

Criminalizing Marital Rape in India: The Need of an Hour

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Abstract

Rape within marriage is one of the worst kinds of sexual violence when it is committed by the husband. Due to the patriarchal structure of the society the husband is always considered as protector of wife. The objectification of women within the institution of marriage does not give the husband a license to rape the wife. Rape is a rape whether within or outside the marriage. Marital rape yet not criminalized but raised the issues of dignity of women. This paper argues that criminalization of marital rape in India is necessary. This paper is an attempt to critically analyze the national and international legislative framework related to marital rape.

Keywords: Rape by Husband; Marriage; Criminalization.

Introduction

"When a woman is raped by a stranger, she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist."

Finekelhor Yello

Marriage is a social institution where the husband and the wife admit to live together. The key to successful marriage is love, understanding, mutual respect, trust, commitment and togetherness. It is the physical, mental and spiritual union of two souls. It brings significant stability and substance to human relationships, which is otherwise incomplete [1]. Traditionally, sexual intercourse was considered central to the legal definition of marriage. The law also made is clear that upon marriage a husband had unlimited sexual access to his wife. Marriage was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others [2].

Rape by husband is the most debatable question in India in present scenario. Women gets confidence that her husband will provide her security, safety after the marriage, but when she finds that her husband is forcefully cohabiting with her it really breaks down her trust, her faith. The most important question which arises here that whether marriage gives right to husband to sex forcefully without the consent of wife? Whether it snatched away the right of women to deny having sexual intercourse with her husband? What is the need of providing immunity to the husband from committing rape with his own wife?

Marital Rape

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 [3]. The term 'marital rape' refers to 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 [4]. Women are supposed to dedicate their

bodies to keep their husbands happy [5]. 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 them [6]. Marital Rape is defined as "Physically forced her to have sexual intercourse with him even when she did not want to [7]." Marital rape is a crime that has devastating consequences on women, affecting the physical, reproductive, sexual and psychological health of women [8].

In the *Hamburabi code*, women were seen as equally liable for acts of rape. Both the victim and perpetrator were subjected to death sentences. The appeals process was directed at husbands, only they could commute a death sentence for their wife [9]. As recently in 1958, Encyclopedia Britannica's definition of marital rape stated "A husband cannot commit rape on his wife unless she is legally separated from him". Legal definitions thus permit a marital rape exemption which does not allow a husband to be criminalized for forcing his wife into a sexual intercourse with him without the wife's will, coerced sex thus is not a crime in marriage [10]. The reason behind the unacceptability of the marital rape in India is the ancient belief system, religious ideologies, and diversification of the society. Denying sex, according to traditional beliefs, goes against the duties of an ideal wife. The dominant nature or the assertion of the superiority of the husband over his wife is an absolute right of the married man in India. The husband's traditional role was that of protector. As such, he received unqualified entitlement to sexual relations with his wife [11].

History says that laws regarding exemption of marital rape have developed to protect the interests of men. People had been assuming that women were men's personal belongings. Based on the notion of 'personal belonging', a man charged for raping his wife is similar to a man charged for stealing his own property [12]. In general, the presumption was that a woman was the property of her father and after marriage; the woman would be the property of her husband. According to the common law, married women were the chattels of their husbands'. The understanding was that if women were the chattels of their husbands then husbands could not be guilty of raping their wives [13]. In addition, it seems that a woman in marriage leaves her identity to become a single person with her husband. Thus, it curtails women's legal identity and enlarges the power of domination of man over his wife [14].

One of the origins of the concept of a marital exemption from rape laws is the idea that by marriage a woman gives irrevocable consent for her husband to have sex with her any time he demands it. This view was described by Sir Matthew Hale, in *History of the pleas of the crown* (1736) who asserted: "but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" [15]. However, this statement of Sir Mathew Hale has overruled by House of Lords in its progressive judgment giving in the case of *R v. R* [16], declaring that the husband could be charged as a principle offender in the rape of his wife. Unfortunately, this decision has not been followed in India where marital rape exemption to the husband still exists. Russell (1989) quotes [17] "The notion of wife as a property is equally fundamental to as understanding of wife rape. Not only are wives commonly viewed as the property of their husbands, but more specifically, they are seen as the sexual property of their husbands. But the viewing of wives as a husband's property is not inevitable; it is a part of our patriarchal heritage".

