

Marital Rape : An Overview

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Abstract

Marriage is a sacrosanct process in which a husband and a wife promise to be together with love, compassion, trust, and togetherness. But whether this also gives a right to husband to do sex forcefully without the consent of wife? Marital rape violates the dignity of the wife. It breaches the trust which the wife has on her husband. And even then it is not criminalised as rape in India. No doubt the purpose of marriage is to provide right to have sex with wife. But it also raises a question that whether a married woman is considered as object or the property over which the husband have open-ended rights? The main purpose of this paper is to find out as to whether sex without consent of wife should be considered as rape in India. We talk regarding women empowerment and many rights are there for them. But in this male dominated society would women be empowered same without criminalising marital rape.

Introduction:

“Marriage is a mosaic you build with your spouse. Millions of tiny moments that create your love story”.

-Jennifer Smith³

Marriage is a social institution where the husband and the wife admit to live together. The key to successful marriage is love, understanding, mutual respect, trust, commitment and togetherness. It is the physical, mental and spiritual unison of two souls. It brings significant stability and substance to human relationships, which is otherwise incomplete. It plays a crucial role in transferring the culture and civilization from one generation to the other, so that the human race is prospered.⁴Marriage is a commitment- a decision to do, all throughout the life, that which will express your love for one’s spouse.⁵ Marriage is an institution which grants a male and female to live in a customary and statutory law. Marriage is one of the biggest fertility rituals known in Indian culture. When two people get married they are said to enter grihasta ashram where they are expected to bear children.⁶ Marriage generates social capital. The social bonds created through marriage yield benefits not only for the family but for others as well, including the larger society.⁷

Now the most important question which arises here that whether marriage gives right to husband to sex forcefully without the consent of wife? We can also say it in different words that whether it snatched away the right of women to deny to have sexual intercourse with her husband. It is the most debatable question in India in present scenario. Women gets confidence that her husband will provide her security, safety after the marriage, but when she founds that her husband is forcefully cohabiting with her it really breaks down her believe, her faith. 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.’⁸ Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women.⁹

Marital rape or spousal rape

Marital or spousal rape is rape committed by one spouse against the other.¹⁰ When someone uses the term rape then it is usually being thought that it has been committed by the strangers. Recognition of marital rape as a crime is a recent development in the history of law. State laws on marital rape in the United States can be traced to England, where the first Chief Justice Sir Matthew Hale pronounced that a husband cannot be guilty of rape of his wife “for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto the husband which she cannot retract.”¹¹ This statement became known as the Lord Hale doctrine. Even the women find it difficult to believe that how the husband can rape any of the women. Though marital rape is very common and repugnant form of masculinity of the Indian society, it is being hidden in the iron curtains of the marriage. Marital rape is a serious and often insidious form of violence against women¹² with potentially devastating long-term physical and emotional effects. However, it is also vastly underreported and thus often untreated. While the legal definition varies,

⁸<http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf> visited on 08.03.2016

⁹<http://www.un.org/documents/ga/res/48/a48r104.htm> visited on 08.03.2016

¹⁰<http://rapeinfo.wordpress.com/2008/05/25/marital-rape/> visited on 10.03.2016

¹¹ Hale, Matthew. *History of the Pleas of the Crown*. Vol. 1. (1680) (Emlyn, ed., 1847).

¹² Although we recognize that sexual violence crosses gender lines, for the purposes of this paper we are using language reflecting the prevalent scenario of the female as the victim/survivor. See Bureau of Justice Statistics—National Crime Victimization Survey: Criminal Victimization, 2004

marital rape can be defined as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent.¹³

Now the question arises that whether to have sex with the wife without the consent is to be considered as rape or rape by male spouse will only be non-consensual sex with wife and not rape. Indian laws doesn't criminalise marital rape. Now there is another question that why it has not been considered as rape in Indian laws under section 375 of the Indian Penal Code, 1860. Under Indian law, it is rape if the wife is less than 15 years of age. The view of our society, when we talk regarding marital rape, can be through this example, that when a lady reported to her parents that she was brutally raped by her husband against her wishes then her parents castigated her for not giving the marriage the best.¹⁴The court in a case said "Defence counsel rightly argued that IPC does not recognise concept of martial 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".¹⁵

In the present day, studies indicate that between 10 and 14% of married women are raped by their husbands: the incidents of marital rape soars to 1/3rd to 1/2 among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who become prime targets for marital rape are those who attempt to flee.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

¹³<http://legal-dictionary.thefreedictionary.com/Marital+rape> visited on 16.03.2016

