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MARITAL RAPE IN INDIA: THE LEGAL LACUNA AND THE NEED FOR REFORM

AUTHORED BY - SREEJITHA U R

ABSTRACT

Marriage is considered to be a holy sacrament and the husband and wife are considered as one and the same. Marriage is a bond out of the love, trust, certain mutual obligations and shared responsibilities between them. However many married women are subjected to marital rape while others go unreported in India. Even though rape is a crime in India, marital rape is not. Marital rape is the forceful sexual act committed by the husband against his spouse without her consent. While there are many special legislations and penal laws which provide protection to women in workplaces, many married woman are subjected to marital rape which results in serious injuries, bodily harm and psychological consequences. There is a need of a strict law for the criminalisation of marital rape in India. Women should not be discriminated on the basis of their marital status. There is an urgent need of a society and law which treats rights of the persons equally thereby removing patriarchal norms in the society. This paper focus on the impact of non-criminalization of marital rape, its legal and social consequences and its need to reform laws in the Indian context.

KEYWORDS: Marital rape, criminalization, sexual violence, consent, background of marital rape in India

INTRODUCTION

Marital Rape is the rape committed by the husband against the consent of his wife, whom is subjected to forceful sexual acts. It is a social evil and a heinous act but is not considered as crime by both the society and the law in India. Marital rape has been criminalized in around 150 countries in the world but it is not penalized in India. Countries like the UK, US, Australia and South Africa have criminalized marital rape. The husband is not guilty under the offence of rape with his wife above the age of 18 during the subsistence of a valid marriage. Earlier the Indian Penal Code and the recently enacted Bharatiya Nyaya Sanhita Act of 2023 ¹did not

¹ Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, Acts of Parliament, 2023 (India).

incorporate any legal provisions to criminalize marital rape in India. In the Indian Penal Code, marital rape was an exception for the offence of rape under Section 375² and now under BNS Act also it falls as an exception for rape under Section 63³. In both the Indian Penal Code and the Bharatiya Nyaya Sanhita, forceful sexual activity committed by a husband with the wife upto the age of 18 is only considered as an offence of rape. In a recent case of *Gorakhnath Sharma v. State of Chattisgarh*⁴, where the wife was subjected to the forceful anal sexual penetration of hands by her husband which resulted in her death in 2017, the Judgment delivered by the Chattisgarh High Court in 2025 ruled that the forceful sexual intercourse committed by the husband towards his wife does not amount to rape under Section 375 of IPC. In my opinion, the consent plays an important role in this aspect, where the women have their own right to life, which includes privacy, dignity, and freedom of choice along with her husband. Where in the Indian Constitution, everyone gets the right to life, dignity and freedom, does the marriages allows the license to husband to do any kind of forced sexual activities without the consent of his spouse which result in causing injuries or even death. There might be many instances while many incidents goes unreported or many might be scared to reveal these acts. She should have her own sexual autonomy and her consent should be considered for any sexual acts. The husband does not acquire the rights to own her body by the institution of marriage. The Survey conducted by National family Health found that between 2019-2021, 32% of married women experienced physical, sexual or emotional violence by their current husbands, and 82% of married women aged 18-49 who have experienced sexual violence reported their current husbands as the perpetrators.⁵ This is just because of the male dominance and patriarchal norms prevailing in the Indian law and society. Mostly men firmly misbelieves that through marriage they have acquired bodily rights of their spouse.

MEANING OF MARITAL RAPE

Marital Rape is the rape committed by the husband against the consent of his wife, whom is subjected to forceful sexual acts. It can include non-consensual penetrative as well as non-penetrative sexual activities by compelling his spouse which can result in both physical and mental issues.

² Indian Penal Code, 1860 § 375

³ Bharatiya Nyaya Sanhita, 2023, § 63

⁴ *Gorakhnath Sharma v. State of Chattisgarh*, 2022 Latest Caselaw 2588 Chatt, 2025 CGHC 7365

⁵ Aisha Akram, *The Decriminalisation of Marital Rape: How India Continues to Refuse Justice to its Married Women*, OHRH (last visited Apr. 11, 2025) <https://ohrh.law.ox.ac.uk/the-decriminalisation-of-marital-rape-how-india-continues-to-refuse-justice-to-its-married-women/>.

