage is a sacrament or a contract create conflict to its status; thus in the case of *Bhagwati saran singh v. Parmeshwari nandar singh*³ it was held that marriage is not only a sacrament but also a contract.

Marriage is the state of being united as a spouses in consensual and contractual relationship recognized by law. As the meaning itself says marriage legalize sexual relationship. Marital rape is nothing but sexual intercourse between married couples without wife's consent. The word 'rape' is derived from Latin word rapere which means "to snatch, to grab, to carry off" Rape is a type of sexual assault usually involving sexual intercourse or other form of sexual penetration carried out against a person without that person's consent.

According to section 375 of Indian Penal Code-

"Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim."

However there is an exception in this section which stated if non consensual sexual intercourse takes place between married couple, it will not amount to rape.

It is based on the notion that a woman does not have right to refuse sex with her husband. The Bench in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*⁴, stated that wife doesn't have a right to initiate proceedings against her lawfully husband for the offence of rape punishable under section 376 as the idea is that, by marriage a woman gives irrevocable consent to her husband to have sex with her any time he demands it.

¹ Pooja, Concept of Hindu Marriage :Whether Sacrament or Contractual Vol.3 of International Journals of Legal Research and Studies 113(2018)

² 1942 ILR ALL 518

³ 21 Bom 23

⁴ 2018 SCC ONLINE Guj 732 [128]65

Types of Marital Rape:-

Marital rape can be classified in to three categories which are:-

1. **Battering rape :-** Battering rape occurs when physical and sexual assault occur together or one after other. The rape may occur after physical violence as an attempt to ‘make up’. In this type of rape husband wants to make up and coerces his wife to have physical relationship against her will.
2. **Force only rape:-** In this kind of rape, husband use only the amount of force necessary to coerce his wife. In this type of rape violence is not present and it is spurred by desire to control over another person.
3. **Obsessive rape:-** It is also known as sadistic rape that involve torture or perverse sexual acts. This type of rape tends to be very violent and physical injuries.

Historical Background:-

Marriage has been very prominent in Indian society. The status of female spouse, her financial entitlements always questioned in the society. Manu regards marriage as an individual and social necessity. It is generally believed that the ‘pristine’ Hindu law was particularly harsh for women and they didn’t have sexual and economic freedom. As Indian society is patriarchal in nature women was considered as chattel. Manu defined women situation as;

“A wife, a son, and a slave, these three are declared to have no property, the wealth which they earn is for him to whom they belong”.

In England Anglo-American concept Doctrine of Coverture was originated which means women’s legal existence was considered to be merged with that of her husband, so that she had no independent legal existence of her own which means after a marriage all the rights of women transferred to her husband. A famous philosopher Thomas express his view on condition of women in marriage that marriage gives a man power to condemn an innocent woman to confinement in a cell he calls his home. Further he compares wife with dog who anticipate his master’s will.

But as the society develop and laws enacted the modern concept changes the situation of women in Indian society and give them status equal to men and equal to their husband. **Circumstances of Marital Rape:-**

- Women married to domineering men who view women as a property.
- Women who are in physically violent relationship.
- Women who are ill or recovering from surgery
- Women who are separated or divorced.

Legal Provisions Relating to Marital Rape:-

Criminal aspect:-

Marital rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence or when she is unable to give consent. The definition of rape under section 375 of Indian Penal Code does not include marital rape as an offence. Exception 2 of the section 375 stated that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. Rape is

punishable under section 376 of Indian Penal Code, according to which rapist shall be punished with imprisonment of either description for a term not less than ten years but may extended to imprisonment for life, and shall also be liable to fine. Under section 376-A added in 1983 in Indian Penal Code, rape of judicially separated wife was criminalized. This amendment based on the recommendation of the Joint committee on the Indian Penal Code (Amendment) bill,1972 and Law Commission of India.

In 2013, the case of *Independent thought v. Union of India*⁵; Supreme Court increased the age limit from 15 to 18 years; a child marriage organization, Independent thought filed a writ petition in Public Interest before Supreme Court to challenge the Constitutionality of exception 2 to section 375 of the Indian Penal Code which decriminalized the sexual intercourse by a husband with his wife between the age of 15 to 18. The petitioner alleged this provision violates the rights of married girl child. Thus Court agrees with petitioner's argument that most statutes like Prohibition of Child Marriage Act,2006 and Juvenile justice Act,2000 recognize a person below 18 years as a child and prescribe a age of consent for sexual intercourse as 18 years. Sexual intercourse by husband upon his wife during separation whether under a decree of separation or otherwise, without her consent shall be punished with imprisonment for a term not less than two years but may extended to seven years, and shall also be liable to fine. In section 498A in Indian Penal Code cruelty by husband or relatives of husband inculcate with marital rape because of the reason of absent of consent in sexual intercourse by husband to his wife works as cruelty against her.

