

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

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An Overview on Criminalizing Marital Rape in India

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ABSTRACT

Women are among the most vulnerable population group in society. Sexual offences are the outcome of patriarchal phenomenon which is deep rooted in our socio-cultural environment. Sexual violence is omnipresent in a family. Rape within marriage definitely holds a serious concern as it is derogatory to the core of womanhood. The history of considering marital rape as an exception gets its moorings from the ancient patriarchal social phenomenon where the patriarchy finds it justifiable too. The IPC 1860 does not criminalise marital Rape, it does not recognise that forcible sex between a husband on his wife could amount to rape. Even the Legislature is not interested in updating the law on marital rape and criminalising it. Many countries all over the world have criminalised marital rape as it is a violation of fundamental rights. Therefore, this is high time for the Legislature to take steps towards the criminalisation of marital rape in India.

I. INTRODUCTION

“A Murderer kills the body but a Rapist kills the soul”

- Justice Krishna Iyer

Rape is a violation of woman’s individuality and loss of her personality accompanied with violence.² Marital rape occurs when women’s bodies are outraged, regardless of their consent or willingness. At present, marital rape is being recognised as a heinous crime in the western world notably the US and some European countries. Many countries of the world have criminalised marital rape during the preceding decades. Sweden has passed anti marital rape law way back in the 1970’s. UK, USA, Australia, Canada, Philippines, Mexico, Turkey, Poland, New Zealand, France, Nepal, Mauritius, Thailand etc. have enacted laws declaring marital rape as a crime during the first decade of new millennium. However, women in Indian setting do not make it an issue of complaint because it is against social norms and considered acceptable for men to force their wives to sex³ as and when they wish. According to United Nation population

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² Phul Singh v. State of Haryana, 1980 AIR 249, 1980 SCR (1) 589, 1979 SCC (4) 413

³ Debdata Das: Marital Rape; The Assasination of a Women’s Dignity (The Indian Police Journal, Vol. LVII No. 2 Apl-June, 2010).

fund more than two-thirds of Marital women aged between 15-50 in India have been subjected to forced sex, beaten, tortured along with a demand for dowry. Various legislations and enactments have been made to combat violence against the women in relation to dowry, cruelty, domestic violence, female infanticide etc. But it has failed to protect the married women who are subjected to rape by their own husband. The objective of criminalizing marital rape is not to put the entire men folk behind the bars but to establish the fact that marriage is not a license to rape.

II. CONCEPT OF MARITAL RAPE

The term Marital rape can be defined as “unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent for it. The term “unwanted intercourse” refers to all sorts of penetration whether vaginal, anal or oral, perpetrated against the wife’s will or without her consent. To put it simply, marital or spousal rape is the exertion of force or deception by a husband on his wife to attain sexual pleasures from her and without her consent.⁴

According to the Centre for Constitutional Rights, marital rape involves sexual acts done against wife’s wishes either by physical force or by threat of force or by making her fear that she will be harmed if she resists. The husband may use psychological or emotional abuse to make her comply. He may use coercion, verbal threats or physical violence to force his wife to have sex with him. Thus, it is the husband’s aggressive attempts to assert control to dominate over his wife. Taking sex by force when wife is asleep or sick is also marital rape. Marital rape is different from physical and sexual violence. It is a betrayal of trust. The affected women feel betrayed, humiliated and above all very confused.

Marital rape is not just a physical or sexual violence. There is emotional violence and psychological intimation involved in it. Under the guise of marriage, a man (husband) is allowed to do anything with his wife such as unnatural sex, sex during pregnancy or sex of a nature that the women dislikes.

Marital rape has broadly been sub-divided into three categories, namely (1) rapes involving a degree of violence; (2) rape involving only force; and (3) sadistic rape in which in addition to actual rape, the victim is forced to do acts designed to further humiliate herself. It is also known as “obsessive rape” or pornographic rape.⁵

⁴ Sanghamitra Longanathan; Marital Rape in India; legal services India; 24 Aug 2021

⁵ Prof. N V Pranjape: Criminology and Penology 18th edn. 2019 p. 257

III. HISTORICAL APPROACH

The history of marital rape is very wide and complex. The prevalence of marital rape in India emanates from the archaic doctrine of coverture where a wife is considered as a chattel of her husband. Additionally, it is perceived that after marriage wife's civil identity should be subsumed by the husband resulting in forfeiting her autonomy and giving irrevocable consent for sexual intercourse. This social construct devalues the existence of a woman, subjecting her to the cruelty of marital rape.

