

MARITAL RAPE - EXEMPTION UNDER INDIAN PENAL CODE: QUEST FOR RECOGNITION AND LIABILITY

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Abstract

Violence is at its worst manifestation when occurs within the family – a unit which is supposedly the safest and the most protected zone in human life. The impact and consequences of family violence are most devastating when such the perpetrator of such violence is the husband – the man who is supposed to be the protector and provider of the woman. Unfortunately, the sexual violence is inflicted by the husbands in the name of irrevocability of consent to matrimonial cohabitation. The society and the legislature do not even recognize such sexual violence by the husbands, which seriously impinges upon the status of women in the society and maintains the status quo of the women’s subjugated position in the family as well as the society.

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I INTRODUCTION

VIOLENCE IS a coercive mechanism to assert one’s will over another, in order to prove or feel a sense of power. Defined in plain terms - “Violence” is destruction, suffering or death, which is deliberately inflicted for the achievement of a purpose, which is political in nature.¹ Violence is a

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¹Vandana, *Sexual Violence Against Women-Penal Law and Human Rights Perspectives*, 3 (2009). Lexis Nexis Butterworths Wadhwa Publishers, Delhi.

means to demonstrate power, authority or superiority in the societal structure. In essence, violence is the use or threat of use of force or coercion to establish domination and can be expressed at the individual level, between classes/communities or at the level of the state.²

Sexual violence

Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women's lives and prompts individual and collective resistance among women thereby maintaining the *status-quo* of gender inequality, subjugation of women and their control.

Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being.³ Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality⁴. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics. Sexual violence does not necessarily include direct physical contact between perpetrator and victim, threats, humiliation and intimidation may all be considered as sexually violent.

Sexual violence is a complex political phenomenon deep embedded in the socio-cultural milieu. Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women's lives and prompts individual and collective resistance among women thereby maintaining the *status-quo* of gender inequality, subjugation of women and their control. Sexual violence is all pervasive and manifests itself in a number of forms, which exist in all institutions of life including the most basic unit of human *society i.e.*, the family.

²Brinda Karat and InduAgnihotri, "Violence Against Women." Paper 53 in UGC Refresher Courses on Women's Studies (1998: Calcutta). Organised by School of Women's Studies and Centre for Women's Development Studies, Jadavpur University, Feb. 3-25, 1998 CD-635.3 available at: <http://www.cwds.ac.in/wp-content/uploads/2016/09/3.-women-and-communalism.pdf>.

³Peter Gordon and Kate Crehan, *Dying of Sadness: Gender, Sexual Violence and the HIV Epidemic*. SEPED Conference Paper Series at 2 available at: https://childhub.org/en/system/tdf/library/.../gordon_crehan_gender_sexua.pdf, last visited on Aug. 22, 2017.

⁴*Contemporary Forms of Slavery – Systematic Rape, Sexual Slavery and Slavery like Practices During Armed Conflict*. (Final Report submitted by Ms.GayJ.McDougall, Special Rapporteur of Commission on Human Rights, 6 (1998).

Sexual violence occurring in the family

The family has been traditionally considered as a retreat, where individuals are able to find security and shelter, a private heaven where peace and harmony prevail. However, the family may be a “cradle of violence” for the women, who are subjected to violence at home⁵. Throughout the world there are practices in the family that are violent towards women and harmful to their health. Young girls are circumcised, live under severe dress code, given in prostitution and incestuously abused in the family.

The family violence is generally hidden under the notions of intimacy of private sphere as the belief that family integrity should be protected at all costs prevent many women from seeking outside help.⁶ The law and criminal justice system generally do not recognise sexual violence occurring in the family as a separate crime, hence such cases are rarely prosecuted and the women have no option, but to suffer in silence.

Violence is at its worst when occurs within the family and leads to the most serious impact and consequences when carried out by a person whom the victim trusts and is in a relationship of love and affection. In Indian society particularly, great sanctity is attached to the marriage and the husband is supposed to be the protector of the wife. When the same person becomes the perpetrator of sexual violence against the woman and the society and the legal system do not even acknowledge the phenomenon of occurrence of such violence, the misery and plight of the victims remain beyond explanation in the words.

II THE CONCEPT OF MARITAL RAPE

Rape must be understood as the gravest kind of sexual violence against women – an extreme manifestation occurring in the continuum of sexual violence which negates the human rights of the women completely. Rape stems from sexist values and beliefs and it is not simply an issue affecting individual woman. It is a social and political issue directly connected to imbalances of power between men and women. Rape is an act of aggression and violence in which the victim is denied her self-determination.

