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MARITAL RAPE AND THE ILLUSION OF CONSENT

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INTRODUCTION

Marital Rape means where one indulges in sexual intercourse with one's spouse without the consent of the other partner. It is one of the legally overlooked concerns. In terms of marital rape, the foremost question that comes is "If they are married, then how can it be rape?" It is because of the deeply rooted idea that has been embedded in the minds of people. It is a ubiquitous yet misunderstood term in the context of marital rape. If we consider the most underreported offences, then marital rape would top the list. There is an urgent need to consider why it is so underreported and how one can freely report it. In our country, where we talk about equality under Article 14 of the Constitution and Article 21, which talks about the right to life, which is applied to everyone irrespective of the relationship they are in, when it comes to marital rape, why are these laws being resisted? Traditionally, sexual intercourse, even without the consent of the spouse, was considered a right, but over the many, society has realized the need to criminalise marital rape as an offense. The need to understand that consent cannot be overridden and that marriage is not a license to violate the dignity of the woman, rather it is a partnership in which there should be mutual respect between the spouses. It is surprising that in a country like India, where sexual violence is a crime, forced sex is still an exception. So husbands consider marriage as a shield to abuse their wives.

HISTORY OF MARITAL RAPE. One can trace back the origin of the evolution of marital rape from the 18th century itself by Sir Mathew. According to whom, husbands cannot be made guilty of rape committed on their lawful wives. For ages, it was believed in the male patriarchal society that. ¹Men are the ones who are the sole breadwinners, and women have to be the ones doing household chores, and men have full rights over the bodies of their wives. The notion

¹ PSA Pillai, Criminal Law, 832 (KI Vibhuti Ed., LexisNexis, 14th ed., 2019)

that women are the property of their husbands was very much prevalent. They assumed that when a woman is married to a man, it is like an implied consent given by a woman to her husband to have sexual intercourse with her. The right to say NO is not even an option.

Earlier, there was a prevalent practice, i.e, Sati Pratha, in which, when a woman's husband dies, she jumps into the funeral pyre of her husband. The major idea was that a woman cannot exist without men. The Indian Penal Code was made by Lord Macaulay. It has section 375, which defines rape, but there is an exception to this definition, i.e, exception 2, which says sexual intercourse or sexual act done by a man with his wife (the wife shouldn't be under the age of 15 years) will not constitute rape. Though the change to the age of the wife having sexual intercourse has been made but the power given to husbands to have sexual intercourse with their wives with or without consent remains the same. In case of BNS section 63, too, the age has been changed from 15 years to 18 years; the rest of the exceptions remain the same.

Justice Verma Committee report,2013, recommended removing the exception stating that the marital relationship must not be a license to sexual violence, as consent is a crucial issue in this regard, irrespective of the relationship.

JUDICIAL DECISIONS

Various changes have been brought through cases. In the case of Harvinder Kaur v. Harmander Singh²The court states that the court cannot interfere in domestic matters as it would destroy the very institution of marriage. In this case, the question was of the constitutional validity of section 9 of the Hindu Marriage Act, as well as the issue of forced sexual cohabitation between the husband and unwilling wife. The court stated that section 9 simply means cohabitation, not sexual cohabitation; both are different terms, and if the court were to interfere in such matters, it would lead to tension. It was noted that the domestic community does not rest on sealed promises, but rather on morality and ideals.

After the Nirbhaya Rape case and Tukaram v. State of Maharashtra case,³the term "Rape" and its scope were re-interpreted, but there were no changes made to remove exception 2 of IPC section 375. In the case of Independence Thought v Union of India⁴, the Supreme Court re-interpreted the exception given under section 375 of IPC given making harmony between laws like POCSO and Juvenile Justice Care and Protection of Children Act, as under those acts, a

² Harvinder Kaur vs. Harmander Singh AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187

³Tukaram v. State of Maharashtra,1979 AIR 185

⁴Independent thoughts v Union of India, AIR 2017 SC 4904

“child” would mean a person who is less than 18 years of age. The Supreme Court declared that sexual intercourse with a wife aged between 15 to 18 years will be considered as Rape. It was held that sex with a minor wife is rape, despite the marital relationship. Here, one can see that though the scope of protection was increased but the real question of a man’s sexual act with his unwilling wife is still not addressed. In the case of *Nimesh bhai Bharat bhai Desai v State of Gujarat*⁵, the Gujarat High Court stated that even though forced sex by a husband to his wife is cruel and that the notion of implied consent has to be removed, the law must give equal protection to both married as well as unmarried women. All this shows the urgent need to remove the exception and to criminalize marital rape as it hampers women's dignity, and they are the one who suffers in silence.

