

MARITAL RAPE UNDER INDIAN LAW: A STUDY

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ABSTRACT

Marital rape violates the right of dignity of a married woman. It breaches the trust of wife. Even then, it is not criminalized as rape in India. It raises a question, is a married woman being considered an object or the property of the husband. It also raises the question, as to does a married woman has right to save her body from the lust of her husband. No doubt the purpose of the marriage is to provide right to have sex with wife. This paper points out whether this right can be coupled with force or right to have sex is only coupled with will or consent of wife. The purpose of the marriage in point of view of right to have sex should only be providing satisfaction of biological need without any check or burden of society and law. India has been a male dominated society and it is also a fact that Indian culture gives special status to the women. Today, we talk about women empowerment. Many rights have been provided to the women in India. But in a male dominated society, would women be empowered in real sense without criminalizing marital rape. The main purpose of this paper is to find out as to whether sex without the consent of wife should be considered as rape. Doctrinal method of research will be applied in this paper.

Key words: *Marital Rape, Dignity, Consent, Constitutional Right*

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1.1 Introduction

“Happy marriages begin when we marry the ones we love and they blossom when we love the ones we marry”

Tom Mullen¹

Marriage is an institution which admits men and women to family life. It generates love and trust. It is a stable relationship in which a man and a woman are socially permitted to have children implying the right to sexual relations.² Institution of marriage gives permission to a male and a female to live together under customary and statutory law. It is a special bond shared between two souls, who tie the wedding knot after promising to be companions for a lifetime. It is the physical, mental and spiritual unison of two souls.³ When a male marries with a female, it means man is duty bound to give due respect to the dignity of wife. Now question arises whether marriage gives right to the husband to have sex with his wife forcefully or in other words, is marriage takes away the right of a lady to refuse to have sex with her husband. It is a debatable question in India in present scenario. Marriage generates confidence in wife that husband will provide safety and respect her dignity and when he commits unwanted/forcefully intercourse with his wife, it breaks this confidence and breaches the trust of the wife. In such circumstances, what is the need of providing immunity to the husband from committing rape with his own wife?

This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, ‘marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband.’⁴ ” Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women.⁵ Indian criminal law also demands changes and inclusion of marital rape in section 375 of Indian Penal Code. In the present scenario in India husband and wife both are having separate legal entity. Women in India are not only giving their major assistance in home but also outside the home. Marital rape breaches her trust on her husband.

1.2 Rape:

The dictionary meaning of word rape is “the ravishing or violation of a woman.” The rape victim i.e. a woman as woman cannot commit rape due to biological reasons.⁶ Rape is one of the most abhorrent crimes against a woman.⁷ It is one of the most violent crimes on the earth.⁸ It is a crime against humanity. It is the violation of Constitutional Right to Life of a woman. Rape is criminalized by Indian Penal Code except marital rape. Section 375 of the Indian Penal Code provides rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 16 years of age." According to this definition consent or will have great importance in deciding sexual intercourse as rape. It is the major parameter in rape to determine the liability of the accused.⁹ A consent is not such a consent as is intended by any section of Indian Penal Code, if it is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or consent of insane person. Consent of insane person is the consent given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child. Consent of child is, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.¹⁰ Section 375 rules out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape.¹¹ According to Section 375 unwanted intercourse with an unmarried lady or married lady except by her husband is rape but what about married lady if the unwanted intercourse is done by her husband. The concept of marital rape does not exist in India.¹² Here it appears that we are creating discrimination in rape committed with unmarried lady and rape committed with married women (15 years of age and above) by her husband.

Exception to section 375 of Indian Penal Code provides that Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹³ So, according to this exception, if the age of wife is under fifteen years then it will be rape. But punishment provided

for rape under Section 376 explains different position of marital rape. It provides that who commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Hence, punishment for marital rape shows the discrimination between, if the wife is under 12 years of age and if wife is more than 12 years but less than 15 years of age.

But there are no provisions to deal with the cases such as if rape is committed by her husband in collusion with third person or if rape is committed by both husband and third person. What will happen in such circumstances? Whether the third person will only be punished for rape or being husband, husband will not be punished for marital rape.

1.3 Marital Rape or Spousal Rape:

Marital or spousal rape is rape committed by one spouse against the other.¹⁴ Now the question that arises is, whether to have sex with wife without consent is to be considered as rape or rape by male spouse will only be non-consensual sex with wife and not rape. Indian law does not criminalize marital rape. It also raises a question why it is not rape. Why it cannot be criminalized under section 375 of Indian Penal Code. It is a debatable issue. Under Indian penal code it is marital rape if the wife is below 15 years of age. The view of the Indian society regarding marital rape is shown in this example when a lady confided to her parents that she was being sexually abused by her husband, who forced her into violent intercourse with him, she was castigated for not giving the marriage her best.¹⁵ The court in a case said “Defence counsel rightly argued that IPC does not recognise concept of marital rape. If complainant was a legally-wedded wife of accused, the sexual intercourse with her by accused would not constitute offence of rape even if it was by force or against her wishes”.¹⁶

According to the UN Population Fund, more than two-thirds of married women in India, aged 15 to 49, have been beaten, or forced to provide sex. In 2011, the International Men and Gender

Equality Survey revealed that one in five has forced their wives or partner to have sex.¹⁷ The United Nations published a report that stipulated that 69% of Indian women believe that occasional violence was justified, for instance when a meal hasn't been prepared in time or when sex has been refused. Further statistical research reveals that 9 to 15% of married women are subjected to rape by their husbands, a staggering and sobering statistic.¹⁸

