

Why Penalize Marital Rape

Sakshi Kanodia¹, Ranjabati Ray²

¹(Amity Law School, Amity University Haryana, India)

²(Amity Law School, Amity University Haryana, India)

Abstract : Marriage is regarded as one of the most sacred institutions of our country, by which one legalizes their right to procreate. But when this sacredness is destroyed, this institution shatters completely, and what remains is just a display of its ruins to the society. The concept of 'marital rape' is prevailing in this pious relationship for ages; and women have had to face various difficulties and health issues, as they are the silent sufferers. Its roots can also be traced to the absence of proper legislations and social stigmas. Various reasons pointing towards its legalization are stated, most of them being unjustifiable. 'Rape' should be considered as 'Rape', irrespective of the perpetrators relationship with the victim. The paper discusses various notions regarding rape and specifically marital rape and throws light on some critical and burning truths of our 'modern society'. The 'hue and cry' by women of our nation, regarding the legalization of the crime, seems to be in vain. Taking into account the vastness of the topic, doctrinal research method has been adopted for the successful completion of this paper.

Keywords – Equals, Hue and cry, legalize, marital, marriage, rape, sufferer.

I. INTRODUCTION

'Marriage isn't a mere exchange of a pair of rings. It's a vow to always trust and stand by your partner because every healthy relationship is based on a foundation of honesty and faith'.

Marriage is an institution which helps to socially develop an irreparable sacred bond of trust, faith and honesty between the two individuals. It's a procedure under statutory and customary law which legitimizes their right to procreate. It is not only the joining of two bodies but it weaves in the minds and souls of two people who are meant to be with one another through all ups and downs in life. Having married each other, both the man and the woman also gain some rights and duties towards each other and each one of them is to respect one another and recognize them as 'equals' in the relationship. However, conjugal rights which arise out of a marriage are quite questionable as to their extent because the thought which then arises in the husband's mind is that he has free access over his wife's body and that he can demand for sex, just for the sake of fulfilling his lust and pleasure, forcefully taking away her right over her own body. The pious ceremony of marriage, which is deemed to be made in heaven, creates assurance in the mind of the wife that she shall receive warmth, care, respect and safety from her husband who is supposed to protect her from outsiders, as a huddle of diverse and special feelings overpower her mind, creating an anticipation of many things, before tying a knot. But when the evil itself lurks in the shadows of her own house and the protector himself become the defiler, then whom shall she turn to? Such an act of forceful intercourse not only ruptures the wife's sense of self-reliance, dignity and self-worth, but also tears down the elementary roots of the relationship. In such situations, what is the necessity which prevents the Legislature in India from criminalizing such a forceful act of invasion on a wife's body by her husband and assigning the term 'rape' to it, when at the same time she has been provided with hundreds of protection and measures to safeguard her from the crime committed against her, by the outsiders.

Rape is an offence which is regarded as the highest kind of torture, inflicted upon 'womanhood'. It shakes the dignity and self-respect of the woman from the very core and when it takes place within the four walls of her matrimonial home, that too by a person whom she had never thought of, it shatters her completely. She has thousands of justification within herself for suffering the crime silently. She has been provided with hundreds of protection and measures to safeguard her from the crime committed against her, by the outsiders. But when it comes to her husband, then why is she not provided with any protection? Is it because in the Indian society the husband is given the status of 'devta' or 'parmeswar'? Or is it because of the fact that she is always taught by her ancestors that she has to 'samarpan' or 'submit' her body, mind and soul to her husband completely, after the wedding. Hence, she shouldn't be given any rights to refuse to have sex. Such situations need to be considered as 'rape' irrespective of the fact that the person committing it is an outsider or her own love because the woman should be the only one to have a right to give her body to someone for sex. In a way, marital rape can also be thought of as 'the murder of a woman's love and trust' because despite of all the physical and damages, which a victim of marital rape has to go through, it also gives her irretrievable mental

scars. So why is it that the law-makers of our country close their eyes and ears and refuse to acknowledge such a heinous crime committed on a woman when it is within the four walls of her bedroom?

