



Marital Rape in India: legal Dimensions

Karan Jawanda

Assistant Professor in Law, University Institute of Legal Studies, Panjab University, Chandigarh.

Rashmi was married at the tender age of seventeen. Her husband assaulted her sexually six to seven times a day. The situation became worse when barely 15 days after a c-section surgery, her husband assaulted her so badly that it ruptured her stitches.¹

This is the story of many such women in India who suffer sexual abuse and violence at the hands of their husbands in silence. Rashmi however raised her voice and is fighting a case of domestic violence against her husband.

The present paper seeks to address the problem of marital rape and also analyze the legal scenario regarding the same in India.

Marital rape is a part of the larger offence of sexual violence perpetrated by a husband against his wife. The term generally implies forced sexual intercourse by a husband with his wife without her consent. Marital rape includes “any unwanted intercourse or penetration obtained by force, threat of force, or when the wife is unable to consent.”² In the present scenario it could also include any kind of sexual abuse of the wife by the husband. Marital rape could be by the use of force only, a battering rape or a sadistic/obsessive rape.³ According to the UN Population Fund, more than two-thirds of married women in India, aged 15 to 49, have been beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five has forced their wives or partner to have sex.⁴ The problem arises because the act of so called marital rape is not seen as a criminal offence by the Indian legal regime except in few circumstances. The reason for this is the notion that a wife gives her implied consent to marital intercourse at the time of entering the

¹Naziya Alvi Rehman, “Stir against marital rape: Yes, it happens” available at http://articles.timesofindia.indiatimes.com/2013-02-14/delhi/37099318_1_girl-child-sexual-assault-rashmi (visited on 29.5.17)

² <https://www.rainn.org/public-policy/sexual-assault-issues/marital-rape> (visited on 13.2.17)

³ Priyanka Rath, “Marital Rape and the Indian Legal Scenario” available at <http://www.indialawjournal.com/Volume 2 / issue- 2/ article-by-priyanka.html> (visited on 25.1.17)

⁴ “Marital Rape: Dirty Linen that needs to be aired”, available at http://articles.timesofindia.indiatimes.com/2013-01-14/mumbai/36330662_1_husband-alumni-group-social-group (visited on 14.2.17)

marital relation. The origin of this marital rape exemption can be traced to a statement by Lord Mathew Hale, a seventeenth century English jurist:

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 up herself unto her husband, which she cannot retract.⁵

In patriarchal Indian society the rules of Hindu Law impose an obligation and duty upon the wife to perform the marital obligation to her husband, which she is duty bound to render. Thus a dutiful wife should never say 'no' to her husband. Marital rights and duties according to the Hindu law are fixed and the woman's most pious obligation is to live with her husband; serve him and bear children.

A look at some of the cases decided by various Courts reveals that, in its operation the scale of law is definitely tilted in favour of men who have frequently succeeded in breaking matrimonial ties by the accusation that the wife has neglected to perform her marital duties that is, she has withdrawn from cohabitation and as such caused him great mental stress. Recently, the Bombay High Court in *Reshma Rakesh Kadam vs. Rakesh Vijay Kadam*⁶ (pronounced on 4.12.13) granted divorce on the ground that "Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment". The Delhi High court in its judgment in *Shashi Bala v. Rajiv Arora* dated 21.3.2012, dismissed the appeal of the wife and upheld the decision of the trial court granting divorce to the husband on the ground that willful refusal by the wife to have sexual intercourse amounted to cruelty.⁷ The court based its judgment on the decision of the Delhi High court in *Mrs. Rita Nijhawan vs. Mr. Bal Kishan Nijhawan*⁸ wherein the court held that "Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long". Also, in the case of *Shankuntla Kumari vs. Om Prakash Ghai*⁹ it was held that willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married. The Hon'ble Supreme Court in *Parveen Mehta v. Inderjit*

⁵ History of the Pleas of the Crown, v I, p 629 (1736), quoted by Lina Gonsalves, *Women and Human Rights*, p.116 (2008).

