
CRIMINALISING MARITAL RAPE: YET ANOTHER WEAPON TO HARASS HUSBAND

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ABSTRACT

The institution of marriage is sacramental in nature and it is considered to be the union of two persons for eternal. Marriage is a social institution which is given heightened importance in society at large¹. In last two-three decades the institution of marriage has lost its sanctity into the eyes of society at large because of the group of people known as the misandry. If we look at the past then we get puzzled by the worsening of this institution through passage of time. The institution of marriage has in the passage of time has changed itself to fit the demands of time. Marriage as an institution has different connotations in different societies. Let us forget about the different societies and talk about the different time spans through which this institution has been worsened by the people in a drastic manner. The structural and functional aspect of marriage as an institution has turned from simple to complex. What can be the reason of this situation? The author will try to justify this through certain societal aspects and data in a dissentient manner. Indian society is very sensitive pertaining to the institution of marriage but this has become unwonted in few metro cities of India these days. The author will not discuss what marriage is, how it is being practised but will try to discuss the inner subject matter of it and its interior sensitivity and how it has gone affected in a matter of time. Marital rape is one of such example wherein the institution of marriage is again targeted by the group of people who is known to be misandry.

¹ Shivasankaran Vs Santhimeenal Civil Appeal Nos. 4984-4985 of 2021

Introduction

Marriage is an institutional arrangement between persons, generally males and females, who recognize each other as spouse or intimate partners across India. Marriage is an institution which is strictly human social institution and assumes some permanence in conformity with societal human norms. No doubt marriage as an institution is in a transitional phase, it can change its form and shape but it will remain always there in the society as a “social fact”².

Marriage cannot be defined adequately which covers all types of human marriages. Various sociologists as well as anthropologists have given number of definitions and explanations of marriage. About four decades ago, anthropologist William Stephens said “*marriage is a socially legitimate sexual union, begun with a public announcement, undertaken with some idea of performance, and assumed with a more or less explicit marriage contract, which spells out reciprocal obligations between spouses and their children*”. Therefore marriage is a socially recognised union between two persons, generally males and females. It is consensual or free union which is legitimated by custom, religious rites, or civil law³. In *Rup Jyoti Das vs Beron Saikia*⁴, the Supreme Court held that a marriage is sacrosanct in nature and this sanctity of the relationship of the man and wife should be preserved.

The institution of marriage has undergone significant transformation over the past two to three decades, or more accurately, has lost its sacredness. Currently, it is frequently stated in public discourse that this institution is becoming outmoded. Functionalists, on the other hand, believe that society must fulfil its fundamental demands. When functionalists investigate marriage, they focus on how it relates to other facets of society, particularly how marriage helps to maintain social order. All communities have organised systems of marriage, family, and kinship. However, the arrangement's characteristics vary significantly across countries, over time, and even within a single community at a given moment.

Rape is considered to be one of the gravest forms of offence against human body i.e sexual violence against women. This type of inhuman act violates the basic human rights of the women. Rape is extreme form of sexual violence which negates the dignity or integrity of women. The crime of rape targets society as a whole, not just the values and beliefs of the

² "A Sociological Insight Into The Institution Of Marriage: A Case Study of Kashmiri Culture", in *Ijisp.in.*, 2022, <http://ijisp.in/admin/mvc/upload/5110_A%20SOCIOLOGICAL%20INSIGHT%20INTO%20THE%20INSTITUTION%20OF%20MARRIAGE%20A.pdf> [accessed 11 February 2022].

³ What We Talk About When We Talk About Rape by Sohaila Abdulali p. 89-90

⁴ AIR 2006 Gau 125

individual victim. It is considered as a social and political issue wherein the power between men and women is imbalanced. In such form of offence the victim is denied self esteem.

Marital rape can be defined as a sexual intercourse or penetration whether vaginal, anal, or oral obtained by force, threat of force, or against the consent of the women by her husband. Therefore the meaning of marital rape is simply understood in its peculiar sense wherein the husband of a woman has forcefully or against her consent had sexual intercourse, be it vaginal, anal or oral⁵.