CAUSES FOR MARITAL RAPE IN INDIA

- Patriarchal norms, cultural and societal norms prevailing in the society
- Lack of sex education, illiteracy
- Women being considered as a chattel of the husband
- Male dominance existing in the society.
- Existence of Implied Consent during the subsistence of a valid legal marriage.
- Legal protection only to the legally wedded wife below the age of 18 years. Only available are civil remedy under the PWDVA⁶ and under the cruelty within marriage .Marital rape is an exception under the Bharatiya Nyaya Sanhita.
- Financial dependence on husbands and lack of employment opportunities for women
- Addiction to alcohol and drugs also leads to marital rape.

ARGUMENTS AGAINST CRIMINALIZATION OF MARITAL RAPE

The exception of marital rape from the offence was made from the doctrine of coverture and implied consent. Doctrine of coverture was a common law doctrine which allowed wife to be considered as a property of husband. Even though as wife can own property, inherit, enter into legal contracts in India, this principle can be seen in marital rape exception. Implied consent means that in a marital relationship, there is an implied consent to involve in a sexual relationship with the husband.

Other reasons are

Firstly, in order to protect the institution of marriage as it is considered to be sacred.

Secondly, the woman can seek protection under the Section 85⁷ and Section 86 of the BNS Act⁸ and Protection of Women from Domestic Violence Act, 2005 and under various personal laws.

Thirdly, due to Indian cultural and social values it is better to not criminalize marital rape as it will cause disturbance to the familial setup in India, the law will have to interfere into the private matters of the family thus reducing amicable settlement of disputes.

Fourthly, there is a chance of misuse of law by women who are vindictive or revengeful by making false allegations against husbands.

⁶ Protection of Women from Domestic Violence Act, No. 43 of 2005, Acts of Parliament, 2005 (India).

⁷ Bharatiya Nyaya Sanhita, 2023, § 85

⁸ Bharatiya Nyaya Sanhita, 2023, § 86

Fifthly, Burden of proof is one of the complex issue in determining whether marital rape has occurred or not.

CHRONOLOGICAL BACKGROUND AND OUTLOOK OF MARITAL RAPE WITH RESPECT TO INDIAN LEGISLATURE AND JUDICIARY.

In *Queen Empress v. Haree Mythee*⁹, which is an earliest case law regarding marital rape in the British India where the husband was acquitted under the Marital rape exception.

In *Bhagwan Dutt v. Kamla Devi*¹⁰, The court emphasized the respect for married women in dignity and autonomy.

In *Sareetha vs. T. Venkata Subbaih*¹¹, 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”. The state does not have the right to enforce the non-consensual sexual intercourse between husband and wife as it is in violation of right to privacy and cannot be forfeited by the marital relationship. This judgment was later overruled and Section 9 of the Hindu Marriage act¹² was upheld.

In *Harvinder Kaur v. Harmander Singh*¹³, The High Court of Delhi stated that Indian Constitution cannot step into the household matters as it will cause destruction to the marriage which is considered to be sacred, also pointed out that Article 21¹⁴ and Article 14¹⁵ of the Constitution of India does not have any part to play in the domestic privacy and marital life.

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*¹⁶, held that even an unchaste women shall have the right to protect herself and deny forceful sexual intercourse in case if her right to privacy is violated by anyone but this right is outrightly

⁹ *Queen Empress v. Haree Mythee*, (1891) ILR 18 Cal 49

¹⁰ *Bhagwan Dutt v. Kamla Devi*, (1975) 2 SCC 386

¹¹ *Sareetha vs. T. Venkata Subbaih*, AIR 1983 AP 356

¹² Hindu Marriage Act, 1955, § 9, 781. Acts of Parliament (India).

¹³ *Harvinder Kaur v. Harmander Singh*, AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187

¹⁴ Art.21, THE CONSTITUTION OF INDIA, 1950.

¹⁵ Art.14, THE CONSTITUTION OF INDIA, 1950.

¹⁶ *State of Maharashtra vs. Madhukar Narayan Mandikar*, 1994 CriLJ 1735 (All HC)

rejected to the married women in India. The Supreme Court assertively stated that each and every woman has the right to privacy and it shall not be violated.