Marital rape is a common but it is only un-reported crime. A study conducted by the Joint Women Programme, an NGO found that one out of seven married women had been raped by their husband at least once. They frequently do not report these rapes because the law does not support them.¹⁹

When we look towards the constitution of India, we find Article 14 which provides equality before law for women or we can say that all are equal before law. Article 15 (i) mandates the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.²⁰ But regarding marital rape women in India are not being treated equal. Equal treatment of law is not being provided to the victims of marital rape. Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape.²¹ Article 21 of the Constitution of India provides right to live with dignity. But marital rape clearly breaches the right of a married woman to live with dignity. Or in other words we can say that section 375 of IPC violates article 21 of the constitution regarding marital rape. Today there are many States that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These States include Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand did so in 2007. The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights. In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries and India is not one of them. Even though marital rape is prevalent in India, it is hidden behind the sacrosanct curtains of marriage.²²

In India, no doubt, Hindu religion and conjugal life gives right to have sex with wife. However, Hindu religion and its literature stress on purity, cleanliness and behavior of good faith in conjugal life, it cannot be said that Hindu religion and traditions exempts the heinous act of rape to wife. Sexual intercourse in conjugal life is a normal course of behavior, which must be based on consent. No religion may ever take it as lawful because the aim of a good religion is not to hate or cause loss to anyone.²³ The Law Commission of India in its 172nd Report on 'Review of Rape Laws' as well the National Commission for Women have recommended for stringent punishment for the offence of rape.²⁴ Report proposed that the sexual intercourse by a man with own wife not being under sixteen years of age is not sexual assault.²⁵ The commission was also not in favour of deletion of exception to section 375. The Protection of Women from Domestic Violence Act, 2005 has only created a civil remedy for marital rape, without criminalizing the same.²⁶

For strengthening anti-rape law, Indian government constituted Justice Verma Committee on December 23, 2012 after the rape of a twenty-three year old student in Delhi, comprising retired Justice J.S. Verma, retired Justice Leila Seth and Solicitor General Gopal Subramaniam to look into the possible amendments in the criminal laws related to sexual violence against women.²⁷ In view of the significance and urgency of the task, the committee undertook to perform it within 30 days, which task has been completed. The Committee is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee has recommended that the country 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....."²⁸ The Verma committee report points out a 2010 study suggesting that 18.8 percent of women are raped by their partners on one or more occasion. Rate of reporting and conviction also remain low; aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.²⁹ The recommendation of Justice Verma Committee regarding deleting exception of marital rape is not included in Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19 March 2013 and by the Rajya Sabha on

21 March 2013. The Bill received Presidential assent on 2 April 2013 and deemed to come into force from 3 February 2013. The word rape has been replaced with sexual assault in Section 375.³⁰ Rashida Manjoo, the UN Special Rapporteur on violence against women said that Justice Verma committee's recommendation and subsequent legislation was a "golden moment for India" but recommendations on marital rape, age of consent for sex, etc. were not adopted in the legislation.³¹ The government is hesitant to criminalize marital rape because it would require them to change laws based on religious practices, including the Hindu Marriage Act 1955, which says a wife is duty-bound to have sex with her husband.³² The parliamentary panel examining the Criminal Law (Amendment) Bill, 2012, said that "In India, for ages, the family system has evolved ... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women, It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice".³³

Conclusion and Suggestions

Rape is a most heinous crime committed on a woman. It is immaterial whether women are married or unmarried. Rape is rape irrespective of the fact that who commits it either husband or stranger. Marital rape also violates the human right of a married woman i.e. safety and integrity. Government of India is reluctant in making marital rape a crime. If a woman who is under 16 years of age and consensual intercourse is done with her it will be rape but if she is married and husband forcefully committed sex with her, it will not be rape. Why marital rape is not being covered under Indian penal code. This discrimination should be deleted. Moreover, on one hand there are talks of empowering women and at the same time we are not protecting the dignity and right to life of married women.

Rape is rape either committed by her husband or committed by third person. Marital rape should be covered under anti-rape laws in India because she should be allowed to protect her dignity. The study points out that married women are being raped frequently by their husbands. While official data on marital rape is meager, activists and lawmakers maintain there is plethora of evidence to imply it is on the rise.

If a woman marries, it should not mean that she has lost her dignity against her husband. She cannot be considered as a property of the husband. She should be empowered to say no, if she is not willing to have sex with her husband. Husband should not be allowed to force his wife to have sex with him. Rape should be considered only rape without any exception of marital rape. Marriage should not be considered as a license of committing rape. Justice Verma Committee recommended criminalizing marital rape as rape but this recommendation was not considered. So, Section 375 of Indian Penal Code should be amended in light of recommendations of Justice Verma. Any type of excuse such as that it will be hard to prove marital rape or criminalizing marital rape would destroy the institution of marriage, should not give right to the husband to play with dignity and sentiments of his wife. When husband commits marital rape, he also breaches his promise made by him at the time of marriage. Majority of the Indian women mainly agree with the occasional domestic violence. This mentality is the reason of violence against this much widespread violence. As soon India's women achieve consensus that sexual abuse is not acceptable, the lawmakers can follow the track and revise India's backward laws.

Succinctly, it can be said the dissimilarity between marital rape and non-marital rape should be removed because marriage does not provide license for committing rape and the dignity of women either married or unmarried is alike.

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