

## **A CRITICAL ANALYSIS ON THE EFFECT OF PERSONAL LAWS ON MARITAL RAPE IN INDIA**

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### **INTRODUCTION**

Women in India have always faced challenges due to various reasons such as the patriarchy that exists in the society, gender-based discrimination due to which gender-based violence like domestic violence, rape, cruelty, acid attack, dowry death, etc have increased. To ensure that the interests and the rights of the women are protected, the Government has taken certain measures like enacting statutes to uplift the status of women.<sup>1</sup>

One of the most heinous crimes that are against the basic human rights of an individual is rape. The rape victim does not merely undergo physical injury, but also undergoes mental as well as emotional trauma. The rape victim even though being innocent is considered to be unclean and is shunned from society. Rape has been defined under Section 375 of the Indian Penal Code which states "sexual intercourse with a woman without her consent and will" is considered as rape.

This particular law has an exception that says forceful sexual intercourse by the husband on his wife, provided the wife is above 17 years of age will not be considered as a punishable offense. This provision completely negates the fact that a married woman is, in the end, a human being, and therefore she shouldn't be deprived of her basic human rights merely because of her marital status. This particular idea of marital rape not being a criminal offense comes from the inherent prevailing patriarchy that exists in the society. The entire concept of a woman being the property of the husband and therefore the husband is entitled to have forceful sexual intercourse is barbaric. In India, marriage is considered to be a sacrament, and it is assumed that there is implied consent from the women to have sexual intercourse with the husband.

In "The Declaration of Violence Against Women, 1993 and Convention on All Forms of Discrimination Against Women" the CEDAW committee has recommended India

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<sup>1</sup> M V Sankaran, The Marital Status Exemption in Rape, Journal of the Indian Law Institute, Vol. 20, No. 4, (October-November 1978), pp. 594-606

to widen the definition of the rape in its penal code and has also recommended criminalizing marital rape. Even in the Justice Verma Committee report it was stated that marital rape should be criminalized and the relationship between the accused and the complainant should not be relevant to the inquiry. Marital rape violates the basic fundamental rights of the women, like The Right to Equality and the Right to Life and Liberty under Article 14 and 21 of the Indian Constitution. <sup>2</sup>

The exception in Section 375 of the Indian Penal Code which states that a forceful sexual intercourse on a married woman by a husband will not be considered as rape is discriminatory as forceful sexual assault on women who are unmarried or are below the age of 15 is considered to be rape. However, if the woman is above 15 years of age and is married, the forceful assault by the husband will not be considered as rape and the husband will not be punished.

India being a diverse and secular country, there exist various religions and the citizens are free to practice their religion provided it does not violate the morality or public order. However, there are religions or religious practices, which propagate sexual intercourse by a man on his wife with or without her consent.

While most of the developed countries have made marital rape a criminal offense, India remains one of the few that does not have laws to protect married women from non-consensual sexual intercourse by the husband. India is a country where religion and religious teachings play a very vital role in law making. Most of the religious scriptures portray women as the weaker or subordinate sex who belongs to the male members of the family as his property and this results in the making of laws where it is normal for a man to sexually assaulting his wife and this is seen as the right of the husband.<sup>3</sup>In this paper, the authors have examined in detail the constitutional rights that are available to women in India, the laws concerning rape and marital rape prevailing in the country, rape and marital rape according to major religions in India, a brief comparison with some other countries where marital rape is a criminal offense, and the supporting judicial decisions. The purpose is to highlight the lapses in the Indian laws for the protection of the rights of women in the country and also provide suggestions to rectify the same.

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<sup>2</sup> Ibid

<sup>3</sup> Sarbani Guha Ghosal, Socio-Political Dimensions of Rape, The Indian Journal of Political Science, Vol. 70, No. 1, (January-March 2009), pp. 107-120

## MARITAL RAPE THROUGH PERSONAL LAWS

India is a secular country where the people have the right and freedom to practice and profess different kinds of religions as long as this does not go against morality and public order. Therefore the law allows personal laws to exist where different religions and communities can have the freedom to practice their own set of laws as long as it aligns with the basic structure of the Constitution and the laws mentioned therein. Some practices like adoption, marriage, divorce, and transfer of property are governed by these personal laws and differ from religion to religion.