II. RAPE LAWS: A SPOOF ON MARITAL RAPE

Section 375 of the Indian Penal Code, is dealing with situations which shall be considered as 'rape'. And, it exclusively excludes 'marital rape' from its purview. This Section deals with sexual attack, in an extremely narrow, constricted and a bottle-neck manner. In fact, the section clearly puts down that sexual affairs even where force is applied, inside a marriage do not amount to rape if the wife's age is less than 15 years. Even if the husband does rape his wife and she is between the ages of 12 to 15 then he shall be imprisoned for a term of 2 years. The law itself is quite contradictory since the legal age of marriage in this country is 18. Also, the minimum age in which consent is supposed to be given freely by a girl for sexual activity is 18. So, how is it possible to protect a girl between the ages of 15 and 18 from being raped by her husband when the law itself paves a path for it? The wife does not have any legal protection accorded to her from the State if she is above 16, which is in direct contradiction with and a gross infringement of her human rights. The felony of rape within matrimonial ties needs to be recognized as a serious offence and the same should be legislated upon without making provisions for any age bar.

III. MARITAL RAPE: THE HISTORY OF NOT BEING AN OFFENCE

The social problem of marital rape is prevalent in our society for ages, though silence has been maintained around it. Marital rape is an exemption to the offence of rape. The history of this exception can be traced back to the Upanishads and the customs prevailing. The upbringing of the male segment of the society, in a way gives us the justification for the existing laws. In many areas, especially in the rural ones, they are taught from their childhood regarding their dominance over women. Position of women has always been shown as a 'slave', a 'chattel' or as a 'property'. An incidence for this treatment can be reverted back to the times of 'Mahabharata', where 'Draupadi' was gambled off in a game of dice by her 'husbands'. The dominant nature is inbuilt in these men from the very beginning. The image which is depicted in their eyes regarding marriage is the 'license to have sex.' They are always taught that the women they marry should be 'pure' and 'pious', regardless of what they see themselves in the mirror as. 'Chastity' is the most important feature considered. Regardless of their mothers also being a woman, they spread the tentacles of possessiveness all around their sons. He is even taught that he should not hesitate on his 'first night' for testing the 'virginity' of his soul-mate, even if the girl hesitates. This has been prevailing as a custom since long, as a 'white bed sheet' is used for testing her 'piousness.' So, the footprints of this exemption can also be traced back to the 'orthodox beliefs' of our society. It is also provided under the 'Upanishads' that the husbands are free to have sex with their wives forcefully and the wife is being considered to be given a permanent implied consent to the sexual relations with her husband at the time of marriage, which cannot be revoked afterwards. Thus, such assumptions about men, women and their married and sexual life impliedly gave consent to the validity of the marital rape exemption. According to 'Manusmriti' also if the wife denies having sex with her husband, then she is not considered as an 'ideal' wife. The doctrines of the marital rape as an exception also owe its existence to the concept of 'irrevocable implied consent'. As per this notion, once a woman is married to a man, there is supposed to be an implicit permission to sexual intercourse, which is irreversible in nature.

Apart from the prevailing customs, there have been various discussions about whether marital rape should be criminalized or not. Sir Matthew Hale, Chief Justice in 17th Century England, in his famous thesis entitled *Historia Placitorum Coronae* had stated that: 'the husband cannot be guilt-ridden of rape committed by himself upon his legalized wife, for, it is by their communal agreement and pact, the wife hath given up herself this kind unto her husband which she cannot retract'. Then the Law Commission reports also adhered to the opinion relating to non recognition of marital rape as a criminal offence.

The Law Commission in its 172 Report had suggested that enactment of any law relating to marital rape will lead to excessive interference within marriage, and had ignored the provision of restitution of conjugal rights wherein the state is intervening in private relationship between two people to control their role in a bedroom. Recommendations were made by Justice Verma Committee, after the *Nirbhaya case* and the Bill to criminalize marital rape which was introduced in India, was turned down by the Parliament, expressing the worry that this would lead to the breakdown of marriages. They are of the view that India is a nation with low divorce rates, and criminalization of marital rape would prove to be against it. Do our Parliamentarians want that the women should suffer violence silently? Or just to save the pride of the nation, the women of the country would be left to suffer, tolerate, compromise and adjust?

