

NON CRIMINALIZATION OF MARITAL RAPE IN INDIA

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

India, right from its inception has been a patriarchal society and in this patriarchal reign, females, even before their very birth are placed at the mercy of the males. And even if somehow they get lucky enough to see the world, the male dominated society completely eats them up. From the very point of them coming into this world, they are given the stereotyped roles of being submissive and weak and at every step of life, they are made to realise that they depend on the males for everything. It is very sad to know that married women are always taught to obey their husbands whether they like it or not. Marriage is a very sacred institution which becomes one of the dream for almost all the girls, but what if this dream turns into a nightmare for them? Women in this society are merely seen and treated as objects and this objectivity of women has resulted in them being exploited at almost every stage of their life, especially at their home, where none other than their husbands force themselves upon their wife either physically or mentally. It is very surprising to know that marriage in many cases results in crimes being committed against women, rape being one of them.

Rape is one of the most brutal forms of violation of a women's privacy and her dignity. The dictionary meaning of the word rape is “the ravishing or violation of a women.” Women, who are rape victims, cannot commit rape due to biological reasons. It is one of the most abhorrent and violent crimes against women in society. This offence has been criminalised in Section 375 of the IPC

according to which, a man is said to commit rape who has sexual intercourse with a woman against her will, without her consent, by coercion or by misrepresentation of fraud or at a time when she has been intoxicated and is unable to understand the nature and consequences of what she consents to and in any case if she is under 18 years of age. Certainly this rule has its own exceptions like almost all the other laws have and the exception provided here proves the fact that the rape laws in India are way too discriminatory and ambiguous. On one hand it states that if a man has sexual intercourse with a girl who is under 18 years of age even with the consent of the girl, it will be termed as rape while on the other hand the same Section 375 of the IPC completely rules out the possibility of marital rape when the age of wife is above 15 years¹. This is a clear indication of how the rape laws in India discriminate between the rape committed with a married lady by her husband and rape committed with an unmarried lady.

It is very comical to note the fact that the term 'marital rape' has the word 'rape' attached to it, yet it is not seen as a crime whereas 'rape' in general is recognized as one of the most heinous crimes that can be committed by a person in the society. Marriage in Indian society is considered to be one of the most sacred institutions and it forms the very basis of a stable family but it is very sad to see that it in itself veils such vicious acts of sexual cruelty, marital rape being one of them. Marital rape can be defined as any unwanted intercourse obtained by force when the wife is not able to consent to it. The bad side about marital rape is that, while rape by a stranger is a one time offence, marital rape is a repeated if not frequent occurrence. It is very sad and disturbing to know that the very place where the wife is supposed to feel safe, in some cases turns out to be the reason

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¹ <http://indiankanoon.org/doc/623254/> visited on 20.02.2016

for her sufferings and distress. National Family Health Survey, in India showed that a vast majority of sexual violence reported by women was within the marriage and just 2.3% of rape that women reported to the NFHS was by men other than their husbands².

Marital rape in India is of the most under reported crimes mainly because of two reasons. First, the lack of awareness among people and, poverty and illiteracy. Many women often accept their husband's wish because they fear that they would be beaten. In many places, women are married at a very young age and then they have to depend completely on their husbands for their entire life. Most of these women are from poor and illiterate backgrounds and are left with only two options i.e. either to choose between forced unwanted sex and being subjected to violence or unwanted sex and being abandoned by their husbands and ending up living in absolute poverty. The second reason is that it is not yet criminalised as an offence under Section 375 of the IPC. In 1983, Section 376A was added to the IPC which criminalized the rape of a judicially separated wife, but albeit this step, marital rape still continues to grip the married women in its demonic clutches. Even after the Criminal Law Amendment Act of 2013, the biggest gap that still remains in our criminal justice system is the non-criminalization of marital rape as an offence. Recommendations made by the J.S.Verma committee has fallen nowhere but on deaf ears. the situation here today is, even if the women complains, they restrict themselves to mental and physical harassment as they somewhere or the other know that there is no law in the country that can book their husband for marital rape if the age of the wife is above 15 years. Another important thing to see is that Section 3(a) of the Protection of Women from Domestic Violence Act, 2005 puts sexual abuse in

² <http://www.thehindu.com/data/statistics-on-marital-rape/article6586829.ece> visited on 20.02.2016

the ambit of domestic violence, which in turn includes conduct of sexual nature that abuses and violates the dignity of women and provides monetary compensation for the same³. So basically this provides civil remedy for crimes committed against women including marital rape. But this seems quite unsatisfactory that the crimes against women is seen as a civil wrong rather than a criminal offence.

