
MARITAL RAPE: AN ANALYTICAL STUDY OF THE WAVE OF SOCIO-LEGAL TRANSFORMATION IN INDIA

Taruna Solanki, Research Scholar, University College of Law, MLS University, Udaipur, Rajasthan, India

ABSTRACT

Marital rape in India has become a social and legal concept which is seeking the attention of community for long and lately a subject public uproar. Whether it needs recognition or a new law with much more clarity, is still an ongoing debate to be concluded soon. In India marriage has always been an institution of sacred importance and whenever the matter is of challenging the sanctity by bringing a rational change it is subjected to unprovoked antagonism. However, we are in 21st century where women share equal role in every aspect of life but there should be no doubt saying that it is the patriarchal and customary mindset which still marks existence in the Indian society and inflicting various responsibilities on the women laid down by the society does not guarantee their safety and dignity. Our history is filled with the atrocities against women and it is evident that whole society joined up to fight against the odd to recognize the role of women and their rights in the society; from Sati to Dowry, untouchability to domestic violence, Triple talaq to rape, the list of violence against women is long enough. Marital Rape is one amongst such harsh reality which women are facing within the four walls of her own marital home where wife is treated as the property of husband and he has absolute unconditional right over the body of his property(wife). India is one amongst 36 countries where marital rape is not an offense which clearly implies sexual relation within all the marriages occurs consensually.

This paper aims to highlight the pitfalls existing in Indian penal code regarding rape laws and puts forth a critical analysis over criminalization of marital rape.

Key words: Rape, Marital rape, criminalization, Indian penal code

INTRODUCTION

“People in denial of change fail to plan their future”

India has thoughtfully denied the existence of marital rape where after marriage husband plays the role of soul protector of his wife. Marital rape had never been a subject of new law in India until now though the glimpse of marital rape could be seen even back in the centuries. The case of Phulamni Dasi (1891) is one of such cruel incidents where an 11 year old wife was raped by her 30 year old husband and the series of cases did not stop there itself.

The most ancient source “Manusmriti” depicts the role of women as subservient to men and regards them as the custodian and transmitters of patriarchal values. It is mentioned in smriti that women would be dependent on his father first and later on husband and son thus it disregards the role of women being independent and setting benchmarks by moving out of private sphere. This is India 2022, where inequality in marriage is losing its footprints, where women share lot many common and standard deals with men. We, the people of India need to rethink, understand, unlearn and relearn about what marriage is. Engagement of rethinking towards marital rape is required not just for society as whole but also to define the problem of spousal or marital rape where sexual intercourse out of wedlock is treated as fundamental of marriage no matter such act is performed willingly or not whether active participation of girl you are married to was present or there is complete negation of her consent.

Development and cognizance have a parallel relationship, the need of development gives rise to the necessity of cognizance therefore the discussion about marital rape has gone rampant.

Maintaining home and family is considered as the de-facto priority of women and they are also seen to prefer the outcomes that protect the notion of family hence larger concept of human right violation, sexual violence within the institution of marriage is often disregarded because women think violence within the four walls is a private matter and violence in the violation of personal agency is rarely acknowledged (Torres, 2021). Social construct of Indian marriage is such that it follows the necessity of being ideal and presentable in front of society no matter what happens behind the door between husband and wife because it is presumed that honor of family is more important than the honor and dignity of a women who is forced to maintain the sexual harmony with her husband. As per the International Center for Research on Women (ICRW) report one out of five Indian men force their wife to have sex and 55% of Indian women feel comfortable with spousal violence. Institution of marriage is treated as unharmed,

sacred and most secure in India and protection of conjugal rights by reconciliation has always been the priority of society as well as justice system before taking a final call for the dissolution of the same in case of unreasonable circumstances to carry forward the marital relationship. When the question is of non- consensual/forceful sexual relationship between husband and wife it becomes necessary to think beyond the outmoded social norms after all married women cannot be put in the category of lust gratifying objects treated for sexual pleasure and reproduction but otherwise disposable because adhering to various socially prescribed roles of wife in a patrilocal society will not resolve the issue of hidden and unrecognized rape by her own husband. Rape is also known as crime against women's honor and dignity then how can the institution of marriage permit rape and dishonor of married women by not recognizing rape as rape but just the sexual violence or may be a "private matter" not a public trouble to broadcast, on the other hand if a woman is unmarried any sexual relation established unwillingly, out of force, without consent is a recognized crime defined under section 375 of Indian Penal Code known as Rape. To escalate the discussion over the issue of marital rape veil of privacy in marital life should be lifted and marriage should be examined under a systematic lens beyond the patriarchal discourse, considering women's equality, independence and dignity.

