

When Rape Isn't Rape: Justice Restricted in case of Married Women in India

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Abstract: Rape in its all forms considered as a criminal offence and are punishable except rape within wedlock of marriage under 'Bhartiya Nyaya Sanhita, 2023'³ (hereinafter referred as BNS) and even earlier in 'The Indian Penal Code, 1860'⁴ (hereinafter referred as IPC). It is not construed as rape due to protection provided by exception 2 to sec. 63 of BNS (earlier section 375 of IPC).

However, such marital exception is a major contravention of our Constitution and human rights principles, still is a limb of our Indian Law. Even, presence or absence of consent makes no difference here at all.

Only two instances exist there, where rape within marriage is punishable. Firstly, in case of sexual intercourse by the husband upon his wife while separation under section 67 of BNS (earlier 376B of IPC) and secondly, under child marriage, where girl child is under eighteen years of age.

Because these are only few above-mentioned provisions in existing Indian legal system to punish husband for committing rape upon his lawfully wedded wife, access to justice to such class of women who is married is highly restricted and hence it may be achieved in true sense through criminalisation of rape within marriage in a balanced way on the lines of gender equality and restorative justice.

³ Act No. 45 of 2023.

⁴ Act No. 45 of 1860.

Keywords: Marital Rape, Rape within Marriage, Rape, Cruelty, Sexual Violence, criminalisation, Marital Exception, Human Rights, Restorative Justice.

Introduction .1

“Yatraa naryastu pujoyunte ramante tatraa Devataa, yatraitaastu naa pujoyante sarvaastatrafalah kriyah”- यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः। यत्रैतास्तु न पूज्यन्ते सर्वास्तत्राफलाः

क्रियाः॥- is a famous shloka taken from ancient metrical Sanskrit text Manusmruthi which means- where Women are honorified, godship blossoms there, and where women are shamed, all action, no matter how magnanimous remain unfruitful.

Swami Vivekananda had also said “That country or nation that does not give reverence to women have never become reputative, nor will ever be in future”.

The Vedas even glorify women as the unique creation of God, a multi-faceted and all-round personality with the power of tolerance, adaptability, adjustability, kindness and integrity.

So, India is a land where women are being considered divine and worshipped as Devi from the ages without any scope of gender biasness. But with the travel of time, the condition of women gets deteriorated and become pathetic in modern Indian society which is an issue of sedate concern.

There are several forms of crime against women prevalent in the our society. But, only offence of rape within marriage would be discussed here in detail.

The word ‘Rape’ came from the Latin term ‘Rapia’, which means “to seize”.⁵ Rape is an act of aggression in which women are denied her self-determination. The definition of rape may secede from one state to another as per their respective legislature, but in almost in every country such definition is limited to forced or non-consensual or vaginal penetrations. The definition in many countries also

5 G.V. Akshaya and M. Kannappam, A Study on Marital Rape in the Indian Legal Scenario, International Journal of Pure and Applied Mathematics, Vol. 119 No. 17 2018, 1089-1100.<https://acadpubl.eu/hub/2018-119-17/1/94.pdf>.

gives immunity to a particular class of males namely husbands, who cannot be accused of rape of their own wives. Similarly, in the majority of the legal system, the interpretation of term rape does not go athwart the parameters of a patriarchal value system⁶and male dominance.

Earlier, IPC conferred two exceptions where a sexual act without consent will not be deemed to rape. First exception is under a medical procedure or intervention and second one is sexual intercourse under wedlock of marriage by a man with his own wife, if the wife not being under the age of 15 years, do not constitute rape. The said exception had become a burning issue as it establishes that, under a lawful wedlock of marriage, a husband will not be held convicted for raping his own wife. In fact, after 2013, age under above said second exception was extended from 12 to 15 years through amendment in old Criminal Laws.

Thereafter in the past, in a landmark case, *Independent Thought v. Union of India*,⁷ the Honorable Supreme Court partially read out such an outmoded exception to the definition of rape. The division bench has ruled out that if a husband under wedlock of marriage rapes his minor wife (i.e. below 18 years), he will not be immunized from Sec. 375 of IPC and is to be held convicted for rape.

The Honourable apex Court explained further that, classification between unmarried and married female child under 18 years of age is artificial and arbitrary. It was reckoned as an unreasonable classification as per Article 14⁸ under Indian constitution, as the classification has no rational nexus with any clear objective that can be achieved. Such exception was also declared unconstitutional on the lines of

6 Dr. Vandana, Marital Rape- Exemption under Penal Code, 1860: quest for Recognition and Liability, *ILI Law Review* Vol. II, Winter Issue 2017.

7 *Independent Thought v. Union of India*, (2017) 10 SCC 800.

8 The Constitution of India, 1950 Art. 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 159 (right against discrimination) and Article 2110 (right to life) of Indian Constitution.

On the lines of recent developments in this matter, even in BNS, above said age limit has been put as 18 years in place of 15 years.

Thus now, second exception to section 63 of BNS may be read as: - “Sexual intercourse under wedlock of marriage by the husband with his wife (wife not being a minor), is not considered as rape”.