⁶ <http://bombaylaw.blogspot.in/2013/12/reshma-rakesh-kadam-vs-rakesh-vijay.html#!/2013/12/reshma-rakesh-kadam-vs-rakesh-vijay.html> (visited on 13.2.17)

⁷ *Shashi Bala v. Rajiv Arora* 1 DMC 721; also available at <http://delhidistrictcourts.nic.in/MAR12/SHASHI%20BALA%20vs.%20RAJIV%20ARORA.pdf> (visited on 13.2.17.)

⁸ AIR 1973 Delhi, 200

⁹ AIR 1983 Delhi, 53

Mehta,¹⁰ held that refusal to have sexual intercourse by the wife amounted to mental cruelty to the husband and dismissed the appeal filed by the wife. In the authoritative pronouncement of the Hon'ble Supreme Court in *Samar Ghosh vs Jaya Ghosh*¹¹, the Hon'ble Supreme Court took into account the parameters of cruelty as a ground for divorce in various countries and then laid down illustrations, though not exhaustive, which would amount to cruelty and held that unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.¹² Should it mean that legally wedded wives are available for forced sexual intercourse by husbands as they are immune from penal consequences if they rape their wives? More so, a denial to have sexual intercourse may amount to causing cruelty to the husband thus threatening the marital tie itself. Thus, the age old notion that wife must consent to sexual intercourse in a marriage still plagues the Indian mindset. Husbands cannot be allowed to force sexual assaults upon their wives and a notion that rape is something which happens outside and not within homes and bedrooms must change.¹³

Legal Provisions:

The Indian Penal Code 1860:

The offence of rape is defined by section 375 of Indian Penal Code 1860. The section has lately been amended by the *Criminal Law Amendment Act 2013*. The whole section 375 has been replaced by a new section. Although the section has widened the definition of the offence of rape by including various types of penetrative sexual abuse apart from non consensual sexual intercourse, the provisions regarding marital rape did not change much. Prior to the passage of *Criminal Law Amendment Act 2013*, and even subsequently marital rape is recognized as an offence only in two circumstances:

- If the wife is under the age of 15 years¹⁴
- If the wife is legally separated or living separately under any custom or usage¹⁵

¹⁰ (2002) 5 SCC 706

¹¹ (2007) 4 SCC 511, para 101(xii)

¹² *Ibid*

¹³ Lina Gonsalves, *Women and Human Right*, p.117 -118 (2008)

¹⁴ Exception to Section 375 *Indian Penal Code 1860* (before the amendment Act of 2013): Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

¹⁵ *Section 376 A Indian Penal Code 1860* (before the amendment Act of 2013): 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

Thus, according to the exception, a husband could not commit rape upon his wife, if the wife was above 15 years of age. It is worth mentioning here that in the original draft of the *Indian Penal Code 1860*, as prepared by Macaulay's commission, exception in clause 359 had stated: "Sexual intercourse by a man with his wife is in no case rape." However, finally the clause, incorporated as section 375 in the *Indian Penal Code* in 1860, laid down ten years as the minimum age for giving valid consent by a woman and also for the exception which permitted husband to have sexual intercourse with his own wife without her consent or against her will.¹⁶ The age was then raised to 12 and ultimately to 15 years. The *Criminal Law Amendment Act 2013* retains the exception as exception 2¹⁷ and even under the present legal scenario a husband cannot be prosecuted for sexual intercourse or sexual acts with his own wife if she is above 15 years of age. However, In the recent case of *Independent Thought v. Union of India*¹⁸ a two Judge Bench of Supreme Court held that sexual intercourse with minor (below 18 years) wife is rape. Justice Lokur's observation in this regard is noteworthy

"we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." ... It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus".

The only change is the use of the term sexual acts to include the other types of sexual assaults apart from sexual intercourse which are now covered under the definition of rape. Section 376 B (instead of 376 A) now covers the cases of rape by husband where wives are legally separated or are otherwise living separately from their husbands. The punishment for such offence has been raised from imprisonment up to 2 years to a minimum period of 2 years up to a maximum of 7 years and fine.