CRITICAL ANALYSIS

No relationship or social structure can be greater than human's individual right. Paragon of virtues and cultural tropes embedded in the social institution over men and women cannot take away their right to live with dignity specially when the matter is of marriage institution. Marriage can be stabilized only when both the wheels who carry the relation stands on equal footing. Identity of woman should not be suppressed by her husband on the grounds of inequality. Merger of women's identity with husband is the British formula known as "Doctrine of coverture" which still reflects in Indian penal code, 1860 under the exception 2 of section 375 which immunizes the husband for the commission of inhumane act of rape against his own wife (if the age of wife is above 15 years) without consent (marital rape) as it is believed that marriage gives irrevocable and perpetual consent to establish sexual relation. Study of UN population fund shows that more than 2/3rd married women in India aged between 15 to 49 have been beaten and forced to provide sex and over 104 countries wide across the world have criminalized marital rape and recognized it as an offence but India is one amongst those countries who still haven't. After the heart shacking incident of NIRBHAYA India has

introduced remarkable criminal law amendments to strengthen the existing laws for the protection women but criminalizing marital rape is still a matter of judicial and political discussion no matter how dreadful slur it is on the dignity of women and their human rights.

Sir Mathew Hale in “**History of the pleas of the crown**” in 1736 declared that:

“The husband cannot be guilty of rape committed by himself upon his lawful wife for, by their mutual matrimonial consent and contract that the wife has given herself up in this kind unto her husband which she cannot retract”.¹ It is also known as “Implied consent theory”, reflects the origin of exemption of marital rape in U.K.

Rape is derived from latin word that means ‘to seize’ or ‘take away ravishly’. There is no precise definition of marital rape unlike rape but in the words of survivors of such inhuman act marital rape means imposing the physical and sexual dominance over wife’s body without her consent by perpetrating violence. Question of debate is how and why it should be criminalized? In answer to such debate the grounds laid down in favor of criminalization of marital rape are: exception 2 attached to section 375² which is said to be unconstitutional because it is a violation of women’s right to equality mentioned under Article 14 of Indian constitution and right to live with dignity and freedom of expression mentioned under article 21. In UK prior to 1991 position was slight different with regard to spousal rape because forced sexual activity was not an offence as husband could impose the conjugal rights on wife believing that contract of marriage provides ongoing consent to perform sexual activity. In case of **R vs. R(1991)** Justice Keith in house of lords overturned the old common rule by declaring that marriage does not provide automatic consent for sexual intercourse and husband could be convicted of rape or attempted rape of his wife where she withdrew her consent to intercourse.³ Later in April 2014 the general sentencing council updated its guidelines and suggested sentences for the offence of marital rape.

Exception 2 attached with section 375 is based upon outgone notion of marriage which should be modified as law can not be put aside while bringing the social change. To face the benefit of social change law has to maintain a reasonable equilibrium with dynamic social institutions so that it does not become outdated. Difference created between married and unmarried women

¹ https://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.Pdf, Sir Matthew Hale. History Of The Pleas Of The Crown, 1 Hale PC (1736)

² Sexual Intercourse By A Man With His Own Wife, The Wife Not Being Under 15 Years Of Age Is Not Rape

³ https://www.law.cornell.edu/women-and-justice/resource/R_V_R,

as per the provision mentioned under section 375 of Indian Penal Code clearly shows sexual intercourse without the consent of woman provided women being unmarried is rape whereas exception to section 375 says sexual intercourse with the wife by her husband (provided wife is not under the age of 15 years) is not rape. Article 14 of the Indian constitution mentions right to equality and when equality comes in play wherever the difference is created it is followed by rational grounds and doctrine of intelligible differentia. If any provision fails to stand on the footing of intelligible differentia its constitutionality comes into dubious role, thus the difference mentioned under section 375 doesn't seem to be qualitative and intelligible per se. Lack of consent cannot be considered as fictional consent under the exceptional clause of section 375 to license the husband to rape his wife.

