
A CRITICAL ANALYSIS ON SOCIO -LEGAL ISSUE: IS MARRIAGE A LICENSE TO RAPE?

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ABSTRACT

“Fight for gender equality is not a fight against men. It is a fight against traditions that have chained them- a fight against attitudes that are ingrained in the society- it is a fight against the system- a fight against proverbial Laxman Rekha is different for men and women. The society must rise to the occasion. It must recognise and accept the fact that men and women are equal partners in life. They are individuals who have their own identity.”¹

-Dr. Justice A. S. Anand

Sexual abuse and violence is very much common in India and nowadays in the ambit of marriage it is more prevalent. Such kind of abuse is not reported mostly and is most brutal one. We can define marital rape as intercourse by husband to his wife where wife is unable to give the consent or wife consent is obtained by force or under threat of force. It is a physical violence against such wife. Due to increase in number of rape cases there is need of amendment hence in 2013 rape laws were amended on the recommendations of the Justice J.S. Verma Committee Report. However, still India not recognise marital rape as an separate offence. The concept of marital rape does exists in a very limited sense in India, If a husband has sexual intercourse with his wife who is below 15 years of age, would be rape and if the women is separated from her husband under a decree of judicial separation and her husband has sexual intercourse with her without her consent, it would amount to rape.² As we have no proper law on marital rape, the parliament doesn't take any effort to criminalize such offence as it is believed that there is implied consent. It does not matter what is the relation between parties as rape would be rape even though they are husband and wife. Also some leaders have opinion that it is a western concept and it cannot be applied in Indian Society

¹ BERGER R.K, WIFE RAPE: UNDERSTANDING THE RESPONSE OF THE SURVIVORS AND SERVICE PROVIDERS, THOUSAND OAKS , CA: SAGE (1996).

² The Indian penal code, ss.375,376 A.

where people are generally poor and illiterate. There are Many countries who removed exception of marital rape in their respective penal statutes. The Law Commission and the Justice Verma Committee also recommended the same. But, no concrete step has been made. In a marriage there should be understanding and mutual respect between spouses and it should not be thrive on sex, hence there is need that marital rape should be criminalized as it a violation of cherished Fundamental Rights.

RESEARCH METHODOLOGY

This research work is mainly a socio-legal analysis. The study is based on the collection of data from secondary sources such as books and internet. The study also involves the collection of data from primary sources such as statutes. Descriptive method of research is used to gather information about the present existing conditions. This study involves the use of doctrinal method of research.

MARITAL RAPE – A BRIEF ANALYSIS

Historical Perspective

A man cannot do force sex with any other women apart from his wife as it is illegal but without violating the law he can do force sex with his. The justifications for this marital rape exception were:

- The British common law view that the marriage is a contract and wife consent to sex by entering the contract and hence husband has right to sex.
- The traditional view is that husband believe wife is their property and they can do whatever they want to do to please themselves.
- The state is discouraged in interfering into relationships as we have right to privacy and harmony in marital relationships

There are many other justifications which are made by those who want to support the exception of marital rape where they state that Marital rape does not happen enough. This point is latent unsupportable. It is difficult to prove the wife consent as spouse had done sex innumerable times. Other justification is that a husband should be able to have sex with his wife without fear of prosecution and should be protected from false accusations of rape. Other Laws like assault and battery, provide a resort to raped wife that are less charged than bringing rape charges against her husband.³

India's struggle against marital rape cannot be studied without studying the international perspective of the same. Marital rape exemption can be traced to Sir Matthew Hale, in History

³ Niharika kumar, *Marital Rape*(November 16,2014), <http://www.lawctopus.com/academike/marital-rape>.

of the Pleas of the Crown (1736), where he wrote that the wife “hath given up herself in this kind unto her husband, which she cannot retract.”⁴ Also, American and English law believed until the 20th century to the system of covertures, that is, a legal doctrine under which, upon marriage, a woman's legal rights were subsumed to her husband and the wife had no legal standing of her own, and she was considered the property of her husband, thus she possessed no legal right to take action against rape by her husband. In the US, with the case of *Kirchberg v. Feenstra*,⁵ the subordination of women to her husband ended. Gradually, most of the common law countries like Australia, South Africa, Canada following the system of England had already enacted the marital rape laws in their countries

