

Women as victims of sex crimes

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Abstract

At the 2013 session of the Commission on the Status of Women UN Member States committed to ending all forms of violence against women. They recognized that there is a need to address the economic and political underpinnings of violence; ensure access to justice; strengthen multi-sectorial approaches; and end harmful traditional practices that negatively impact women.²A signatory to the Convention for the Elimination of Discrimination against Women and the UN Convention on the Rights of the Child, India heralds itself as a model for developing nations yet women do not seem to enjoy all the rights to freedom provided under the Constitution of India. According to a report by National Crime Records Bureau, a crime against women is recorded every 1.7 minutes in India.

Though there are ample laws covering rape (S.376), molestation (S.354), harassment (S.509), dowry death (S.304 B), cruelty by husband (S.498 A), importation of girls (S.366 B), kidnapping and abduction (S.363-373) in IPC and special laws such as Dowry Act, 1967; Prohibition of Child Marriage Act, 2006; Protection of Women from Domestic Violence Act, 2005, yet the laws haven't contributed in developing Indian societal mind-sets.

The paper is designed with an objective of profound analysis of gender inequalities and women as victims of sex crimes including an assessment of the relevant law in light of international standards with special attention paid to promising practices as reforms in society.

Key-words: Honour-Killings, Marital Rape, Prostitution

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²*Gender Equality and Empowerment*, UN <http://in.one.un.org/task-teams/gender-equality-and-empowerment/>.

Introduction

“We are deeply concerned about the prevalence of gender-based violence, including sexual violence against women and girls, which we are witnessing in India.”

-Mr. Yuri Afanasiev, *UN Resident Coordinator in India.*

Law and order condition in India is heart-breaking. The recent rape incidences of *Unnao* and *Kathua* are examples of the grim situation India is in. Nearly five years ago, the horrifying gang rape of *Nirbhaya* prompted thousands to protest our rape laws and handling of sexual assault cases. It seemed like a turning point. The widespread outrage turned into fervent support for legal reform and change finally seemed possible. But a new Human Rights Watch report found that despite improved laws and policies, stubborn attitudes toward and denigrating views of rape victims still pose massive barriers to victims getting both support services and justice.³ Being born a girl in India is itself dangerous. Although the law protects women’s rights there’s still a patriarchal society that devalues women as human beings and countless of them have to face violence on a daily basis. The brutalisation of women in India has increased alarmingly in recent times. Rape, molestation, and abuse have spiralled out of control, with the incidents of violence becoming uglier and more frightening. According to data from India’s National Crime Records Bureau (NCRB), the country recorded more than 36,000 cases of rape, sexual assault, and similar offences against children in 2016. The rising number of cases and the inordinately low conviction rate have brought no cheer to victims.

Hypothesis

The paper assumes that the present laws in India are insufficient to protect women.

Research methodology

A doctrinal study has been undertaken for this research paper.

Marital rape

³*India: Rape Victims Face Barriers to Justice*, HRW, <https://www.hrw.org/news/2017/11/08/india-rape-victims-face-barriers-justice>.

Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice.

-Law Commission of India

Women can no longer be safe in India. In the land of Gandhi and largest democracy, this seems to be unbelievable, but it's true. Marital Rape means "unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually. Marital rape is also known as spousal rape or inmate partner rape.

Position the globe across

Marital rape has been declared as human rights violation by UN when it published Declaration on the Elimination of Violence against Women in December 1993. In 1997, UNICEF reported that just 17 States had criminalized marital rape. In 2003, UNIFEM reported that more than 50 states did so. The countries like Poland (1932), Czechoslovakia (1950), Soviet Union (1960) were first to criminalize marital rape. Since 1993, in USA, all 50 states and DC have enacted laws against marital rape. All states now recognize rape within the marriage as a crime, and most charge the crime in the same way that rape between the strangers, would be charged in U.K. The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of R v. R.

Position in India

According to the UN Population Fund, more than two third of the married women in India, aged between 15 and 49, are severely beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partner to have sex.

In India marital rape exists de facto but not de jure. In *Bodhisattwa Gautam v. Subhra Chakraborty*⁴ the Supreme Court said that a rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not

⁴Bodhisattwa Gautam v. Subhra Chakraborty, 1996 SCC (1) 490.

recognizing marital rape. Women who experience and wish to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian Penal Code, 1860 has a general marital rape exemption. Only two groups of married women are covered by the rape legislation those being under 15 years of age and those who are separated from their husbands. While the rape of a girl below 12 years of age may be punished with rigorous imprisonment for a period of 10 years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is married to the victim. However, this is only a piecemeal legislation and much more needs to be done by Parliament as regards the issue of marital rape. When the Law Commission in its 42nd Report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope. With the criminalisation of Rape with minor wife in *Independent Thought v. Union of India & anr.*⁵, the Supreme Court has moved in a positive direction.