Such developments in this regard have become considerable events for the persons who were combating for rights of child and women. But, not able to get the whole exception declared unconstitutional, it is like moving only a single step towards the conquest for those fighting for providing access to justice to the victimized persons of marital rape through its criminalisation.

2. Historical Background

Rape under wedlock of marital union has not been reckoned in the Indian civilization since time immemorial. In India, marriage is regarded the sacred institution through which any human being authenticates his or her right to procreate. When a person enters into marriage, it is reckoned that there is an automatic or implied consent for any sexual act to his partner.

According to K. Vibhute, this exemption is based on the reciprocal matrimonial contract and this contract takes the right from wife to withdraw her consent to take part in sexual intercourse with her husband.¹¹

The rules to be pursued by a married couple can be founded in the ancient Sanskrit texts like Upanishads, Manusmriti and customs prevailing in our civilization.

9 The Constitution of India, 1950 Article 15: The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

10 The Constitution of India, 1950 Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

11 K. Vibhute, Rape within Marriage in India, 27 Ind. Bar Rev. 167 (2000).

According to Manusmiriti, responsibility of a husband is to defend his wife, her honour and individuality, while a wife has the burden to preserve the home's peace and happiness on her shoulder. Marriage is an everlasting bond and the internal problems between marital partners must never be taken away from their home. A husband should not forcibly bind his wife in marriage or protect her without her wishes under any condition and on these lines; wife must not forcefully pursue love and compassion to the husband at all. Moreover, if the person in front of him is his brother or father, a friend or neighbour, a husband must not ignore or avoid intuitions or warnings of his wife about a man other than himself. A women must safeguard her marriage instantly by each possible effort, if she sees her husband deviating from the direction of marriage; the same also germane for a husband¹². Furthermore, a wife under wedlock of marriage is not being reckoned ideal, if she denies for sexual activity or intercourse with her husband.¹³ It is always considered as a private matter between marital partners which should not be communicated outside the walls of their private space i.e. bedroom.

During Mughal era also, same opinion regarding marriage was in trend and during this era condition of women was extremely deteriorated and pathetic in the society. Even marital rape was not acknowledged as a crime by Britishers during their rule. Lord Macaulay provided exception to spousal rape under rape laws of the country because Lord Matthew Hale, at common law in the seventeenth century, stated that under wedlock of marriage, due to their reciprocal matrimonial consent and contract, the husband cannot be held accountable for raping his lawfully wedded wife because the wife has given herself up to her husband in the said marriage and

¹² <https://ijcrt.org/papers/IJCRT2105097.pdf>

¹³ Sakshi Kanodia & Ranjabati Ray, Why Penalize Marital Rape, IOSR-JHSS Vol. 21, Issue 9, (10 September 2016) pp. 49-55.

for which she cannot retract.¹⁴ It does not only affect Indian laws related to rape but also rape laws in many other common law countries.

The statement given by Hale was completely based upon the theory of marital unity¹⁵. According to doctrine of “Unity in marriage”, a man and women are considered as single entity after marriage.¹⁶ So, definitely it is unthinkable for a man to rape himself. This disgusting law of a colonial epoch has not been repealed even in the independent India.

The Hindu Marriage Act, 1956¹⁷, which confers the components of marital union as well as divorce among Hindus, is also silent about it. All other Indian personal laws have nothing about such a burning issue.

Sec. 375 of IPC (now Sec. 63 of BNS) is based on consent, i.e. whether consent is free or not, and burden to prove lies on the victim. Under wedlock of marriage between husband and wife, it is always envisaged that by entering into matrimonial relationship both have consented for sexual relationship. So, when they are living under marital obligation together, consent is envisaged to be taken. Thus, the issue taken noticed by various legislative bodies and law commissions has been restricted to valid or invalid consent only which is a matter of fact only.

For the first time, 42th Report of Law Commission mentioned the rape under marriage. It was however completely restricted to a condition where legally wedded partners are living separately by a mutual consent or under a decree of judicial separation.¹⁸ This amendment was accepted and brought into The Penal Code, 1860 in the form of section 376B (now Sec. 67 of BNS) with a prescribed

14 Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*, 94 (1994).

15 Dr. Vandana, *Marital Rape- Exemption under Penal Code, 1860: quest for Recognition and Liability*, *ILI Law Review* Vol. II, Winter Issue (2017).

16 Shobha Saxena, *Crime against Women and Protective Paws*, pp. 81, (Deep & Deep Publication Pvt. Ltd., New Delhi) (2001).

17 Act No. 25 of 1955.

18 The Indian Penal Code, 1860, S. 376 B

punishment of imprisonment of the either description for a term which shall not be less than 2 years, but which may extend to 7 years, and shall also be liable to fine.

The said commission has made another recommendation to impose criminal liability on the husband for having sexual intercourse with his minor wife, but such recommendation was not accepted.¹⁹ Now, it was rejected again on a ground that when two human being enter into marital relationship, then consent for sexual intercourse which is automatic or implied is always there. So, a husband may not be held convicted and punished for rape of his own legally wedded wife as sexual intercourse is a crucial part of marriage.²⁰

The question of validity of such exception to definition of rape was again raised before the Law Commission in its 172th report²¹ by instituting a writ petition namely Sakshi v. Union of India. But again, the said report denied to criminalise the marital rape by stating a reason that it will amount to excessive interference into marital affairs of two people. This report also demotivated the persons battling for the rights of women under marriage and again gave dominance to the male partner and patriarchal mind set.