IV. LEGAL PROVISIONS RELATING TO MARITAL RAPE IN INDIA

Marital rape is not defined in any statute or anywhere, it has been partially covered under section 376-B of the Indian Penal Code. This section criminalizes sexual intercourse by husband with his wife without her consent when they are separated. "Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine." The explanation to this section prescribes that "sexual intercourse includes penetration of penis to any extent into the vagina, mouth, urethra or anus of a woman." It also includes "insertion to any extent any object or part of the body other than the penis into the vagina, urethra or anus of a woman." Even when a man applies his mouth to the vagina, anus or urethra of the woman it would also be included in term sexual intercourse. The implication of this section is that if a wife is living separately with the husband even without a decree of separation, she will enjoy full autonomy over her body and the husband can in no way coerce her to have sexual intercourse in the widest sense of the term. However, if the woman is living with the husband, she loses her right.

Marital rape in layman's terms can be explained as a spouse having sexual intercourse with their spouse without their consent.

According to Section 375 of the Indian Penal Code –

"Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim."

However, there is an exception provided which says that if non-consensual sexual intercourse takes place between a married couple, in that case, it will not amount to rape. Domestic violence refers to the violent or aggressive behaviour within the home which involves the violent abuse

of a spouse or partner which takes place with a woman because the husband in all the circumstances is powerful and most males comprehend that marriage gives them the right to have sexual intercourse with the wife at any point of time whether she is willing or not. This is the face of a patriarchal society; this act is detrimental to the institution of marriage. IPC, 1860 provides for rape and punishment for rape under section 375 and 376, respectively.

The Indian Penal Code, 1860 defines Rape under Section 375 and includes all forms of sexual violence involving non-consensual intercourse with a woman. However, Exception 2 to Section 375 exempts unwilling sexual intercourse between a husband and wife over fifteen years of age and as such immunises this offence of non-consensual intercourse with a person's own wife.

Exception 2 of Section 375 of the Indian Penal Code, 1860 decriminalises rape by a husband on his wife. It has mentioned that – “Sexual intercourse by a man on his own wife, the wife not being under 15 years of age, is not rape.”

The second exception talks about marital rape and how it is not an offence provided the female is not less than fifteen years of age. Thus, it means that a rape that is committed within a marriage shall not amount to the same and will be protected by the sanctity of a marital union. It is saddening however that in a relationship where maximum amount of respect should be provided, there such a heinous act is awarded with such exceptions. The main thought process behind giving an exception in this regard is the outdated mentality of every Indian household where women are considered givers to a marriage. The sole responsibility of a woman is considered to be her household and her husband and she must please the husband at all costs.

The Protection of women from Domestic Violence Act, 2005 has created a good remedy for various victims but the Act has failed to criminalize the Marital Rape. The Act has ignored the violation of fundamental right of freedom for any married women, the right to her body or to protect her from any abuse, her right to equality, her right against exploitation etc.

The constitutional aspect promotes the autonomy which is the right of every person. Art.14 provides for right to equality and necessitates that there shall be equality in such a close relationship. Equal status between husband and wife shall strengthen the relationship and not harm it. Art.21 guarantees the right of personal liberty to a female. This is one of the most important fundamental right of a person and which should not be taken away. Right to privacy, right to live with dignity, right to bodily integrity etc are an integral facet of Art. 21. However, marital rape violates her rights. The fundamental rights of any person should always prevail over the conjugal rights.

Marriage is a form of social bonding between both the spouses and everything in this institution

needs to have the consent of both; Justice Ahmad in the case of *Bodhisattwa Gautam v. Subhra Chakraborty* said that this “cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crises”

Marital Rape is a crime in almost all the countries of the world wherein they have either made amendments to the existing law or added a new law for the same. Marital Rape has been criminalized in around 150 countries of the world wherein countries have brought amendments in their law for criminalising marital rape. In the United States, marital rape is a crime in all the 50 states whereas in the United Kingdom the maximum legal penalty for marital rape is life imprisonment. In countries like the United Kingdom, Fiji it was criminalised due to decision delivered by courts, in some countries like Brunei the offence is explicitly criminalised. In some countries like Bangladesh, India the law for marital rape does not exist because women are considered the property of the husband and the state does not interfere in the institution of marriage.

