



MARITAL RAPE: THE BITTER TRUTH OF OUR SOCIETY

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Abstract

Rape *per se* is an offence against woman, violating her dignity and self-respect and when it occurs within the four-walls of a matrimonial home, it reduces the woman to the status of an object used merely for sexual gratification. There is an immediate need for a distinct law on marital/spousal rape in India, which should be at par with the accepted international norms on this issue. Rape within marriage is a concept that recognizes the wife to the very core. The dread of having to face it and still have to silently suffer through it is an unbearable thought that affects the psyche of the women. This self-enforced silence has a very detrimental effect on the emotional, psychological and mental stability of women. However, this silence is not exactly self-enforced. The lack of laws and abundant social stigmas against the act of marital rape is one of the primary reasons that the evil of marital rape is still hidden behind the sacrosanct of marriage.

The woman has been given the right to fight for protection when the violators are outside entities, but when the perpetrator of her bodily integrity is her own husband, who she married with all the pomp and show, such protection is withdrawn by the legislators. In light of this, the idea that a woman (wife) has to have sex with her husband irrespective of her will, consent, health, etc., is absolutely unacceptable to a civilized society. Therefore there is no justification or applicability of the notion of marital exemption in the current times. It is true that mere criminalization of marital rape in India will not end the problem, but it sure is an important step towards changing women's experience of sexual violence in a marriage. It is high time that the concept of "rape is rape, irrespective of the relationship between the victim and the perpetrator" is recognized by the law and put strictly to force. It also looks at the present legal stand available for women who face such abuse. Finally, the paper concludes with the opinion of the author on the said subject.

KEY WORDS: marital rape, self-enforced silence, civilized society, marital exemption,

INTRODUCTION

When one mentions the word rape, the tendency is to think of someone who is a stranger, malicious person. Usually one does not think of rapes in the context of marriage. Women themselves find it difficult to believe that a husband can rape his wife. After all, how can a man be accused of rape if he is availing his conjugal rights. It is indicative that a woman has no right to her own body, and her will is subject to that of her husband. Though marital rape is the most common and repugnant form of masochism in the Indian society, it is well hidden behind the iron curtain of marriage. While the legal definition varies, marital rape can be defined as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent. Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. The word 'rape' has been derived from the term '*rapio*', which means 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non-consensual sexual intercourse with a woman. Rape can be viewed as an act of violence of the private person of a woman, an outrage by all means. It is the ultimate violation of the self of a woman. The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity'¹.

Rape is not merely a physical assault, but is destructive of the whole persona of the victim. There have been plenty of legislations and enactments passed in India in regard to violence against woman in her own house like laws against dowry, cruelty, domestic violence and female infanticide. However the biggest and the most shameful wrong within a marriage, where a Husband forces himself upon his wife thinking that it is his nuptial right to have sex with his wife (with or without her consent), 'marital rape', has failed to gain recognition as a crime in the eyes of policy makers. Women who are raped by their husbands are likely to be raped many times. They experience not only vaginal rape, but also oral and anal rape. Husbands often rape their wives when they are asleep, or use coercion, verbal threats, physical violence, or weapons to force their wives into having non-consensual sex with them².

Marital rape is a serious problem that millions of women worldwide have to suffer and face such abuse on a day-to-day basis. It is difficult to obtain accurate data and rape and violence against women within the family, in part because women are reluctant to report incidents, as women raped by their husbands may hesitate to report because of family loyalty, fear of their abuser's retribution, inability to leave the relationship, safeguarding the future of their children, or the fact that there are no stringent laws in force protecting the victims of marital rape. Despite underreporting, marital rape unquestionably has an enormous impact on the lives of women who experience it. By way of comparison, the best available statistics on marital rape in the United States suggest that one out of every seven or eight married women has been subjected to rape or attempted rape by her husband³.

¹BodhisattwaGautam v. SubhraChakraborty AIR 1996 SC 922.

² <http://www.taasa.org/library/pdfs/TAASALibrary104.pdf>

³Box, S., Power, Crime and Mystification, (London Tavistock Publications, 1983), p.122.

HISTORY OF MARITAL RAPE

Throughout the history of most societies, it has been acceptable for men to force their wives to Have sex against their will. The traditional definition of rape in most countries was 'sexual intercourse with a female not his wife without her consent'. This provided the husband with an exemption from prosecution for raping their wives—"a license to rape". The foundation of this an exemption can be traced back to statements made by Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: 'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract'⁴.

Historically, in much of the world, rape was seen as a crime or tort of theft of a man's property (usually either a husband or father). In this case, property damage meant that the crime was not legally recognized as damage against the victim, but instead to her father or husband's property. Therefore, by definition a husband could not rape his wife. The view that a husband cannot be charged with the rape of his wife was described by Sir Matthew Hale (1609–1676) in History of the Pleas of the Crown, published posthumously in 1736, where he wrote that "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract". Also, American and English law subscribed until the 20th century to the system of coverture, that is, a legal doctrine under which, upon marriage, a woman's legal rights were subsumed by those of her husband. The implication was that once unified by marriage, a spouse could no longer be charged with raping one's spouse, anymore than be charged with raping oneself.