Then, in 2012, after Nirbhaya rape case, a committee constituted under chairmanship of Justice J.S. Verma was formed for recommending amendments in Criminal Law System. Such committee has recommended to make laws more effective to deal with heinous crimes committing against women in our Country. Another recommendation made by the said committee was the elimination of exception 2 from sec. 375 of IPC²² (now Sec. 63 of BNS) also. The report indicated that there is no rationale behind giving immunity to the husband for

19 Law Commission of India, 42nd Law Commission Report, Penal Code, 1860, (June 1971).

20 Arima Pankaj, Independent Thought v. Union of India: An evaluation of judgment and its repercussion in the field of marital laws, IOSR-JHSS Vol. 22, Issue 11, Ver. 4 (November, 2017) pp. 79-85.

21 Law Commission of India, 172 Law Commission Report, Review of Rape Laws, (March 2000).

22 Justice J.S. Verma (Retd.), Report of Committee on Amendments to Criminal Law, (January 23, 2013).

raping his lawful wedded wife. Report also states that having such kind of marital exceptions shows that women are property of husband. While even previously women were considered to be the estate of men, but in the 21st century this view is outdated and not in consonance with human right principles however still existing in our legal system.

In 2014, a case namely State v. Vikash²³ has been held by Hon'ble Delhi High Court, in which matter of rape within ambit of marriage was argued in detail. But determinately, the court ruled that in India, marital rape cannot be criminalised as section 498-A of IPC (now sec. 85 and 86 of BNS) is a substantial bolster to deal with its allied matters. In that case, it was also ruled out that, at the moment, there is neither any urge for fresh legislation, nor for the abrogation of exemption clause as well.

Also, in RIT Foundation v. Union of India²⁴, a bench of the then acting Chief Justice Gita Mittal and Justice C Hari Shankar in the Hon'ble High Court of Delhi said that in a relationship like marriage, both male as well as female partner have a right to say 'no' to physical relations. Meaning of marriage is not that the woman is all time ready, and moreover, it was even held that physical force is not essential for constituting the offence of rape. In the said case, Central government's reactionary stand was that criminalizing rape under marital union would "destabilize the sacred institution of marriage" and could be a weapon to "harass husbands", before Hon'ble Delhi High Court, is utterly disappointing. It is although arduous to comprehend how marital rape is less brutal than triple talaq or polygamy²⁵.

The Standing Committee of Parliament on Home Affairs in its 167th report also refused to remove exception regarding rape within marriage on a factor that the

23 2014 SC 1/14: Special fast track court, Dwarka., New Delhi.

24 WP (C) No. 284 Of 2015: High Court of Delhi.

25 A news 18 Report on July 17 2018: www.news18.com

whole family system will suffer due to this step and this can lead to further injustice and may demolish the family structure also²⁶.

In 2015, DMK MP Kanimozhi, through a question submitted in Rajya Sabha, favoured the abrogation of the second exception from the definition of rape provided under IPC²⁷ (now BNS). In the very same year, a private member bill was tabled in Rajya Sabha by the Congress leader Avinash Pandey.²⁸ While introducing the bill, he acknowledged the fact that rape under marital union is a very sensitive issue whereas on the other side he stated why this is a right time to criminalise forced sexual relationship in marriage. The bill even then not get supported and by this reason, he withdrew the same.

This time, private member bill moved in Rajya Sabha in 2018, recognising that the social construct of patriarchy has made women a vulnerable class and this social construct has resulted to the exclusion of them in other social spaces.²⁹ Chapter II of the said bill provides for amendment in rape law by deleting exception two to section 375 of IPC³⁰ (now Sec. 63 of BNS). But, all have gone in vain.

Several statutes like The Prohibition of Child Marriage Act 2006,³¹ The Protection of Women from Domestic Violence Act 2005,³² The Protection of children from Sexual Offences Act 2012,³³ The Juvenile Justice (Care and Protection) of

26 The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report (Presented to Rajya Sabha on 1st March, 2013).

27 India not criminalise marital rape, The Hindu (August 30, 2015).

<https://www.thehindu.com/news/national/concept-of-marital-rape-cannot-be-applied-inindia/article7154671.ece>.

28 Private Bill on Making Marital Rape a Crime Tabled in RS, Outlook Magazine (April 24, 2015).

29 Dr. Shashi Tharoor, M.P., The Women's Sexual, Reproductive and Menstrual Rights Bill 2018 (November 19, 2018).

30 Dr. Shashi Tharoor, M.P., The Women's Sexual, Reproductive and Menstrual Rights Bill 2018 (November 19, 2018).

31 Act No. 6 of 2007.

32 Act No. 43 of 2006.

33 Act No. 32 of 2012.

Children Act 2015³⁴ have been enacted for protecting the interests of women and children but none of them have covered the issue of rape within marriage.

Thus, Rape under ambit of marriage can be stated as one of the oldest undeclared crimes in society but because of conceptualization of the female body as an estate of husband with patriarchal social structure, rape within marriage, even today, remains unattended and unrecognised which ultimately restrict the accessibility to justice to the married women in India.