In *Vinay Kumar v. State of UP*¹⁷, the court held that the husband cannot claim to have sexual intercourse with the wife under judicial separation and upheld dignity and sexual autonomy of wife and the exception 2 of Section 375 of IPC¹⁸ can be invoked.

In *Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty*¹⁹, the Supreme Court held that rape violates Article 21 of the Indian Constitution as it violates the basic human rights and breaches the victim's right to life and dignity.

In *Sree Kumar v. Pearly Karun*²⁰, the Kerala high court held that the judicial separation does not mean an end to the institution of marriage and hence the husband cannot be guilty of rape due to the exception 2 of Section 375 IPC and can only be charged under Section 498A of IPC²¹.

Further, in the case of *Suchita Srivastava v. Chandigarh Administration*²², the Supreme Court held the right to make choices related to sexual activities is personal liberty.

Following the Nirbhaya Rape incident in 2013²³, ambit of rape under Section 375 was widened by adding non penetrative forms of acts to be included under the ambit of rape and various other sections protecting women such as Section 376B²⁴ – Sexual intercourse by the husband during separation was also penalized with enhanced punishments. Only after this incident, the exception of marital rape was enhanced from the age of 15 to 18 years. Justice J.S Verma Committee had proposed for criminalizing marital rape in India and stated that legal wedlock didn't mean an implied consent to any kind of sexual activities²⁵. However, the Parliamentary Standing Committee on Home affairs rejected this recommendation of criminalizing marital rape and gave the opinion that if exception under Section 375 removed, it will facilitate

¹⁷*Vinay Kumar v. State of UP*, 1994 CriLJ 1735 (All HC)

¹⁸ Indian Penal Code, No. 45 of 1860, § 375, Exception 2, Acts of Parliament, 1860 (India).

¹⁹ *Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty*, 1996 AIR 922, 1996 SCC (1) 490

²⁰ *Sree Kumar v. Pearly Karun*, 1999 Cri LJ 3962(Ker)

²¹ Indian Penal Code, 1860 § 498A

²² (2009) 14 SCR 989

²³ *Mukesh and Anrs. vs. NCT Delhi*, 4 (2017) 6 SCC 1

²⁴ Indian Penal Code, 1860, § 376B.

²⁵ J.S. Verma Report, supra note 32, 117.

husbands will be maliciously prosecuted and the entire system of family will be disturbed and destroyed.

In the case of *the State vs. Vikash Sharma*²⁶, 2014, Special fast track court in Delhi recognised that "the petitioner and respondent (accused) being a legally married husband and wife, the petitioner being major, the sexual intercourse between the two, whether forcible, cannot be considered as rape and no conviction can be fixed upon the accused."

In 2015, the RIT Foundation filed a Public Interest Litigation in High Court of Delhi challenging of marital rape exception in section 375 of the IPC on the grounds of violation of the fundamental rights i.e., Article 14, 15²⁷, 19²⁸, and 21 of the Indian Constitution. In *All India Democratic Women's Association v. Union of India*²⁹, also challenged the marital rape exception and was clubbed with this RIT Foundation case.

Shri. Maneka Gandhi, who was the then minister for Women and Child Development in 2015, opined that the notion of marital rape cannot be enforced in India even though it is well understood and accepted by people globally.³⁰

*The Kerala High Court in a decision held that the marital rape can be treated as a good ground for divorce and the husband does not owes the body of his wife. The court said that "Merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce. We, therefore, are of the view that marital rape is a good ground to claim divorce." This judgment can be called as a shift to betterment of the society and its concern to prevent marital rape and any sort of violence against women.*³¹

In *K. V. Prakash Babu v. State of Karnataka*³², the court held that acts of cruelty constitutes under Section 498A of IPC and does not amount to rape.

²⁶ *the State vs. Vikash Sharma* ,AIR 1978 SC 1091

²⁷ Art.15, THE CONSTITUTION OF INDIA, 1950.

²⁸ Art.19, THE CONSTITUTION OF INDIA, 1950.

²⁹*All India Democratic Women's Association v. Union of India*, WPC(C) 1072/2015 – Delhi HC

³⁰The indian express ,<https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>(last visited apr. 11,2025)

³¹ X v. X, Mat. Appeal No. 151 of 2015

³² *K. V. Prakash Babu v. State of Karnataka* ,(2016) 12 SCC 654

In *Forum for Engagement of Men v. Union of India*³³, men's rights group opposed the criminalization of marital rape.