Many jurisdictions, including all fifty U.S. states, had criminalized marital rape by the 1990s. English common law also had a great impact on many legal systems of the world through colonialism⁵.

Rape has been, until recent decades, understood as a crime against honor and reputation – not only in domestic legislation, but also in international law; for example according to the Article 27 of the Fourth Geneva Convention, "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". It was not until the 1990s that the ICC statute recognized crimes of sexual violence as violent crimes against the person. "Not until the last half century was rape understood to be an offense against the woman, against her dignity, instead of against her family's or her husband's honor"⁶

Research Problem

Research question - What are the Punishments for the Act of Sexual Intercourse amounting to Marital Rape?

Problem: Due to the Act of Sexual Intercourse with one's spouse without the spouse's consent.

Intervention of the Laws: Penal laws which provides as a Boon for the innocent women. Outcomes: Try to Spered the awareness among the married women in the country.

⁴Hale, Matthew, 1 History of the Pleas of the Crown, p. 629. (1736, London Professional Books, 1972)

⁵https://en.wikipedia.org/wiki/Marital_rape (visited on 27.2.2022)

⁶Rana Lehr-Lehnardt. "One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court". visited on 27.2.2022

Research Methodology

Doctrinal Research has been attempted for the paper.

Secondary Sources of information have been used in paper.

Marital Rape—An Exception to Rape

An intercourse between a man and his wife without the consent of his own wife obtained by force, threat of physical violence and mental torture where the women is unable to give her own consent is said to be considered as a marital rape. Considered as the violence of perversion by her own husband against his wife amounting to physical and sexual abuse. The statistics have clearly mentioned that, in every 6 hours a young married women has been burned or beaten to death and even commits a suicide due to the emotional abuse from her husband. The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years, does not amount to rape. It thus keeps outside the ambit of rape a coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of age and thereby allows a husband to exercise with impunity, his marital right of non-consensual or undesired intercourse with his wife⁷.

It is believed that the husband's immunity for marital rape is premised on the sexual intercourse. Her husband has the right to have sexual intercourse with her, whether she is willing or not, and she is under obligation to surrender or submit to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false, fabricated and motivated complaints of rape by wife against her husband and the pragmatic procedural difficulties that might arise in such a legal proceeding. However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage amounts to rape⁸.

Marital Rape in Indian Society

If we look into the judicial aspects of India it clearly states that “sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape” under section 375 of the Indian Penal Code. Section 376 of the Indian Penal Code provides punishment for rape. According to this section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine or both. In *Saretha V. T. VenkataSubbaih*⁹ case, it was held that, rights and duties in a marriage, is like a creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by marital Association. Hence there is no punishment for marital rape and the remedy lies with her.

⁷ KI Vibhute, “Rape within Marriage” in India: Revised”, Indian Bar Review, 2000, Vol 27, P. 167.

⁸ Bhupinder Singh V. Union Territory of Chandigarh (2008) 8 SCC 631, (2008) Cr LJ 3546 (SC)

⁹ AIR 1983 AP 356

LAWS GUARDING MARITAL RAPE IN INDIA CONSTITUTION OF INDIA

Not only is the Indian Constitution a safeguard against all the wrongs for the Indian citizens, but it also clearly demarcates what's right from what's wrong. Along with rights, it also crowns upon its citizens the responsibility that go hand in hand with it. Each citizen has a responsibility toward **Article 21: Right to Life and Right to Live with Human Dignity**

The Right to Life is an all-encompassing right. Every time an issue on human rights violation crops up, the Right to Life comes to play an integral role in that scenario. The Article 21 guarantees each and every citizen a Right to a healthy and a decent life without any kind of encroachment from the State or any other party. Once this right is violated, the victim can approach the Court to seek Constitutional remedies against the violation under Article 32 of the Indian constitution the State and its fellow citizens.

In a landmark case, *Chairman, Railway Board & Others v Chandrima Das & Others*¹⁰, a foreign woman, **Smt Hanuffa Khatoon** was raped in the *Yatri Nivas* by four men belonging to the Railway Department and thus later raped again by a member of the Railway department where she was gagged and abused. Hearing her hue and cry, the people from the rented flat had rescued her and she was given Rs10 Lacs as compensation from the Court. The Supreme Court in this regard pointed out that rape is not only a crime against the victim individual but it is also a crime against the society at large. Rape disturbs the entire society as well as the victim equally.

Right to Privacy

The Right to Privacy is a recent judicial development where the Court realized that no individual should be subjected to encroachment to their personal space and privacy. More than 150 national Constitutions give the Right to Privacy a legal standing in their respective countries. In the celebrated case of *Justice K S Puttaswamy (Retd) vs Union of India*, the Honorable Supreme Court of India unanimously upheld the Right to privacy as an important and intrinsic part of the **Article 21- Right to Life and Personal Liberty**.

