

Marital Rape: A Crime, Not Criminalized

Shambhavi Pandey
Faculty of Law, Jamia Millia Islamia University
New Delhi, India

ABSTRACT:

If murder destroys body of an individual, Rape degrades sole of the helpless female.

As defined by Lowie, “Marriage is relatively a permanent bond between permissible mates.” Marriage, often known as a wedlock is a relationship of trust and that of affection. A husband exercising sexual superiority by getting it on demand and through any possible way, is not a part of the institution of marriage. On emotional and religious grounds, the role of a wife has traditionally been understood as submissive and docile and that of a homemaker. Sexual intercourse is treated as a ‘Taboo’ and this often gives rise to highly disputed issue called “Marital Rape” or “Spousal rape”.

The offence of Rape is one of the most gruesome and barbarous crimes perpetrated against women. Marital Rape, though not defined as a crime, in India is one of the most debatable and divergent issue. Women are moreover treated as an object of pleasure and a property of the husband since time immemorial. They have been victims of crimes like rape, sodomy, sexual harassment, female infanticide etc. In recent times, where the general public is fighting for equal rights for both men and women, the rate of crime against women is proliferating.

Many a times people misunderstand that an institution of marriage where two souls tie a wedding knot to be companions for lifetime, gives the husband a licence or the right to have sex with his wife forcefully or in other words, marriage takes away the right of a lady to refuse to have sex with her husband.

This paper basically points out the flaw in Exception 2 of Section 375 of the Indian Penal Code 1860 and is the wife an object or property of the husband ? Is she not given any right to protect herself from the lust of her husband and prevalence of the problem of marital rape and the factors for why men rape their own wives in order to ensure gender justice.

Keywords : Marital or spousal rape, Indian perspective, Consent and Dignity, Fundamental rights violation.

I. INTRODUCTION

Marital rape has always been a disputable concept in the academic literature. The general idea of “marital rape” can be conceptualized as ‘intercourse with the wife either by force or by threat of force or where a wife is unable to give consent. Rape is not only asexual violation of a woman but also a violation of her Fundamental Right of Life and personal liberty. This concept has been so complex because the nature of marital relationship between two spouses makes it hard for a wife to see herself as a victim due to the obligations attached to it as it follows the “doctrine of coverture”.

As the verbatim goes on, it is said that marital rape cannot apply to India due the factors like illiteracy, poverty, religious and social customs and the sanctity of the bond of marriage. But who are we to decide that it is appropriate for a man to sexually abuse his wife because they are poor or they are illiterate or because the marriage is basically solemnized to legalize generations for which consummation is necessary, and men mostly

exercise it to fulfill their physical and sexual needs. Invoking arguments of destitution, religious beliefs and social customs can result to justifying several regressive practices that have rightfully been thrown out of law.

The entire social, political and cultural milieu is shaped in woman's total subjugation to men who consider women as their chattel or objects to fulfill their own needs. The Indian Penal Code 1860 was drafted on Victorian patriarchies with a male chauvinist mindset of considering women to be property of men with no autonomy or agency over their own body post marriage.

II. MARITAL RAPE – THE CONCEPT

When one talks about rape, the thinking tendency of a person never reaches the extent of rape within the confines of a marital relationship because the wife herself is not able to judge whether she has been raped by her husband or it was a part of marital obligation that a wife has to fulfill. One need to understand that marriage is a type of journey which requires the consent of both the parties and not one dominating over the other. The non realization of the same gives rises to marital rape which is a repugnant form of masochism in the society, yet it is hidden by the sanct curtains of marriage.

The word "Rape" has been emerged from the generic term "raptus" which means to imply violent theft of both body and property. Earlier it was not said to be rape according to the words of Sir Mathew's Hale, Chief Justice of England during 1600 –

"Husband cannot be guilty of rape committed himself upon his wife, for by mutual matrimonial consent and contract, the wife had given herself in kind onto the husband , whom she cannot retract"¹.

It is very shocking to observe that Sir Hale did not refer to any judgments or case law while giving such assertions. According to his words, it can be clearly interpreted that a wife has to hand over her legal person to the husband and consent to all sexual acts even if she is not willing to do so. This is a notion of "implied consent" which gives a husband the license to rape his wife and an exemption from prosecution from their wives.