⁵*Preliminary Report submitted by UN Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, (1994).*

⁶*Integration of the Human Rights of Women and the Gender Perspective- Violence against Women, UN Commission on Human Rights, 9 (2003).*

The definition of rape, as recognised by the majority of legal systems, does not go beyond the parameters of a patriarchal value system, reflects old notions of chastity, virginity, marital ties and emphasises the fear of female sexuality. The legal definition of rape in most countries is limited to non-consensual or forced vaginal penetrations and exempts a particular class of males – husbands, who cannot be charged with the rape of their own wives.

The definition

Marital rape can be defined as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife does not consent. One of the very peculiar implications of the narrow and restricted definition of rape is that it cannot be committed against a particular set of women – a married woman cannot be raped by her own husband. Further, the implication of this loophole is that violent and unwanted sex does not necessarily define rape rather it is *illegal sex, i.e.*, sexual assault by a man, who has no legal rights over the woman⁷. In other words, in law's eyes, violence in a legal sexual intercourse is permissible, but sexual relations with a woman, who is not one's property is not.⁸

The irrevocable consent

The initial rationale for the marital exemption clause is based on Sir Matthew Hale's statement made in 1678 that "the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract"⁹. The premise of the statement was based upon the common law notion of marital unity that husband and wife were one and a married man could not be held liable for raping himself. In majority of the countries in the world; husbands enjoy 'criminal law immunity' for

⁷Ann Wolbert Burgess and Lynda Lytle Holmstrom, *Rape : Victims of Crisis*, 197 (1974) quoted in Dianne Herman, "The Rape Culture" in *Women – A Feminist Perspective*, ed. by Jo Freeman, 3rd edn., 20 (1984) at 22.

⁸*Ibid.*

⁹ Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*, 94 (1994).

raping their wives. Wife rape has existed as long as the institution of marriage¹⁰. In words of Lord Mathew Hale, a seventeenth century English jurist: ¹¹

The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself unto her husband, which she cannot retract.

III THE INCIDENCE AND CAUSES

According to a US Sexual Assault Information Sheet, one in seven women reported that they had been raped by their husbands.¹² Rape in marriage is vastly unrecognised by the legal systems all over the world. This legal reluctance is the product of the social notion that the wives are the properties of their husbands. To be more precise, viewing of wife as the sexual property of the husband is the inevitable heritage of the patriarchal society.¹³ Apart from this, there are economic structural arrangements of the society with the man as the bread-earner of the family, thus, having massive economic control over the family and the woman as the dependent on the bread-earner, having no independent income, the one who is, therefore, left with no alternatives, but to continue even in an abusive marriage.

In majority of countries, criminal law can be invoked for assault in marriage, but not for rape. While countries, like Australia, New Zealand and the United Kingdom, have changed the law with regard to marital rape to allow a husband to be prosecuted for raping his wife, this is by way of a rare exception and not the norm.

Sexual assault within marriage is arguably the most mystified of abuses perpetrated against women.¹⁴ Marital rape is not a contradiction in terms rather a form of violence against wives, which

¹⁰Diana E.H. – Russell, *Rape in Marriage*, 2nd edn., 2 (1990).

¹¹*History of the Pleas of the Crown*, Vol. I, at 629 (1736) quoted in *Rape – A Legal Study* by National Commission for Women, 39(2000).

¹²*Sexual Assault Information Sheet*, Wisconsin Coalition Against Sexual Assault, (1992), available at: http://www.wcasa.org/pages/Resources-Info_Sheets-Lesbian-Gay-Bi-Sexual-Transgendered-%28LGBT%29-Populations-and-Sexual-Assault-2003.phpt last visited on Sep. 20, 20, 2017.

¹³*Supra* note 9 at 3.

¹⁴Arati Rao, “Right in the Home – Feminist Theoretical Perspectives on International Human Rights” in *Feminist Terrains in Legal Domains – Inter-disciplinary Essays on Women and Law in India*, ed. by RatnaKapur, 100 (1996) at 113.

is not rare, just rarely discussed. Rape is a persistent problem in a large number of marriages.¹⁵ Sexual assaults by husbands are the most common kinds of sexual assaults reported, occurring over twice as often as sexual assault by a stranger.¹⁶ In a study conducted by her, Diana Russell found that one in every seven married women reported being raped by the husband.¹⁷ David Finkelhor and KerstiYllo have commented that “the marriage license is a raping license”.¹⁸