Types Of Marital Rape

Battering rape:

In battering rape, there is physical and sexual violence which is experienced by women in the relationship and they experience this violence in many ways. Some women are battered during the sexual violence, or the rape may succeed physically violent episode where the husband coerces his wife to have sex against her will.⁶

Force-only rape:

In force-only rape, husbands use only the amount of force necessary to coerce their wives. Battering may not be present in this kind of relationships. Here there is imposition of power and control by husband to his wife.⁷

Obsessive rape

Other women experience what has been labeled as sadistic or obsessive rape; these assaults involve torture or vexatious sexual acts and are often physically violent⁸

There are few cases where sex by husband to his wife amounts to marital rape and is not a loving sex, some of them are:- if husband give threat of harm to her or about what she is cared about to, and verbally threatens her to do or if he comes to her in a barely contained rage, she can't consent. She can only comply rather than risk being harmed either physically or

⁴ SIR MATHEW HALE, ROSEMARIE TONG, *WOMEN SEX AND THE LAW*, 1994, p.94.

⁵ 450 U.S. 455 (1981).

⁶ <https://www.healthyplace.com/abuse/rape/types-of-rape-the-different-forms-of-rape/st>.

⁷ Ibid.

⁸ Ibid.

emotionally. If a husband calls his wife names, accuses her of not being a good wife, or blackmails her emotionally by suggesting she's so bad in bed that he will go elsewhere, he's manipulating her. When a wife falls for these tactics, it isn't consent. It's rape.

Wife cannot give the consent if she is intoxicated, asleep, drugged or unconscious. Some men make her hostage in her own home by controlling her all money and not letting go outside from home by keeping keep themselves in a position of superiority by controlling. She then finally gives up whatever he wants including sex. Women thinks that sex is easy route to give as compared to her needs and respect what she is unable to give up and by doing this she is being raped.⁹

Problems In Prosecuting Marital Rape

Mostly in practice, there is no prosecution except in extreme cases where it involve a very high level of violence. There have been many problems with prosecuting the perpetrators of marital rape, one of such hindrance is the reluctance of the various legal systems to recognize it as an offence.

Another problem is the existing social norms that prevail in certain cultures. Society first of all consider such acts offensive so that laws are successfully enforced. Because even if a legislature enacts adequate laws against marital rape, in practice these laws are ignored if the act is not socially considered a crime. For example, in many parts of the world, where women refuse to husband sexual demand and husband commit sexual abuse. Marital rape is seen as an incident provoked by the wife who refused to perform her duty.

Rape Versus Marital Rape And Its Effect

Rape is usually a one-off, where someone you don't know, and you don't even share any kind of personal experiences and history. Marital rape is quite different from a physical and sexual violation which is a betrayal of trust. Here is a person whom you have those intimate experiences and has a history and with whom you may have a home and children. Marital rape is destructive because it betrays the fundamental basis of the marital relationship.¹⁰ If a woman is raped by a stranger, then she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist. Marriage is a bond of respect, love and affection

⁹ <http://psychcentral.com/lib/marital-rape/>.

¹⁰ <http://www.lawteacher.net/free-law-essays/family-law/marital-rape.php>.

but in such respect is not there there are chances of physical and mental . Harsh reality about the cases of marital rape is that the victim has to face this and has no other option left out and has to face both mental as well as physical abuse. Victim or women does not get divorce on such basis because marital rape is not considered as rape by the legislators. While rape by a stranger is highly traumatic, it is typically a one-time event. Furthermore, marital rape is rarely a one-time event, but a repeated if not frequent occurrence. In the case of rape by a spouse or long term sexual partner, the history of the relationship affects the victim's reactions. Marital rape is more emotionally and physically damaging than rape by a stranger because affection or trust between partners breaks. Whether marital rape occurs once or is part of an repeated pattern of domestic violence, trauma from rape has serious long term effect for victims regardless of fact whether the assault is prosecuted or not. Unlike in other forms of rape, where the victim can remove themselves from the company of the rapist and never interact with them again, in the case of marital rape the victim often has no choice but to continue living with their spouse: in many parts of the world divorce is very difficult to obtain and is also highly stigmatized.