Civil law aspect:-

Marital rape is not a criminal offence in India but it is partially covered under civil law which is covered under the Domestic Violence Act,2005. Violence against women by their spouse or partner comes under this act. A substantial number of women are subjected to torture and violence within home, in which refusal to have sex is one of the reason. Any act, commission, omission which harms or injures or endangers the health, safety, life, whether mentally or physically and which includes physical abuse, sexual abuse, verbal or emotional abuse which humiliates, degrades, or violate the dignity of the woman. *Violence against women (VAW)* has been recognized as a public health issue and violation of women's human rights. In India *National Family Health Survey (NFHS) and National Crime Record Bureau (NCRB)* are the sources to find out the VAW.

NFHS uses two categories to measure sexual violence:

- “Use of physical force by husband to have sexual intercourse even when the wife did not want to”
- “Forcing a wife to perform sexual act she did not want to”

This includes the use of physical force by husband for engaging in “sexual degrading or humiliating acts, using weapons for forcing sex or forcing wife to engage in sex in the absence of privacy and criticizing or humiliating for, or during sex”.

⁵ [2017] 10 SCC 800, AIR 2017 SC 4904

Constitutional Aspect:-

India has an impressive assortment of laws and schemes aimed at providing social justice. In Vienna Declaration of 1993 under article 1 it is stated that “Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of governments.” However the exception 2 of section 375 of IPC discriminate against married women and doesn't qualify a reasonable classification. In Indian Penal Code, there is a differentiation in married, unmarried and separated women. A sex worker can say ‘no’ for sexual intercourse but not a married woman which makes discrimination.

- Under article 14 of Indian Constitution it states equality before law and equal protection of law. But marital rape exception (MRE) deprive one half of the population from equality and equal protection of the laws. It violates the article 14 .
- Article 15 prohibits the state to not to do discrimination on the ground of religion, race, caste, sex or place of birth.
- Article 21 defines right to life and personal liberty, it includes right to healthy and dignified life and right to sexual privacy and right to body integrity.

In the landmark case of the *The Chairman Railway Board v. Chandrima Das*⁶ Court held that rape is mere not a matter of violation of ordinary rights but a matter of violation of fundamental rights. It violates the right to live with human dignity.

In the recent judgement of *Delhi High Court*⁷. A Division Bench of High Court handed down the judgment on constitutional challenge of marital rape exception. The petitioner, NGO RIT Foundation, All India Democratic Women's Association and marital rape victim challenged as unconstitutional an exception of section 375 of IPC as it violates article 14, 15, 19(1) and 21 of Constitution of India.

Advantages to Criminalize Marital Rape in India:-

Under article 14 of Indian Constitution it states equality before law and equal protection of law. According to UN Women, an organization that promotes women's legal rights every third woman across the world has experienced violence, either sexual or physical by a close companion, a non partner or both. According to NFHS three out of ten women experience some form of domestic violence. If this kind of sexual abuse by husband to his wife get criminalized it protect the fundamental rights of women.

1. Marriage can not be viewed as a license for husband to coerce sexual relations on demand.
2. Marriage can not mean irrevocable implied consent.
3. It violates the article 14 which stated right to equality to protect and provide equal rights; it should be criminalize.

Kerala High Court in 2021 noted that treating a wife's body as something owing to the husband and committing a sexual act against her will is nothing but marital rape.

⁶ MANU/SC/0046/2000

⁷ W.P.(C) 284/2015 & CM Nos.54525-26/2018

As an unmarried woman, a married woman has same right her bodily integrity.

In *Joseph shine v. Union of India*⁸; *Justice D.Y. Chandrachud* posed a question of whether a woman or man loses sexual autonomy when they marry. I think ‘no’ . In addition he noted that “**Right to refuse sex should also exist after marriage.**”

Disadvantages to Criminalize Marital Rape in India:-

India is a society of religion and culture in which marriage is also a culture. The institution of marriage is considered to be union of two souls. *Justice Deepak Mishra*, the former Chief Justice of India in the conference at KLE Society’s Law College in Bengaluru said that, “in my opinion marital rape should not be regarded as a crime in India, as it will create anarchy in families, and our country relies on its family platform for its success of upholding family.”