Several policy considerations have been advanced in favour of marital exemption rule. First, if this rule is not adopted, wives would make false complaints against their husbands out of spite or in order to obtain divorce or property settlement; secondly, rape laws are designed to protect women from sexual attacks of malign strangers and not to protect headachy wives from the discomfort of having sex with their basically benign husbands and thirdly, allowing women to charge their husbands with rape will prevent reconciliation.¹⁹

In fact, wives raped by their husbands are often traumatized at even more basic level in their ability to trust.²⁰ In addition to the violation of their bodies, they are faced with a betrayal of trust and intimacy. A woman raped by her husband has to live with her rapist, not just a frightening memory of the attack by a stranger.²¹ Raped wives use many self-deceptions to avoid facing the realities of an intolerable marriage because the after natives – loneliness, loss of financial security, separation from children etc., are so frightening.²²

David Finkelhor and KerstiYllo have identified four basic types of coercions involved in marital rape. First type of coercion is *social coercion* – whereby wives comply for financial and

¹⁵ David Finkelhor and KerstiYllo, “Rape in Marriage – A Sociological View” in *The Dark Side of Families – Current Family Violence Research*, ed. by David Finkelhor, Richard J. Gelles, Gerald T. Hotaling and Murray A. Straus, 119 (1983) at 119.

¹⁶*Id.* at 120.

¹⁷ Diana E.H. Russell, *Rape in Marriage*, (1990). Diana Russell interviewed over 900 randomly selected women, out of which 644 were married. She found that wife rape was the most common type of completed rape reported as 3% women had experienced completed rape by a stranger whereas 14% of married women had experienced rape by their husbands.

¹⁸*Id.* at 17. See also, Mother of a convicted wife rapist commented – “I don’t think this should be a crime, because after all, this is what men get married for”. *Id.* at 27.

¹⁹ The social attitudes against the recognition of marital rape are so hard set that in a South Carolina case, where a man tied up, blind folded and raped his wife, a jury acquitted the husband. The injury was shown a videotape of the incident made by the husband with the woman pleading, “please don’t tie me up again, I’ll do anything you want me to”. The jury concluded that the videotape depicted a ‘sex game’ rather than a rape.

²⁰ Nancy M. Shields and Christine R. Hanneke, “Battered Wives’ Reactions to Marital Rape” in *The Dark Side of Families – Current Family Violence Research*, ed. by David Finkelhor, Richard J. Gelles, Gerald T. Hotaling and Murray A. Straus, 131 (1983) at 134, 135.

²¹*Supra* note 4 at 126.

²²*Id.* at 121.

social security provided by the husband; second is *interpersonal coercion* – refers to non-violent threats by the husband; third is *threat of physical force* – which could be express or implied and lastly, *physical coercion* resulting in physical restraints/injuries²³. The main reasons that inhibit women from attempts to ward off marital rape are that the victims think that the partner is stronger than them; they could get greater harm, if they resisted or they themselves were wrong by being frigid or non-cooperative with their husbands.²⁴ Stereotypes about women and their sexuality reinforce culturally that it is the wife's duty to have sex with her husband and she is a 'bad wife' if she does not enjoy sex with her husband against her will.

Women experience the violence by the husbands in various ways, *e.g.* some are battered during the sexual violence or the rape may follow a physically violent episode when the husband wants to "make up" and coerces his wife to have sex against her will.²⁵ Wife rape does not occur in a vacuum, but it is one of the consequences of the unequal power relationship between husband and the wife.²⁶

Wife rape is the consequence of two very serious primarily male problems – violence and predatory sexuality.²⁷ Wife rape is a manifestation of a male sexuality, which is oriented to conquest and domination, to proving masculinity defined in terms of power superiority, competitiveness, control and aggression. A real man is supposed to get what he wants, when he wants, particularly with his wife and even more particularly, in his sexual relations with her²⁸.

The composite picture of the husband rapist reveals jealous, domineering individuals, who feel a sense of entitlement to have sex with their 'property' – wife on whom anger, depression, frustration can be taken out and dominance and coercion can be exercised – all in a permissible legal sphere. Marital rape is most likely to occur in relationships characterized by other forms of violence

²³*Ibid.*

²⁴ *Supra* note 4 at 126,127.

²⁵*Ibid.*

²⁶The structural arrangement with husband as the bread-earner and the wife as his dependent does not make the occurrence of marital rape inevitable, but certainly does contribute a lot in encouraging it.

²⁷*Supra* note 5 at 357.

