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Marital Rape: License to Rape or Not?

KETAN TEWARI¹ AND MANSI BISHT²

ABSTRACT

Rape is commonly known as a sexual assault involving any sexual intercourse or any other kind of sexual penetration done or carried out generally by men against women and not his wife that too without her consent. The meaning of marital rape is indecisive and is subject to interpretation. There has been no rational interpretation of the same in the Indian scenario, it is still a doubt in the minds of the Indian society that it is based on violence or is merely just forceful sex is extensive. Marital rape has now been recognised globally as a grave public health concern due to its devastating effect affecting the physical, sexual and psychological health of the victim. The recognition of marital rape as a serious crime and long-term consequences to the victim has now become a significant topic of research in the recent past within the area of domestic violence. Though marital rape was a kind of domestic violence that has been generally ignored now the marital rape has often received a denunciation and voices by various researchers, academicians, intellectuals and feminists through discussions of it on several occasions. The available shreds of evidence on marital or domestic violence show that many women's are forced to have sexual intercourse with their husband with physical force. The current article represents a broad review of marital rape. Definition of marital rape and important information relating to the incidence of marital rape are being summarised followed by both legal and psychological aspects of the problem and its exemptions. A brief legal history of marital rape in Indian as well as a global perspective, followed by the remedies and legal provisions available to the victim. Suggestions for the change in existing rape laws and their penalties have been offered in the conclusion.

Keywords: Sex, Physical Intercourse, violation, Rape, Consent, Marriage etc.

I. INTRODUCTION

Marital rape as the word in itself defines a kind of sexual violence. Marital rape refers to forcible sexual assault or violence by one spouse towards the other. It is violent and brutal and the use of force by the husband towards his wife to have physical relation with the wife is the essential element of marital rape. Thus, the only way by which an accused can commit an

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offence is by the use of physical force and the absence of which would not amount to the commission of an act. Also, marital rape is non-consensual i.e, negation or rejection by one or more parties involved in the act.

These non-consensual sexual acts not only includes Natural sex but also includes anal and oral sex, forced sexual behaviour with other individuals and other sexual activities that are considered by the victim as humiliating, unwanted, painful and brutal.³ Exception 2 to section 375 of the Indian Penal code according to which sexual intercourse or acts by the husband with his wife and the wife not being under the age of 15 years would not amount to rape.⁴ Thus resulting in providing legal immunity to marital rape.

The Supreme Court in **Independent Thought v Union of India** held that Constitutionally female have equal rights as of male and no statute or act can take away those rights from females and if any such statute or an act is passed regarding the same should be declared null and void. The court further held that sexual intercourse or sexual act by the husband with his wife below the age of 18 years would result in the commission of rape.⁵ Thus the judgement came in favour of women belonging to an age group of 15 to 18 years and not for all women as a whole.

Now here the question which arises is that does the contract of marriage gives the husband power to have sexual intercourse too forcefully and without her consent? But Again the law remains silent on the criminalisation of such offender and left out remaining a debatable topic all around India. Taking the dignity of married women into consideration there had been no specific provision under Indian law that would protect the dignity of married women. Though several questionings have been put forth under various judgements on the notion of “Implied consent” in a marriage. The Gujarat High court in regards to the criminalisation of marital rape said, **“The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanised treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalised.”**⁶

Thus to date, there has been no such steps taken by our Indian parliament as well as the judiciary to criminalise the concept of marital rape in India but the country remains in hope of

³ <https://www.liveabout.com/what-is-marital-rape-2300724>

⁴ Criminal Law (Amendment) Act, 2013

⁵ Independent Thought V. Union of India (2017) 10 SCC 800

⁶ Express News Service, Marital Rape an injustice, must be criminalised : Gujarat High Court (April 3, 2018, 2:13:17 am) <https://indianexpress.com/article/india/marital-rape-an-injustice-must-be-criminalised-gujarat-high-court-5121161/>

it being criminalised by the ongoing cases in the hon'ble courts of justice.