As per the **Canadian law** “an accuse cannot take the ground of belief that there was consent to the specific sexual activity, it shall have to be a certain consent for the same, subjective belief of consent is not enough. Accuse must show reasonable steps he took to ascertain consent”.⁴

Marriage cannot be the essence to dilute the women's identity and dignity into men by assuming implied consent of wife over her own body.

In case of *Joseph Shine vs. Union of India*⁵ it was mentioned that-

“Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter”.

Therefor exception to section 375 IPC seems to be archaic, it cannot be made the ground to safeguard the institution of marriage and a shield to societal standings from being ruptured. In the words of laureate advocate **Karuna Nundi** “If protection of conjugal rights were to be taken as the object of the marital rape exception, then the same doesn't align with post

⁴ https://www.Thehindu.Com/Multimedia/Archive/01340/Justice_Verma_Comm_1340438a.Pdf,

⁵ <https://Indiankanoon.Org/Doc/42184625/>,

constitutional law on conjugal rights in India as conjugal right ends where bodily integrity begins.”

In favor of criminalization of marital rape, justice *Verma committee* has also put forth valid points to be considered such as:

“The purpose of laws is to prescribe the standard of behavior of the people and to regulate their conduct in a civilized society. Faithful implementation of the laws is of the essence under the rule of law for good governance. In the absence of faithful implementation of the laws by efficient machinery, the laws remain mere rhetoric and a dead letter.”

Women alone cannot be the carrier of honor and prestige unlike men. India needs to rethink to take a shift from misogynic approach which enfeeble the law and society. In the committee report by justice Verma it was noted that “the stages of change need not to be in the Darwinian sense but can be fast forwarded by fundamental change of attitude”⁶. Merely saying that married women raped by her husband is given protection and civil remedies under various provisions and she can complain of an offence of sexual assault, Domestic violence, cruelty mentioned under section 498-A of Indian penal code and Hindu marriage Act but she cannot complain of being “raped” because she is married and concept of rape by husband doesn’t exist in Indian society and its legal system. Whereas in my opinion rape is rape and rapist is a rapist be him a stranger or husband. Marriage cannot be treated as the ground of consortium to perform sexual intercourse with husband and debilitation of women’s own identity by merging it with men. India is one of the signatories and voted in favor of UDHR for ensuring the protection of Human Rights and fundamental freedom, Article 16 of UDHR states that:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”.

UN committee on elimination of violence against women 1993 and Convention on Elimination of all forms of Discrimination against Women in 2007 (CEDAW) made recommendations in respect of India that India should: “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape”.

⁶ https://www.thehindu.com/Multimedia/Archive/01340/Justice_Verma_Comm_1340438a.Pdf,

Canada, South Africa, Australia were one of those countries to deny initially the criminalization of marital rape but later the denial was converted by criminalizing marital rape in 1983, 1993 and 1991 respectively. Indian judiciary has been expressing its opinion regarding marital rape for quite an extended period.

In case of **Shri Bodhisattwa Gautam vs Subhra Chakraborty (1996)** Supreme court established that “rape laws in India do not cover social perspectives and in many ways they are unsuitable”.

Division bench of **Kerala High court** comprising justice A. Muhamad Mustaque and Dr. Kauser Edappagath said “treating wife’s body as something that is owed to the husband and committing sexual act against her will is nothing but marital rape”.⁷

Gujrat High court stated while dealing with the issue of marital rape that “treating rape with the wife an offence shall remove destructive attitude that promotes marital rape”.⁸

In case of **Navtej Johar vs Union of India**⁹ Supreme Court stated that “the stereotyped mindset that the burden of marital happiness and family planning is on women is discriminatory to women”.