In *Independent thought v. UOI*³⁴, the Supreme Court recognized the marital rape for time and held that the sexual intercourse with the wife under the age of 15 to 18 would constitute and fall under the category of rape. But it did not recognize the non-consensual sex with wife after the age of 18 as a rape. This case can be said to be a small step towards partially recognizing marital rape up to the age of 18 years.

Honorable Justice DY.Chandrachud while delivering the Joseph shine judgment³⁵ which struck down adultery law (Section 497 IPC³⁶), also has held that man is not the owner' of the sexuality of wife. Thus, from the above judgement it is clear that Exception 2 of section 375 violates Article 14 and 21 of Constitution of India and therefore marital rape should be criminalized in India as well.

In the case of *Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat*³⁷, High Court of Gujarat through Justice Pardiwala made a progressive judgment that although marital rape is an exception and the wife can file a petition under Section 377³⁸(sexual intercourse against the order of nature) of the IPC. Here, the wife had filed a complaint alleging against her husband for forcible oral and anal sex.

In 2018, Shri, Shashi Tharoor, the then Minister of Parliament introduced a private bill in Parliament on 'The Women's Sexual, Reproductive and Menstrual Rights Bill,' which was aimed to criminalize marital rape in India. However, the bill got lapsed.³⁹

In the case of *Anuja kapur v. Union of India*⁴⁰, a Public Interest Litigation was filed in the Supreme Court to direct the Government of India to release guidelines and laws on marital

³³ *Forum for Engagement of Men v. Union of India*, WP(C) 1463/2017 – Delhi HC

³⁴ *Independent thought v. UOI*, (2017) 10 SCC 800; AIR 2017 SC 4904

³⁵ *Joseph Shine v. Union of India* (2018)2 SCC 189

³⁶ Indian Penal Code, 1860 § 497

³⁷ *Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat*, 2018, Guj 732

³⁸ Indian Penal Code, 1860 § 377

³⁹ *Shashi Tharoor's Bill Seeks to Make Marital Rape a Crime*, LiveLaw (Dec. 18, 2018, 5:01 PM), <https://www.livelaw.in/news-updates/shashi-tharoor-bill-seeks-to-make-marital-rape-a-crime-141823>.

⁴⁰ *Anuja kapur v. Union of India*, W.P.(C) No.3/2018(India)

rape in India but the Supreme Court headed by Justice SA Bobde and Justice BR Gavai turned down the petition and stated that it is on the part of legislature to formulate or legislate on any subject matter and not on judiciary, the court is concerned with the interpreting law rather than drafting.

The High court of Chhattisgarh in the case of *Dilip Pandey v. State of Chattisgarh*⁴¹, the Chattisgarh High Court held that any forced sexual activities by the husband of a valid marriage will not fall under the offence of rape, even it is without the consent of the wife.

The High Court of Karnataka in the case of *Hrishikesh Sahoo v. State of Karnataka*⁴² stated that *the exception provided under Section 375 can't be considered to be absolute in nature as there is no exception in law which is so absolute that it gives or allows a license or permission granted for commission of crime against society.*

The Supreme Court's observations in *X vs The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi*⁴³ highlighted the flaw existing in the IPC's marital-rape exception. The court disregarded the view that "only strangers are guilty of gender-based violence" and acknowledged that "intimate partner violence is a reality and can take the form of rape." Importantly, it held that rape includes marital rape for the purpose of the Medical Termination of Pregnancy Act, 1971.⁴⁴

*In RIT Foundation v. UOI*⁴⁵(2022), while delivering the judgment, with one of the judge dissenting and striking down the down the marital rape exception as unconstitutional, while the other upholding its constitutional validity. Justice Hari Shankar, dissenting judge opined that sexual intercourse between a husband and a wife is considered to be sacred. He stated that the notion of marital rape is "antithetical to the very institution of marriage" and that marital rape is unconstitutional in nature. The judge further opined that "it would be artificial to assume that the degree of outrage felt by a wife who is compelled to have sex on a particular occasion with her husband, despite her unwillingness, is the same as the degree of outrage felt by a woman who is ravaged by a stranger against her will."