²⁸*Ibid.* In many countries, even the legislators have declined to take the issue seriously. As one US State senator put it – "If you cannot rape your wife, who can you rape?"

or abusive situations. This has led many researchers to argue that marital rape is “just one extension of domestic violence”.²⁹

IV MARITAL RAPE AS PROPERTY CRIME -THE MARXIST EXPLANATION

From the times of its rudimentary development as the Marxists explain, the political and legal theory has rested on the assumption of individual's right to own private property. Its second assumption – that men are superior to women and, thus, the legal, social and economic disparities between the two sexes, is justified being very natural – laid down the foundations of a sexist society.³⁰ With passage of time, ownership of private property of the man became very crucial. It required control of means and products of reproduction in order to ensure the purity of male lineage and that further required controlled sexual access to a woman by a man, to ensure paternity of their off springs. Since ownership is considered to be best form of control, women were reduced to the private property of sexual nature, owned by distinct male owners. Such notions are prevalent even till date and it is for this reason that husband's absolute ownership of the wife's body and sexuality, remains unchallenged and majority of legal systems do not recognise rape within marriage.

V THE LEGISLATIVE DEVELOPMENTS AND THE ‘AGE OF CONSENT’

For thirty years, after the enactment of IPC' 1860, rape law remained the same. The later change was owing to a number of cases in Bengal in which the child wife died due to consummation of marriage. Out of these, the most notable was *Queen Empress v. Haree Mohan Mythee*.³¹ This case tells the pathetic story of phulmonee Dassee, who was eleven years and three months old when she died as a result of rape committed on her by her husband. The medical evidence showed that Phulmonee had died of bleeding caused by ruptured vagina.³² In this case, rape of child wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her.³³

²⁹ Johnson and Sigler, 22 (1977) quoted in Raquel Kennedy Bergen, “*Marital Rape*”, Paper by VAWO, Office of Justice Programs, U.S. Department of Justice and MINCAVA .

³⁰ Friedrich Engels, *The Origin of the Family, Private Property and the State* (1972).

³¹ILR 1891 Cal 49.

³²*Id.* at 53, 54.

³³*Id.* at 62.

In 1891, Sir Andrew Scoble introduced the Bill, which culminated into Indian Criminal Law (Amendment) Act' 1891.³⁴ This act raised the age of consent to 12 years both in cases of marital and extra-marital rapes. The object of Act was humanitarian, viz., "to protect female children from immature prostitution and from pre-mature cohabitation."³⁵ Pre-mature cohabitation resulted in immense suffering and sometimes even death to the girl and generally resulted in injury to her health and that of her progeny.

Beginning of the 20th Century witnessed increased public attention towards the improvement in the physique of the nation and the reduction of causes leading to abnormal mortality of younger generation. In 1922, Rai Bahadur Bakshi Sohan Lal, MLA, moved for leave to introduce a Bill in the Assembly to amend section 375, Indian Penal Code, 1860 (IPC) by raising the age of consent in both marital and extra-marital cases.³⁶ This attempt to legislation proved futile, but with the passing years, agitation for a modification of law steadily grew owing to a better knowledge of the evil consequences of early marriage and early consummation.

In 1924, Hari Singh Gour introduced a Bill to amend section 375, IPC, raising the age to 14 years in both marital and extra-marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 years in the case of marital rape.³⁷ On September 1, 1925 Sir Alexander Muddiman introduced the Bill fixing 14 years the age in extra-marital cases and 13 years in marital cases, which culminated into Amendment Act, 1925.³⁸ The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasised in section 376 by incorporating the words – "unless the woman raped is his own wife and is not under twelve years of age". In which case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by raising the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by amended section 376.

³⁴ Act No. X of 1891, published in Gazette of India, (1891), Pt.V.

³⁵ *Id.* Statement of Objects and Reasons.

³⁶ *Report of the Age of Consent Committee*, Calcutta, Government of India, 11 (1928-29).

³⁷ *Id.* at 12.

³⁸ Act No. XXIX of 1925, published in *Gazette of India*, (Oct 3, 1925), Pt. IV.

The question of age of consent was not considered as finally settled and Hari Singh Gaur again introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases respectively. It was followed by the appointment of Age of Consent Committee,³⁹ which reviewed the prevailing situation and suggested few amendments.