Theories of causation of marital rape

Various authors, over a period of time, have come up with different theories regarding the occurrence of marital rape in the society. They are:

- **The feminist theory**: This theory considers marital rape as a tool in the hands of the patriarchal society that is used to exercise control over the women. They consider that the exemption given in cases of marital rape is a remnant of the earlier laws regarding women that considered them to be the property of the husband. The feminists are of the view that marital rape is nothing but a result of a power play by the male spouse in the marriage.
- **The social constructionism theory**: The believers in the theory of social constructionism are of the view that men have dominated the society in law making and the political arena since time memorial. Law thus came as a reflection of the interest of men. Such laws considered women to be their husband's property after marriage and hence, marital rape was considered an offence of lesser degree as compared to rape. Some jurisprudence even considered that rape in a marriage is not rape at all.

⁵Independent Thought v. Union of India & anr., W.P.(C) 382/2013.

The social constructionism believe that marital rape is a means through which men try to assert themselves over their wives so as to retain their long gained power over their property.

- **The sex-role socialization theory**: In a marriage, women are always taught to be calm and passive, submissive whereas, men are trained to be dominant and aggressive. Care and love are attributed to women, Man, on the other hand, are the major perpetrators of sexual entertainment with violent themes. Sex role socialists are of the view that marital rape is nothing but an expression of the traditional perceptions of sex roles.

Authorities on marital rape in India: a case for deletion of marital exception

“Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted”⁶

- The CEDAW Committee 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...”
- The Justice Verma Committee notes: “Changes in the law therefore need to be accompanied by widespread measures raising awareness of women’s rights to autonomy and physical integrity, regardless of marriage or other intimate relationship.” Its report points out a 2010 study suggesting that 18.8% of the women are raped by their partners on one or more occasion. The rate of reporting and conviction also remains low; aggravated by the prevalent beliefs that the marital rape is acceptable or is less serious than the other types of rape.⁷
- The concept of crime, undoubtedly, keeps on changing with the change in the political, economic and social set-up of the country. The constitution, therefore, confers powers both on the Central and State Legislature to make laws in this regard. Such right includes the power to define a crime and provide for its

⁶ The 172nd Law Commission Report.

⁷ Justice J.S. Verma et al, *Report of the Committee on Amendments to Criminal Law*, PRSINDIA
<http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>.

punishment. It is high time that the legislature once again intervenes and goes into the soul of the issue of marital rape. Marital rape is a serious matter though, unfortunately, it is not attracting serious discussions at the end of the Government.⁸

- “We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. Different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent.⁹
- Moreover, to treat the marital rape cases differently from the non-marital rape cases in terms of the elements that constitute the crime and in the rules for their proof, infringes on the equal protection clause. The Constitutional right to equal protection of the laws ordains that similar subjects should not be treated differently, so as to give undue favour to some and unjustly discriminate against the others; no person or class of persons shall be denied the same protection of laws, which is enjoyed, by other persons or other classes in like circumstances.
- The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such right by contracting marriage for the simple reason that human rights are inalienable. Rape is a crime that evokes global condemnation because it is abhorrence to a woman’s value and dignity as a human being. It respects no time, place, age, physical condition or social status. It can happen anywhere and it can happen to anyone. Husbands need to be reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife’s body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved

⁸Sandeep Mohan Varghese vs. Anjana, MAT. Appeal. Nos. 99 & 152 of 2009.

⁹Independent Thought vs. Union of India & Anr., Writ Petition (Civil) No.382 of 2013.

by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield.¹⁰

The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.¹¹ The exemption given to marital rape, as Justice Verma noted, "stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands". Marital rape ought to be a crime and not a concept. Of course, there will be objections such as a perceived threat to the integrity of the marital union and the possibility of misuse of the penal provisions. It is not really true that the private or domestic domain has always been outside the purview of law. The law against domestic violence already covers both physical and sexual abuse as grounds for the legal system to intervene. It is difficult to argue that a complaint of marital rape will ruin a marriage, while a complaint of domestic violence against a spouse will not. It has long been time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.