When this critical issue of criminalizing marital rape was discussed in the Rajya Sabha, the then India's Minister of State for Home Affairs, Haribhai Parathibhai Chaudhary, stated that marriage is a sacrosanct institution. He argued that 'the concept of marital rape, as understood internationally, is not suitable in the Indian context, due to illiteracy, poverty, social customs and values, religious beliefs and the fact that Indian

society treats marriage as a sacrament'. Are the women of our country born to suffer? For which offence are they being punished? The then Minister for Women and Child Development, Maneka Gandhi once said to the Parliament, in her written reply that, "*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, mindset of the society to treat the marriage as a sacrament, etc.*"

Whenever this issue is raised in the parliament, responses like, "*It will break million homes; it will pollute the institution,*" or "*the law will be misused, always come up.*"

IV. WHY THE SETBACK?

These kinds of rapes are predominantly more complex due to their personal and delicate nature. The women find it even harder to recognize themselves as a victim and deal with such a situation, as they are being raped by someone they love and trust. This is the reason behind the non consideration of women as victims because even those who consider themselves the victims are reluctant to report the cases to the concerned authorities. They fear the withdrawal from their families on reporting the matter. They often step back thinking about the future of her children, their financial dependency on their husbands and the dignity and honor of both their families. This makes marital rape as one of the most highly under-reported violent crimes all over the country.

In India, there are ample number of laws and enactments which have been brought into force to protect the woman from violence, which takes place against her. Such cases of violence includes dowry, cruelty, domestic violence, female infanticide and many more. Nevertheless the most major and reprehensible wrong inside a marriage, where a spouse forces himself upon his partner discerning that it is his matrimonial right to partake in sex with his wife (with or without her consent), has been unsuccessful in gaining acknowledgement as a crime in the discernments of strategy makers.

Females who are raped by their partners are probable to be raped countless times. They are involved in not merely vaginal rape, but also oral and anal rape. Husbands often rape their companions while they are intoxicated, or practice intimidation, oral terrorizations, corporeal vehemence, or weaponries to force their wives into partaking in non-consensual sex with them. Marital rape is a grave difficulty that masses of womenfolk all over, have to agonize in and face such mishandling on a routine basis. It is problematic to attain precise statistics with respect to rape and violence against women within the family, in part because women are reluctant to report incidents, as females raped by their partners may waver in reporting because of domestic allegiance, dread of their user's vengeance, incapability to vacate the bond, preserving the future of their children, or the fact that there are no stringent laws in force protecting the victims of marital rape. In spite of underreporting, marital rape indisputably has a massive influence on the existence of women who have to experience it.

V. CONSTITUTION OF INDIA AND THE MARITAL EXEMPTION TO RAPE

The Constitution is the heart and soul of any nation. As per the Constitution of India, any law passed, which is not in conformation with the principles and ideas preserved by it and enshrined in it, will be declared to be ultra vires to the constitution, and hence unconstitutional.

The Indian Constitution guarantees the right to liberty, equality, of living a dignified life and to safeguard its bodily integrity to all its citizens. Then what happens to these rights when it comes to marital rape? Are the wives considered as lesser citizens, in our constitution? Does a woman lose her right to live her life with dignity upon marriage? The doctrine of marital exemption to rape also fails to meet the requirements of Article 14 and Article 21 of the Constitution of India.

5.1 Equal protection of the law

According to Article 14 of our constitution, every citizen of India is guaranteed a fundamental right of equality before the law and equal protection of laws, which does not mean that everyone should be treated equally in every situation, but requires that 'equals should be treated equally'. While making the classification, it should be taken care that the 'stereotype enjoined by the patriarchal ideology' does not predetermine as to what is reasonable classification. Section 375 of our Penal Code criminalizes the offence of rape and protects a woman against sexual intercourse happening against her will and without her consent. Paradoxically, this section makes a classification, by excluding protection to the victims of marital rape. The section only talks about and provides protection to statutory rape and not marital rape. This is so as it is often assumed that once a woman is married, she has to 'submit' herself to her husband and she is believed to have given a permanent consent to sexual relationships with her husband. Such an assumption made is totally wrong and hence, the basis of such classification is completely irrational.