⁴¹*Dilip Pandey v. State of Chattisgarh* ,2021 SCC online Chh 3964

⁴²*Hrishikesh Sahoo v. State of Karnataka*, 2022 SCC OnLine Kar 371

⁴³ *X vs The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* ,[2022] 7 S.C.R. 686

⁴⁴ The Medical Termination of Pregnancy Act, 1971, No. 25, Acts of Parliament, 1971 (India).

⁴⁵*RIT Foundation v. UOI*, WRIT PETITION (C) NO. 284/2015.

In 2022, a dalit woman rights activist Ms. Ruth Manorama filed a fresh petition at the Supreme Court challenging the marital rape as an exception. On 9 January 2023, a Bench comprising of the then Hon'ble Chief Justice D Y Chandrachud and Justice P S Narasimha merged together the petitions and listed them all for hearing on 21st March, 2023.

On 21 December 2023, Parliament passed the Bharatiya Nyaya Sanhita. Under the Section 63 of the Act which deals with the offence of "rape" also includes the same marital rape exception which was found under the Section 375 of the IPC.

The case remained unheard for almost a year until in January, 2024 where it was listed for hearing before the bench of the then Hon'ble CJI Chandrachud and Justices J B Pardiwala and Manoj Mishra.

On 1 May 2024, the High court of Madhya Pradesh in *Manish Sahu vs State of Madhya Pradesh*⁴⁶ held that "any sexual intercourse or sexual act by the husband with his wife not below the age of 15 years is not a rape, then under these circumstances, absence of consent of wife for unnatural act loses its importance."

On 4 October 2024, the Union government filed an affidavit opposing the striking down of the marital rape exception. It stated that while the husbands have no right to deprive the fundamental rights of a women, describing this violation as "rape" under the "institution of marriage can be arguably considered to be excessively harsh and therefore, disproportionate." However, the consequences of such violations within marriage differ from those outside it." However, it relied on efficacy of other legal provisions in the Bharatiya Nyaya Sanhita and the Protection of Women from Domestic Violence Act, 2005 which are equipped with protecting the women.

The Supreme Court had made it clear that rape is an invasion to the privacy of the women and it infringes her from the right to have a dignified life. Judiciary asks the legislators to frame new laws to protect married women against marital rape. Indian judiciary has moved a way forward by considering marital rape as a ground for divorce and exception is not absolute. Many contradicting views are taken by various High courts regarding the cases. Even though

⁴⁶ Manish Sahu v. State of M.P., 2024 SCC OnLine MP 2603

bill was introduced in Indian Parliament by Shri. Shashi Tharoor, his efforts remained to be futile, Justice J S Verma Committee report and 42nd Law Commission reports also remains to be in vain. The central Government is still insisting in continuance of the current legal framework as the criminalization of marital rape will destroy the institution of marriage.

INTERNATIONAL AGENCIES AND ORGANIZATIONS VIEWS ON MARITAL RAPE

Marital rape was first explicitly included as an act of Violence against Women in Article 2 of the UN Declaration on Violence against Women, 1993.

According to Article 51(c) of the Indian Constitution⁴⁷, India is bound to obey the treaty obligations under the International Law. India is also a party to various international covenants like ICCPR, ICESCR, CEDAW and has also signed UDHR. Additionally, India not only signed the Universal Declaration of Human Rights and also significantly played an important role in its establishment but India continues to explicitly violate the basic fundamental rights to its own married women by not criminalizing marital rape .According to Article 1 of UDHR, everyone shall have equal rights and dignity.

According to Article 6 of ICCPR, everyone has the right to dignified life and health and the state cannot arbitrarily deprive it.

India has enacted the Human rights Act of 1973⁴⁸ and has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1993. Marital rape is considered as one of the form of violence by CEDAW. According to Article 1 of CEDAW, states that discrimination of women means any curtailment or restriction made on the basis of sex which impairs the recognition ,enjoyment ,exercise in civil , cultural, political areas irrespective being married and should be given equal treatment as men. According to Article 2(b) of CEDAW, states that all state parties should prohibit all forms of discrimination against women and Article 3 states that the state parties shall be all measures in the field of social, political and cultural areas to guarantee human rights and fundamental freedoms to all women as same as men . Article 15 deals that the state shall treat women and men equally before the

⁴⁷ Art.51(c), THE CONSTITUTION OF INDIA, 1950.