The committee was of the opinion that the amended law was ineffective due to the nature of the offence, particularly in case of marriage as consummation necessarily involves privacy.⁴⁰ The prevalent view among the awakened sections of society was that prohibiting the marriage of a girl under a particular age would be a better measure than to increase the age of consent for sexual intercourse.⁴¹ The dissenting group among these classes felt that law was partly futile because it afforded no protection to the girls over 13 years, who need it on account of their tender age.⁴² The Committee recommended the use of term 'marital misbehaviour' instead of rape in marital cases. The offence of marital misbehaviour would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehaviour in Chapter XX of IPC⁴³ and section 375 and section 376 of the IPC should be confined to rape outside the marital relation.⁴⁴

The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend upto one year or fine or both, where wife was between 12-15 years.⁴⁵

VI THE PRESENT LEGAL POSITION

Under Indian law, exception to section 375, IPC embodies that when the woman is married and not less than fifteen years of age, sexual intercourse by the husband is not rape.⁴⁶ Prior to the amendment in IPC in 2013, when the wife was between 12 – 15 years, the drastically reduced

³⁹*Supra* note 36, at 17, 18.

⁴⁰*Ibid.*

⁴¹*Supra* note 36 at 16.

⁴²*Id.* at 21.

⁴³*Id.* at 123, Chapter XX, IPC deals with offences relating to marriage.

⁴⁴*Ibid.*

⁴⁵*Supra* note 36 at 124, 125.

⁴⁶ S. 375, IPC, exception 2: reads as - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

quantum of punishment was provided, which *may* have extended to two years or fine⁴⁷. It amounted to rape only when the wife was below 12 years of age.⁴⁸ The amendment in 2013⁴⁹ has done away with this clause but at the same time has not recognized the concept of marital rape and has chosen to continue with the earlier legal approach. It would be pertinent to point out that Justice Verma Committee Report⁵⁰ has recommended that marital rape exemption in the IPC should be withdrawn.

The peculiarity of Indian law is adoption of the principle of primacy and supremacy of husband's right over that of the wife, even when she is well below the legal age of marriage⁵¹. The legal corollary of not treating forcible intercourse with a minor wife (between 15 – 18 years) as rape would surely be not to consider such intercourse with an adult wife as marital rape at all. The only instance, which law covers is that of legally separated couples not living together under section 376-B, IPC and the vast bulk of marital rape remains out the purview of law.

The court held in *Haree Mohan Mythee* case⁵² that husband does not have the absolute right to enjoy the person of his wife without regard to the question of safety of her. As per this decision, the only circumstances where the law recognises the encroachment upon husband's absolute right to sexual intercourse is when it becomes extremely dangerous to woman due to some physical illness etc. and grave consequences like death may follow.⁵³

Thus, under Indian law, no effort has been made to give even a veneer of protection to the right of a married woman to her physical or sexual autonomy.⁵⁴ In the existing scenario, there is hardly any feeble hope of future changes as far as recognition of marital rape of adult women is

⁴⁷Unamended S-376 (1), IPC. In other rape cases, the minimum mandatory punishment is 7 years, which extend upto 10 years or for life.

⁴⁸Unamended S-376 (2) (F), IPC, 1860.

⁴⁹The Criminal Law (Amendment) Act no. 13 of 2013.

⁵⁰Justice Verma Committee Report, (2013).

⁵¹ Hindu Marriage Act, 1955, s.5 (iii), prescribes 18 years and 21 years as the legal age for females and males respectively.

⁵²(1890) 18 Cal. 49.

⁵³*Id.* at 62. In this case, when eleven years old wife was subjected to forcible sexual intercourse by the husband, she died of vaginal ruptures and profuse bleeding.

⁵⁴ Another peculiarity of Indian law is the provision for decree of restitution of conjugal right's embodied in s. 9, Hindu Marriage Act, 1955. In *T. Sareethav. VenkataSubbiah* (AIR 1983 AP 356), the Andhra Pradesh High Court declared it unconstitutional and violative of the fundamental right of personal liberty and privacy. But the Apex Court upheld the validity of s. 9, Hindu Marriage Act, 1955 in *Saroj Rani v. Sudarshan Kumar* (AIR 1984 SC 1562) and totally ignored the effect such a decree can have on an Indian woman, who under the threat of judicial and social pressure and financial dependence may well be forced to go back to the matrimonial house and because of her vulnerable position in it, be forced to have sex and live a life of misery in an atmosphere she obviously abhors.

concerned and even in case of minor wives between 15 – 18 years of age, the offence is treated for less seriously.⁵⁵ In 156th Law Commission Report, the Commission expressed its reluctance to raise the age for wife from 15 years to 18 years in the Exception to S-375 IPC⁵⁶, without assigning any reasons in particular. In 172nd Law Commission Report, the Commission found the deletion of the exception to Section 375 IPC, unnecessary as it may amount to excessive interference with the marital relationship.⁵⁷ However, the Commission recommended that the age limit for the wife be raised to 16 years from the existing 15 years.⁵⁸

VII THE FOREIGN LAW ON MARITAL RAPE

The United Kingdom law

In United Kingdom, the legal position is prescribed under Sexual Offences Act, 2003. Despite the elaborate provisions of the Act dealing with sexual abuse/assault etc., the legislation recognises marital exemption,⁵⁹ in its chapter on ‘Familial Child Offences’. If a lawful marriage exists between the parties, the sexual activity with a child family member will be no offence in the eyes of law.