Honour killing: a blatant disregard of life

'Honour Killing' also known as 'customary killing' is the murder of a family or clan member by one or more family members where the murderers, essentially the community at wider scope thinks that the victim through his/her actions has brought disgrace to the family honour. It is a crime which originates from the culture or race or one might even call it a cultural tradition. Honour is a fluid concept which has been widely interpreted by different societies, cultures and classes. The form of honour, in the cases of the killings of females by their own family members arises from ideas that the reputation and social standing of an individual, a family or a community is based on the behaviour and morality of its female members

Human Rights Watch (2004) describes that "honour crimes are acts of violence, usually murder, committed by male family members against female family members, who are perceived to have brought dishonour upon the family

Amnesty International observes that "honour killing of a woman by a male relative is not an individual act of violence, but one which is collective, planned, sociologically predictable, and socially approved by both men and women in the family and community

¹⁰J Pardiwala, Nimeshbhai Bharatbhai Desai v. State of Gujarat, R/CR.MA/26957/2017.

¹¹Suchita Srivastava & Anr. vs. Chandigarh Administration, 2009 (9) SCC 1, para-22.

concerned” (Amnesty International, 2011, p. 3). The Law Commission of India views that the words ‘honour killings’ and ‘honour crimes’ are being used loosely as convenient expressions to describe the incidents of violence and harassment caused to the young couple intending to marry or having married against the wishes of the community or family members. They are used more as catch phrases and not as apt and accurate expressions

The studies conducted by various civil society organisations reveal that India stands into the category of worst affected nations. It is estimated that approximately 1000 people (both females & males) are killed every year in India owing to alleged honour killings. In India, due to its complex socio-cultural patterns, there are variant causes which result into the honour killings.

The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation united. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.¹²

Honour killing is a global phenomenon.¹³As far as India is concerned, “honour killings” are mostly reported from the States of Haryana, Punjab, Rajasthan and U.P. Bhagalpur in Bihar is also one of the known places for “honour killings”. Even some incidents are reported from Delhi and Tamil Nadu. Marriages with members of other castes or the couple leaving the parental home to live together and marry provoke the harmful acts against the couple and immediate family members.

Reasons for rise in honour killings in India

- ***Socio-cultural patronage***: In traditional patriarchal societies inheritance is patrilineal. Moreover, the family or kin group, and not the individual, is the basic social, economic and political unit. Therefore, in all such types of societies, the role of community members, community elders and particularly the community

¹²Lata Singh v. State of U.P., AIR 2006 SC 2522.

¹³The Report of the Special Rapporteur to U.N. 1.

councils (such as *Khap Panchayats* in Haryana) can be observed as patronising the honour killings and protecting the killers. These traditional patriarchal societies surprisingly denounce the role of state and the law to prevent honour killings by considering it as an unacceptable interference into their socio-cultural values and familial patterns.

- **Legal clemency:**For the framers of the Indian Penal Code, honour killing was not a cultural issue related to the Indian subcontinent, nor a socio-religious matter that belonged to a particular community or communities living in a particular geographical area but, a universally practiced phenomenon wherein men kill the men who commit adultery with their wives or daughters. This social norm was dealt with leniency under the plea of grave and sudden provocation under exception I of the section 300 of the Penal Code 1860.

Legal insights against honour killings

Honour killings are violation of Articles 14, 15 (1) & (3), 17, 18, 19 and 21 of the Constitution of India. The Article 21 under the chapter of Fundamental Rights of the Indian Constitution guarantees the Right to Life and Liberty to all persons irrespective of their citizenship.

Honour Killings are cases of homicide which are brutal crimes under the IPC (Indian Penal Code). Section 299 and 301 of the IPC, deals with culpable homicide not amounting to murder while Section 300, deals with murder. Honour killing amounts to homicide and murder because the acts are done with the intention of murdering the victims as they have purportedly brought dishonour upon the family. The perpetrators can be punished as per Section 302 of the IPC.

But it's not enough. This crime should be analysed more as a psychological instinct which is installed into the mind-set of the males through the socio-cultural value system that they are extremely intolerant to observe the sexual course of the females associated to them through any relationship with any unfamiliar males. Therefore, besides constituting rigorous laws and rigid punishments, it is immediately required to change the mind-set of the bigoted patriarchal societies to become tolerant to matrimonial choices. However, it is really a challenging task for the civil society, government and the judiciary to transform the socio-cultural psyche of the people who are much more possessive and committed to

their ethno-community based socio-cultural patterns in comparison to the society, state and the law.

In 2012, the Law Commission had drafted a bill titled “*Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011*”. This bill proposed to prohibit people from congregating together to condemn a legal marriage on the ground that the said marriage has brought dishonour to the caste or community. However, so far this bill has not moved forward from being a proposal only

Another such bill drafted by law commission was *Endangerment of life and Liberty (Protection, Prosecution and other measures) Act, 2011*. This bill proposed to prosecute persons or group involved in threat, encouragement, commending, exhorting and creating an environment whereby loss of life and liberty is imminent or threatened.