3. Glance over the issue through the Constitution

In this part, stress will be given upon the relationship of the State and the woman through the realm of constitutional law by analysing the fundamental rights, fundamental duties and directive principles of state policy along with other residuary powers mentioned under it. But before it, we will also discuss 'public private dichotomy' here that still persists in the interpretation of constitutional law. Marriage can be consummated in a very personal space and the State is always hesitant to disturb this delicate space. This is to maintain the privacy of citizens and the intrusion thereby through the State in this sphere would disrupt their privacy. Thus, the State does not compel two individuals to marry or divorce against their will.

However, the refusal of the State to enter this private space even in certain specific instances can be problematic also. For example, if a legally wedded wife is subject to cruelty in a marriage, then the State itself have to enter into this private sphere to criminalise this cruelty by husband to his legally wedded wife. If the State does not do so, then such woman will have no legal redressal for seeking justice. Thus, it is important for the State to pierce the veil from this private sphere on some specific occasions.

³⁴ Act No. 2 of 2016.

Likewise, in case of marital rape, if the State does not pierce the veil from this private sphere, then a woman will definitely remain empty without any remedy when raped by her husband. But such required remedy may be provided by legislature or can be exercised by such class of women only after its criminalisation.

Now, it can be discussed and testified that marital rape is a straightforward infringement of the fundamental rights of a married woman specifically under Art. 14, 15 and 21 of the Constitution of India with the help of arguments given below:

- Article 14 of Indian Constitution states that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. It therefore avail a safeguard to a people from State discrimination whereas the exception 2 given under Section 63 of BNS (earlier Sec. 375 of IPC) even discriminate with a wife under marital union when we talk about protection from the rape within marriage. Thus, such marital rape exception provided under Section 63 of BNS (earlier Sec. 375 of IPC) is not justifiable classification and thus, a clear contravention of protection guaranteed under Art. 14 of the Constitution.

- Article 15 (1) (i) of Indian Constitution even provides that “The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. So, such exception to the definition of ‘rape’ is a clear infringement of said Constitutional provisions.

- Article 15 (3) of the Indian Constitution further states that “The State to make any special provision in favour of women and children”. It is highly an issue of great shame that despite having such specific provision in our Constitution, legislature has ignored the matter of rape within marriage.

- Article 21 of Indian Constitution contains a fundamental right which recognised “Right to live with human dignity” within its ambit. Rape within marriage is a contravention of the right to live with dignity of a woman as well. hence, it is evident that the exception 2 detailed under Sec. 63 of BNS (earlier Sec. 375 of IPC) is infringement of Art. 21 of the Constitution.

Also, protection of the dignity of women is the fundamental duty mentioned under Indian Constitution which casts a duty upon every citizen “to renounce practices derogatory to the dignity of a woman”. it again seems that rape exemption under marital union availed by BNS (earlier IPC) is again disharmonious to Article 51(A) (e) of the Constitution.

Most importantly, Preamble of our Constitution talks about securing ‘social justice’ to the people of India. In case of married women, such social justice cannot be secured without removing marital rape exception as such exception is not in consonance with the social justice principle mentioned in the preamble of our Constitution.

But it is germane to consider that securing such ‘social justice’ is not mere responsibility of the state but also the collective responsibility of each and every citizen of the country as the Preamble itself has been addressed to whole of the people of the country from the very beginning of it and stated as- ‘WE, THE PEOPLE OF INDIA’.

Even then, if every time a woman feels unsafe in her own house, it deemed to be a clear failure of fundamental principles of Indian society and its social justice system as well.

Thus, State is liable to criminalise marital rape at the earliest and also it is the collective responsibility of each and every citizen not to indulge in such type of immoral activity in order to achieve ‘social justice’ in true sense.

4. Analysis of existing remedies available in criminal law

The most relevant provision that has been often used as an alternative to criminalisation of marital rape and to provide justice to its victims is sec. 498A of the IPC (Sec. 85 and 86 of BNS). It was incorporated into the IPC and now in BNS to specifically deal with cases of cruelty against women. However, we strongly believe that this is inadequate for two reasons. Firstly, there is a major difference between cruelty and rape. The nature and act of rape differentiates it from an offence of cruelty. Another factor behind it as this section is not ample enough to deal the cases of rape.

Beyond that, offence of rape is different by the different nature of the offence itself. It is a form of cruelty definitely; but this cruelty is so different from physical violence and mental violence. This is even depicted through the treatment of rape as a distinct offence in the criminal statutes which is different from grievous hurt or assault.³⁵ it could be correct that a victim of marital rape might have alternate mechanisms, however this has no effect on necessity for criminalisation of marital rape.

Cruelty is purely a factual issue based upon of the matrimonial relationship amongst husband and wife, status of their health, culture and temperament in life etc. Moreover, each person experiences mental cruelty differently based on their level of sensitivity, courage, strength, and capacity and resistance to endure such abuse.