III. FLAW IN EXCEPTION 2 OF SECTION 375 INDIAN PENAL CODE 1860:

Exception 2 to sec- 375 of IPC exemption of "rape by husband" deprives women from exercising their fundamental rights and hence contravenes the provisions of Constitutional law.

Section 375 IPC defines rape but The Exception 2 to sec- 375 of Indian Penal Code states that "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape.*"

¹ Imperial Journal of Interdisciplinary Research (IJIR)

This section was drafted Lord Macaulay in the Victorian era that did not recognize men and women as equal, did not allow married women to own property, and merged their identity with husbands as it followed the doctrine of “coverture”.

Article 14 states that “The state shall not deny to any person equality before law or equal protection of laws with in the territory of India.”

In *E.P. Royappa v. State of Tamil Nadu*² the court held that if an act is arbitrary it is unequal both according to political logic and Constitutional law and it violates Article 14. The right to equality as incorporated in Article 14 requires legislation for its operation so that equals may be treated equally and unequals may be treated differently.

This exception also contravenes the *Article 2 of Universal Declaration of Human Rights* which states that “Everyone is entitled to all the rights and freedom set forth in this declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status.” In addition to this *Article 2 of the Declaration of the Elimination of Violence against Women* includes marital rape explicitly in the definition of violence against women.

The more traditional the society, the closer the adherence to the sexual script for this reason, many men do not believe that woman means “no” when she says “no”, and they are entitled to continue to pressure woman, and ultimately coerces or forces her into sex.

Taking age as requisite consideration for providing consent in case of *Independent Thought v. Union of India*³, a division bench of the Supreme Court of India read down Exception 2 to Section 375, Indian Penal Code (hereinafter, IPC), which now stands thus altered,

“Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape.”

The contention raised by petitioner is that the act was made in view keeping in mind that women when marries, she waives her right to choice and thus submits to husband about her right of sexual desire and issue of age restriction was based on child marriage and protection of female child at her tender age. But issue here is that society has now changed drastically and needs to amend such laws which forces women to wave her very rights which are necessary for human existence which fundamentally means a dignified life.

Just to protect the marriage by stabilizing it with such laws is not a valid argument because women too have rights and what benefit is democracy for if it is unable to provide security and rights to weaker sections of society.

² 1974 AIR 555, 1974 SCR (2) 348

³ (2017) 10 SCC 800

In 2005, the *Protection of Women from Domestic Violence Act, 2005* was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. This is only a piecemeal legislation and much more needs to be done by the Parliament in regards to marital rape. Marital rape reflects the perversity of an individual. It is not only the rape of a woman's body but a rape of her love and trust as well. Being subject to sexual violence by her own husband envelopes her in a sense of insecurity and fear. The Indian Penal Code 1860, has dealt with this form of rape in a very piecemeal manner. Various provisions of the IPC relating to sexuality reinforce not only Victorian morality but also the non-agency of women.

The husband cannot claim right to privacy, to justify raping his wife. Marital rape of a major woman may, similarly, result in a pregnancy, which the woman may be forced to carry to term. This would also be a contravention of her right to reproductive choice.

Article 13(2) of the Constitution of India states that “*The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*”

Article 15(i), mandates “*The state shall not to discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them*”. But when it comes to 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 in case of protection from rape.

If the law is anomalous for presuming the consent of girls who are legally incapable of consenting, it is equally contradictory if it disregards the lack of consent of women who *are* legally capable of consenting.

Verma committee, headed by late Justice *J.S.Verma*, the committee had advocated criminalization of marital rape as well but this was rejected due to apprehension that it would dent the institution of arranged marriages and lead to frivolous complaints. But only this argument cannot be taken as a sole ground for violating Fundamental Right of citizens.

Bench of three judges in the case of *Suchita Srivastava v. Chandigarh Administration*⁴, held that a woman's right to make reproductive choices is also a dimension of “personal liberty”. As understood under Article 21 of the Constitution reproductive choices can be exercised to procreate as well as to abstain from procreating. The Andhra Pradesh High Court in the case of *B.K. Parthasarathi v. Govt. of Andhra Pradesh*⁵ recognised reproductive rights as a fundamental right and upheld ‘the right to reproductive autonomy’ of an individual as a

⁴ (2009) 14 SCR 989

⁵ 2000 (1) ALD 199, 1999 (5) ALT 715

facet of his 'right to privacy' when the concept of privacy is extended to matters of procreation, state's interference or restrictions on procreation amounts to direct encroachment of one's privacy.