A plethora of judicial decisions do exist which make the situation slightly better than Indian law. Before the Court of Appeal decision in *R v. R*,⁶⁰ a man could not be convicted of raping his own wife during the subsistence of marriage because she was deemed to have given consent for marital intercourses under all circumstances. In *R v. R* and *S v. H.M. Advocate*,⁶¹ the respective courts observed that rape has always been essentially a crime of violence and aggravated assault and doubted if it was ever contemplated by the common law that that a wife consented to intercourse against her will and obtained by the force.

⁵⁵*Supra* note 46.

Law Commission of India – 156th Report on The Indian Penal Code, Ministry of Law and Justice, Government of India, 161 (August, 1997).

The NCW had recommended that the age limit in the Exception to S-375, IPC be raised from 15 years to 18 years.

⁵⁶Law Commission of India – 172nd Report on Review of Rape Laws, Ministry of Law and Justice, Government of India, (2000), para 3.1.2.1.

However, it was recommended by Sakhi and other women organisations that the exception be deleted. Their reasoning was – where husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognised by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault, where wife happens to be above 15/16 years.

⁵⁸*Id.*, para 3.2.

⁵⁹ Sexual Offences Act, 2003, s. 28,

⁶⁰(1991) 93 Cri App R 1.

⁶¹1989 SLT 469.

It was further held by the court in *R. v. Graham*⁶² and *R. V. C*⁶³ that the man may be properly convicted of raping his own wife even though the rape incident may have occurred much earlier and it does not offend section 7 of the European Convention which bars the retrospective operation of the penal provisions. Thus, United Kingdom law has undergone judicial innovations recognising marital rape.

In United States, the Federal Criminal Code, 1986⁶⁴ makes a distinction between aggravated sexual abuse and sexual abuse, depending upon the use of force or the degree of fear generated by the offender. The Code recognises the defense of marital status in case of sexual abuse of a minor or ward,⁶⁵ whereas in case of aggravated sexual abuse, the defense marriage is not recognised. As far as States are concerned, all States have recognised marital rape as an offence by the year 1993,⁶⁶ but the classification of the offence and the punishment for it varies under different State laws. In nearly 33 states, there are still some exemptions given to husbands from rape prosecution, when the wife is most vulnerable (mentally or physically impaired, asleep, unconscious, *etc.*) and is legally unable to consent. This perpetuates marital rape by conveying the message that marital sexual violence is less reprehensible than other types of rape.

VIII THE RECENT DEBATE BEFORE JUDICIARY

Recently, a PIL⁶⁷ before the High Court of Delhi has generated a judicial debate on the constitutionality of exception 2 to section 375, IPC – the marital rape exemption clause. A division bench of acting Chief Justice Gita Mittal and C. Hari Shankar J hearing the PIL against the penal code provision noted that “marital rape is a serious issue, which has notoriously become a part of the culture.”⁶⁸

⁶²(2003) EWCA Crim 1512, May 7, 2004.

⁶³(2004) 2 Cr App R. 15.

⁶⁴The Federal Criminal Code, 1986.

⁶⁵Federal Criminal Code, 1986, s. 2243 (c) (2)

⁶⁶*Marital Rape, Violence against Women Online Resources @www.vaw.edu* (last visited on Aug. 9, 2017). On July 5, 1993, marital rape became a crime in all 50 States, under at least one of the Sections of the sexual offences codes. In 17 States and District of Columbia, there are no exemptions granted to husbands.

⁶⁷The PIL has been filed by NGO RTI Foundation challenging that IPC’s s. 375 saying that it does not consider forcible sexual intercourse by a man with his wife, as rape.

⁶⁸“Marital Rape is a Serious Issue : High Court”, *Times of India*, May 16, 2017.