In the words of **Kalpna Kannabiran** “granting the husband an absolute immunity solely on the basis of the matrimonial consent was against the tenets of gender-neutrality”.¹⁰

Ministry of health and family welfare conducted a survey known as **National Family Health Survey, in 2015-16** which exposed that 83% of the Indian women surveyed were subjected to sexual violence and 6% of them stated that sexual violence was in the form of force used by their husbands to have sexual intercourse without their consent. 4% of the surveyed women stated that husband used coercive methods over them to make them perform sexual acts without their consent. Such perspectives depict that narration given by the victims of marital rape reflect more of their silence than the voice to recognize their sufferings. Her mental, emotional and physical trauma in marital bond becomes just a tale to tell because in the eyes of law no such

⁷ <https://thewire.in/Law/Marital-Rape-A-Form-Of-Cruelty-Is-Ground-To-Claim-Divorce-Kerala-Hc>,

⁸ See Nimeshbhai Bharatbhai Desai Vs. State Of Gujrat

⁹ AIR (2018) 10 SCC

¹⁰ (Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India, 2013)

crime as marital rape exist, it is treated as the ordinary sexual violence occurred between husband and wife but not an aggravated and recognized form of offence.

Supreme Court in *Independent Thought vs. Union of India*¹¹ held that by criminalizing marital rape it cannot destroy the institution of marriage as it's a personal matter.

Impending question to criminalize marital rape or not is yet to be decided under the writ petition of **RIT Foundation vs. Union of India**.

The dichotomy of treating rape as rape and marital rape as no rape but just the violence doesn't seem to fit into 21st century's India and its societal structure. Modern India needs a permissive society with less restrictions and more progressions, leaving outdated approaches behind to look forward, to think ahead and to act rationally towards women no matter she is married or unmarried, young or old, kid or adult and that shall be a step towards change and empowerment in true sense not just of women but society as whole.

There has been much of hesitation to recognize Marital rape and to criminalize it. Opinions vary but to draw the conclusion is difficult. 172nd law commission report and criminal law amendment bill 2012 did not favor the recognition of marital rape because rape within marriage comes into the periphery of personal matter and excessive interference doesn't protect the matrimony.

Those who favor the retainment of current situation on the issue of marital rape opines that criminalizing marital rape shall result into disruption of institution of marriage and erosion of family structure because marriage is one of the pious institution of Indian society. But counter argument here is when divorce, judicial separation and existing provision does not harm the sanctity of marriage then how the provision relating to marital rape shall have adverse effect on institution of marriage and Indian family structure.

Another argument to de-escalate the discussion over marital rape is that women who complains about being raped by husband can avail many other remedies in civil law as well as under criminal law like mentioned under section 498-A of IPC, Hindu marriage Act and Protection of women from Domestic violence Act but that doesn't change the nature of offence and ensures protection of integrity, dignity and equality of women. Some of the experts point out that there is a fear of misuse of law against innocents as such cases of marital rape shall be

¹¹ AIR (2017) 10 SCC 800

difficult to prove unless corroborated by material particulars and there is a probability that false accusations may be levelled against men and then in such case more men shall be behind the bars than in house. By stating such opinion one cannot ignore the unseen reality behind the door. It is to be noted that why ordinarily a young women will put her reputation and dignity on stake by accusing her husband falsely for being raped because in the words of justice Arjit Pasayat “murder and murderer kills the physical frame of the victim but rape and rapist defiles the soul of a female”. Stigma of being raped doesn't change in any society as it gets attached with the victim forever and requirement of change should not go offset by concomitance increase of misuse of such law.

Categorizing the women on the basis of marital status does not safeguard her freedom and dignity but it promotes stark inconsistency of laws. Primary aim of rule of law is to provide impartial justice. Rape of a women be it after marriage or before marriage is deprivation of her fundamental rights and human rights in whole. Moreover bodily integrity is superior to all the other marital privacy hence law must take action to safeguard the same. It is also expected from Indian parliament to reinforce the positive change so that women can enjoy full spectrum of their rights, breaking the chain of patrilineal society which consider women as physical center of sexual congress. The call for the time is to correct the anomaly that has been created for so many decades and to crystalize the recommendations constitutionally into substantive law of India. Issue of marital rape is not uncommon in India, it is the need of “Law-Language” which can help the victims to narrate the problem faced by them because slight murmuring shall not be enough to bring the attention of authority to amplify the voice of sufferers which often remains suppressed under the sheet. Prof. Fredman's review to justice Verma committee in the favor of criminalization of marital rape is: “training and awareness programs should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife”.