Bringing attention to the fact that not only the IPC, but even the constitution in a way protects the life and dignity of everyone, this exception under Section 375 of the IPC violates Article 14 i.e. right to equality and Article 21 i.e. the right to life and live with dignity of the Indian constitution. In *Bodhisattwa Gautam v. Shubhra Chakraborty*⁴, the Supreme Court said that “It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”⁵ Yet the sad part is that the current law negates this pronouncement and thus it directly violates the fundamental rights enshrined in the Indian constitution. Not only Article 14 and Article 21 but even Article 51A(e) of the constitution states that it is the fundamental duty of every citizen of India to condemn the practices that are derogatory to the dignity of women and hence the legislative framework should make amendments under IPC Section 375 and save the married women from this evil of forceful sex at the hands of her husband.

The basic reason why the government is hesitant to criminalize marital rape is that if they do so, then they would also have to change all the laws based on religious practices including the Hindu Marriage Act, 1955 which states that the

³ <http://ncw.nic.in/acts/TheProtectionofWomenfromDomesticViolenceAct2005.pdf> visited on 20.02.2016

⁴ 1996 AIR 922, 1996 SCC (1) 490

⁵ <http://indiankanoon.org/doc/642436/> visited on 20.02.2016

denial of sex by wife is a ground for divorce⁶. Apart from this, the other contention of the people who are in favour of the non-criminalization of marital rape is that, if criminalized, it could be misused. If we limit our thoughts to this, it is better that the legislature stop making any more laws because as a matter of fact, there is no such law in the country today which cannot be misused at all. The first genuine problem that is faced today in case of marital rape is the prosecution of the perpetrator out of which the chief problem which arises, is the reluctance of various legal systems recognizing marital rape as a crime. The second problem is on a procedural level. There are difficulties proving the fact that the rape actually took place as in marriage, sexual relations are to be expected and also, if the defence claims consent, then it becomes difficult for the prosecution to prove the fact that there was no consent and that it was rape actually⁷.

The history of marital rape in England dates back to 1736 when C.J.Mathew Hale received much criticism after he commented that: “But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up her in this kind unto her husband, which cannot retract.”⁸ He explained his point by stating that there is a matrimonial consent between the wife and the husband and so the husband cannot be prosecuted for the rape of his wife. But this soon had to change. The beginning of the 19th century, activists of the women’s movement challenged the presumed rights of men to engage in forced sex with their wives. Voltairine De Cleyre, an American anarchist writer and feminist, in one of her articles, refused

⁶ http://highcourtchd.gov.in/hclsc/subpages/pdf_files/4.pdf visited on 20.02.2016

⁷ V.K.Dewan, *Dewan’s Law relating to sexual offences and rape*, India Law House 2013, 768

⁸ <http://www.lawctopus.com/academike/marital-rape-need-criminalisation-india/> visited on 20.02.2016

to distinguish between rape and marital rape. She stated “and that is rape, where a man forces himself sexually upon a woman whether he is licensed by the marriage law to do it or not.”⁹ Gradually more and more cases regarding this came up which led to the abolishment of marital rape in England and Wales in 1991. The first attempt of prosecution of a husband was seen in *R v. Clark*¹⁰ where rather than arguing against Hale’s logic the court held that consent in this case had been revoked. Then subsequent cases like *R v. Miller*¹¹, *R v. Kowlesi*¹² followed by *R v. Sharples*¹³. In Miller, Kowlesi and Sharples, the husbands were convicted for assault. *R v. R* which came in 1991 was the first case where the marital rights exemption had been appealed till the House of Lords. The judgement was given by Lord Keith wherein he stated that avoiding to apply the marital right exemption is the absurdity of the rule. He agreed with the earlier judgement of the court of appeal that in *R v. R* “the friction of implied consent has no useful purpose to serve today in the law of rape and not the marital rights exemption was a common law friction.”¹⁴ The appeal was dismissed and the husband was convicted of rape of his wife.