¹⁴http://articles.timesofindia.indiatimes.com/2013-01-14/mumbai/36330662_1_husband-alumni-group-social-group visited on 29.5.2016

¹⁶<http://law-india.org/marital-rape-present-scenario> visited on 2.07.2016

¹⁷http://articles.timesofindia.indiatimes.com/2013-01-14/mumbai/36330662_1-husband-alumni-group-social-group visited on 24.10.2016

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 It is a matter of concern that marital rape is common but it is an unreported crime. A study was conducted on marital rape by Joint Women Programme, an NGO and it was found that one out of every seven women is being raped by their husband once in the lifetime. And these reports are not being submitted because of the society and these women are not supported by the law.¹⁹

Constitution of India and marital rape

The constitution of any country represents the soul of any nation. The Indian Constitution organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the cultures and experiences of the country and operates as a vehicle for national progress and unity.²⁰ As per the Indian constitution every law that is passed by the country must be in regulation with the ideas and the principles which have been given in the constitution of India. And if it doesn't falls within its parameter it shall be declared ultravires and should be declared unconstitutional. Now we will see that, how the doctrine of marital rape violates various provisions of our Indian constitution. Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India.²¹ 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.²² But regarding marital rape women in India are not being treated equal. The equal treatment is not being provided to the victims of the marital rape. Article

¹⁸<http://www.divorceindia.org/marital-rape-divorce-in-india> site visited on 13.6.13

¹⁹http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf visited on 19.08.2016

²⁰ Roy, Sudhanshu & Jain, Iti, "Criminalizing Marital Rape in India: A Constitutional Perspective", Criminal Law Journal, Apr 2008, p. 81-92

²¹Equality before law- Article 14, The Constitution of India,.

²²http://streeshakthi.hpage.co.in/constitutional-protection_62485969.html

21 of the Indian Constitution enshrines in it the right to life and personal liberty.²³ Article 21 although couched in negative language confers on all persons the fundamental right of life and personal liberty. Post the case of *Maneka Gandhi v. Union of India*²⁴ it has become the source of all forms of right aimed at protection of human life and liberty. The meaning of the term 'life', has thus expanded, and can be appropriately summed up in the words of Field J. in the celebrated judgement of *Munn v. Illinois*²⁵ where he held that life means 'something more than mere animal existence', which was further affirmed by the Supreme Court of India in the case of *Bandhua Mukti Morcha v. Union of India*.²⁶ In light of this expanding jurisprudence of Article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression 'right to life and personal liberty' under Article 21. There cannot be a more obvious and blatant violation of Article 21. The marital rape violates article 21 to right to live with dignity. The marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time. 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 2007.²⁷

Effects of marital rape

Research indicates that marital rape has severe and long-lasting consequences over women and may include physical effects such as injuries to vaginal and anal areas,

²³ The Constitution of India, Article 21

²⁴ 1978 AIR SC 597

²⁵ 94 US 113 (1877).

²⁶ 1984 AIR SC 802, 811

²⁷<http://www.takepart.com/article/2014/05/21/marital-rape> visited on 26.09.2016

soreness, vomiting etc.²⁸ Worldwide, studies show that health problems caused by marital rape include HIV and other sexually-transmitted infections, vaginal bleeding or infection, genital irritation, pain during sex, chronic pelvic pain, and urinary tract infections. The physical violence associated with marital rape can also lead to complications during pregnancy, resulting in health problems for both women and their children. Mental health impacts associated with marital rape and other forms of abuse by partners include depression, anxiety, emotional distress and suicidal thoughts.²⁹ Marital rape and violence also undermine children's health and well-being, both through the psychological impacts of witnessing violence and because it can undermine the ability of mothers to care for themselves and their children³⁰. Additionally, there may be experiences from a range of symptoms like flashbacks, nightmares that replicate aspects of the rape, always feeling guarded, panic attacks and depression. These are features of Post-Traumatic Stress Disorder (PTSD)³¹. Rape Trauma Syndrome is similar to PTSD but has some rape-specific symptoms.