The RTI Foundation has filed the PIL in 2015 and other individuals and institutions⁶⁹ have also approached the High Court of Delhi challenging the exemption under section 375 as well as section 376B IPC on the ground that it excludes marital rape as a criminal offence. It has been argued in the PIL that the exemption is unconstitutional and violates the right of married women under articles 14, 15, 19 and 21 of the Constitution. One of the petitioners has challenged the provisions of Cr PC, which are to be read with section 376 IPC on the ground that differential procedure as well as differential punishment is prescribed, which is arbitrary and unconstitutional.⁷⁰

Incidentally, the hearing of the case stands intervened by another NGO called Men's Welfare Trust⁷¹ that claims that laws have already given a special status to a married woman, wherein she is liable to get maintenance, alimony, right to residence from her husband by way of various provisions. In the light of this, men become vulnerable to victimization at the hands of women, who file false cases of sexual harassment, 498-A IPC and domestic violence etc. Men's Welfare Trust pointed out that around 62,000 married men commit suicide every year, which is more than double the suicides by women, with domestic including marital issues being the single largest reason.⁷²

The Government of India has filed an affidavit before the High Court of Delhi⁷³ and maintained that "it has to be ensured adequately that marital rape does not become an easy tool for harassing the husbands. The affidavit further maintains that criminalizing rape could destabilize marriages and make men vulnerable to harassment by their wives."

It is a matter of fact that there is very scanty data available on domestic violence including marital rape because of conservative and patriarchal norms⁷⁴. There are several countries, including Nepal, US, UK and South Africa, where marital rape has been criminalized, but in India, the response of Central Government, on this issue, has been extremely misogynist and obnoxious. The Central Government has also expressed its wish to implead "State Governments" as there may be a cultural variation on the issue of marital rape.⁷⁵

⁶⁹The High Court of Delhi is hearing a clutch of petitions filed by All India Democratic Women's Association, RTI Foundation and some other individuals who want deletion of exception 2 to s.375, IPC.

⁷⁰"Delhi High Court to Hear Pleas Against Criminalizing Marital rape", *Times of India*, Aug. 29, 2017.

⁷¹ *Ibid.*

⁷²"Delhi High Court to Hear NGO's Plea Opposing Marital Rape", *Indian Express* 28, 2017.

⁷³"Men May Suffer if Marital Rape Becomes Crime, Indian Government Says", *Renters* Aug. 30, 2017.

⁷⁴ *Ibid.*

⁷⁵Jibby J. Kattakayam, "What the Union Government's Submissions on Marital Rape in the Delhi High Court Reveal" at <http://blogs.timesofindia.indiatimes.com>

It is very disappointed to note the comments of the government, which are obnoxiously anti women at the onset. The government has assumed that 'all sexual' acts by husbands would be labelled as rapes and all wives are potential liars, who would like falsely implicate their husbands. The government's notion that the stability of marriage is ensured by preventing women from filing complaints about rape reveals the true mind set of patriarchs in a conservative society.

IX THE SUPREME COURT JUDGMENT IN *INDEPENDENT THOUGHT V. UNION OF INDIA* [2017]

In a writ petition filed in public interest by a society – Independent Thought, the Supreme Court has considered the scope and viability of exception 2 to section 375 IPC. The issue before the court was to consider the recognition of marital rape when the husband has sexual intercourse with the wife when she happens to be between 15-18 years of age. This is a landmark decision of Supreme Court whereby the court has held:⁷⁶

Exception 2 to s-375 of the Indian Penal Code answers this in negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child.

The court further held that the artificial distinction is contrary to the philosophy and ethos of articles 15(3) and 21 of the Constitution as well as the International conventions. It certainly violates the bodily integrity of the girl child and her reproductive choices.

The petitioner society pointed out that any person who has sexual intercourse with a girl child below 18 years will be liable for statutory rape even if it is with the consent of the minor girl and the situation is very absurd when the offender happens to be her husband because in such case the marital exemption applies and the husband goes scott free and escapes the punishment completely. It is because of her marriage, the right of such girl child to her bodily integrity and to decline sexual

⁷⁶ Madan B. Lokur, J in 2017 SCC Online SC 1222 [Writ petition (C) no.382 of 2013] at 2.

intercourse with her husband is snatched away. Just because of her marriage she does not become mentally or physically fit for such decisions.

Pointing out the obligations of the Indian government under Convention on the Rights of the Child, 1990⁷⁷ to undertake all appropriate measures to prevent the sexual exploitation and sexual abuse of any person the court observed that the Indian government has persuaded the legislature to legitimize an activity which is otherwise a heinous offence when occurs without marriage. The duality of the marital exemption clause is that it comes in sharp conflict with the provisions of POCSO and JJA. The POCSO defines “penetrative sexual assault”⁷⁸ which becomes aggravated when the offender is related to the victim.⁷⁹ Since the Act has got overriding effect⁸⁰, a very complex and peculiar legal position emerges whereby the husband is exempted from any offence under IPC and he becomes liable to be punished for aggravated sexual assault under POCSO. Similarly, under JJA, a married girl child below the age of 18 years requires care and protection as she is prone to exploitation.