The two bills are just proposals and so far no concrete legislative reform has been done by executive / legislature to curb the clout of *Khaps*. A few suggested legislative measures include: constitution of fast track courts to deal with honour killings; amendments to Special Marriage Act to reduce duration of registration of marriage; provide enough protection to couple engaged in inter-caste marriage.

Prostitution: should it be legalised

Officials say India has over 3 million sex workers. Historically speaking, “sex-work” is regarded as one of the oldest professions in the world. The legal attitude world-wide towards prostitution can be classified in four broad categories: (a) total prohibition; (b) regulation; (c) repression; and (d) total toleration. Countries in category (a) regard prostitution as illegal in all cases. In these countries prostitution per se is a crime, and even clandestine misconduct is punishable. Countries in category (b) regulate prostitution by licensing or other measures, but do not prohibit it totally. Countries in category (c), to which India belongs, repress prostitution by forbidding its blatant manifestations, while those in category (d) impose no prohibitions or restrictions on prostitution.

Some estimates suggest that global trade in prostitution earns revenue of \$186 billion annually¹³ with prostitution in India comprising more than 8 % of this figure.

Ancient Indian epics like *Ramayana* and *Mahabharata* (and even Buddhist scriptures like *Jatakas*) contain several references to existing prostitutes who formed guilds and had recourse to civil and domestic rights.

Soon after independence, India became a signatory to the UN International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, New York, 1950. This led to the enactment of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). The Act underwent an amendment in 1978 and then, due to changing scenarios and debates in the international context, was further amended in 1986, entitled to the Immoral Traffic in Persons Prevention Act, 1986 (ITPA).

While the act of prostitution per se is not criminal, every other act associated with prostitution is criminal. Specifically, it prohibits anyone from maintaining a brothel and living off the earnings of a prostitute. Procuring or inducing and detaining a woman for prostitution are criminal activities, as well.

Section 2 (f) of the Immoral Traffic (Prevention) Act defines the term “prostitution” as “the sexual exploitation or abuse of persons for commercial purposes and the expression ‘Prostitute’ shall be construed accordingly.”

Evidence shows that sex workers are highly vulnerable due to the existing legal framework and that they face unbearable levels of harassment by state (police) and private individuals (clients and pimps). There is little doubt that clients of sex workers repeatedly abuse them during, and even outside of, their sexual engagements.⁸⁸ Street-level prostitution particularly attracts high risk of violence. Police extortion is an equal threat and sometimes a worse one. The number of prostitute women arrested is disproportionately greater than the number of pimps, procurers, and brothel keepers arrested under the same laws, while the penalties imposed on prostitutes were far greater than those imposed on brothel keepers or pimps. This discriminatory treatment of those whom the law seeks to “rehabilitate” stems from collusion between police and pimps who use the law’s design to brutally exploit sex workers

The Universal Declaration of Human Rights, 1948 states that “All men are born free and are equally entitled to have their basic human rights.” Denying legal recognition to this profession means denying the basic human rights of the prostitutes. Giving legal recognition to prostitution would enable the prostitutes to make some contribution towards the development of the nation as they would have legal protection; their children can get

education and would be entitled to participate in the main stream of the society. Recognising prostitution as a profession will at least reduce the real illegalities that come with it like child prostitution, drug trafficking and other crimes.

Legalising prostitution would mean that pimps and brothel owners would be held accountable for the treatment of sex workers, and that abused sex workers would have the option of turning to the law for protection. Legalising prostitution will protect minors. Around ten million children worldwide are estimated to be in the profession. Legalising and regulating this profession will ensure that only willing, consenting adults are employed, not trafficked children. There are enormous health benefits of Legalisation. Legalisation will reduce the transmission of sexually transmitted diseases.

Conclusion

There are many who remain invisible, unheard and therefore, not counted due to everyday normalization of sexual and other forms of violence. Such normalization can only be prevented through strong engagement with schools, colleges, communities, state machineries and elected leaders, and a policy of zero tolerance of violence against women and girls. Addressing impunity at every level – family, community, institution – is crucial.

In addition, the Criminal Law Amendment Act, 2013, and the Protection of Children from Sexual Offences Act, 2012 (POCSO), must be effectively implemented. Some flagship schemes and programmes have the potential to address structural gender inequalities – these can be amplified. Others can be enhanced to ensure equal opportunities for and benefits to women and men, girls and boys. Strengthening law enforcement, judicial and health systems and other essential services for women and girls is critical to support and respond to women, girls, child victims and child perpetrators.