⁴⁸ Human Rights Act, 1973, Act No. 42, Acts of Parliament, 1973 (India)

law & Article 16 states that men and women shall have equal rights in marriage and shares the responsibilities equally.

In 2019, UN urged the nations for solving legal lacunas relating to marital rape. Marital rape can be considered as a violation of human rights to married women.

India should criminalize marital rape in India, it can be called as a gender biased discrimination towards married women, State parties should fulfill the international obligations hence India should also follow it thereby protecting every women in India without any discrimination. Married women from the age of 18 in India does not have a legal recourse to protect them from sexual violence committed by husbands.

IMPACT OF MARITAL RAPE IN WOMEN

Women can be subjected to both mental and physical health consequences.

Even without the protection of law and without the support of society, marital rape can lead to psychological consequences like insomnia or sleeplessness, clinical depression, fear, confidence lacking, anxiety and stress, low self-esteem, suicides, sexual dysfunction, mental trauma etc.

Also it can lead to gynecological issues like miscarriages or abortions, spread of sexual transmitted diseases, still-births, prolapse of uterus, pelvic inflammatory diseases.

The physical injuries caused due to forceful sexual acts can include bruises, pain in the anal and vaginal areas of the body. Most of these can be long-term aftereffects.

WHY MARITAL RAPE SHOULD BE PENALIZED IN INDIA?

Marital rape should be penalized in India because the married women are subjected to cruelty and torture just like the offence under section 64 rape of BNS, only difference is that it is done by their own husband and during the subsistence of a valid marriage. Marriage does not give a permission to own her body and bodily autonomy. Women cannot be considered as a chattel of the husbands, they have their right to dignified life and right to privacy. Consent is the most important criteria and the cruelty towards wife during marriage should not be encouraged. The idea or concept of marriage has also changed in which partners are looking for equal rights

and dignity. Cultural values must be kept aside, in order to protect the rights of married woman earlier abolishing sati and remarriage were considered as against the cultural values of India, later on laws were changed accordingly. Marital rape also can be considered as against the Article 14 and Article 21 of the Indian Constitution. Married women up to the age of 18 years are protected under the BNS Act 2023, the women after this age have also the right to get the protection under the law as it would be unconstitutional and arbitrary and against the Article 14 of Indian Constitution. Marriage is sacred and holy union of two persons made of trust, love and faith, it is unacceptable to use force and harm on the spouse .Marital rape exception ignores the sexual violence and health consequences both mental and physical in the women.

INDIAN LAWS AND MARITAL RAPE

The Indian laws which protects the married women from these atrocities are the Protection of Women from Domestic Violence Act and under the Bharatiya Nyaya Sanhita, 2023.

Section 3(a) of the PWDVA defines sexual abuse as “any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman”, and considers that spousal sexual violence is a type of domestic violence.⁴⁹

Even though there is a clear legal recognition of sexual violence within wedlock by PWDVA, the exception to Section 63 condones rape within marriage, PWDVA is civil law and provides damages or civil remedies to women. The civil remedy available are order for protection to stop violence against women and also offers compensation and other reliefs to the aggrieved wife.

The sole provision available in criminal law that a woman can use is Section 85 IPC which recognizes cruelty within marriage. Cruelty is defined as any conduct that may cause serious injury or harm or drive a woman to commit suicide as a consequence of ongoing abuse. This definition raises the bar of evidence very high because women mostly has no evidence of acts of violence perpetrated against them. The chances of getting evidence is very own, as the crime is of very private nature. There is differences in the nature and act between the rape and cruelty. The maximum punishment under Section 85 of BNS is only three years with/without fine and the maximum punishment for rape is life imprisonment. These difference in the

⁴⁹Protection of Women from domestic violence Act,2005§ 3(a)

punishment shows that the concept of cruelty cannot in any manner dealt with the offence of marital rape.

FUNDAMENTAL RIGHTS AND MARITAL RAPE

Article 14 of the Constitution of India guarantees all the citizens with the equal protection against laws and equality before law, without discriminating them based on caste, colour, class, creed, age, sex, religion or place of birth within the territory of India. The marital rape exception under Section 63 under the Bharatiya Nyaya Sanhita, 2023 violates the right to equality enshrined in Constitution of India. This exception discriminates the married women above the age of 18 with the other unmarried women and married women below age of 18. Only difference is that they are subjected to the atrocities by their own husbands in a valid legal marriage. The marital rape exception discriminates the women on the basis of age and marital status.