It is very difficult and inappropriate to include cases of rape or marital rape within this section of cruelty. The first reason is because the threshold for conviction under cruelty is very high. Secondly, to be convicted under Sec. 85 and 86 of BNS (earlier Sec. 498A of IPC), generally such conduct has to be done repeatedly or

³⁵ See IPC 1860. While hurt is covered from Ss. 319-338 in another part, the offence of rape is covered separately from Ss. 375-376E.

over a longer duration of time.³⁶ Therefore it is not feasible to convict a person when the forced sexual intercourse is done one or two times only, if to be covered under the periphery of these sections.

Harassment of men by the misuse of this section itself is a matter of great concern. Recently, in *Rajesh Sharma v. State of Uttar Pradesh*,³⁷ the Court issued directions to foreclose the misuse of section 498A (now Sec. 85 and 86 of BNS). Such remarks regarding its misuse given by the apex Court is an indication of the mentality that adversely affects the various organs of the State and will also make prosecution of cases of rape within marriage more difficult.³⁸

Thirdly, the maximum punishment under sec. 498A of IPC (now Sec. 85 of BNS) is only for three years with or without fine. The maximum sentence for offence of rape is life imprisonment.³⁹ This major difference in the punishment again indicates that the notion of cruelty cannot in any manner deal rightly with the rape or rape within marriage.

Therefore, Cruelty, rape and rape under marriage are different categories of violence against the women and should be treated differently. Taking all of them under one umbrella would not be appropriate and justifiable.

5. Analysis of existing remedies available in civil law

The remedies that available in civil law occupy an uncomfortable place in discussions which are centred around gender-based violence. One of the main factor of this problem is perhaps the belief that emphasizing upon civil remedies which will only encourage the public private dichotomy because it makes gender-

36 *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

37 *Rajesh Sharma v. State of Uttar Pradesh* 2017 SCC OnLine SC 821.

38 *The Wire*, Supreme Court Order on Domestic Abuse Cases Is a Step Back for Women's Rights Law, July 31, 2017, available at <https://thewire.in/163011/supreme-court-domestic-abuse-dowry/> (Last visited on December 23, 2017).

39 See IPC 1860, Ss. 375 and 376.

based violence a problem only between the perpetrator and victim rather than act of violence against the State itself.⁴⁰

Meanwhile, it is even not unreasonable to underestimate the relevancy of civil remedies as they allow women to 'do something' rather than relying upon the criminal justice system to act appropriately and in a rapid way to provide their rights and to move outside their private structures.

However, this discussion tends to be clearer when we incline it in context of violence within marriage. This is because matters in context to marriage are governed by family law. In these circumstances, it is of huge importance to have a corresponding civil remedy while criminalising a certain act and further, the criminal and civil remedies exist without any contradiction i.e. harmoniously with each other.

Therefore, while we continually argue for getting it criminalised, we question the efficacy of this criminalisation if family law does not adopt this. We also put our focus on how family law, as it stands today, is not completely prepared to address the notion of marital rape.

The grave concern regarding family law is 'restitution of conjugal rights' which continues to exist in India till today despite being abolished in the United Kingdom.⁴¹ This is basically used by men to force their wives for resuming their conjugal relationships.⁴²

Personal laws in India recognise cruelty as a ground for divorce but sexual violence has not been considered specifically as an adequate ground for seeking divorce. This leads to paradox in Indian legal system.

40 Lauren M. Gambier, Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence, 87 NYU L. REV. 1934-1937 (2012).

41 In 1970, the Matrimonial Proceedings and Property Act abolished Restitution of Conjugal Rights in United Kingdom.

42 Flavia Agnes, Hindu Conjugal Rights: Transition from Sacrament to Contractual Obligations in REDEFINING FAMILY LAW IN INDIA, 236 (2008).

'Refusal to engage in sexual intercourse' falls within cruelty, specifically under 'mental cruelty'. At the same time, 'forced sexual intercourse' should also amount to cruelty itself without imposing any condition. Thus, cruelty encompasses two different positions.

Primarily, it would seem simple to draw a line between a wife's refusal to have sexual intercourse and forcing the wife to have sexual relationship. However, while analysing different case laws, it is challenging to draw this so-called line, since the majority cases have relied upon the notion that a wife must have sex with her husband.

In fact, the notion of marital rape now largely relies on the changing notion of marital union by woman's right to say 'no' to fulfil her husband's sexual pleasures. But if courts have held that the husband can file a case for divorce if a wife is not engaging in sexual intercourse with him; Married women's right to say 'no' is totally diluted.

How do the courts decide what amount of sexual intercourse is 'required' in a matrimonial relationship and at which point the husband loses his 'right' to sexual intercourse with his partner?⁴³ There is no clear rule as such and it is not a denial for sexual intercourse or inability to perform sexual intercourse, it is rather based upon the judiciary visualizing some basic amount of sexual intercourse required for a marriage which allows the judges to use their discretion in this matter. Moreover, the conflict of ideologies between refusal to participate in the sexual intercourse as a type of mental cruelty as well as right to deny forced sexual intercourse in a marital union is clearly evident.

43 The Times of India, Denying Sex a Ground For Divorce: Karnataka HC, April 20, 2012, available at <https://timesofindia.indiatimes.com/india/Denying-sex-a-ground-for-divorce-KarnatakaHC/articleshow/12739949.cms?referral=PM> (Last visited on November 02, 2024).