Proposed changes and amendments

The government is going to propose new law against rape and sexual assault including marital rape to protect women from all kinds of physical and psychological imbalances and hence soon husbands may be behind bars if they commit marital rape³². The department of legal affairs has drafted the Criminal Law Amendment Bill based on the suggestions of women and child development (WCD) and National commission for women (NCW) to amend certain sections of IPC and Indian Evidence Act. The proposed change for marital rape under this bill basically includes imprisonment which may extend to 3 yrs. of imprisonment with fine.³³

²⁸http://indialawjournal.com/volume2/issue_2/article_by_priyanka.html visited on 18.10.2016

²⁹[http://www.realising-rights.org/docs/newsletter/Marital rape.pdf](http://www.realising-rights.org/docs/newsletter/Marital%20rape.pdf) visited

³⁰ Finkelhor, D and Yllo, K, License to Rape: Sexual Abuse of Wives, The Free Press, New York 1985

³¹ Bergen, R. Wife Rape: Understanding the Response of Survivors and Service Providers, Sage Publications, California, (1996)

³²<http://indiatoday.intoday.in/story/exclusive-should-marital-rape-be-criminalised-in-india/1/622248.html>

³³<http://www.dnaindia.com/india/report-husbands-can-t-get-away-with-marital-rape-government-1356512>

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 behaviour of good faith in conjugal life, it cannot be said that Hindu religion and traditions exempts the heinous act of rape to wife. Wives are being treated as epitome of goddess Lakshmi in Hindu religion and she should not be misbehaved with in such a way. Sexual intercourse in conjugal life is a normal course of behaviour, 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.³⁴ The law commission of Indian in its 172nd report which deals with the 'review of rape laws' as well as national commission of women have recommended for the harsh punishment of rape.³⁵ Report also proposed that the sexual intercourse by a man with own wife not being under sixteen years of age is not sexual assault.³⁶ The Protection of Women from Domestic Violence Act, 2005 has only created a civil remedy for marital rape, without criminalizing the same.³⁷

The Varma 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 rape³⁸. The recommendation of Justice Varma 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 came into force from 3 February 2013. The word rape has been replaced with sexual assault in Section 375.³⁹ Rashida Manjoo, the UN Special Rapporteur on violence against women said that Justice Varma committee's

³⁴<http://legalperspectives.blogspot.in/2009/10/marital-rape.html> visited on 31.5. 2016

³⁵<http://indialawyers.wordpress.com/tag/law-commission-of-india-2> visited on 1.6.2016

³⁶<http://www.lawcommissionofindia.nic.in/rapelaws.htm#chapter3> visited on 1.6.2016

³⁷<http://jils.ac.in/wp-content/uploads/2012/11/pallavi-arora1.pdf>

³⁸<http://www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-says-committee/article4351148.ece> visited on 31.5.2016

³⁹[http://en.wikipedia.org/wiki/Criminal_Law_\(Amendment\)_Act,_2013](http://en.wikipedia.org/wiki/Criminal_Law_(Amendment)_Act,_2013) visited on 2.6.2016

recommendation and subsequent legislation is a “golden moment for India” but recommendations on marital rape, age of consent for sex, etc. were not adopted in the legislation.⁴⁰ 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.⁴¹ From the ancient period of time it is being believed that the matrimonial dispute is being resolved by the family members within the four corners of the wall. And if these matters will be revealed outside the family then it would be a matter of shame and the entire family will be under higher stress.

Conclusions and suggestions

In India marriage is seen as a sacrosanct process but it doesn't mean that it legalises marital rape or gives the power to husband to violate the right of women to live with dignity. Women are the half part of the society's population and in all the circumstances they should be protected from the abusive behaviour even if it comes from their own dear ones. Marital rape violates the human right of the married women i.e. safety and integrity. Moreover, on one hand there are talks of empowering women and at the same time they are not being protected the dignity and right to life of married women. How can the law ignore such a massive violation of a fundamental rights of freedom of any married woman, the right to her body, to protect her from any abuse? 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 meagre, activists and lawmakers maintain there is plethora of evidence to imply it is on the rise. Any type of excuse 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

⁴⁰<http://www.hindustantimes.com/India-news/NewDelhi/Anti-rape-law-does-not-fully-reflectJustice-Verma-committee-s-recommendation/Article1-1053389.aspx>visited on 1.10.2016

⁴¹<http://blogs.wsj.com/indiarealtime/2013/03/26/why-india-allows-men-to-rape-theirwives/>visited on 13.6.16

domestic violence. This mentality is the reason of violence against this much widespread violence. There should be a positive mentality between the couples that there should be no sex until it is agreed by both the parties of the sex.⁴² The author finds no valid justification in viewing non-consensual sex between married couples to be different from that of non-consensual sex between strangers. Nobody has a right to force his will upon any other person. Law by exempting such criminal acts expressly for no good reason provides these offenders with an upper hand; it should rather aim at bringing the right change in the society.

⁴²Keith Burges- Jackson, Wife Rape, Vol. 12 University of Illinois Press, Public Affairs Quarterly, pp. 1-22.