5.2 Right to life and personal liberty

Right to life and personal liberty is enshrined in Article 21 of our Constitution, even though in a negative language. This article impliedly preserves many other rights of the citizens. The non inclusion of 'marital rape' in 'rape' category is violative of a swarm of rights which are included in 'right to life and personal liberty.' The marital exemption to rape violates the right to privacy and sexual privacy, right to bodily self-determination and right to good health, right to reproductive and sexual health, right to live with human dignity and many more.

In one of the most leading cases of *Harvinder Kaur v Harmender Singh*, the court commented upon the applicability of the constitutional rights, mainly that of Article 14 and Article 21 within a family. It had stated that, "introduction of Constitutional law in the home is most inappropriate. It is like introducing bull in China shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 has any place. In a sensitive sphere which is at once most intimate and delicate, the introduction of cold principles of Constitutional Law will have effect on weakening of marriage bond".

This was later challenged in the case of *Sareetha v T Venkata Subbaih*, failing to improve the situation. The Apex Court had also commented upon the matter in the case of *Saroj Rani v Sudarshan Kumar Chadha* by saying that "the introduction of equality clause within home will destroy the institution of marriage."

While delivering these judgments, why did the court forget about the already existing laws provided under the Hindu Marriage Act and in the Protection of Women from Domestic Violence Act? Are these laws not applicable behind the closed doors or are they not invading the privacy? Is it a situation where the courts are cautious in taking steps towards analyzing the situation and condition of the marital rape victims?

VI. MARITAL RAPE AND LAWS IN INDIA

Despite all of the laws to safeguard and uplift women, marital rape is the worst and the most appalling wrong which takes place within the four walls. It is considered to be the vilest crime as it is being done by a person whom the woman trusts and loves, and this betrayal is extremely hard for her to deal with and is more traumatic. Still, despite of all amendments, legislations and law commissions, this heinous crime is unable to gain recognition as a crime in the eyes of the policy makers. The chief question which now arises is that does a married woman lose her right to save her body from the lust of her husband? Does she have any kind of protection? Can she knock the doors of the court to penalize her husband for the offence committed by him? Will she be granted justice or any kind of protection? Why is it thought that bedroom will be converted into battlefield, if the woman is provided with protection?

The Supreme Court of India has aptly described rape as a 'deathless shame and the gravest crime against human dignity.' It is not just an assault; it is an act which is considered to be the destroyer of the complete persona of the victim.

Hindu marriages have always been considered as sacred, rather than a contract. Under Section 13 of Hindu Marriage Act, 1955, grounds for divorce are provided, which also includes in it cruelty, both physical and mental. Rather than defining it properly, it is used in the context of human conduct and behavioral relation to matrimonial duties and obligations. A clearer picture of the term 'cruelty' is provided under section 498A of the Indian Penal Code. To bring the case within the purview of this section, cruelty must be grave, persistent and causing serious trouble to wife, both mentally and physically. The husband if found guilty of marital rape is punishable with an imprisonment of up to 3 years and fine.

Section 122 of the Indian Evidence Act, 1857 which provides for communications during marriage, comes under the category of 'privileged' communications. It states that the communications which are made during marriage are not bound to be disclosed, with certain exceptions to it. In India, marriage is considered to be sacred institution and what one goes through within the bond of this relationship should be kept secret. Due to the customs and the still prevailing orthodox mentality, sex is treated as a requisite in marriage and open discussion about it is considered to be miserable. The consent to sex is considered to be as the one of the most personal intimate choice that a women reserves for herself. And if in this case also, she is imposed upon with some other person's lust, then she is left with nothing. Where the right to control her body does go now?

According to the Indian Penal Code, Sections 375 and 376 the husband is liable to be prosecuted for marital rape as a criminal offence in the following cases:

- When the wife is below 12 years of age, the husband has committed a punishable offence and is liable to be punished with imprisonment of not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.
- Where the age of the wife is between 12 – 15 years he has committed an offence, which is punishable with imprisonment up to 2 years or fine, or both;

- If the two spouses are judicially separated and then the husband commits an offence of Marital Rape, then he is liable to be punished with imprisonment up to 2 years and fine;

The reason behind marital rape being considered as an offence, when the spouses are judicially separated was stated in the 84th report of the Law Commission. The report elaborated that the judicially separated wife is now no longer the 'wife' (de facto) because of which the husband loses his right to forcibly enforce his conjugal rights on her, and forcefully have sexual relations with her.