‘Sexual violence’ may be included into cruelty. For instance, section 13(1)(i)(ia) of The Hindu Marriage Act⁴⁴ could be amended to include the sexual violence into cruelty. But it may also have certain reservations like firstly, The Protection of Women from Domestic Violence Act, 2005⁴⁵ brings in ‘sexual violence’ in the definition of ‘domestic violence’ under it. If said definition could be used particularly as outline for figuring out cruelty, it could also be in tune with one another and secondly, term ‘cruelty’ is a gender-neutral term in family law but, offence of sexual violence only perceive women as the victim and not the men. So, it will not be suitable to include ‘sexual violence’ within ‘cruelty’. However, whenever the rape within marriage got criminalised, a wife could file a case for divorce as the conviction of husband for committing marital rape got reckoned as a prominent ground for divorce.

The main concerns covered in this part are more crucial for accrediting the ideological shifts necessary in family law. Particularly, when the victim of sexual violence is not ready to file a case or complaint for rape or if it does not meet with the criteria fit for rape but was a sexual assault. In particular, sexual assault is recognized by The Protection of Women from Domestic Violence Act, 2005,⁴⁶ as an extremely crucial instrument to ensure the justice delivery to lawfully wedded wife.

In order to address cases of rape within marriage, we have examined the existing criminal and civil remedies available under the current law. As a result, the significance of criminalizing rape within marriage has been established rather than examining alternative remedies, as we discovered that there were inadequate alternative remedies. Such deficiency can be fulfilled through using restorative

44 Act No. 25 of 1955

45 Act No. 43 of 2006

46 Act No. 43 of 2006

practices moreover with other forms of punishment which will be argued in the next part.

6. Restorative Justice and Marital Rape

Justice is globally becoming more victim centric through restorative practices. But, right now, it is limited to first time juvenile offenders or cases of minor offences. Restorative justice is founded on certain principles like empathy, respect, and an acknowledgement of guilt that recognizes crime as a damage to interpersonal relations as well as social bonds, creating certain responsibilities to repair that damage. It is just not only the offender who has a duty to fix things, but community at large must also become a strong support system for the victim.

Now, through restorative practices, the focus of administering justice is shifted from the crime as being an offence against the State to an act that harms an individual. Furthermore, it recognises that offenders might be victims themselves who have been harmed and need social integration and healing.

This has changed the very definition of justice itself. In this concept, victim has a control over the way how he wants justice. Victim can even choose to forgive offender and move on, but without existence of any force or undue influence and only where there is a true acknowledgement of guilt and offender take direct answerability for his actions instead of blaming the society and other undergoing circumstances.

In a case of offence like marital rape, victim is not just physically harmed, but also psychologically affected and emotionally damaged. Still, it might be possible that a woman who rejects an apology may be passively coerced by her society or community.

It is pertinent here to change the focus from actor to action, only in this way harm caused to all concerned stakeholders can be restored effectively. It is not ethical or

acceptable to view their husband just as the husband, but the preparator and his act should be condemned at large.

Although, implementing restorative practices can be beneficial in some rape cases, but cannot fit uniformly in all type of rape cases. Here, the main problem is acknowledgement of guilt which becomes complicated in cases of rape when offenders start externalizing the blame.⁴⁷ It becomes much complex when it comes to marital rape. This can become successful only where the man as well as society can see beyond the camouflage of his masculinity and the woman can find consolation and support. This is not possible in conventional criminal justice system.

Even, Criminal Law (Amendment) Act, 2018 had reflected in the past precisely a growing retributive trend in the sentencing policy by the legislature for sexual offences. The major change introduced there at that time was the increase of punishment to the individuals convicted for committing offence of rape of a girl under the age of 12 years and 16 years. At a time when most of countries are trying to abolish capital punishment by moving towards a more reformatory model of justice, it introduced the death sentence for gang rape of a girl below the age of 12 years. The amendment was done in procedural law also to disallow the offender to apply for anticipatory bail in minor girl's rape cases below age of 16 and to speed up the appeal and trial processes.

Another important concern in introducing restorative practices in rape as well as rape within marital union is the over-reliance on consent in determining whether the offence has been committed. The attention then automatically shifts from the culpability of the offender to acts of the victim. The victim thus suffers from the same trauma again and trying to reaffirm the absence of consent and her innocence

47 Kathleen Daly & Julie Stubbs., *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).

also even where notion of ‘no means no’ has been widely recognized by the Indian courts and the requirement of resistance to prove non consent is even now not required.

Women are often unable to exercise effectively her choice in giving the consent, this is also a major problem in defining consent in Indian scenario. This is only due to patriarchal social structure and cultural norms.

Legislatures across the world should take a serious note to change the way of justice delivery in cases of marital rape firstly with its criminalisation and focusing more on the expectations of the victims, gender neutrality and changing notions of consent.

Moreover, if we really want to criminalise rape within marriage in a country like India, we should incline our justice delivery system more towards restorative justice rather than sentencing through retributive practices. Otherwise, it cannot be criminalised ever even after a long battle. Even, Mahatama Gandhi once said, “Justice that love gives is a surrender; justice that law gives is a punishment”.