International Scenario

The "United Nations Convention on the Elimination of All Forms of Discrimination against Women 1981" (CEDAW), has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity [18]. In February 2007, the CEDAW Committee made recommendations to India to widen the definition of rape and to remove the marital rape immunity [19]. Article - 2 of the Declaration of the elimination of violence against women 1993 (DEVAW) includes force against victim, or the penetration by any object, however slight." Emphasis on the provision is not meant to tantalize but to give the victim and not the criminal, the benefit of doubt [20]. The DEVAW gives specific recognition to marital rape as a form of violence against women [21]. Similarly, the Beijing Declaration and Platform for Action defines violence against women as physical, sexual and psychological violence that occurs in the family, including marital rape [22]. In 1995, The Fourth World Conference on United Nations Women's Conference in Beijing Declaration and Platform for Action [23], delegates unanimously passed a resolution stating that a wife has a right to refuse sexual demands by her husband. The Beijing Declaration reiterated that violence against women under international law includes "physical sexual and

psycho-logical violence occurring in the family, including battering..., marital rape..., and violence related to exploitation” and gender violence condoned by the state [24].

Indian Scenario

In India, marital rape is still not considered to be an offence. Despite many efforts put by the law commission in its reports or bills brought up before the parliament, this horrendous act which uproots the sanctity of a marriage, has not been declared as an offence. A married woman in India has absolutely no laws to protect her and everything only depends upon the interpretation of the courts [25].

Constitution of India

The constitution of any country represents the soul of any nation. The Indian Constitution organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the cultures and experiences of the country and operates as a vehicle for national progress and unity [26]. In *BodhisattwaGautam v. Shubhra Chakraborty* [27], the Supreme Court said that “It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.” Yet the sad part is that the current law negates this pronouncement and thus it directly violates the fundamental rights enshrined in the Indian constitution. Not only Article 14 and Article 21, but even Article 51A(e) of the constitution states that it is the fundamental duty of every citizen of India to condemn the practices that are derogatory to the dignity of women.

Indian Penal Code

In India, rape is a crime but marital rape stands as an exception to it. Definition of rape as per Section 375 of the Indian penal Code, is as follows:-

“A man is said to commit ‘rape’ who, except in the case hereinafter exempted, has sexual intercourse with a woman falling under any of the following categories: first, against her will, secondly, without her consent; thirdly with her consent when the consent has been obtained by putting her 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 or without her consent when she is under sixteen years of age.” Exception-

Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape [28].

The Domestic Violence Act

This is the only way of penalizing marital rape in India, and it is a civil remedy and not a criminal action. The Domestic Violence Act regards marital rape as a form of domestic violence and provides for a lesser jail term than non-marital rape [29]. Under this Act, if a woman has suffered marital rape, she can go to the court and obtain judicial separation from her husband. Being subjected to sexual violence by her own husband envelopes a wife in a sense of insecurity and fear. Her human rights are sacrificed on the altar of marriage. But, this is only piecemeal legislation, with many loopholes. However, the enactment of specific legislation against domestic violence has opened the door for legislation criminalizing marital rape because it signals a shift in the state’s approach of non-intervention in family life [30].

Recommendations of Law Commission of India

The 42nd Law Commission Report put forward the necessity of excluding “marital rape” from the ambit of Section 375 of the Indian Penal code and emphasized to not even call it as “rape” in the technical sense. In their words naturally the prosecutions for this offence are very rare. The report recommended to take this offence altogether out of the ambit of section 375 and not call it rape even in technical sense. The punishment for this offence may also be provided in a separate Section [31].

172nd Law Commission Report [32] had made the following recommendations for substantial change in the law with regard to rape.

1. ‘Rape’ should be replaced by the term ‘sexual assault’.
2. ‘Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
4. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

Judicial Response

The most notable case is *Queen Empress v. Haree Mohan Mythee* [33]. This case tells the pathetic story of Phulmonee Dasee, 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. The husband was charged under section 304, 304A, 325 and 338 of IPC. But he was acquitted on charges of rape, because the law of rape was not applicable to the case as Phulmonee had attained the age of 10 years. This case served as a catalyst for bringing the legislation in 1892 by which age of consent was increased to 12 years. It was further increased to 13 in 1925 and to 15 in 1949. Since then there is no change and it remains 15 years. In the case *E.P. Royappa v. State of Tamil Nadu* [34], the Supreme Court observed that there is no basis for treating married and unmarried women differently with respect to rape. The requirements for Article 14 as laid down in present law require not just a nexus between the purpose to be achieved and the law, but also that the law is not arbitrary.