When we talk about our constitutional rights, that is being given to everyone, Article 14 which states equality before the law and equal protection of law and Article 21 which talks about the right to life and personal liberty is most relevant here but here the question of the right over one’s own body comes, if Article 21 guarantees right to life and personal liberty it also guarantee the right to dignity and the one’s control on their own body, then how come marital rape is still an exception under section 63 of BNS. It is then contradictory to the rights given under Article 21. IN BNS section 63, exception 2 is making a distinction between married and unmarried women, i.e, if an unmarried woman is being raped, it is considered rape and they have protection under the law, whereas if a married woman is raped by her husband, it will not amount to rape. Here, the bias as well as the immunity being given to the husbands is visible. So, where is justice then? The law is then only for unmarried women and not for married women. In May 2022, various PILs challenged the Delhi High Court to review the constitutionality of section 375 (exception 2). The Delhi High Court gave a split verdict on this issue to criminalise marital rape. The perspective or the opinion of the two judges who gave the verdict was different. In the judgment by Justice Rajiv Shakti, he highlights that when rape is done on an unmarried woman, she is protected through the law, but when the same happens with a married woman, she is not protected. The married woman has the right to withdraw her consent to sexual intercourse, be it at any point in the relationship, whenever she wants; one cannot take away her right over her body. Hence, it becomes necessary to strike down this exception 2 of section 375 as it is unconstitutional and it violates Articles 14, 15, and 21. The Judge also added that marital rape not only leaves physical scars on the body but also on the mind as well which will remain with the victim throughout the years.

⁵ *Nimeshbhai Bharat Bhai Desai vs. State of Gujarat*, 2018, Guj 732

The verdict given by Justice C Hari Shankar contradicted the verdict given by Justice Shakti, saying that this exception is constitutional as the sexual intercourse between husband and wife cannot constitute rape, and he made a comparison between a non-consensual sexual act with one's husband and a non-consensual sexual act with a stranger. It was highlighted that the level of outrage of the woman who is raped by a stranger is far more intense than when a woman has a non-consensual sexual act with her husband. It was also noted that the changes in the law have to be made by the legislature, as it includes certain social, cultural, and legal aspects. So, making changes in the law would amount to interference in the legislative functions. The case is taken to the Supreme Court, and the debate is still going on. This split decision between the judges shows different perspectives of men towards the same issue. Hence, this split decision created a deadlock situation, and now the decision of the Supreme Court is much-awaited in the matter.

TRENDS THROUGH TIME

According to the report released by the National Family Health Survey in 2015 -16, there were around 83% of married women aged between 15 to 49 who go through sexual violence. As per the NFHS-4 report, around 4% of women were being forced by their husbands to have sexual intercourse, 2.1% of the women were forced to perform sexual acts, wherein 3% were threatened when the wife refused.

According to NHFS-5⁶ Around 1 in every 3 Indian women between the ages of 18 -49 has suffered from some form of spousal abuse. It was conducted in (2019-2021), in which a total of 6.37 lakh sample households in 707 districts in 28 states and 8 union territories, covered over 7,24,115 women, out of which 32% of married women suffered from spousal physical and sexual violence (the most common type was slapping). 14% of women have experienced emotional violence. If we see state-wise, Karnataka has topped the list with 48% of women suffering spousal violence. 40 -41% in Manipur, Tamil Nadu, and Telangana.

INTERNATIONAL COMPARISONS-Around 150 countries all over the world consider marital rape a crime. The first country to criminalise marital rape was the USSR in 1992. Poland recognised marital rape as a criminal offence in 1932. In the UK, in 1992, after the case of R v. R, the exception to marital rape was removed from the common law, and marital rape was defined as an act of penile penetration by the husband on his non-consenting wife. In the

⁶ <https://www.nfhsiips.in/>

case of the USA, by 1993, marital rape was criminalised as a crime in the sexual offences code in all 50 states of the USA.

In the case of Norway, Israel, Belgium, the Netherlands, Sweden, Germany, and many more countries, marital rape has been criminalised as an offense. In Nepal, in 2006, the court struck down the exception on marital rape, considering the right to the body and human rights. But India and other countries, including Afghanistan and Pakistan, remain among the shrinking group of countries where the law keeps the exception, giving immunity to husbands over the non-consensual sexual intercourse to wife.

CONCLUSION Hence, there is an urgent need to remove the exception that guarantees immunity to husbands during marital rape and to recognise the need for spousal consent. By way of imposing stricter punishments for marital rape, it will help to deter such crimes and reduce their prevalence. Women do not dare to report such incidents as they happen within the four walls of the house, and they have the constant fear that the law will not stand by them and protect them, and a constant fear of societal stigma that shuts their mouths forever, which pushes them to emotional and legal invisibility. Marital rape hampers women's dignity and provides the superiority to husbands to act accordingly to their choice, and in that process, the whole question of consent of wife is reduced to dust. The right to say no should be given to women. By criminalising the act of marital rape, the perspective that just because the wife has taken marital vows, it doesn't amount to the unconditional and lifelong sexual consent without her willingness. The need to acknowledge a woman's consent and dignity remains an inevitability, as marital rape is not just a moral wrong but also a legal offense that goes against the constitutional jurisprudence.

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