With the passing of the greatly awaited, Protection of Women from Domestic Violence Act, 2005, there was not much change brought for women suffering from the menace of Marital Rape, and it also led to disappointment. The act did not consider marital rape as a crime, but still giving a ray of hope to the women; it considered it as a form of domestic violence and provided civil remedy for the same. If a woman is undergoing marital rape, then she can approach the court, seeking judicial separation from her husband.

VII. INTERNATIONAL SCENARIO

Marital rape as a crime finds its foundation in various generalized international laws. The footings of the International Law of Human rights, stands on an addition of a number of rights, which includes those of equal protection before the law, right to life and the basic claim to human dignity. Moreover, when we read the '*International Convention on the Elimination of All forms of Discrimination Against Women*' (CEDAW), in combination with the 'General Comment No. 12', it is found that the focus is on the State's responsibility towards protection of women from violence of any kind which includes both sexual abuse and the abuse faced by them at home. Article 2 of '*The Declaration on the Elimination of Violence against Women*' encircles marital rape in its definition of vehemence against women. All the member states of United Nations are burdened under this declaration, to practice due interest and caution while carrying out investigations and preventing and punishing acts of violence against the women of the country. Such rules and obligations prove that the podium of international law is not silent on the cause of marital rape and in fact it is vehemently opposed by it. According to the present scenario, marital rape has been impeached in approximately 106 countries, out of which 32 countries consider it as a special criminal offence, and in the rest 74 countries, marital rape is included in the general rape provisions. Even there are countries which criminalize it only if the partners are judicially separated. There are numerous countries that have either enacted the laws relating to marital rape or have repealed the exceptions or have such laws that do not differentiate between marital rape and ordinary rape. The list of such countries is inclusive of Albania, Algeria, Australia, Belgium, Canada, China, Colorado, Delaware, Denmark, District of Columbia, Florida, France, Georgia, Germany, Hong Kong, Indiana, Ireland, Italy, Japan, Massachusetts, Mauritania, Montana, Nebraska, New Jersey, New Mexico, New Zealand, North Carolina, North Dakota, Norway, Oregon, the Philippines, Scotland, South Africa, Sweden, Taiwan, Texas, Tunisia, the United Kingdom, the United States, Utah, Vermont, Wisconsin and recently, Indonesia. Turkey has forbidden marital rape in the year 2005 and Mauritius and Thailand did so in 2007. The illegalization of nuptial or marital rape in these nations equally in Asia and everywhere in the world specifies that marital rape is today documented as a desecration of human rights. In 2006, it was assessed that marital rape is a felony chastised under the criminal law in at least 100 countries and India is unfortunately not one of them. Even though matrimonial rape is predominant in India, it is veiled under the sacred drapes and curtains of matrimony. Immunity granted to the husband from criminal liability for marital rape is now no longer a good law in some of the states. Marital rape has now been recognized as a criminal offence in South Dakota, Delaware, Oregon and Nebraska. In the other few states, the immunity has been successfully challenged. In all the other countries, marital rape is considered to be a lesser offence.

When the issue comes to India, the attitude of 'Indian Exceptionalism' is being followed. In recent times, the Minister for Women and Child Development has said that the cause of criminalizing marital rape can only be bound to international law and cannot be applied to the Indian scenario. In a country like India such statements only trigger the thoughts of those people who believe that the cause of International law is a sham and question as to why the laws applicable to other countries' customs and traditions need to be followed by them. It is further argued by many as to why International law (especially General Comments and Declarations) should be considered as binding when they are actually soft laws and are only present to give directions and suggestions, not actual laws. India, being a part of various International Committees, which have the ultimate motive of improving the standard of human rights across the globe, it cannot just shy away from making laws on them under the veil of cultural specificity. The country is not allowed to choose between the rights, and adapt to it according to its own will. Apart from the domestic obligation, India also has the international commitment to protect women from marital rape. The '*United Nations Committee on Elimination of Discrimination against Women*' also wants India to criminalize marital rape.