Since that time, there are almost 104 countries as of today who have criminalized marital rape but India’s position on it remains the same. Talking about the United States, the criminalization of marital rape started in the mid 19th century and by 1993, marital rape was a crime in all 50 states under at least one section of the sexual offences code. In some places the legislature has created marital rape as a distinct offence. For example, in California, there are two different criminal

⁹ V.K.Dewan, Dewan’s Law relating to sexual offences and rape, India Law House 2013, 764

¹⁰ (1949) 21 All ER 448

¹¹ (1954) 2 QB 282

¹² (1988) 86 Cr App R 399

¹³ (1990) Crime IR 198

¹⁴ V.K.Dewan, Dewan’s Law relating to sexual offences and rape, India Law House 2013, 766

offenses: Rape (Article 261) and Spousal Rape (Article 262). According to this, actions that can lead to spousal rape charges include both obvious and not-so-obvious scenarios. Some examples are: If a husband uses physical force to make his wife have sexual intercourse with him or if a husband has sex with his wife while she is passed out after a drinking too much etc.

In Oklahoma, a person cannot charge her/his spouse for rape if she/he is compelled to submit due to drugs which are administered by or with the permission of the accused as a means of forcing the victim to submit, or when she/he is unconscious. Lastly, talking about South Carolina, it actually has the most extreme situation. Here marital rape is not only punished less severely and the victim has only 30 days to report, but the law here also demands a higher level of violence used.

Talking about Philippines, recently the Supreme Court affirmed a 2002 conviction of a husband who was accused of sexually assaulting his wife. In the case of *People vs. Jumawan*¹⁵, the Supreme Court thoroughly discussed the issue of marital rape wherein it affirmed the conviction of a husband for marital rape and elaborated the dynamics of sexual relations between married couples. According to the Supreme Court:

“A woman is no longer the chattel-antiquated practice labled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent.”¹⁶ The husband here argued that the wife is duty bound to have sex with her as she is his

¹⁵ GR 187495

¹⁶ <http://www.manilatimes.net/marital-rape/176379/> visited on 21.02.2016

wife and is obligated to do the same but the court said that the husbands don't have property rights over their wife's body. It also said that sexual intercourse, albeit within the realm of marriage, without consent is rape.

Marital rape as of today, happens way more more than the normal rape, yet our current legal system fails to recognize this as a criminal offence. People argue against its criminalization on the fact that the laws made will be misused but then let them ascertain this fact first as to which of the laws in our country is an exception to this. Let's think practically and rationally. There are other countries out there, almost 104, who have criminalized marital rape and are actually punishing the offenders, but what India does, is make this offence a civil wrong (the term is not even able to respect the gravity of the offence) and offer compensation for the same. Now many of the devout followers of the Hindu religion state that the religion gives the right to the husband to have sex with the wife. Yes, it does, but the fact to be noted is that it only gives the right to have sex and not the right to force the wife to consent to it even when she doesn't want to. And on the other hand, it is the same Hindu religion which stresses on purity, cleanliness and behaviour of good faith and so it cannot be said that this religion exempts this heinous act of rape to wife. Marriage in India is being given more importance than the women's life and her right to live with dignity. Criminalization of this grave offence doesn't take place because of the fear, that if criminalized, it will destroy the institution of marriage. Well, this statement clearly implies the fact that the society expects the women to be patient and to keep suffering with whatever is done against her. The Crime Against Women Cell was created for the very purpose of helping the women but it is astonishing to know that even there the accused women are taught that they have to bear with all what is happening with them to save the family and to keep the house from breaking.



People's mind even today is particularly tilted towards saving and honouring the traditions and those laws of 1900s which are governing the 21st century. Time is changing and so are the people along with it but the laws still remain the same. What really needs to change is the mind-set of the people who think against the criminalization of this grave offence. The laws need to be flexible enough to incorporate new changes and the people should start respecting lives of others and allow them to lead a life with dignity.