It is strange to note that the age of consent for sexual intercourse has been raised to 18 years from 16 by the *Criminal Law Amendment Act 2013*.¹⁹ However

shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

¹⁶ Dalbir Bharti, *Women and The Law*, p.115 (2008)

¹⁷ Section 375 *Indian Penal Code 1860*, exception 2: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not rape.

¹⁸ , W.P. (Civil) No. 382 of 2013, decided on October 11, 2017 (Madan B. Lokur and Deepak Gupta JJ) (hereinafter, *Independent Thought*)

¹⁹ Section 375 *Indian Penal Code 1860*: A man is said to commit "rape" if he- (a).....,

(b).....,

(c).....,

(d).....

when it comes to the presumption of consent for sexual intercourse in a marriage, the age continues to remain 15 years. The basis for this distinction is totally irrational and negates the right of equality of women in marriage between the age group of 15 to 18 years of age. In light of the recent Supreme Court decision, the IPC should be accordingly amended

The Protection of Women from Domestic Violence Act, 2005:

In the year 2005, some recognition was legally given to the cases of sexual abuse being suffered by a woman within the bounds of her home. Sexual abuse was identified as a type of domestic violence by section 3²⁰ of the *Protection of Women from Domestic Violence Act, 2005*. However, the *Protection of Women from Domestic Violence Act, 2005* to this extent has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Thus, the gravity of the offence of marital rape has been undermined by not providing any punishment for the same. The indirect method of prosecuting a husband for sexual abuse already existed in various provisions like cruelty under section 498 A,²¹ *Indian*

Under the circumstances falling under any of the following seven descriptions.....

Sixthly- With or without her consent, when she is under eighteen years of age.....”

²⁰ *The Protection of Women from Domestic Violence Act, 2005*: section 3- “Definition of domestic violence.-For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or.....

Explanation I.-For the purposes of this section,-

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;.....”

²¹ *Section 498 A, Indian Penal Code 1860*: Husband or relative of husband of a woman subjecting her to cruelty.-- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.- For the purposes of this section," cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Penal Code 1860. If we can prosecute a husband for such offence, then why not for marital rape?

Remedy under Personal Laws:

Under the various personal laws²² a wife may petition for divorce on the ground of cruelty. Although the ground of marital rape is not per se a ground for dissolution of marriage, it falls within the purview of physical cruelty. Even if the divorce is granted, there are no penal consequences against the offending husband and he is left free to re marry and spoil the life of some other women as divorce may not operate as a taboo against him but may be so against the wife obtaining the divorce decree.

Protection of Children from Sexual Offences Act 2012:

This Act is a progressive step in the area of sexual offences and aims to protect the children from various types of sexual offences. This is a comprehensive law as it creates categories of sexual offences of which rape is one of the offences. Rather, it does not use the term rape and instead uses the terms penetrative sexual assault, sexual assault and also defines these offences in aggravated forms. In the present context the Act assumes relevance as it defines a child as any person below the age of 18 years.²³ The act also penalizes various types of sexual assault against a child. The *Indian Penal Code* even after the 2013 amendment considers age of consent in marriage as 15. Thus this is clearly in contravention to the *Protection of Children from Sexual Offences Act 2012*. Section 5 of *Protection of Children from Sexual Offences Act 2012* penalizes aggravated penetrative sexual assault. Clause (n) of section 5²⁴ considers penetrative sexual assault by a person related to the child by marriage as an instance of aggravated penetrative sexual assault. Moreover, the *Criminal law Amendment Act 2013* has added section 42 A²⁵ which provides an overriding effect to the provisions of *Protection of Children from Sexual Offences Act 2012* in case of any inconsistency with any other law. In my submission, if section 5(n) of POCSA 2012 is literally interpreted, the exception 2 to section 375 IPC providing for marital rape exemption where wife is above 15 years is a direct

²² *The Hindu Marriage Act 1955, The Special Marriage Act 1954, The Dissolution of Muslim Marriages Act 1939* all provide for cruelty as a ground for divorce.