Right to life under Article 21 of the Constitution of India is the basic fundamental right provided to citizens and non-citizens irrespective of their nationality. Marital Rape infringes the right to life of legally wedded women above the age of 15 years as it deprives her of her life, dignity, personal liberty. It is a clear violation as there is high chance of being attacked causing damage to body and even death.

RECOMMENDATIONS

- There is a need for special legislation for the protection of married woman against marital rape or the existing Bharatiya Nyaya Sanhita, 2023 Act should undergo amendment to insert legal provisions criminalizing Marital rape. There must be a strong legal framework looking into the complexities of consent, burden of proof, evidences to substantiate the crime of rape etc. The law should give strong emphasis that marriage is not a defence for committing marital rape.
- Marital rape shall be kept on par as rape under Section 63 of Bharatiya Nyaya Sanhita, 2023.
- Women should not be discriminated on the basis their marital status as it is in violation of fundamental rights Article 14, Article 21 of the Constitution of India.
- Removal of exception clause under Section 63 of BNS act and the addition of exception clause that the marriage is not a defence.

- The J S Verma Committee report had suggested for the elimination of exception 2 under Section 375 of IPC and that the marriage is not a defence for any kind of atrocities towards their spouse, there will be no presumption of consent in marital rape and should have the same quantum of punishment as rape. Whereas the 42nd Law Commission suggested that the marital rape should be kept under different section and not called as marital rape and different punishment should be given for marital rape. The sentencing policy should be made considering whether marital rape and rape under Section 64 of IPC requires same quantum of punishment or not. In my opinion, marriage does not act as a ground to reduce the punishment to husbands.
- Producing evidence in support of the marital rape is extremely difficult .Consent can be understood only by circumstantial evidence, there is also chances of woman to seek revenge or falsely prosecute her spouse of committing marital rape. As the nature of act is private, evidences should be collected with care and caution, doctors and scientific experts opinions can be used, main evidence of the crime is the testimony of the victim or spouse. Force only cannot be taken as an evidence of committing marital rape, also the sexual intercourse cannot be alone taken as a proof of marital rape. Testimonies of other family members, preceding harassments and assault by husband, bodily harm to wife can be considered in determining the crime. All the factors should be properly looked into before framing of a new legislation.
- Cultural and societal values not supporting marital rape does not mean that there is no need to criminalize marital rape. Looking into the Article 14, the married woman above the age of 18 also deserves to receive equal status as any other unmarried woman or like any married women below the age of 18. Considering Article 21, the married woman deserves to have right to life, liberty, to live a dignified life as any other unmarried woman. Considering cultural and societal values alone, would not serve justice to the married woman.
- Sex education should be imparted to all men and women in both urban and rural areas. Public Awareness campaigns should be conducted by the Government with the support of NGOs, women and child and women protection helplines. Police and other law enforcement agencies should impart legal education, awareness, legal aid to women to address their concerns without any fear or hesitation. Free medical services, shelters, camps should be made to ensure protection to women by the Government. Not only

enactment of a special legislation, there is a need of strict enforcement from the State government to address the issue of marital rape and prevent it.

- There is a need of sufficient amendments to personal laws relating to marital rape such as considering marital rape as a ground for divorce, as a ground for maintenance, custody of children .

CONCLUSION

It's high time for India to criminalize marital rape and to strike down the marital rape as an exception in Bharatiya Nyaya Sanhita, 2023. Marriage cannot be used as a defence to marital rape. It cannot be called as a privilege of husband, it is a grave injustice to married women who are subjected to sexual violence. It is an injustice done to married women in India who cannot file a petition against her husband for these atrocities. There has been a progressive shift from the Indian judiciary to consider marital rape as a ground for divorce but there is a need from the side of the Indian legislature to enact a special legislation or to add a new provision in BNS to criminalize marital rape. The patriarchal and the societal norms should not deter and put a way to discriminate married women above the age of 18 as it is a clear violation of Fundamental rights enshrined in the Constitution of India. The society, legislature and judiciary should try together to eradicate this crime and rethink the grave injustice done to them.

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