



**ORIGINAL RESEARCH PAPER**

**Law**

**LEGISLATIVE RELUCTANCE TO PENALISE MARITAL RAPE IN PRESENT SOCIAL SCENARIO**

**KEY WORDS:**

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**ABSTRACT**

Law is not something static and it has to amend with change in social values. In earlier times, wife was considered to be property of husband, and therefore, she had to submit physically to husband at his desire. Such obsolete notions have altered in present times to a large extent, and women enjoy constitutional equality. In this background, a debate has emerged on the justification of creation of exception in Rape Laws when the rapist is husband. Present paper seeks to analyse arguments for or against criminalising Marital Rape in the light of some recent developments before submitting conclusion and suggestion.

**Introduction**

Person of a Woman may be violated by a stranger i.e. somebody who is not her Husband. In such cases, law penalises the offender. However, sexual intercourse, even forcefully and without the consent of wife, does not make a husband liable for the offence of Rape in most of the jurisdictions, including India. This position of law exists despite the fact that Marital Rape is no less a traumatic experience for a woman than rape by stranger. Marital Rape is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually. Marital Rape can have distinct health consequences harbouring right to life implication such as miscarriages, fistulas, bladder infections and potential contraction of sexually transmitted diseases including HIV that can have fatal consequences. The study of psychological reactions of marital rape victims suggests that it may result in depression, humiliation, anger, somatic complaints, fear, anger, low self-esteem, dislike of men in general, and problem in sexual functioning. The problem is that marital rape in the imagination of people in general is merely a bedroom squabble between husband and wife over whether to have sex or not. But marital rape "does have brutality and terror and violation and humiliation, and in many cases enough to rival the most graphic stranger rape".

Traditionally, the setup of institution of marriage is such that the role of breadwinner has been assigned to husband, whereas wife is financially dependent upon her husband. It has been rightly observed that such structural arrangement "contributes a lot in encouraging marital rape". The fact of financial dependence and consequent fear of destitution makes it difficult for a wife to take a stand against violence inflicted upon her by her husband. The fact that the victim has to repeatedly suffer the atrocity and horror of the perverted husband adds to the severity of the offence.

**Historical Background**

In the past the Law of Rape was concerned with the theft of virginity and its primary object was to protect property rights. The redress lay in financial compensation. Even in thirteenth century, in spite of penal sanction for rape in England, in practice, pecuniary damages continued to be paid. Even today, as observed by Delhi High Court, the purpose of rape law does not seem, unequivocally, to establish the female's right to her bodily integrity. The fact that marital rape is protected from penalty under the law is a pointer towards that direction.

The Common Law theory of spousal exemption from rape is most frequently attributed to Sir Matthew Hale, who asserted that "husband cannot be guilty of 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 to her husband, which she cannot retract." According to this view, rape by husband is justified as marriage amounts to consent for sex for all times to come. As a direct result of above stated statement of Sir Matthew Hale, no prosecutions for marital rape were brought in England for next 200 years. Status as a husband provided absolute immunity from criminal proceedings that would otherwise result in death penalty or life imprisonment.

In the year 1991, House of Lords took a bold stand and altered the Law related to marital exemption from rape in the case of R. v. R. Lord Keith, in this case, held that common law was "capable of evolving in the light of social, economic and cultural developments". He further observed:

"Hale's proposition involves that by marriage wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at that time. In modern times, any reasonable person must regard that conception as quite unacceptable."

**Constitutional and Legal Perspective**

The most cherished of all fundamental rights in Constitution of India is Right to Life. In Boddhisatva Gautam v. Miss Subhra Chakraborty, Supreme Court of India held that Rape is a crime against basic human rights and is also violative of victim's most cherished of the Fundamental Rights, namely the right to life contained in Article 21 of the Constitution of India. Although this judgement is not about marital rape, it may be legitimately argued that mere fact of marriage should not be allowed to justify a violation of fundamental right of life. Article 14 of the Constitution provides for "equality before law" and "equal protection of law". The discrimination between two classes of persons can be made only if there is some reasonable differential. Therefore, the question arises if it is reasonable to differentiate between women sexually abused by strangers and those sexually abused by their own husband.

Indian Penal Code, 1860 defines the offence of Rape under Section 375. Exception 2 to Section 375 absolves a man from the offence of rape for sexual intercourse with his wife above 15 years of age. Thus, the law gives marital exemption to husband from the offence of rape if the wife is above 15 years of age.