Though right to privacy is not mentioned explicitly in our constitution but in a series of cases the hon'ble Supreme Court has expressed its views that right to privacy is very much part of our constitution under Article 21 of the Indian Constitution⁶. The notion of right to privacy denotes a right to be left alone. The conjugal rights between matrimonial relationships are also part of right to privacy as guaranteed by Article 21 of the Indian Constitution. The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*⁷ has held that every woman was entitled to sexual privacy and it was not open for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v. State of Rajasthan*⁸, the Supreme Court extended this right of privacy to workplaces. Therefore in a matrimonial relationship there exists right to privacy to enter into a sexual relationship between the partners. The sexual privacy between the matrimonial partners is protected within the framework of Article 21 of the Indian constitution. Both men and women are given equal sexual privacy right and freedom as matrimonial partners. Declaring exception 2 of Section 375 of the Indian Penal Code as unconstitutional will certainly violate the sexual privacy and sexual freedom of a couple in matrimonial relationships. In a marital relationship both the parties have expectations of conjugal relations and such expectation cannot be labelled as husband having forcible sex with wife.

As per Rawlsian principal of self respect the individuals should not be denied sexual intimacy. The right to life and liberty protected by part III of our Constitution would include right to sexual intimacy and freedom of expression. Sexual intercourse in a marital relationship

⁵ S Dutt & S Kataria, "The Slant of Marital Rape in India", in *Penacclaims.com*, 2022, <<http://www.penacclaims.com/wp-content/uploads/2020/01/Shaurya-Dutt.pdf>> [accessed 6 March 2022].

⁶ *Kharak Singh v. State of U.P.* AIR 1963 SC 1295; *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378; *Neera Mathur v. LIC*, (1992) 1 SCC 286 ⁷ AIR 1991 SC 207.

⁷ AIR 1991 SC 207.

⁸ AIR 1997 SC 3011

between a husband and his wife cannot be labelled as rape and at worst, can only be called a sexual abuse⁹.

The civil liberties of a man are protected as per exception 2 of section 375 of the Indian Penal Code. The court should try to protect the civil liberties of men rather than curtailing their civil liberties. Curtailment of civil liberties of a man would cause negative impact on the institution of marriage. If this has been the situation then that day is not far when men will lose their faith in the institution of marriage. The purpose of incorporating rape legislation into the penal code was to protect women from sexual assault by unwelcome parties, not to shield headachy wives from the discomfort of having sex with their spouses. In his dissenting opinion, Justice Kaul cited the ruling in the case of *Mosley v. News Group Newspapers Ltd.* Justice Kaul opinionated that "*the emphasis for individual's freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest*".

Remedies available for Marital rape under Indian Law:

Genuine cases of marital rape already have enough legal recourse available to them in both our criminal and civil systems.

1. **Cruelty:** The definition of Domestic violence mentioned under section 3 of the *Protection of Women from Domestic Violence Act, 2005* includes sexual abuse which is specifically defined under the act. According to the definition, sexual 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.*" As per section 3 of the *Protection of Women from Domestic Violence Act, 2005* and Section 498A of the Indian Penal Code, 1860 provisions speaks regarding cruelty inflicted on women. The forceful sex with wife can certainly fall within the meaning of cruelty as per section 3 of DV Act and section 498A of IPC. It can certainly help the victim wherein Protection order can be issued as per section 18 of the DV Act along with monetary relief and compensation order for women who has been subjected to cruelty of any form which includes sexual violence by husband. On the other hand the husband can be punished

⁹ Why Men Rape: An Indian Undercover Investigation by Tara Kaushal p. 42 [2008] EWHC 1777 (QB)

with imprisonment for a term which may extend to three years and can also be liable to fine as per section 498A of IPC.

2. **Separate Residence:** Victims can also claim separate residence as per section 19 of the DV Act, if the Magistrate is satisfied that domestic violence has been committed. The husband can be directed to secure same level of alternate accommodation for the wife.
3. **Divorce:** In civil remedies the victims can claim divorce in genuine cases of sexual violence in matrimonial relationship on the ground of cruelty as per section 13 of the Hindu Marriage Act, 1955, as sexual abuse in matrimonial relationship includes cruelty within the essential requirements of section 13 of the said act. In *Gurbux Singh vs Harminder Kaur*¹⁰, the Supreme Court was of the opinion that “*the persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse*”. Various

High Courts took help of this view wherein excessive demand of sex from women by their husbands was considered to be cruelty within the basic requirements of Section 13 for divorce. Recently in *Rajiv Mangal Vs Ritu Mangal*¹¹, the Madras High Court took the help of Gurbux Singh Case¹² and granted divorce to the woman and held that demand of too much sex by the husband is cruel and it can be a ground for divorce.