The Hindu Marriage Act, 1955 is the primary act that is followed by the Hindu community in India concerning marriage between Hindus. Section 9 of this particular Act provides for the restitution of conjugal rights, which means that the Court will order the wife or husband to return to the spouse if they have left them arbitrarily without any proper justification. However, this particular provision enables men to misuse it as they can then forcefully have sexual intercourse with their wives, and the wife does not have the option to leave the husband.

Even though it is not explicitly mentioned under the dissolution of the Muslim Marriage Act 1939, this principle of a man exercising his dominance over his wife violates the wives' fundamental right under article 21, that is her right to live a dignified life is violated. If the court orders the wife to return to the husband, who forcefully has sexual intercourse with her, this violates the rights of women as the entire concept of consent concerning married women is not taken into consideration.

This particular argument that forceful cohabitation would also include forceful sexual intercourse with the wife was seen in the case of *T. Sareetha v T. Venkata Subbaiah*, wherein the Andhra Pradesh High Court, the constitutionality of Section 9 of the Hindu Marriage Act and the entire concept of conjugal rights was questioned. The court held that the decree compelled the unwilling wife to have sexual intercourse with her husband thereby violated her bodily autonomy.<sup>4</sup>

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<sup>4</sup> AIR 1983 AP 356

The court struck down section 9 of the Hindu Marriage Act, 1955, and declared that it violates article 21 of the Indian constitution. Here the court found the threat of section 9 or conjugal rights being misused by the husband to have forceful sexual intercourse with their wives without their consent which is marital rape, but later the Supreme Court in the case of Smt. Saroj Rani v Sudarshan Kumar Chadha held that the main purpose of Section 9 of the Hindu Marriage Act was to bring together estranged spouses and as them to cohabit, as marriage in India is considered to be a sacrament, and unless there are justifiable reasons, the spouses cannot desert each other.<sup>5</sup>

However, the Supreme Court failed to take into consideration the implications and consequences of Section 9 which enables husbands to take advantage of this cohabitation and force their wives to have sexual intercourse with them.

Under the Muslim law, it is the right of the husband to cohabit with his wife and the wife cannot refuse it, but the change in this concept comes with the arrival of the concept of dower.

Marriage under the Muslim law is a contract, and the dower that is paid to the wife by the husband acts as a consideration to the contract. There are different types of dowers but the one which attracts or supports the practice of marital rape is prompt dower which is paid by the husband to the wife after marriage, and in this, the wife is entitled to deny cohabitation and consummation until the prompt dower is paid.<sup>6</sup>

Once the prompt dower has been given to the wife, she has no other choice other than to consummate with her husband.<sup>7</sup>

The entire idea of women having sexual autonomy has been ignored and this practice is equivalent to women being forced into sexual intercourse, just because the man has paid for it and the concept of consent of the wife is no longer relevant. Sexual intercourse is a part of a marriage, however, it should not be considered as a matter of right of the husband to have sexual intercourse with the wife with or without her consent, merely because he is married to her. This particular practice violates the

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<sup>5</sup> AIR 1562: 1985 SCR(1) 303

<sup>6</sup> Syed Sahid Ahammad, A Critical Analysis of Dower (Mahr) in Islam, IOSR Journal of Humanities and Social Sciences, Vol. 21, No. 7, (July 2016), pp. 86-91

<sup>7</sup> Ibid

women's right to live a life with dignity. In the case of Abdul Latif Khan and Another v Niyaz Ahmed Khan, the Allahabad High Court held that since the wife was very ill to consummate with the husband, the husband was not required to pay dower to the wife. Here it is clear how the entire concept of consummation is directly related to the dower that is paid to the wife by the husband, which makes it look like payment made by the wife to her husband.<sup>8</sup> Even in the case of Wilayat Hussain v Allah Rakhi, it was held by the Allahabad High Court that a Mohammedan cannot file the case of restitution of conjugal rights or for cohabitation or consummation until the prompt dower is paid, and the wife is free to stay away or refuse to cohabit with the husband until the prompt dower is paid.<sup>9</sup>