In *Railway Board v. Chandrima Das*,¹¹ The Supreme Court has observed that rape is not merely an offence under the Indian Penal Code, but is a crime against the society as whole.

Legal Scenario Of Marial Rape In India

Protection Under Indian Penal Code :

Marital rape is considered a rape only if the wife is less than 15 years of age. There is no as such legal protection given to the wife after the age of 15, which is against human rights regulations. The same law that provide for the legal age of consent for marriage to be 18, protects from sexual abuse only those up to the age of 15. As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

- When the wife is below 15 years of age, offence punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life and shall also be liable to fine. Rape of wife of above 15 years in age is not punishable.¹²

¹¹AIR 2000 SC 988.

¹² The Indian Penal code(45 of 1860),ss. 375,376.

- Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years which can be extended upto seven years and fine;¹³
- Cruelty on part of husband is punishable of imprisonment for a term which may extend to three years and shall also be liable to fine.¹⁴

In *Independent Thought v. Union of India*¹⁵, PIL was filed before the Supreme Court of India that the 'Exception 2' to Section 375 of the Indian Penal Code, violates Articles 14, 15 and 21 of the Constitution of India to the extent that it permits intrusive sexual intercourse with a girl child aged between 15 to 18 years only on the ground that she has been married.

Section 375 of the Indian Penal Code defines the act of 'rape'. However vide exception 2, it provides that the sexual intercourse or sexual acts by a man with his own wife, will not be recognized as rape if the wife is above 15 years of age. Thus the exception does not provide a recognition to marital rape as a crime. Further it also does not regard such acts with a woman above the age of fifteen as rape if she is such concerned person's wife though otherwise such acts with a woman below the age of 18 years is considered as rape even if committed with the consent of the woman. Court observed that Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape". It is, however, made clear that this judgment will have prospective effect.

Protection Of Women From Domestic Violence¹⁶

Women get relief from domestic violence act. Under section 3 of this act it gives the definition of domestic violence i.e For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,-

¹³ The Indian Penal code(45 of 1860),s.376 (B).

¹⁴The Indian Penal code(45 of 1860),s 498 A.

¹⁵ Writ Petition (Civil) No. 382 Of 2013.

¹⁶ The Protection of women from Domesic Violence Act, 2005.

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

It occurs when a man imposes intercourse on his wife either by force, threat of force, or when the wife is unable to consent. And just as domestic violence has been made punishable by law, so should domestic sexual abuse, because rape is rape, regardless of whether it is committed by husband, father-in-law, uncle or stranger. Since the late 20th century, most of the developed world has criminalized marital rape but India has still not.¹⁷

Justice J.S Verma Committee Report And 2013 Amendment In Rape Laws

After the most serious and heinous offence of Nirbhaya’s Gang Rape case , the recent Criminal Amendment Act, 2013 came that provide requirements that were proposed in the Law Commission Report in 172nd Commission. Section 375 has been expanded and the definition of rape under sub-section (a) states that rape includes penetration of penis in the mouth, urethra or anus of a woman against her will.¹⁸ Further, several Sections such as 376A, 376B, 376C and 376D have been added to make rape laws more stringent. Before amendment under section 376 of IPC in which it was mentioned that if wife is between 12 to 15 years of age and is raped then husband shall be punished for two years and fine. This has been done away so that now if wife is between 12 to 15 years of age 15 years is raped then the punishment now shall be imprisonment for 7 years or life imprisonment and fine. Penalty and punishment which was earlier low was now more.

Even though there are many positive reforms brought by Criminal Amendment Act, 2013 yet it has a number of shortcomings. One of them being non-inclusion of marital rape within the ambit of the definition of rape as it is believed that inclusion of such law is out of question in the background of such societal norms, poverty and a lack of education In India. Various criminal law reports and recommendations given by Justice J.S. Verma Committee Report have

¹⁷ MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN 132,(EASTERN BOOK COMPANY, Lucknow, 3rd edn) .