1. Union Government in submission to Delhi High Court stated that rape would thwart the marriage institution and become an easier way to harassing the spouse.
2. In 2016, an Indian official told the Rajya Sabha that the concept of marital rape is international and could not be applied in Indian contexts due to the factors such as poverty, illiteracy, social customs, faiths, and sanctity of marriage.
3. Both husband and wife would engaged in sexual relations so it almost impossible to prove the absence of consent.
4. It becomes a burden to the court as it is difficult to the court to proved it accurately.

Law Relating to Marital Rape in other Countries:-

Historically, Implied Consent Theory⁹ of *Chief Justice Sir Mathew Hale* defines, “The husband can not be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she can not retract.” This theory arise from the legal fiction that husband and wife are same. But now as the time passes husband and wife consider as separate entities having equal rights. Due to this, marital rape become a crime in many countries.

*The UN Declaration on the Elimination of Violence Against Women*¹⁰ states that:-

“Violence against women is a manifestation of historically unequal power relations between men and women and that against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”

Poland was the first country who criminalize marital rape in 1932. Australia under the influence of wave of feminism reform and criminalize marital rape in 1976. In 1980’s several common law countries have criminalize marital rape. In 1984, in New York, the court of appeal struck down the exception of marital

⁸ W.P.(Cr.) No. 194 of 2017

⁹ The History of Pleas of Crown 1736

¹⁰ Adopted by United Nations General Assembly in 48/104 resolution of 20 December 1993.

immunity from the Code. In 2002 Nepal criminalized marital rape. The Supreme Court held that exception of marital rape went against the constitutional right of equal protection before the law and right to privacy of an individual.

United Nations support for the Rights of women began with the Organization's founding Charter. The purpose of UN in Article 1 of its Charter declared as "To achieve international co- operation... in promoting and encouraging respect for fundamental freedom for all without distinction as to race, sex, language, or religion." UN Committee Elimination of Violence Against Women (CEDAW) defines under article 1 "Discrimination of women" as any distinct... made based on sex which has the effect of impairing...the exercise by women irrespective of their marital status...of human rights and fundamental freedoms in the... social, cultural, civil or any other field."

Suggestions:-

Justice Arjit pasayat express his view on rape; "While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of helpless woman".

Each and every person has right to live with dignity and everyone should be equal in the eyes of law. But due to some act which is done with one person without the consent of that person affect the rights of that person. So as relate to this there are some suggestions; why marital rape should be criminalized and why not?

- The Legislature has the power and right under the constitution. The striking down of marital rape exception would result in creation of new offence as it may enhance false allegation. There is need to create an ecosystem to deal with the issue and these issue not only relating to legal but also to social and cultural.
- Legislature by creating a separate legal ecosystem for dealing with spousal sexual violence. Legislature criminalize non consensual sex between spouses without terming it as a rape and, at the same time balanced the rights of husbands by appending MRE.

Conclusion:-

Marriage is a relationship between two peoples in which they live together and this relationship is considered to be of love, affection, care and concern between two spouses. The foundation of a sound marriage is tolerance, adjustment and respecting one another. During ancient time, women enjoyed equivalent status & rights to that of their male counterparts. But in medieval period society became patriarchal which made the status of women as a property; property of the husband. This kind of view of the society increased the cruelty against wife. But in today's scenario our Constitution provide equal status to women as in Article 14 defines equality before law and Article 21 right to life which include right to live with dignity. The state has already made law relating to marriage like dowry, cheating, cruelty, divorce etc. But status of marital rape is in question. In the recent split verdict of Delhi High Court, Justice Rajiv shakdher struck down the exception 2 of the section 375 of Indian Penal Code (IPC) which decriminalize marital rape. On the other hand, Justice C. Hari Shankar upheld the validity of controversial provisions in rape law, saying it is based on "intelligible differentia." The relation

between religions and marital rape is controversial. The Bible at 1 Corinthians 7:3-5 explains that one has a “conjugal duty” to have sexual relations with one’s spouse (in sharp opposition to sex outside marriage which is considered a sin) and states that “The wife does not have authority over her own body but the husband does. And likewise the husband does not have authority over his own body, but the wife does.

Marriage not only involves men but also includes women. So to protect their fundamental rights is also important. Cruelty is of any kind is not justiciable whether physical or mental so to protect a woman rights against cruelty such as sexual assault by husband legislature has to make law but to kept in mind the concept of marriage in Indian view point.

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