²³ Section 2(d) of *Protection of Children from Sexual Offences Act 2012*

²⁴ Section 5(n) *Protection of Children from Sexual Offences Act 2012*:Whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relation with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child.....is said to commit aggravated penetrative assault.

²⁵ Section 42 A *Protection of Children from Sexual Offences Act 2012*: The provisions of this act shall be in addition to and not in derogation to the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of inconsistency.

contravention of provisions of section 5(n) as the latter penalizes the act of sexual assault by a person related to the child by marriage. The husband of a minor wife who is above 15 years but below 18 may fall under this category. Thus, applying this logic we may be able to bring about cases of sexual violence by husbands against minor wives under the ambit of *Protection of Children from Sexual Offences Act 2012*.

Marital Rape and the International Conventions:

The United Nations Convention on Elimination of all forms of Discrimination against Women marks the opening of a new chapter in the field of women's rights. Article 2²⁶ of the convention enumerates the ways through which gender just environment is to be created. Article 2 of the said convention aims to eradicate discrimination against women in all spheres. Article 1 defines the term discrimination as follows: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

UN Committee on the Elimination of Discrimination against Women ("CEDAW Committee") in February 2007 has recommended that India should "widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced

²⁶ "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

To repeal all national penal provisions which constitute discrimination against women.

by women and to remove the exception of marital rape from the definition of rape.....”²⁷

Thus, in light of the above development it is all the more necessary to match the international standards as far as the offence of marital rape is concerned.

Recommendation by the Law Commission of India:

1. In 1997, “Sakshi” an organization interested in the issues concerning women, approached the Supreme Court of India inter alia for directions concerning the definition of the expression “sexual intercourse” as contained in section 375 of the *Indian Penal Code 1860*. The Supreme Court by its order dated 13th January, 1998 directed the Law Commission to indicate its response with respect to the issues raised in the above writ petition. The organization demanded a review of rape laws, with a view to widen the definition of rape to include different kinds of sexual assault and to include marital rape within its ambit. Consequently, in the 172nd Law Commission report a very significant recommendation regarding marital rape was made: “Marital rape: exception of section 375 of *Indian Penal Code 1860* 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.”²⁸

It is extremely disheartening to note that the recommendations of the law Commission in this regard were ignored by the legislators while enacting the *Criminal Law Amendment Act 2013*.

Recommendations by Justice J.S. Verma Committee:

The Justice J.S Verma Committee was appointed in order to examine and suggest reforms in the rape laws in a short time span as a reaction to the Delhi gang rape case in December 2012. The Committee examined the rape laws in India in great detail and also critically analyzed the proposed Criminal Laws Amendment Bill of 2012. The matter of marital rape was also elaborately dealt. After analyzing the law in other countries like U.K., Canada etc. the committee gave the following recommendations:²⁹

1. The exception for marital rape be removed.

²⁷ Quoted by Justice J.S. Verma Committee, on amendments to Criminal Law available at <http://www.Prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (visited on 29.5.17)

²⁸ The Law Commission of India, “Review of Rape laws March 2000”, 172nd Report, available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (visited on 16.10.17)

²⁹ Report of the committee on amendments to Criminal Law available at <http://www.Prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (visited on 29.5.17)

2. The law ought to specify that:

- a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual
- b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
- c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

Thus, the committee took a very strict view with regard to the offence of marital rape, equating it with rape outside marriage. So much so, they recommended that quantum of punishment should not be lowered in case of marital rape. Unfortunately, our law makers again totally ignored these recommendations.