One of the arguments against criminalisation of marital rape is that it will destroy institution of marriage. The Law Commission of India declined to recommend deletion of this exception on the ground that it may amount to "excessive interference in marital relationship". The Government of India is also reluctant to remove marital exemption clause from the Indian Penal Code, 1860. Minister of Women and Child Development, Mrs Maneka Gandhi told Rajya Sabha in March 2016 that the "concept of marital rape, as understood internationally, cannot be suitably applied in Indian Context due to various facts like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc." Another argument against removal of marital exemption clause is due to near impossibility of proving marital rape, its criminalisation would only serve as an increased burden to already burdened legal system. In rebuttal to this argument, it is stated that merely because it is difficult to prove marital rape, cannot be ground for not criminalising it. The existence of the offence of marital rape in statute book itself will have a deterrence effect upon perverted husband.

The Declaration on the Elimination of Violence against Women, proclaimed by General Assembly of United Nations recognised violence against women, which inter alia includes marital rape, as violation of human rights of women. Article 4 of the above stated declaration, provides that states should develop Penal, for the offence.

The recommendations of Justice Verma Committee, regarding criminalisation of Marital Rape have not been given effect to by the legislature. On the other hand, recently, Central Government, disclosed its view on the question of Marital Rape by filing an affidavit in Delhi High Court stating that Marital Rape cannot be made a criminal offence, as it could become a phenomenon that may destabilise the institution of marriage and easy tool for harassing the husbands.

Judiciary in India has severely criticised the practice of Marital Rape, but it has failed to take further step towards abolition of exception clause from Indian Penal Code In Nimeshbhai Bharatbhai Desai v. State of Gujarat, Gujrat High Court observed that Marital Rape is a "disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of Women has faced the brunt of the non-criminalization of the practice." Despite this severe condemnation the court did not strike down the exception clause, nor did it urge the Government to do the same.

In Independent Thought v. Union of India, Apex Court refrained itself from going into question of Marital Rape of Women above 18 years of age since that question was not I integrity of a human being. It further ignores the individual freedom of a woman to decline use of her body as sex object, even to her husband.

#### **Marital Rape in view of Privacy Judgement:**

In Justice K.S Puttaswamy v. Union of India Constitutional Bench of Nine Judges of Supreme Court of India has elevated right to privacy to the status of "guaranteed fundamental right". The Court observed that "Privacy in its simplest sense, allows each human being to be left alone in a core which is inviolable". The Apex Court further held that "Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds its origin in the notion that that there are certain rights which are natural to and inherent in human being." In view of above stated position of law, regarding right to privacy, it becomes incumbent upon judiciary and legislature to consider the question deletion of marital exemption from rape clause from statute book. If privacy is a fundamental right, inherent human being, there is no reason to deny this right to a woman just because she is in marital relationship. It may further be legitimately argued that privacy which forms "core which is inviolable" should not be allowed to be violated, against the will and despite her consent of wife even by her husband.

The Apex Court, in above stated case, also took into notice the feminist apprehension that right to privacy may be used as a "vener for patriarchal domination and abuse of women". The court noticed that "women have inviolable interest in privacy". Speaking in the context of state imposed sterilization programmes and state imposed drug testing for women, the court observed:

"The challenge in this area is to enable the state to take the violation of dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty."

Thus, the Court has clearly defined the role of state as protector of "violation of dignity of women in the domestic sphere" and her "privacy entitlements" and thereby ensured that right to privacy works in positive sense of protection of rights of women and not otherwise. It may, therefore, be argued that violation of dignity of women in domestic sphere includes Marital Rape which is violation of privacy entitlement of woman, imposing duty upon state to protect women from such practice.

#### **Conclusion and Suggestions:**

It is submitted that rape law in India is based upon the perception

that Rape is an offence against morality and sex but ignores the fact that it is a crime against physical integrity of a human being. It further ignores the individual freedom of a woman to decline use of her body as sex object, to her husband. The notion that criminalisation of Marital Rape will threaten the sanctity of institution of marriage is not well founded. In fact, mutual trust and respect, the twin pillars of the institution of marriage fell down the moment husband uses force to subdue his wife, physically and sexually. The Privacy Judgement has further strengthened the argument in favour of abolition of Marital Exemption clause and it will be curious to see how the Apex Court will deal with matter as and when occasion arises.

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