However, recently, some petty reforms have been introduced in BNS for incorporating restorative justice practices in our justice delivery system. Section 4(f) of BNS incorporates community service as a form of punishment in our legal system which streamlined restorative justice principles. Further, Section 75 of BNS includes strong protections against sexual harassment, reinforcing gender justice. Moreover, BNS encourages correctional programs for offenders rather than long-term imprisonment for minor crimes. But, these improvisations in our justice delivery mechanism are not sufficient at all and just like cumin in camel’s mouth.

In fact, it is need of the hour to criminalise the marital rape on the lines of restorative justice, but it is apparent that the road to justice delivery through

restorative practices seems so long in Indian legal system specially in cases of all forms of rape.

7. International Human Rights Obligations and recommendations

India has become party to CEDAW convention with the 189 member States in total and ratified it later in 1993. This treaty is first ever of that kind particularly emphasizing upon the abolition of all forms of discrimination against women.

According to the said treaty, any sex-based differentiation, exclusion, or restriction that has the intent to hinder or negate women's recognition, enjoyment, or exercise—regardless of their marital status—is considered as discrimination and it also includes Rape within marriage as a form of violence against women whereas exception 2 to section 63 of BNS (earlier Sec. 375 of IPC) establishes that sexual intercourse by a man under wedlock of marriage with his own wife, not being under age of 18 years, is not considered as rape. Although the said article does not have a binding effect but still such outdated provision of such a recent Law i.e. BNS is disharmonious and incompatible with it and even treat women with discrimination based upon her matrimonial status.

Moreover, as per general recommendation namely GR 1948 of CEDAW, the state parties are required to take adequate legal measures, such as penal sections, civil remedies, and other residuary provisions, to protect women from all forms of assault. Again, GR 33 also enumerates that States shall ensure to define sexual offences along with marital rape which takes coercive measures into account or focuses on lack of freely provided consent.

The Beijing Declaration and Platform for Action, which India, as a United Nations Member State, ratified in 1995, acknowledged that rape under wedlock of marriage and several other forms of assault against women are just a reflection of the historical imbalance of power between men and women and even States have to

48 <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

enact laws or enforce existing ones in order to penalize offenders and avail women easy access to the justice.⁴⁹

For implementation of such recommendation, The National Commission for Women (NCW) were constituted. Its main aim also was to ensure and avail a secured environment at workplace. Moreover, to provide protection to women everywhere at all spheres of life, other enactments like Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013⁵⁰ and Protection of Women from Domestic Violence Act 2005⁵¹ had been framed and enforced but still such sensitive and burning issue of rape under wedlock of marriage is open and alive till date just because of irrational exception to section 63 of BNS (earlier section 375 of IPC).

Even, provisions of an International Convention like CEDAW have been adopted in India also by the judiciary in Vishakha v. The State of Rajasthan⁵² which has been even considered later by the legislature in enacting Domestic Violence Act, 2005.

A number of provisions in UDHR, ICCPR, ICESCR and ICESCR are existing that specifically prohibit marital rape, just like in CEDAW.

Additionally, two UN treaty bodies namely Committee against Torture and Human Rights Committee even acknowledged the assault against women including marital rape which ultimately violates their fundamental rights to life, liberty, and personal security, as well as equal protection from torture and non-discrimination.

Furthermore, according to Article 51(C) of our Constitution, the state should respect all international law and treaty obligations⁵³ and Article 253 even

49 World Conference on Women, Report of Fourth World Conference on Women, paras. 118, 124(c,h) UN Doc.

50 Act No. 14 of 2013.

51 Act No. 43 of 2006.

52 Vishakha v. State of Rajasthan, (1997) 6 SCC 241: AIR 1997 SC 3011.

53 Art. 51 (c), Constitution of India, 1950

enumerates the authority of Parliament to enact legislation by amending or implementing any treaty.⁵⁴ These articles in our Constitution make it quite evident that the Indian legislature ought to enact legislation against rape under wedlock of marriage in accordance with these International Conventions.

A unique approach of Universal Periodic Review also exists whereby all of the United Nations' member states assess each other's human rights situation and offer suggestions to one another on how to enhance both their own and other member states' human rights.

To improve the condition of married women in our Country, suffering by limited access to justice, countries that includes Ireland, Honduras, Portugal, Australia, Belgium, Iceland, Namibia, Sweden, France, Lithuania, Canada, and Zambia, through the Indian UPR- 3rd cycle-27th Session, proposed our Country to implement existing laws on all forms of violence including sexual violence against women and minors and also to remove exception regarding rape under wedlock of marriage from the definition of rape and further to adopt other extensive laws to encounter all types of violence, including rape within marital union.⁵⁵

8. Restrictions to Justice within Marriage

There are several restrictions in our Justice delivery system regarding marriage and allied matters. Offences like rape within marriage are very difficult to report and prove as committed in the private space of marital partners. Even, fear of society is another lacuna as people do not raise voice against the accused and bear everything year to year. That is the main reason why it is unreported and unattended till today and as it is an unreported crime, proper and accurate data is not available regarding the same in our Country till date.

⁵⁴ Art. 253, Constitution of India, 1950

⁵⁵ UPR27_India_ThematicListofRecommendations_E.pdf.