The common arguments that have been advanced against penalizing marital rape are that the law if introduced will be misused by revengeful wives, that there is an implied consent to have sexual intercourse when a woman marries a man, that such law would destroy many marriages by making reconciliation impossible.³⁰ However it is submitted that these arguments are baseless. It may be noted that if proving a claim of rape in marriage is hard, proving a fabricated claim will be even more difficult.³¹ Because of the associated stigma of rape trials, it is unlikely that women will elect to undergo such an experience out of sheer spite. Besides, the criminal justice system provides inherent safeguards such as the requirement of proof beyond any reasonable doubt. This is no justification to say that the victims should be denied protection simply because someone might be at risk of a fabricated case.³²

In *Bodhisattwa Gautam v. Subhra Chakraborty*³³ the Supreme Court said that “rape is a crime against basic human rights and a violation of the victim’s” most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution.

A marriage in which a husband sexually assaults his wife and undermines the dignity of a wife by disregarding her desires is already dead. Attempt to hold together marriages has been regarded as one of the objectives of matrimonial laws. The retention of provision for restitution for conjugal rights in our statutes is a glaring example of this thought. An ideal wife is considered to subject herself to the will of her husband and is not to exercise her own free will. She is hardly able to exercise her

Saurabh Mishra & Sarvesh Singh, “Marital Rape — Myth, Reality and Need for Criminalization” available at <http://www.ebc-india.com/lawyer/articles/645.htm> (visited on 25.1.17)

³¹ *Ibid*

³² *Ibid*

³³ (1996) 1 SCC 490

choice regarding procreation of children. The concept of restitution implies sexual cohabitation. Thus when a husband obtains the decree of restitution of conjugal rights he also gets the right to have marital intercourse with his wife. “As a result, the choice to have or not to have marital intercourse gets transferred from the Hindu wife to the State, which delegates this authority to the Hindu husband. Secondly, by virtue of a decree for restitution of conjugal rights, the Hindu wife’s choice as to whether she wants to allow her body to be used as a vehicle for another human being’s creation is also transferred to the Hindu husband vis-à-vis the state.”³⁴ The term voluntary implies that the parties have free consent. However, the provision of restitution of conjugal rights seems to be a blatant violation of the right to privacy. The American Supreme Court has in the case of *Planned Parenthood of Missouri v. Danforth*³⁵, held: “The right to privacy belongs to a person or an individual and it is not lost by reason of their marriage.” Thus the remedy of restitution of conjugal rights is a tool in the hands of a husband to submit her to his will in order to exercise his right of marital cohabitation which results in denial of the right of a wife to sexual autonomy. In my view, this provision is a remnant of the theory that the wife must submit to the will of her husband and becomes a tool to perpetuate marital rape in the garb of restitution of conjugal rights. It serves little purpose and hence should be discarded.

In my opinion the theory of implied consent is outdated and we cannot presume that a wife consents to sexual violence by marriage. Any kind of sexual activity which is non consensual must be regarded as sexual abuse and should be penalized.

Conclusions and Suggestions:

- There is a need to penalize the offence of sexual assault by a husband with his wife.
- Penalty should be deterrent and could vary with the degree of assault committed- the model under POCSA 2012 could be followed.
- Penal provisions could also be provided for wives filing frivolous complaints.
- If a person is convicted, apart from undergoing imprisonment, he should be made to undergo counseling sessions from trained psychologists and psychiatrists considering that these crimes are largely due to some psychological imbalances.

³⁴ Sharmishtha Ghosh, “Restitution of Conjugal Rights- A Feminist Jurisprudential Critique”, (2004) 7 ACE (J), pp. 43-55 at p.53; also see *T. Sareetha v. Venkata Subbaiah*, AIR 1984 SC 1562.

³⁵ 1976-49 L ED 2d 788; cited in *T. Sareetha v. Venkata Subbaiah*, AIR 1984 SC 1562

- Need to sensitize and educate children in schools and other educational institutions about the need to respect their spouse and the role of consensual sex in a marriage.

In my humble submission, the provision criminalizing marital rape if introduced under the penal laws will help in preserving and regaining the lost dignity of a woman in marriage.