¹⁸ Criminal (Amendment) Act, 2013.

fallen on deaf ears. But it is high time to realize that putting marital rape as a separate offence having stringent punishment is important to protect the woman.

Constitutional Safeguard

How Marital rape infringes Right to Equality and Right To Life?

After breaking the stereotypical patriarchal view Several countries have recognized marital rape as an offence. Earlier, a woman was considered to be the sexual property of a man but now she is equal to that of a man.

The exception under Art. 375 permitting a man to have sexual intercourse with his wife without her consent is the infringement of Article 14 and Article 21 of the Constitution.

Article 14 protects a person from discrimination. If the exemption 2 to section 375 is seen in light of the equal protection clause then the differentiation of women who have been raped on the basis of their marital status goes against the spirit of Section 14. Rape within marriage and rape outside marriage is same in principle, if we see rape of a wife by her husband irrespective of their marital relationship.

In *Kharak Singh v. State of U.P*¹⁹ the Supreme Court has recognized that a right of privacy is constitutionally protected under scope of Article 21. It is submitted that the doctrine of marital exemption to rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her will.

But the exemption under Section 375 of IPC, 1860 discriminates a wife when it comes to protection from rape. There is fundamental right to life and live with human dignity²⁰. The current law fails to look at consent of a woman as an elementary condition for sexual element; and taking away the element of consent from married woman when cohabiting is not only immoral but also unconstitutional.²¹

Even in *Bodhisattwa Gautam v. Subhra Chakraborty*²² the Supreme Court said that 'rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental

¹⁹ AIR 1963 SC 1295.

²⁰ The Constitution of India, Art 21.

²¹ Anjali Srivastava, Devanshu Jain and Ayan Hazra ,*Marital Rape: A legalized sin* , INDIAN JOURNAL OF APPLIED RESEARCH, Vol. 3 Issue 2, Dec. 2013.

²² (1996)1 SCC 490.

rights, namely, the right to life enshrined in Article 21 of the Constitution.’ Yet the current law negates this very pronouncement by not recognizing marital rape, thus, directly violating the Right to life with dignity under Article 21.

It is the fundamental duty of every citizen of India to denounce practices that are derogatory to the dignity of woman.²³ Thus the legislative framework should make amendment under Section 375 of IPC and save married woman who face evil of forceful sexual intrusion at the hands of their husband.

Conclusion And Suggestions

Human rights are violated if marital rape is occurred. Rape is a rape and marriage is not a ground of excuse to commit such serious offence. To curb such offence, first of all women must be educated and empowered enough to stand against violence faced by them and through this they can themselves abolish the existing marital rape exception. In present era there is need to raise voice against this evil and should secure justice. Females are devoid of their agency and due to this clause females agency is transferred to their husband because husband get the protection from prosecution. It is very much evident that due to this exception of marital rape the goal of law is not to protect the autonomy of a women rather it deprive her of own control over her body. Article 21 of the Constitution states about right to life and liberty which includes female agency and body integrity. Without discriminating on basis of marriage these rights should be given to every women.

Marital rape can also be termed as partner rape and marriage is a kind of partnership who are equals. Under our Constitution equality is given and there must be gender equality. The exemption of marital rape contravene such equality as women are denied their right over her bodies and pass to husband. But unfortunately marital rape is not considered as an offence by the parliament.

Married women can get their due agency if marital rape exemption is removed. Females must take part in consenting procedure. Society also have such effect criminalizing the non consensual sexual conduct as this would make people understand what is right and wrong and people behavior and perception shall be changed. Criminalization and law alone cannot eradicate such evil unless mindset of society is changed and this can be done through

²³ The constitution of India, Art 51(A).

awareness. Hence there is huge need to criminalize the marital rape or sexual violence in marriage by the legislature otherwise it is the state who is breaking the law and violating right to privacy of married women by allowing their husband to rape them without fear of prosecution and punishment.