Moreover, fear of abusing the provisions of Law concerning marriage and allied matters is a most crucial issue now a days. Many fake cases are being registered with malafide intention to create pressure upon the opposite party or to demand money and fulfillment of other unjustifiable desires.

In a recent heart-rending case, A police head constable namely Thippanna Alugur, a native of the Handiganur village in Vijayapura and head constable at the Hulimavu police station in Bengaluru died by suicide on alleging harassment by his wife and father-in-law. The death of Alugur occurs days after another as in likewise case Atul Subhash, a 34-year-old engineer, died by suicide in Bengaluru, allegedly due to harassment by his estranged wife and her family members. According to police officials, Alugur had left a one-page death note on which he had mentioned alleged harassment by his wife and father-in-law. Additionally, according to the said police officer, Alugur and his wife got into an aggressive altercation at their rented residence in Electronics City and his father in law made a phone call to verbally abuse Alugur with foul language. The police said Alugur, in his death note, suggested that his father-in-law had asked him to die or else he would “finish him off”.⁵⁶

Chanakya also mentioned in Chanakya Niti that “Ati Sarvatra Varjyet”- “अति सर्वत्र वर्ज्येत”- which means that excess of anything is bad. This is a worrisome scenario that amply indicates that each and every Law should be balanced and in any case, be it husband or wife, person guilty should not be escaped and an innocent should not be victimized or punished.

9. Suggestions

As earlier discussed, justice should be accessible to all of the Indian citizen equally and a rapist should be presumed as a rapist regardless of his relationship with the victimized person and of course the gender itself.

⁵⁶ <https://indianexpress.com/article/cities/bangalore/bengaluru-cop-suicide-wife-harassment-9725662/>

Moreover, it is much worse than rape as the rapist is someone who was supposed to take care of his/her marital partner. For attaining such rights for the married woman in India, these suggestions should be taken into thoughtful consideration with criminalization of rape within marriage given as under:

- 1) Exception 2 to section 63 of BNS (earlier Sec. 375 of IPC) may be removed with the inclusion of an explanation to the same section clarifying that marriage is not a defence for an offence of rape.
- 2) Separate sections may be introduced in BNS (earlier IPC) for definition and punishment of 'marital rape' after concerning its future misuse with gender-neutral approach.
- 3) Section 67 of BNS (earlier Sec. 376B of IPC) may be repealed in case if rape within marriage is wholly going to be criminalised by the legislature.
- 4) Only amendment in the substantive law alone is not adequate enough at all. Few amendments in the procedural law in tune with the substantive law are also necessary. For attaining such purpose, suitable amendment should be introduced for improving the investigation and trial procedures.

5) In Bhartiya Sakshya Adhiniyam, 2023⁵⁷ (earlier Indian Evidence Act, 1872)⁵⁸ provisions regarding bad character may be amended for removing complexities in prosecution and moreover, a new provision may also be inserted stated as under-

“No presumption of consent in prosecutions of rape cases: There shall be no presumption of consent in prosecutions of rape, even if the accused is the husband of the woman”.

6) Only heavy fine or penalty should be imposed for the first-time offenders along with the compulsory counselling on the cost of the accused.

7) Other restorative practices should be introduced as supplemental tools in post sentencing stages of the judicial process to save holy institution of marriage from possibility of its destabilization through retributive punishment.

8) In case, if such an offence committed frequently, strong retributive punishment should be given to such repeat offenders to remove criminal phenomena from the mind frame of such ‘domestic culprits’.

9) New parliamentary committees may be formed to analyse each nuance of the intended law to prevent it from misuse before its criminalization with a gender-neutral approach.

57 Act No. 47 of 2023.

58 Act No. 1 of 1872.

10) A new board namely 'Restorative Punishment Board (RPB)' may be constituted to explore, suggest, control and regulate the restorative practices in Indian legal system separately and in complement with other penal punishments.

10. Conclusion

"Marital rape is not about sex, but about violence; it is not about marriage, but about lack of consent. Rape is rape and it should be penalized whenever and wherever it occurs."⁵⁹

We are the people of a land which recognises from the ages "Ahimsa Parmo Dharma"- "अहिंसा परमो धर्मः"- which means "there is nothing greater than non-violence." Therefore, the barbarian form of violence in society in this modern era must be contained.

Even, our criminal justice mechanism along with our recently enacted criminal laws is even not in consonance with constitutional provisions with regard to rape within marriage. We should remove this disharmony between existing criminal laws and provisions of Constitution and it can only primarily be removed by removing such marital rape exception from BNS (earlier IPC) which is root cause of whole of the discrimination with the married women in India which is also limiting their access to justice.

Moreover, it is in highly contravention with all international human rights conventions and recommendations discussed above.

As there no adequate existing remedy available there in current civil and criminal law, thus, to attain complete justice by such class of married women, rape under

⁵⁹ Shashi Tharoor, The Citizen. about the private member's bill 'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018' introduced by him in the parliament.

<https://www.thecitizen.in/index.php/en/NewsDetail/index/7/15986/Marital-Rape-Is-Not-About-Marriage-ButAbout-Lack-Of-Consent-Shashi-Tharoor>.

marital union should be declared as a criminal offence on the lines of gender equality and restorative justice in India, but certainly with the precaution towards the misuse of the provisions.

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