II. HISTORICAL BACKGROUND

In the early 18th century under the British common law, there was no such specific provision in context with marital rape. Though at times it was considered illegal to have forceful sex by a husband with women other than his wife, still a man can have sex with her wife either with or without her consent. Contract of marriage was thus deemed to be the right of the husband to have physical intercourse with his wife. Thus as a result of which contract of marriage remains to be a contract to have sex or Right to sex. Under the British common law these were justified under the following exceptions:

- According to the British common law, the contract of marriage includes in itself the husbands right to sex i.e., contract of marriage remains no more remained a recognised union of two partners but a mere all-time consent by the wife to have sexual intercourse.
- The wives were treated as the property of the husband i.e., they are free to or pleased to do whatever they wish to under the British Common law and were free from all kinds of shackles.
- Public interest and promoting privacy and secrecy in the marital relationship was the primary duty under the English law and thus result in non-interference of the state in the marital issues.

Sir Mathew Hale in his History of pleas of the crown wrote, "But the husband cannot be treated as guilty of rape which is committed by him only upon his legal wife, as per their mutual matrimonial consensus and contract wherein the wife has given up herself in this kind unto her husband, which she cannot retract".⁷ This, later on, became the major backdrop of the then earlier code.⁸ Later on a new Code in the year 1860⁹ was brought up by the British parliament and is prevailing in independent India. The Indian Penal Code, 1860 is also considered to be the primary code for penalising criminal offenders. Many other countries followed the same provisions or were not so strict on the criminalisation of such marital rape offenders out of which 50 countries including Australia, New Zealand, Canada, Thailand etc., later amended their laws and declared marital rape as an offence, Unlike India whose position remains unaltered since 73 years of independence till date.

⁷ 1Rob Jerrard, Marital Rape, 65 Police J. 340,343 (1992).

⁸ Indian Penal Code, 1857

⁹ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860

III. POSITION OF WOMEN, SEX ROLES AND MARITAL ADJUSTMENTS IN RESPECT TO RELIGIOUS SCRIPTURES

(A) In Hinduism

Devi Sukta hymn of one of the oldest Veda i.e., Rig Veda Claims marriage to be a sacramental Union between the two as devised by the gods for the welfare of the human Beings in the society of which the primary sole purpose was to have sexual relations. The secondary purpose according to Veda is to perform Dharma, which could be best performed by a mutual fidelity between husband and wife. “Those who have wives can fulfil their obligations in this world; those who have wives truly have a family life; those who have wives can be happy; those who have wives can have a full life.”¹⁰

According to Satpatha Brahmana wife were known to be as ardhagini i.e., half of her husband. According to Mahabharata if a man wants to cherish the Goddess of prosperity he has to cherish his women first. The husbands first and foremost duty was to support his wife in every aspect of his life and to give her all happiness that she deserves to.

Now again the Sacramental union of Marriage has various aspects of it i.e.,

1. Sacrament union of marriage once entered cannot be dissolved on any ground whatsoever it be; and
2. The primary aim of any Sacrament union must be the performance of religious and spiritual Duties and not just to fulfil the physical needs; and
3. Such sacrament union must be the union of soul, body and mind i.e, it should not be a specific time or for just a single life but for the whole of upcoming lives as well.

In India, Under Hinduism, There are Three Major Faiths I.E., Jainism, Sikhism and Parsis -

1. Jainism

Jainism an Indian religion that walks on the path of non-violence against all living creatures. Their sole purpose is to attain Moksh (Nirvana). Moksh under Jainism means liberation (liberation of the soul from the cycle of birth and death) and that Moksha can only be attained by enlightenment i.e., by quietness or renunciation. It is based on three basic principles known as Ratnas (jewels) viz. Right faith, Knowledge and action. They have to pass through four stages in their whole lifespan i.e.,

¹⁰ Diwan P, Diwan P. Modern Hindu Law. Allahabad: Allahabad Law Agency; 2008.

- Brahmacharya Ashrama refers to a life of a student
- Grihastha-ashrama refers to family life
- Vanaprastha-ashrama refers to family and social Services
- Sanyasi-ashrama refers to the life of a monk or period of renunciation.