Hence we can see how the prompt dower plays an important role in Muslim law as once the husband pays the prompt dower, the husband becomes entitled to have sexual intercourse with his wife even without her consent. The main problem lies in the discrepancy of how even though rape is a punishable offense in the country and is against human rights, why is it not a crime when the same is done to a woman who is married to the offender. Women in the country are so dependent on the husbands both financially and emotionally, that they put up with the forceful sexual intercourse for mere survival. These personal laws are indirectly forcing the wife to consummate with the husband, which makes the woman go through physical as well as mental agony. Since most women are financially dependent on their husbands, even if she chooses to divorce her husband, the maintenance amount provided by the husband is very minimal, and it can only be given if the wife had consummated with the husband or she is pregnant (Iddat period). Therefore even to get maintenance, it is required that the woman must consummate the marriage; otherwise she will not be entitled to get maintenance from the husband. Even though this act matches all the requirements of a rape come under section 375 of the Indian Penal Code but it is still not a crime. With these outdated dated laws and practices still happening, the position of women keeps degrading.<sup>10</sup>

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<sup>8</sup> (1909) ILR 31 All 343

<sup>9</sup> (1880) ILR 2 All 831

<sup>10</sup> Srimati Basu, *Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory*, *Feminist Studies*, Vol. 37, No. 1, Conjugalities and Sexual Economies in India (2011), pp. 185-211

## EVOLUTION OF MARITAL RAPE

The practice of having sexual intercourse forcefully by the husband on his wife has been prevalent even before the British rule. The first case of marital rape reported in India was the Phulmoni Das rape case also known as the *Empress v Hari Mohan Maiti* in the year 1890. In this case, the husband who was 30 years old forcefully had sexual intercourse with his wife who was a 10-year-old girl. The trial was held in Calcutta Sessions Court on 6th July 1890, where the court convicted the husband Hari Mohan Maiti and sentenced him for 12 months of hard labor.<sup>11</sup>

It was considered as a revolutionary judgment and led to modifications in the Indian Penal Code.<sup>12</sup>

Even in the 172nd Law Commission Report it was mentioned that forceful sexual assault on the wife by the husband will not amount to rape as it would ruin marital relationships. The National Family Health Survey 2005-2006 recorded that a lot of women were forced by their husbands to have sexual intercourse with them. One in seven married women has suffered physical injuries as a result of spousal violence. A lot of married women undergo sexual assault by their husbands, and unfortunately they do not have any remedies for the same.<sup>13</sup>

Even though Section 375 of the Indian Penal Code has been modified to incorporate forceful sexual intercourse with a wife who is less than 18 years of age as rape, the National Commission for Women Annual Report of 2010-2011 said that this is a progressive step, but it would have been better if there was no age limit.<sup>14</sup>

The Supreme Court in the landmark judgment of *Independent Thought v Union of India* after analyzing the exception under section 375 held that the rape of a married woman who is less than 18 years of age will come under the ambit of section 375 and will be considered as an offense, which means that the age limit had been raised from 15 to 18. However, the same protection is not given to a married woman who is above

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<sup>11</sup> (1891) ILR 18 Cal 49

<sup>12</sup> Meghna Bhat, *Examining Marital Violence in India: Review and Recommendations for Future Research and Practice*, Trauma, Violence and Abuse, Vol. 15, No. 1, (January 2014), pp. 57-74

<sup>13</sup> Stellina Jolly and M. S. Raste, *Rape and Marriage: Reflections on the Past, Present, and Future*, Journal of the Indian Law Institute, Vol. 48, No. 2, (April-June 2006), pp. 277-284

<sup>14</sup> Ibid

the age of 18. The Court held that this was on the basis that it was arbitrary and discriminatory as the classification was based on marital status, which is unrelated to numerous harms of child marriage. Further, the Court also felt that nonconsensual sex with minor who is married is itself a crime under the Child Marriage Restraint Act, 1929 and section 6 of The Protection of Children from Sexual Offences Act, 2012.<sup>15</sup>

In the case of RIT Foundation v Union of India, the Delhi High Court held that in a marriage both men and women have the right to refuse to sexual intercourse. Further, the Court held that the marriage does not imply the willingness of the wife to have sexual intercourse. The Court also focused on the point of how force is not a pre-condition of rape, and women can be coerced into having sexual intercourse through various means.<sup>16</sup>

A similar judgment was passed by the Gujarat High Court in the case of Nimeshbhai Bharatbhai v State of Gujarat, where it was held that if a law does not give equal protection to married and unmarried women concerning forceful sexual intercourse, this would amount to injustice, as it allows husbands to have forceful sexual intercourse with their wives as a matter of right.<sup>17</sup>

This issue was brought forward in the Parliament, which proposed for making forceful sexual intercourse by husband on his wife as a criminal offense under 'The Women's Sexual Reproductive and Menstrual Rights Bill 2018, which was introduced by Dr. Shashi Tharoor in the Lok Sabha. He urged that marital rape should be made an offense under section 375 of the Indian Penal Code, as by doing this. the sexual autonomy of the woman and her right to live with dignity can be rightfully protected.