Today, it has become customary to file fictitious complaints under section 498A of the IPC with the goal to torment her husband. In *Kans Raj v. State of Punjab*¹³, husband was charged on the complaint being filed by the relatives of his wife because wife was found dead at their residence. The Court was of the opinion that that it is imperative to prove beyond reasonable doubt that some overt act has been done by the husband so as to punish him under *Section 498A of IPC*. Considering the rampant false complaints of Section 498A of IPC, the certain guidelines were issued by the Supreme Court in few cases like *Arnesh Kumar v. State of Bihar*¹⁴ where the Supreme Court was of the opinion that the provision is often used by women

¹⁰ Civil Appeal No. 5010 OF 2007

¹¹ MANU/TN/3818/2017

¹² Supra Note 10

¹³ Banerjee Sayani, *Top 10 Supreme Court cases on misuse of Section 498A of the IPC*, Lexforti, <https://lexforti.com/legalnews/top-10-supreme-court-cases-on-misuse-of-section-498a-of-the-ipc/> (last visited Jan 17, 2022)

¹⁴ MANU/SC/0559/2014

as a weapon to tarnish the reputation as well as to harass the husband and his relatives. The Court gave directions that proper investigation w.r.t the genuineness of the allegation has to be done before making arrest under section 498A of IPC. In *Rajesh Sharma & Ors v. State of U.P*¹⁵, Supreme Court directed to establish family welfare committee and involve civil society organisations and asked investigating officers and trial courts to look into matters related to investigation and bail respectively.

The Law Commission of India thoroughly examined the rape laws in its 172nd report. After studying the rape laws, the Law Commission of India concluded that the second exemption to Section 375 of the IPC does not need to be changed. As a result, the Law Commission of India did not recommend making marital rape a crime in its report. According to the Law Commission of India, each nation has its own unique collection of laws, and it is impossible to adopt all the laws that are in effect in other nations. Therefore mere fact that majority of the countries have criminalized the marital rape or sexual assault between two persons i.e husband and wife in marital relationship cannot be any justification that India should also follow the same path towards criminalizing marital rape. The Law Commission also believed that, given the diversity of Indian society, which includes social and religious customs, inadequate education, extreme poverty, a lack of social awareness, and the male partner's legal right to engage in sexual activity with the spouse, criminalising marital rape is currently impossible. The Law Commission of India consequently came to the judgement that criminalising marital rape at this time would unjustifiably interfere with the purity of the institution of marriage based on the aforementioned reasons¹⁶.

In the history of Indian Criminal Jurisprudence Section 498A of IPC is considered to be the abused law so far. It is imperative to note that in the eyes of lawmakers a married man can never be subjected to cruelty by his wife or his in laws. The provision pertaining to cruelty was incorporated in our criminal system to protect women from marital violence¹⁷. But over the years this provision has been misused grossly because of the arbitrariness that it confers upon the police authorities as well as the women who allege domestic violence. This provision have received wide criticism and accused of fostering misogyny in the country. Domestic violence under Section 498-A is a cognizable, non-bailable and non-compoundable offence. This leaves

¹⁵ Criminal Appeal No. 1265 of 2017

¹⁶ "Marital Rape in India", in *Drishtias.com*, 2022, <<https://www.drishtias.com/pdf/1608640272-marital-rape-inindia.pdf>> [accessed 8 January 2022].

¹⁷ Marital Rape and Consent: Analysing Marital Rape in India by Md Zishan Khan p.56-57

no scope for the parties to amicably resolve the issue outside court. Without conducting initial investigation the police officers are given powers to immediately arrest the husband and his family members where necessary, including elderly parents and minor-aged siblings. In few bizarre cases even two years old baby was dragged into court and in particularly eccentric case even two months old baby was hauled into a police station¹⁸. This provision is being rampantly misused these days and women are misguided or assisted by unscrupulous lawyers to torture their husbands and in-laws, to an extent that slowly the sacrosanctity of marriage as an institution is getting in danger. Since this offence is irrevocable and non-bailable nature, therefore the possibility of reconciliation and restoration of the parties is negligible. In the series of false cases of Section 498A the Supreme Court of India itself has labelled the misuse of section 498A as “legal terrorism” and stated that “many instances have come to light where the complaints are not bona fide and have been filed with an oblique motive. In these false cases, acquittal of the accused does not wipe out the agony suffered during and prior to the trial. The study conducted by the Center for Social Research which stated that 98 % of the cases filed under section 498A IPC are frivolous¹⁹.

Even the Malimath Committee on Criminal reforms (2003) suggested that the offence under Section 498-A should be made compoundable and bailable. This view was reiterated in the 243rd Law Commission Report. Justice CK Prasad in his judgment in the case of *Arnesh Kumar v State of Bihar*²⁰ also highlighted the pressing need to balance the interests of the woman as well as the stability of the family.