Unlike Hindus, Jains treat the institution of marriage as a contract and prefer that their children get married within their community so that their children would also follow the same Dharma. They prefer celibacy- chaste as their basic norm over any other kind of living. Monks usually have a realistic understanding of the power of sex but once they convert into monks they don't even think about sex and need to forget all the sexual incidents that took place before the conversion. Jains can have sexual intercourse or any kind of physical relationships with no other person than his wife and if possible should avoid having sex after yielding a son from that wife. Every male person following Jainism must consider all women as his mothers, sisters and daughters.

2. Sikhism

Sikhism, one of the fifth-largest religion in the world constituting around 30 million Sikhs having been originated from the North Indian regions (undivided Punjab) in the fifteenth century by a visionary leader, Guru Nanak Dev. The religion believed in the concept of equality in the society where the inequalities were rampant and treated even person equally without any discrimination based on caste or gender. Sikhs believe in 'Waheguru' as their god and spread the message of "Ik Onkar" i.e, there is one God. In Sikhism, there is no gender of god denote by using the word "Nirankar" which means "without form" for God. Sikhs treat wives as the other half of the husbands and help them in leading their goal towards liberation. Further Guru Nanak has also condemned various cultural practices which were derogatory to the status of women in the society like the sati, Dowry system in Gurbani.¹¹ The Sikhs Scriptures considers marriage as "Anand Karaj" which means "Blissful Union" and such marriage is to take place with the consent of husband and wife and their families as well. They also followed the custom of widow remarriage.

In matters regarding the date of the marriage, Sikhism believes all days to be the same and does not believe in any astrological or mythological superstitions. The Sikh marriage takes place either at the gurudwara or at the bride's house that too in front of Guru Granth Sahib (The Holy Scripture). Sikhs value family honour at it speak and this family honour wholly depends upon the modest behaviour of the female members of the family. As a result, Sikhs extremely

¹¹ Singh NG. *Sikhism: An introduction*. I.B.Tauris Publishers; 2011.

discourages adultery i.e., sex outside marriage. According to Guru Nanak's teaching, one should strive to focus on the Guru's teachings rather than following his whims. Thus as a result of which imprudent sex would be considered as Manmukh and not Gurmukh.

The Guru Granth Sahib speaks of "the God-conscious man as being one ...whose eyes do not gaze upon the beauty of others' wives... who banishes the mind's evil desires from his mind, who conquers his sexual instincts and is free of the five sinful passions."¹²

3. Parsis

Parsis are followers of Zoroastrianism in India. According to Parsi tradition, a group of Iranian Zoroastrians emigrated from Persia to escape religious persecution by the Muslim Majority after the Arab conquest. In Parsis, there is the belief that God revealed to Zarathustra (the prophet), that marriage is not only a righteous act but is a duty which when fulfilled is earthly heaven. One can only be said to be a Parsi only if he had born in a Parsi family which means that either both the parents must be a follower of the Parsi faith or at least the father of that child must be a follower of Parsi faith to be considered as a Parsi. And if the mother of any such child is a Parsi faith follower and the father is a Non-Parsi the child cannot be considered to be a Parsi.

According to Special Marriages Act, 1945 permits the person instituting marriage outside his community to follow their faith. E.g., a Parsi woman married to a Hindu Gujarati was refused to be given her last rites at the Tower of Silence unless an affidavit was signed by the next of kin swearing that the deceased had been practising Zoroastrianism.¹³ The Parsi girls are considered to be more educated and financially independent as compared to Parsi boys as a result of which they promote interfaith marriage more when compared to any other kind of marriage. As per the statistical data of 2011, 39% of the total members of the Parsi community had interfaith marriages.

(B) In Islam

At Present time Islam is considered to be the second most followed religion in India with around 13% of the Indian Population.¹⁴ With the invasion of Mughals in the 12th century and the ongoing poverty that the country was facing at the same time, the Mughals took benefit of the same by full filling their needs and started conquering India and expanding their rule. As a result of which Islam rule got a bang in India and the Islamic religion got its existence in the

¹² Guru Granth Sahib, Page No. 274

¹³ Luhrmann TM. Evil in the sands of time: Theology and identity politics among the zoroastrian parsis. *J Asian Stud.* 2002;61:861-89.