VIII. THE 21st CENTURY OPINION

In India, the common philosophy followed by the Legislature and the Judiciary while making laws or while adjudicating a case is that no innocent should be punished even at the risk of acquitting a hundred guilty. The Additional Solicitor General of India, Ms. Indira Jaising, while delivering her address speech to the Justice Verma Committee, pleaded for the criminalization of marital rape in our country and focused upon its urgent need. She said that, the exemption provided under the Penal Code, time and again draws her attention towards the position of women, which is no less than that of a chattel. If rape is considered as a violation of human right; then why is this discrimination, between her husband and a stranger? In today's modernized age, where women are more educated and financially independent and are at par with men, and enjoy freedom and liberty to do everything, then why are married women refused protection against marital rape?

The thought behind this decision can be interpreted in two ways. Firstly, the situation in India is not suitable to adapt such laws, for reasons like, illiteracy, traditional beliefs, customs, poverty etc. Such views seem to reflect the age old shades of a patriarchal society and gender bias. Secondly, the existing laws which have been enacted to safeguard the women, are being misused and the fear that if women also start misusing these laws, then what will happen to the institution of marriage and the men involved?

But the question that remains to be answered is that what is the use of saving and preserving such institution of marriage in which the woman dies every other day? There are various kinds of justification which our legislators provide, regarding the non criminalization of marital rape. Just giving mere excuses gives the right to husband to play with the emotions of the woman. Were the promises made by him at the time of marriage, in front of the holy fire all fake? Is this the position of the women in our country? Just because our religion focuses on the purity and cleanliness of the woman, how does it give acceptance to marital rape? It is only because our legislators interpret things in their own way. Why are they ignoring this heinous crime, when their foremost duty is to act as a savior of the victimized? Tracing back the ignorance of the legislature to their impractical and mindless interpretations is not the answer, the country seeks for. Even if the laws are being misused, it does not mean that they are not acting as a savior for some others. How does it mean that all women are liars and will always file false cases? Is the woman only considered to be an object valued for her sexuality and fertility? How can this rape be considered to be legal when it comes to marriage? What remains the status of marriage? The legislators are considering the minority as a reason for their view, and are neglecting the majority of the sufferers. In a way they are not providing protection to the rapid increase in the risks of infertility, unwanted pregnancies and abortions. Then why is abortion considered to be illegal? The reality is much beyond what these legislators wants to see.

IX. CONCLUSION

It is not just the woman alone who suffers, children are no exception to the impact faced by the commitment of this crime. These little ones have no option, but to witness the harassment of their mother. When in this age, we are justifying the illegalization of this crime, by taking the support of poverty and illiteracy then has someone ever thought about the mindset of the children being framed on being silent witnesses to such incidents. An example of such incidence can also be taken from the movie '*Bhaag Milkha Bhaag*', where the same was depicted in a scene. The girls think it as their fate and start preparing themselves mentally, for the future suffering and the boys take it as their right to overpower women. Isn't it trapping our future generations in the web of this endless vicious cycle? Aren't the young minds being polluted?

The Indian Cinema is also playing a titular role in changing the age-old perception of girls being mere commodities. The recently released film '*Pink*' puts forward the impactful message that 'till date all of us have been putting our efforts in a wrong direction... we should be saving our boys, not our girls... as if we save our boys, then our girls will automatically be saved.' The film further elaborates that 'the word "NO" is not merely a word but a sentence in itself, which requires no explanation or elaboration. It even throws light on the concept of marital rape, by advocating the fact that 'no matter even if it is his wife, when she says no, it means 'to stop'.'

Law is not static and needs to change with time and society. Our dynamic law, which proves to be the savior of the victimized in almost every circumstance, is derisory upon this matter. One says that criminalizing of this offence would result in destroyed married institutions, breakdown of a million homes, and men would be wrongfully tortured. To which extent can the correctness of this statement be justified? How long will the women suffer for the crime done by their intimates? How long will marriage considered to be a permit to rape? How long will the punishment for rape differ according to the marital status of the women? Shouldn't women all across the country be provided with education and awareness regarding this critical issue? Also, isn't it high time for reviewing our legislation and inculcating in it the needed?

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