Actual acts of cruelty and harassment are hardly reported under section 498A of the IPC or via the use of other dowry-related laws. Because the victims lack the required financial and moral support from their natal families, women find it difficult to disclose such difficulties, which make the problem more common in rural areas. The majority of women are also unaware that there are such laws in India or that they have any legal options. In essence, the goal of this provision has not been at all achieved. It wouldn't be inaccurate to say that the government is actually defending the women who harass their husbands and in-laws and engage in perjury,

¹⁸ S Ramakrishnan, "Male- The Ignored Gender in Most Gender Laws in India - Jus Dicere", in *Jus Dicere*, , 2022, <<https://www.jusdicere.in/male-the-ignored-gender-in-most-gender-laws-in-india/>> [accessed 14 February 2022].

¹⁹ S Thomas, "The Gendered Contagion: Perspectives on Domestic Violence During Covid-19", in *Nls.ac.in*, , 2022, <https://www.nls.ac.in/wp-content/uploads/2022/03/The-Gendered-Contagion_corrected_-_21-3-2022.pdf> [accessed 6 February 2022].

²⁰ MANU/SC/0559/2014

blackmail, and other forms of extortion. The rights of both genders should be taken into account while crafting laws. The Sexual Harassment of Women at Workplace Act, passed in 2013, is another law that is recognised as a trailblazer for anti-men and pro-women legislation. This statute is not gender-neutral, and men are not permitted to use it as a means of protection²¹.

One of the few nations in the world that has not yet made marital rape a crime is India. The topic has generated a lot of discussion recently in a nation where the courts are increasingly defining the right to individual autonomy as a right that should be valued and defended. The Delhi High Court recently sought to resolve the issue, but the result was a split decision, with Justice Rajiv Shakti ruling that the husband's exclusion from the crime of marital rape is unconstitutional. He ruled that 376B IPC, Exception 2 of 375, violates Article 14 of the Indian Constitution and must be overturned. Justice C. Hari Shankar, in contrast to Justice Shakti, found that Exception 2 to Section 375 is based on an understandable difference and does not violate the Constitution. In response to a number of petitions challenging the Delhi High Court's divided decision on the subject of marital rape, the Supreme Court recently requested the Union government's answer.

In a landmark ruling on 29th September 2022, a bench chaired by Justice DY Chandrachud in the case of *X v. Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi*²² ruled that, for the purposes of the Medical Termination of Pregnancy Act and Rules, "rape" includes "marital rape". The Court decided that notwithstanding of exception 2 of section 375 of the IPC, which exempts marital rape from criminal prosecution, for the purposes of Rule 3B (a) of the Medical Termination of Pregnancy Rules, "rape" would encompass a husband's act of sexual assault or rape perpetrated against his wife.

The Court set the path for the ongoing marital rape hearing before the Supreme Court while deciding the inclusion of marital rape for the purpose of termination of pregnancy.

Conclusion

If we look into the arguments in favour and against the criminalization of marital rape, it can be inferred that there are too many nuances associated with this issue. At this stage tempering

²¹ R Kallakuru & P Soni, "Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact", in *Nujslawreview.org*, 2022, <<http://nujslawreview.org/wp-content/uploads/2018/01/11-1-RaveenaRao-Kallakuru-Pradyumna-Soni.pdf>> [accessed 6 February 2022].

²² Civil Appeal No 5802 of 2022 (Arising out of SLP (C) No 12612 of 2022)

with the soul of institution of marriage is not commendable because it is a personal affair of couples which needs a careful handling. There is very thin line of gap which makes an act which is mere inter-personal sexual act and a grave offence which can cause serious consequences against the husband. There are numerous opinions for criminalization of marital rape but dealing with this private domestic affair without bringing any discussion for the fact that it might be misused like Section 498A, Section 304B of IPC and Domestic violence Act, 2005 is not appreciable. It is never possible to argue that consent is completely irrelevant when it comes to questions of consent between husband and wife in a marital relationship when one takes a look at the definition of rape under section 375 of the IPC. The law does not recognise the husband's right to sexually attack his wife without facing any repercussions. This issue must be dealt deliberately taking into consideration the diversity of the Indian society. Therefore considering the diversity in Indian society and giving emphasis on other factors like literacy, lack of financial independence of majority of women, poverty etc. criminalising marital rape is not expedient at this stage. As discussed above there are sufficient remedies already available against genuine cases of marital rape under our criminal as well as civil law. It will not be advantageous to criminalize marital rape to satisfy the opinion of some people known as misandry and ignoring the rights of the majority of the people on male counterpart. If it is misused like any other women centric laws then it will certainly create problem rather than solving one. Further criminalizing marital rape will not solve the problem but this will certainly overburden the courts with frivolous cases against husbands or men and their family members.