The Supreme Court has pointed out the legislative scheme as is deducible from various legislations that a child is a person below 18 years of age who is entitled to the protection of her human rights; unfortunately if gets married while a child. Her marriage is in violation of law and voidable at her instance⁸¹ and the accused husband is liable to be punished under POCSO. The only jarring note is the exemption granted to him under the IPC.⁸²

The court took note of the fact that the Committee on Amendments to Criminal law, headed by Justice Verma has also pointed out that the age old notion of a wife being a subservient chattel of the husband is no longer a viable proposition. The Committee has recommended the deletion of the marital rape exemption under the IPC while making the reference that a rapist is a rapist irrespective of his relationship with the victim.⁸³

With a view to harmonise the provisions of the IPC, the POCSO Act, the JJA and the PCMA, the court has tried locating a resolution, which they feel, is best found in the Karnataka Amendment to

⁷⁷ Convention on Rights of the Child, Arts 1 and 34.

⁷⁸ POCSO, S-3.

⁷⁹ POCSO, S-5 penalizes the act and provides for a rigorous imprisonment of not less than 10 yrs.

⁸⁰ *Id.*, s- 42-A.

⁸¹ The Prohibition of Child Marriages Act, 2006, s.3.

⁸² *Supra* note 76 at 32.

⁸³ *Supra* note 50 at para 72.

the PCMA, 2006.⁸⁴ The state legislature has inserted a sub section (1-A) in section 3 of the PCMA⁸⁵ declaring that every marriage henceforth will be void *ab initio*, if violative of the age requirements specified. Therefore, the husband of a girl child will be held liable for the offences under POCSO if the husband and the girl child are living together in the same household.

The court has observed that “it would be wise for all state legislatures to adopt the route taken by the Karnataka legislature to void child marriage and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC.”⁸⁶

The court has considered various options to lessen the turmoil of the girl child and observed:⁸⁷

...[W]e are left with absolutely no other option but to harmonise the system of laws relating to children and require exception 2 to section 375 IPC to now be meaningfully be read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of the Constitution can be preserved and protected and perhaps given impetus.

The *Independent thought judgment* is indeed a vivid illustration of judicial activism and craftsmanship to give a socially viable interpretation to a provision incorporating a dead concept in the legislation. But at the same time, it is a little disappointing to note that how the Supreme Court on more occasions than one, has very categorically stated that they would not like to make a comment on marital rape generally where the age of the wife is 18 or more than 18 years.

X CONCLUSION

Marital rape is one of the worst types of sexual violence occurring at the level of family. Due to the nature of the activity and the associated issues of privacy of relationships, internalization of patriarchal subjugation and most of the times, because of their economic dependency, the women victims don't come forward with their sufferings. The patriarchal mind set has led the law to close

⁸⁴ Presidential assent to the amendment was obtained on April 20, 2017.

⁸⁵ The Karnataka amendment reads as follows:

(1-A) Notwithstanding anything contained in sub s. (1) of sec of PCMA, every child marriage solemnised on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void *ab initio*.

⁸⁶ *Supra* note 76 at 47.

⁸⁷ *Id.* at 69.

its eyes to the plightful misery of the abused wives and the law does not even recognize marital rape as an offence leave aside providing any penalties in such cases.

Marital rape occurs in all types of marriages irrespective of age, social class, race or ethnicity. A very meagre and scanty research data is available on the issue and lack of data poses a major hindrance in the direction of making due efforts by the government and the legislature to provide effective legal forum to address the traumatized victim's concerns.

The acceptance of any spousal exemption from rape indicates an acceptance of the archaic understanding that wives are the sexual property of their husbands and the marriage contract is an entitlement to coerced sex. Moreover, by confining the offence to women, who are not married to the perpetrator, rape laws become discriminatory and deny equal protection to a class of persons – married women, on account of their status.

The Supreme Court has recognized rape of a minor wife in very loud terms and has delivered a landmark judgment suggesting the legislative formula to make child marriages void *ab initio*. But the major wives have not been able to win the judicial sympathy so as to get marital rape recognized by the apex judiciary. The narrow and restrictive definition of rape, which allows for the marital exemption make the definition of rape, a hollow statement, which provides escape-route for many perpetrators of sexual violence and the quest for justice remains unquenched.