¹⁴ Alkaysi MI. *Morals and manners in Islam.* Islamic Foundation: Leciester; 1991.

country.

It is a universally applicable fact that marriage in Islam is a contract between the two i.e., husband and wife. Thus being a Contract it is subject to certain conditions as well which they are duty-bound to perform. Thus in Islam, every individual should Dress up with modesty and should discourage adultery. Also, Sex in Islam is seen as a gift from Allah but it restricts any kind of sexual relationships before marriage. Adultery in Islam is considered as a form of theft and its punishment under Sharia law is stoning till death.

Also, the relationship of a man and women under the Quran is considered to be of Mawaddah and Rahmah i.e., love and compassion thus making it more sacred and sensitive. Therefore the relationship is so sacred there exists no ground of force or compulsion towards the wife.

(C) Global Perspective

Unfortunately, Marital rape has become a societal problem with having its impact over the entire Globe. A Dozen of Countries have been facing this devastating problem of marital rape affecting millions or even trillions of women in society. Though it has now been criminalised in many of the countries some of the countries are still silent in this upgrading problem. Such problems of marital rape can be traced back to the 17th century since the institution of Marriage took place considering it to be a private wrong or private trouble to a particular class of women.

During the 17th century when the British common laws prevailed over the Country rape was considered to be a criminal act and violation of women chastity. But on the other hand, a very well renowned British Jurist Lord Mathew Hale in the year 1736, addressed the issue of consent by declaring that “Husband can’t be held guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract”.

Also, the Ideology has a global resonance that too not just because of the declaration given by Lord Mathew but due to the concept of patriarchy that prevailed in the society. Even in a well established and well-developed country Like the US forced to sex in marriage is illegal and has been criminalised but still, numerous cases regarding the same prevail in the Country. But again in the US also this does not turn out to be just as rape against a wife though considered to be illegal but not serious when compared to a rape committed against any third person. According to research in the US approx. 10%-14% of the women face the problem of marital rape and while considering all kinds of rape somewhere around 25% of the rape accounts for rape in marriage.

By the End of the year, 1993 around 50 of the states criminalised this act of rape in marriage

by including certain provisions in their respective codes and acts. But still, those provisions were subject to certain expulsions resulting in making it to be a less serious offence.

According to a report in the year 2017, merely 60% of the female victims of intentional homicide were killed by a family member with a rate of 137 women killed each day. Nearly one out of five women (aged between 15-49) globally experienced physical or sexual abuse from a former or present partner or spouse in the presiding year.¹⁵ Still many countries are so silent on the issue that they neither have any data relating to the issue nor they want to collect it.

IV. INDIAN PERSPECTIVE

Marital rape an act to compel your spouse into having sexual intercourse without her will. This is an unjust way to degrade the value of women in society. Since domestic violence is a long and well-established issue in India, it has only been worse in the past years. As per the National Crime Records Bureau in India, a woman is raped every 16 minutes and every 14 minutes she experiences cruelty and violence through her in-laws. It has been difficult to pay attention to marital rape cases because it happens inside the privacy of a home and often goes unreported or is swept under the carpet by the police or any other workers.¹⁶

Section 375 of the Indian Penal Code defines rape but exception 2 of this section says that sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.¹⁷ Hence, marital rape is not criminalized in India. Though recent past years various amendments took place in criminal as well as various other laws relating to sexual assaults but leaving behind marital rape not to be ineffective to the society. Marital rape having been criminalized in all major democracies worldwide is still not recognized as a crime in India. Exception 2 of section 375 of IPC however violates Article 14 of the Indian Constitution as it divides women into two classes married and unmarried. Where article 14 talks about equality before the law and equal protection of law, exception 2 of section 375 declares that sexual assault with an unmarried woman is rape while the same thing with a married woman is not rape. This section further violates the fundamental right inherited under Article 21 of the Indian Constitution. The Supreme Court associated the right to make choices and consent related to the sexual act with the rights to personal liberty, privacy, dignity and bodily integrity under

¹⁵ Ellen Wulforst, U.N. urges legal reform to protect women from rape at home, Reuters (June 25, 2019, 8:35pm) <https://www.reuters.com/article/us-un-women-violence-idUSKCN1TQ1YY>