In *Roe v. Wade*⁶, the court had decided that every woman has the right to take a decision with respect to how her body is used, and therefore a woman has the right to procreate and abstaining from procreation. Right to reproductive choices is not just a matter of privacy, but also a basic civil right which a woman can exercise.

*Rafiq v. State of Uttar Pradesh*⁷, Supreme Court of India rightly described it as "deathless shame and the gravest crime against human dignity". Rape is not merely sexual assault but is destructive of the whole persona of the victim.

The Supreme Court, in *State of Maharashtra v. Madhukar Narayan Mandikar*⁸, has referred to the right to privacy over one's body. In this case, it was decided that a prostitute has the right to deny sexual intercourse if she was unwilling for the same. However, the Supreme Court has conveniently left 'wife' out of this expression of privacy and not yet given her complete privacy over her body which reflects an approach that is not only sexist and misogynistic but also arbitrary and not found on any prominent legal justification.

The right of bodily self-determination, which has not been recognized separately by the constitution of India but upto some extent it lies in the ambit of the right to life and personal liberty under Article 21. Consent to sex is one of the most intimate and personal choice that a woman reserves from herself. It is a form of self expression and self-determination and a law that takes away the right of expressing and revoking such consent definitely deprives a person the constitutional right of bodily self-determination. It is submitted that the marital exemption doctrine effectively deprives a married woman her right to bodily to self-determination in respect of one of the most intimate and personal choice, i.e., consent to sexual intercourse, and is hence, unconstitutional.

The right to good health, which is associated to right to life under Article 21. Such a right is necessary for the continuous intellectual and spiritual well being of a person. The marital exemption doctrine violates the right to good health of a victim as it inevitably causes serious psychological as well as physical harm in the process. It destroys the psychology of a woman and pushes her into a deep emotional crisis. A more compelling argument can be made in case where forceful sexual intercourse in a marriage leads to the communication of a sexually transmitted disease (STD) to the victim of crime of rape. The marital exemption doctrine effectively deprives a married woman of her right to good health and is hence, unconstitutional.

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,

⁶ 410 U.S. 113 (1973).

⁷ 1981 AIR 559, 1981 SCR (1) 402

⁸ AIR 1991 SC 207

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 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.⁹

IV. CONCLUSION

It is argued that marital rape should be criminalized in India, as this can be achieved by applying an individual rights approach to violence against women. Indian women's organizations have succeeded to achieve public awareness and to pass legislation on domestic violence, but marital rape has not been fully criminalized by abolishing the distinction between marital rape and stranger rape. The continuing exemption of marital rape from the purview of criminal law sustains the assumption of the wife as exclusive property of the husband, which is absolutely wrong .

Though a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, inquiry or matrimonial relief, what is needed is the incorporation of the principle of liability for marital rape in our penal laws. Not only child-brides, but all wives need legal protection from rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person must be recognized.

Ideas about women's sexuality, and therefore ideas about non-marital and marital rape in Indian society, originate in concept of gender, shame and family honour, rather than women's rights and individual autonomy. If the reformers see rape as a crime against a woman and her person and bodily integrity and humanity, then marital rape and its punishment would be a legal possibility. To bring a change in the existing policy, we may use an individual rights rhetorical approach in working towards criminalizing marital rape in India, because marital rape will not be a State concern until the society and legislators understand women to have individual rights within marriage.

⁹ <http://legalperspectives.blogspot.in/2009/10/marital-rape.html>

The woman has and still continues to be victimized by man and society. The patriarchal power structures have deemed marriage to be a license to legal unwilling sex. There is a need to acknowledge her as a human being and amend the provisions of the Indian Penal Code, away from the ancient notion of her being a mere chattel, and give her respect and the dignity she deserves because it truly said and universally accepted that *“The fastest way to change the society is to empower the women in the world”*. If women are emancipated then the society will also prosper.