Many legislations have been passed in the country to check violence towards the woman such as dowry, domestic violence or cruelty but amongst them is marital rape that has not yet been criminalized in the country. Marital Rape is inhumane and the woman knows that she has to live her whole life with the perpetrator which has a substandard physical and mental effect on her. It is a very under-reported crime in the country because most of these women know that going to the authorities will be futile as there are no laws for marital rape; they can also face social boycott.

In the 21st century, when society is well aware of their rights and needs, laws need to be amended. Indian Penal Code, 1860 provides that having sexual intercourse with a wife who is under 15 years of age, is a crime. However, there is a loophole in this situation. According to the Prohibition of Child Marriage Act, 2006, child marriage is only voidable and not void in India which says that it is not immediately illegal. The minor party, when attains the age of major, can file for divorce within one year of attaining majority otherwise, the marriage is considered legal. But till the party can attain legal age and there being no provision for men asking for consent with their wife aged 15-18 years, this provides a window for husbands.

Under the Protection of Women from Domestic Violence Act, 2005, the definition of domestic violence is given under Section 3(a) which says that “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.” Sexual abuse mentioned under this definition includes any conduct of a

sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman, which in turn gives a chance to wives to initiate legal proceedings. The drawback of this Act is that it is more civil in nature than criminal. The Act provides for compensation, monetary gain, restraining and protective order.

V. LEGISLATIVE AND JUDICIAL PERSPECTIVE

The response of Indian judiciary towards the evil of marital rape is not as reluctant and reserved as that of Indian legislature. Indian judiciary is much more proactive in dealing with the menace of marital rape. There are several important decisions of Supreme Court of India where the court came down heavily on the practice of marital rape in India and called for its criminalization time and again. Similarly, various High Courts in India have also called for the criminalization of marital rape in the country through their numerous judgments. But the role of Indian judiciary is very limited in this regard. It is the job of Indian legislature to outlaw marital rape in the country and not that of Indian judiciary.⁶

The reasons given by the Government against criminalization of Marital Rape are: First that marriage is a sacrament and the criminalisation of the act in the Indian context would lead to the destabilisation of the society and secondly, it would lead to exploitation of the husband by the unscrupulous wife. It can be used as a weapon to frame fabricated charges against the husband in order to seek vengeance. The government is apprehensive that the criminalization of Marital Rape can be used as a weapon to trouble the not guilty husband. The wrong about this argument is that where the woman decides to charge the husband as a rapist, the marriage has already broken down. Nothing is left in the marriage. The only thing that criminalization would do is that it would provide a remedy to a victim of broken and brutal matrimonial relation rather than wreck the institution of marriage.

Justice Madan Lokur in the landmark judgment of *Independent Thought v. Union of India*,⁷ has replied to this contention of the government very meticulously. According to him, no one can break the institution of marriage except for a law which criminalizes marriage. Even divorce, judicial separation, can break the marriage and create a dent but it cannot destroy the institution of marriage. If we follow this argument of the government then divorce and judicial separation should also not be permitted.

Kerala High Court in a recent judgment recognised marital rape as a sufficient ground for

⁶ Kumar Yadav, Dr. Raj and Da, Manish, Marital Rape in India: A Critical Study (May 16, 2021). Available at SSRN: <https://ssrn.com/abstract=3847118> or <http://dx.doi.org/10.2139/ssrn.3847118>

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

divorce. It held that albeit marital rape is not an offence, the acts of the husband amounts to physical and mental cruelty which is a sufficient ground for divorce under the aegis of law. Notably, the Karnataka High Court in *Hrishikesh Sahoo v. State of Karnataka*,⁸ ruled that “The exemption provided under Sec.375 cannot be absolute in nature as no exemption in law can be so absolute that it becomes a license for commission of crime against society.”

VI. CONCLUSION AND SUGGESTION

Marital rape is still not recognised as a crime in India in comparison to other western countries. Criminalization of Marital rape is the need of the hour and as such it will shun the destructive attitude of dominance that prevails in our society. It will raise a boundary and inform the society that penal actions would take place whenever the boundary is crossed. The awareness among the peoples with stringent, accountable and well implemented penal laws shall be a step towards the cure of deeply rooted sexism and patriarchal structure and in real sense will provide justice to the oppressed.

⁸ 2022 LiveLaw (Kar) 89