¹⁶ One Rape Every 16 Minutes in India, NCRB Data highlights Country's Deteriorates Law and Order, (October, 02, 2020, 8:14 am), <https://www.india.com/news/india/no-country-for-women-one-rape-every-16-minutes-in-india-ncrb-data-highlights-countrys-deteriorated-law-order-4159540/>

¹⁷ Criminal Law (Amendment) Act, 2013

Article 21.¹⁸

In a largely illiterate country, women enter into marriage not being fully aware and conscious of sexuality. Moreover, any move towards intimacy by the husband could be construed as absence of consent amounting to marital rape.

The central government submitted to the High Court of Delhi that criminalizing marital rape would destabilize the institution of marriage. The centre also said that what could appear to be marital rape, might not appear the same to others and warned against aping the west blindly. It further submitted that merely deleting exception 2 will not serve any purpose. If sexual acts by a man with his wife will qualify to be marital rape then the conclusion whether it is marital rape or not will rest with the wife. Also, there can be no lasting evidence in the case of sexual acts between a man and his wife.¹⁹

Though there is a remedy available for marital rape under the domestic violence act and section 498A of IPC still the offence is not criminalized separately. There is no separate law to deal with marital rape just because people and the government are uncomfortable with acknowledging that there can be rape within a marriage. Different harm requires different punishment and different kind of treatment in the society, perhaps marital rape cannot be covered under the domestic violence act or cruelty in IPC because section 498A is not taken up seriously. Also if a husband has to force his wife to have sexual relation with him the institution of marriage is destroyed already so there is no need for marital rape to be a crime for the institution to be destroyed. Since the essence of rape is lack of consent the problem that arises is sexual intercourse is looked at as something that has to be within the confine of marriage and to which women has irrevocably consented for the rest of their lives. Perhaps there are many loopholes in the Protection of Women from Domestic Violence Act, as it does not talk about marital rape specifically.

As per Maneka Gandhi, “it is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament etc.” concluding marital rape law can’t be applied in India.²⁰ Hence such responses add to the difficulty arising in criminalizing

¹⁸Suchita Srivastava v Chandigarh Administration (2009) 14 SCR 989, (2009) 9 SCC 1

¹⁹ RIT Foundation v Union Of India

²⁰ Concept of Marital Rape Can’t be applied in Indian Context: Maneka Gandhi, The Indian Express (March 11, 2016, 2:03 am), <https://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/>

the offences like marital rape.

The United Nations Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”²¹ In 2013, the UN Committee on Elimination of Discrimination against Women recommended that the Indian government should criminalize marital rape.²² In 2017, a PIL was filed by an NGO, Independent Thought, claiming that married women over 15 years of age should also be afforded protection.²³ It can be concluded that though India is developing in every domain at the world level, the laws which govern Indian people are old fashioned and need to be amended. Also being governed under a law made in 1860 is questionable and need to be changed with time.

V. CONCLUSION

A marriage should not be treated as a license by a husband to force his wife for any kind of physical intercourse subject to being excluded from punishment. A married woman has the same right and liberty to control her body as an unmarried woman, after marriage one cannot consider her as the property of men. Rape is rape, be it post or before marriage, irrespective of the identity of the perpetrator and age of the survivor. If a woman being raped by any outsider other than his spouse is considered to be a sin soon the other hand how can women raped being by a spouse be considered as just and ignorable? The issue of domestic violence and that of sexual assault within a marriage should be dealt with differently under different laws. Marital rape is no less serious than any other forms of sexual violence. The problem of not reporting such an issue results in a lack of public knowledge that sexual intercourse in marriage without consent is a crime.

²¹ Marital Rape in India, Drishtias, (December 22, 2020), <https://www.drishtias.com/daily-updates/daily-news-editorials/marital-rape-in-india>

²² *Ibid*

²³ Anirudh Pratap Singh, Criminalize Marital Rape In India: Marriage is not a License to Rape (December 21, 2020)<http://web.archive.org/web/20210117023709/https://counterview.org/2020/12/21/criminalize-marital-rape-in-india-marriage-is-not-a-license-to-rape/>