Process of transformation is slow and cannot be achieved after fortnight because unfair and unlawful discrimination has been rooted since long in our society and its mindset which ultimately weakens the objectives of our constitution. M.K Gandhi in his speeches on women empowerment had once said: “women have been suppressed under custom and law for which man was responsible and in the shaping of which she had no hand. Rules of social conduct must be framed by mutual co-operation and consultation. Women must realize their full status

and play their part as equals of men. Wives should not be dolls and objects of indulgence but should be treated as honored comrades in common service¹².”

To conclude, bringing the issue of marital rape as a change is not a matter to be deconstructed by parliament and judiciary only but by the people of India and their acceptance towards transformation. It is hoped that recommendations and objectives of this paper turns into reality and problems of the victims are heard and extenuated with effective implementation of laws which are ahead of social prejudice.

¹² https://www.Mkgandhi.Org/Articles/Womens_Empowerment.Htm,

References

- (n.d.). Retrieved January 17, 2022, from https://www.law.cornell.edu/women-and-justice/resource/r_v_r
- (n.d.). Retrieved February 1, 2022, from <https://thewire.in/law/marital-rape-a-form-of-cruelty-is-ground-to-claim-divorce-kerala-hc>
- (n.d.). Retrieved February 3, 2022, from <https://thewire.in/law/india-marital-rape-criminal-law>
- (n.d.). Retrieved February 1, 2022, from https://www.mkgandhi.org/articles/womens_empowerment.htm
- (n.d.). Retrieved JANUARY 13, 2022, from <https://feminisminindia.com/2018/01/11/manusmriti-ultimate-guide-good-woman/>
- (2022, February). Retrieved from Indian kanoon: <https://indiankanoon.org/doc/42184625/>
- Arora, P. (n.d.). Retrieved January 3, 2022, from manupatra.in: <http://docs.manupatra.in/newsline/articles/Upload/62E06DEA-C615-4356-AA69-666E5E83F79C.pdf>
- Balazsi, L. (n.d.). Retrieved December 10, 2021, from <https://www.diva-portal.org/smash/get/diva2:1597487/FULLTEXT01.pdf>
- Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India. (2013). In k. k. singh (Ed.). sage publication. doi:<https://dx.doi.org/10.4135/9788132100270>
- Dr. Sanjay Sindhu, M. T. (n.d.). Retrieved December 25, 2021, from <http://ijmas.com/upcomingissue/26.01.2015.pdf>
- Gogoi, S. (n.d.). Retrieved December 27, 2021, from <https://ijlra.com/wp-content/uploads/2020/11/Volume-1-Issue-6-Soyonika-Gogoi.pdf>
- lawtons solicitors*. (2019, June 6). Retrieved January 3, 2022, from lawtonslaw.co.uk
- Malik, D. (2021, June). Retrieved January 2, 2022, from <https://historyofyesterday.com/a-10-year-old-was-raped-to-death-on-her-wedding-night-by-her-30-years-old-husband-cc7c190a80de>

Mishra, A. (n.d.). Retrieved december 22, 2021, from <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>

ramaswamy, A. (2016, january 12). Retrieved december 28, 2021, from <http://esocialsciences.org/oldSite/essResearchPapers/showArticle.aspx?q=1Hpf6nexHrWMB7N0kGoH5NS4y739ErjLOY5pZRishsawTeHIDZu2GpiJIQltuhUjjE5QNorCuKvAcuEwJcI27PuLuH/K1xrnkmXAtWrPaoFnwjonSwrosD5G0Gp8kp+y>

singh, V. P. (n.d.). doi:<https://doi.org/10.1177/09715215211056791>

Teeters, H. E. (1959). *THE ETERNAL QUEST FOR THE CAUSES OF CRIME, New horizon of criminology.*

thehindu.com. (n.d.). Retrieved february 16, 2022, from https://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf

Torres, M. (2021). *Sexual Violence in Intimacy.*

VERMA, J. (2013). *Amendments to criminal law.*