The Andhra Pradesh High Court in the case of *T. Sareetha v. T. VenkataSubbaiah* [35] struck down the constitutionality of the restitution of conjugal rights as given in the Hindu Marriage Act. The argument before the Court was that the section 9 of the Hindu Marriage Act violated Articles 14, 19 and 21 of the Constitution. The Court agreed with this argument. The Court held that the restitution of conjugal rights remedy was unconstitutional since it transferred the right of choice to indulge in sexual intercourse from the woman to the State. This would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual. Moreover, the Court accepted that women would be hurt by this provision and noted the importance of sexual autonomy for a woman.

In *Harvinder Kaur v. Harmander Singh* [36], the Delhi High Court was also confronted with a petition challenging the constitutionality of the restitution of conjugal rights. Departing from *Sareetha*, the Court upheld the constitutionality of section 9 of the Hindu Marriage Act. Again, the Court uses this 'progressive' understanding of marriage to ignore the fact that when a woman is forced to live with her husband, there is a very high probability that these women would be forced into sexual relationships as well. The Court turned a blind eye to this form of abuse women would face by subscribing to the theory of 'marital privacy'. The Court asserted that:

"The introduction of constitutional law into the ordinary domestic relationship of husband and wife

will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in relationships which should be obviously as far as possible protected from possibilities of that kind. The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces 'two-in-one-ship'."

Recently in the case *Independent Thought v. Union of India* [37] the Court partly struck down a part of the exception clause in section 375 of IPC. Under the Protection of Children from Sexual Offences Act, 2012 (POCSO), it is illegal to have sexual intercourse with a child under the age of eighteen. However, the exception clause allows for this in the event a girl is married and is between the ages of fifteen to eighteen. The Court noted that this differential treatment to the girl on the basis of marriage was wholly unconstitutional. This was because marriage did not serve as reasonable classification. Although the Court was keen on noting that the judgment was not for adult marital rape, it is encouraging that the Court has recognized that women's rights cannot be subsumed on the basis of marriage. This is a landmark decision of Supreme Court whereby the court has held:

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 [38]. The conceptualization of the private sphere can be done in a progressive manner highlighting women's rights as was done in *Justice KS Puttaswamy v. Union of India* [39]. The crux of the judgment focuses on how the individual autonomy of a woman is violated when she is compelled to stay with her husband. In a patriarchal society like India where marriage is considered as a license to sex and is so sacrosanct that criminalizing marital rape is not even easy for Indian judiciary [40].

Women's rights activists, women's organizations and the National Commission for Women have been

demanding that marital rape be made a criminal offence as it is against the dignity of women who are forced to suffer the worst form of sexual violence silently within the four walls of their homes [41]. The Justice Verma committee, formed in the wake of the 2012 Delhi gang rape, had also recommended removing the exception made for marital rape in the law. However, the recommendation was roundly rejected by the Indian government. When the issue of legalizing marital rape is raised in the parliament, responses like, "It will break million homes; it will pollute the institution," or "the law will be misused" are always ready by the opponents of this idea. It has become year's old defense for our parliamentarians to cunningly procrastinate the issue of legalizing marital rape in the name of a sacred intuition [42].

Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. There are many countries that have either enacted marital rape laws, replaced marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include; Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany Hong - Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, The United Kingdom, The United States and Indonesia. Turkey criminalized marital rape in 2005. Mauritius and Thailand did so in 2007. India must move toward removing this outdated defense; the IPC must be amended and modernized to criminalize marital rape in accordance with both India's domestic (constitutional) and international (CEDAW) legal standards [43].

Conclusion

In India marriage is considered as a sacrosanct institution but it does not mean that it legalizes marital rape or gives husband the power to violate the right of women to live with dignity. Women are that half of the society's population which gives rise to the other half; they should in all circumstances be protected from any kind of offensive behavior even if it comes from the family. Women who are raped by their husbands are more likely to experience multiple assaults and often suffer long term physical and emotional effects. In this context, marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault. Therefore, there is clearly an urgent need for criminalization of

the offence of marital rape. It is suggested that the legislative framework should make amendments under IPC Section 375 and save the married women from this evil of forceful sex at the hands of her husband.

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