In the landmark case of *Vishakha State of Rajasthan*¹¹, the same was observed. It is a woman's personal right. No one can infringe her Article 21 against her wishes. In the case of *State of Maharashtra vs Madhakar Narayan*, the Supreme Court held that a woman's sexual privacy is not open to all according to their wishes. It's her own personal right and decision and it should be respected accordingly.

Indian Penal Code, 1860

The Indian Penal Code, 1860 is the main criminal code in India. It is a comprehensive act which is divided into twenty tree chapters and five hundred and eleven sections. The following are the relevant sections of the IPC, 1860 in this regard:

¹⁰ AIR 2000 SC 988

¹¹ (1997) six SCC 241

Section 319 – Hurt

Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320-

Grievous Hurt The following kinds of hurt only are designated as "grievous":-

First- Emasculation.

Secondly- Permanent privation of the sight of either eye.

Thirdly- Permanent privation of the hearing of either ear,

Fourthly- Privation of any member or joint.

Fifthly- Destruction or permanent impairing of the powers of any member or joint.

Sixthly- Permanent disfiguration of the head or face.

Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 321-

Voluntarily causing hurt whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Section 322-

Voluntarily causing grievous hurt Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes grievous hurt, is said "voluntarily to cause grievous hurt."

Section 339-

Wrongful restraint Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Section 349- Force A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

Section 351- Assault Whoever makes any gesture, or any preparation intending or knowing. it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Section 375- Rape A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First- Against her will.

Secondly, - Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age¹².

ROLE OF JUDICIARY IN INDIA

The judiciary in India, by passing the much needed legal reforms can lead the way towards equality by encouraging women to come up and report cases against the violence they face and help them bring about a change in the way marital rape is viewed in society¹³. As per the Constitution of India, every law which is passed must be in conformation with the principles and ideas which are enshrined in the constitution. Any law which has been made failed to meet its required standards are considered to be ultra vires and it can be struck down or to be declared unconstitutional. Here, the exemption of Section 375 withdraws the protection of married women on basis of her marital status. Recently, the Supreme Court took another opportunity to inform the subordinate Court and high court that despite stringent provisions for rape, much court in the past have taken a softer view while awarding punishment to perpetrators of such a heinous crime. The judicial trend, the court stressed, exhibits stark insensitivity to the need for proportionate punishment for perpetrators of rape. This has warned them to be cautious as false charges of rape, motivated by personal or economic gains, are not uncommon. Persons accused of these kinds of sexual assault also need protection from the false or engineered accusation of rape loaded with ill-motives or designs. False allegations of rape, like a rape victim, cause a great distress, humiliate and damages to the accused. Rape, being a monstrous burial of dignity of a woman in the darkness and a crime form the court and the courts are bound to respond, within the legal parameters, to the demand. It is a demand for justice and award of punishment has to be in consonance with the legislative command and the discretion vested in the court¹⁴

SOME SUGGESTIONS TO CURB THIS PROBLEM

1. By criminalizing marital rape.
2. By understanding the consent of women because the woman should have the right to say “NO
3. By not seeing women in our society as “other”.
4. By removing the traditional barriers and flaws which let the man consider his wife as his personal property.
5. Most important thing by the awaking the women through the awareness camp and promoting the legal education among them so they can fight for the “**Right**”

¹² Indian Penal Code ,1860 ,Sections-319,322,321,322,339,349,351,375

¹³ [https://indianlegalsolution.com/marital-rape\(visited](https://indianlegalsolution.com/marital-rape(visited) on 29.12.2022)

¹⁴ Volume 119 No. 17 2018, 1089-1100 ISSN: 1314-3395 (on-line version) url: <http://www.acadpubl.eu/hub/> Special Issue

Conclusion

A woman remains a woman, how the dignity of a married woman is not affected as an unmarried woman, is the question raised by the Delhi high court. Pondering over the same, I conclude that on the basis of a woman's relationship status with the man raping her cannot justify the inhumane act of such a man. Marriage does not justify rape. It has been concluded that Indian laws have failed to provide a proper protection to women as earlier as the women are still treated as the property of husband and he has all the rights to exploit her and no remedies have been provided. Though a husband's violent and non - consensual act of intercourse may entitle a wife to bring action for criminal assault, the incorporation of the principal of liability for marital rape in our penal laws is not present. This prima facie violates Article 14 and 21 of the Indian Constitution. Non-criminalization of marital rape is the major concern in the Indian legal system. In order to protect the women, the Judiciary should take initiatives to safeguard them. Married women should be taken proper care and they should not be subjected to sexual assault or violence. Hence this section has a very narrow view in dealing with sexual assault and as such till now there is no legal provision which protects the married women.

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