## CONCLUSION AND SUGGESTION

For centuries, women have been treated as inferior and subordinate to men in society. They have been socially and economically handicapped in the past and have been dependent on their male family members for the greater part. Rape, which is one of the most gruesome offenses against humanity, originates from the idea of exercising

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<sup>15</sup> (2017) 10 SCC 800

<sup>16</sup> Writ Petition No 284 of 2015

<sup>17</sup> 2018 SCC OnLine Guj 732

dominance over the other person sexually using force. As the Indian society kept improving, laws were made concerning the protection of women, which included laws that made rape by a man on a woman a criminal offense. However, in India the concept of marriage is considered to be a sacrament and therefore it is given high regard, and therefore forcefully sexual intercourse by a man on his wife was not considered as rape as it was considered to be interfering the marital lives of the couple.

The society is progressing, and with this, the crimes against women are also on the rise, both outside the house and within the house, where family members commit most of the crimes. Marital rape must be treated as an offense and the offender should be punished in the same manner as other forms of rape. A woman being married does not imply that she is willing to have sexual intercourse forcefully. The husband should not take it as a matter of right that he can have sexual intercourse with his wife whenever he wants to, with or without her consent.

Article 21 of the Constitution of India has widened the meaning of the right to live with dignity. This also includes the right to have sexual autonomy and one should not be treated as an object or commodity to satisfy sexual pleasures merely because of her marital status. Their husbands often beat up women when they try to resist sexual intercourse. It also leads to mental trauma like depression and anxiety, and sexual problems like rupturing, infection, internal bleeding, and miscarriages.

India is a diverse country where religion plays a very key role concerning how the society functions, also to an extent influence the minds of the people. Personal laws in the country are such that it propagates the idea of women being subordinate to men and husbands have an upper hand in the marriage, which makes it obligatory for the wife to obey her husband, which includes not resisting sexual intercourse.

Such provisions in the personal laws should not be allowed as it goes against the basic human rights of married women, and the mere fact that a married woman is being treated differently than an unmarried woman amounts to inequality as the distinction is arbitrary.

Marital rape should be made a punishable offense and then there should be Commissions set up to provide medical, emotional, and legal remedies to married



women who are being sexually assaulted by their husbands. Women who have suffered sexual assault by their husbands should be compensated for the mental trauma that they have endured and should also be given counseling for their well-being.

Indian laws have failed to protect the rights of married women as they are still considered to be inferior and the property of their husbands. Knowing that the married women don't have any legal recourse or remedies, the husbands can freely exploit their wives sexually. Even though the husband's acts of forceful sexual intercourse can be punished under criminal assault, it would not amount to rape.

The Indian law has given marital immunity to the husband for raping his wife. The age limit of 18 years of the married woman, which makes it a criminal offense when she undergoes sexual assault by her husband, should be removed and protection against any form of sexual assault should be given to all women irrespective of their age or marital status. Married women have the right to be protected and to live a life of dignity.

Marital rape can be proved in the court of law with the help of evidence, which can include bruises or any other marks that point at the history of sexual abuse, which can be proved by forensic evidence.

Moreover, the Judiciary interfering into the marital life of the couple in cases of such heinous offenses, it nowhere brings down the reputation or the sanctity that is attached to the institution of marriage. The lives of married women and their right to live a life free of abuse is much more important than the concept of marriage.

Lastly, no reforms can be successful, unless they are accepted and followed by the people. The attitude of the people concerning treating women as inferior or as property has to change, and therefore sensitization programs must be conducted to educate the people at workplaces, educational institutions, and communities. Only when women are treated with respect and with dignity, can the country be finally called as a developed and progressive country.