

## MARITAL RAPE: A LICENSE TO SEXUAL VIOLENCE

-MEGHA CHATURVEDI<sup>1</sup>

### ABSTRACT

**“Marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”<sup>2</sup>**

Marriage in Indian society is a sacred institution. However, such Institution overlays act like sexual savagery and diverse forms of inhumanity in the household. Therefore, Marital Rape is one of such acts which are itself inhuman and brutal in nature. It is the act of sexual intercourse by one spouse without the consent of the other spouse.

“Every woman was entitled to sexual privacy and such privacy must be free of violations.”<sup>3</sup>Section 375 and 376 of IPC<sup>4</sup>criminalizes rape but the exception to marital rape was read down as inapplicable to minor wives by the Supreme Court last year<sup>5</sup>.Rape is a crime against basic human rights and the violation of the victim’s right to life and dignity under Article 21 of the Constitution.<sup>6</sup> Marital Rape is an abuse to status of women and even then such an offence is not criminalized as rape in India.

Henceforth, it raises several questions that whether a married woman is to be considered as an object or a property of the husband or does she posses the right to save her body from the lust of her husband. Since today we talk about women empowerment and no doubt many rights have been provided to women, but in a male dominated society does the women would really be empowered without criminalizing marital rape. This silence in the law creates legal impunity for men who rape the women who are their wives or intimate partners, thereby legitimizing this particular form of violence against women. This is a human rights problem that cries out for redress. Therefore, there is need of criminalization of marital rape as it is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated.

---

<sup>1</sup> Student, B.A LL.B Delhi Metropolitan Education, GGSIPU

<sup>2</sup> Nimeshbhai Bharatbhaidesai v State of Gujarat

<sup>3</sup> State of Maharashtra versus Madhkar Narayan (1991)

<sup>4</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

<sup>5</sup> Independent Thought v Union of India

<sup>6</sup> Bodhisattwa Gautam versus Subhra Chakraborty (1995)

## INTRODUCTION

Marriage is considered to be one of the essential stages in one's life which has been historically accorded social and legal recognition. It is a stable relationship in which a man and a woman are socially permitted to have children implying the right to sexual relations.<sup>7</sup> Marriage is often referred to as 'licensed sex' amongst teens and young adults<sup>8</sup>.

Now the question arises that such an institution of marriage gives husband the right to forcibly indulge his wife to have sexual intercourse with him? Does now the consent of the wife is not required or it becomes immaterial, just because they both are married, it gives an implied meaning that husband has every such right over his wife.

### **Why such marital rape is not included under the ambit of Rape?**

Violence is the aggressive behavior showcased by an individual. Violence is of several kinds. Sexual violence is one of the kinds. Rape falls under the ambit of Sexual violence.

### **Sexual Violence By Intimate Partners:**

In the Indian State of Uttar Pradesh, in a representative sample of over 6000 women, 17% reported having been sexually and physically abused by their husbands<sup>9</sup>. In 2013, a United Nations survey found that nearly a quarter of 10,000 men questioned in six Asia-Pacific countries, including India, admitted to having raped a female partner. The belief that they are entitled to sex even without their partner's consent is a common motivation, the study found. The majority of these men experienced no legal consequences.<sup>10</sup>

As a society, we are extremely uncomfortable to publicly acknowledging that marriages can be potentially disharmonious, abusive and dangerous sites of human interaction.<sup>11</sup> According to

---

<sup>7</sup> Available at <<http://www.vapsoft.org/meaning-of-indian-marriage/>> last visited on 18<sup>th</sup> October, 2017.

<sup>8</sup> Marital Rape: The Secret Shame India's sweeping Under the Rug, By Nishtha Gautam.

<sup>9</sup> Available at <<http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html>> last visited on 29<sup>th</sup> October, 2017.

<sup>10</sup> Ibid.,

<sup>11</sup> Available at <<https://thewire.in/173906/marital-rape-and-not-its-criminalisation-debases-society/>> last visited on 31<sup>st</sup> October, 2017.

the National Family Health Survey 2005-06, Data show that 8.5 per cent of the surveyed women (aged 15-49 years), one in 12, said they had experienced sexual violence in their lifetime. Almost 93 per cent of these women said that they had been sexually abused by their current or former husbands, while only 1 per cent said that they had been sexually abused by a stranger.<sup>12</sup>

### **JUDICIAL AND LEGISLATIVE APPROACH**

Delhi Rape Case of 2012 triggered a nationwide debate on Indian rape laws. Public pressure, political obligations of the legislators and international backlash that the government faced resulted in overhauling of some of these laws. Consequently, a 3-member committee headed by Justice J.S. Verma, former Chief Justice of Supreme Court, was constituted to provide recommendations in this regard. The recommendations of the committee were seen as very progressive and, inter alia, included repealing of Exception 2 of Section 375. This exception gives legal immunity to marital rape. According to Exception 2, “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”<sup>13</sup> Effectively, the committee recommended that marital rape should now be criminalised. Many of these recommendations were enacted in the form of Criminal Law (Amendment) Act, 2013. For instance, meaning of the word ‘rape’ was broadened to include oral penetration, penetration through objects and things alike. Also, an explanation was added to describe what qualifies as a woman’s consent to sexual activity. The amended rape laws were more women-centric. However, one important recommendation on which the law remained silent was of criminalizing marital rape. Recently, the Supreme Court, in *Independent Thought v. Union of India*<sup>14</sup>, has held that sexual intercourse with wife who is below 18 years of age will constitute rape. However, the broader question of constitutional validity of marital rape still remains unanswered.

The Supreme Court has pronounced that rape is a crime against basic human rights and the violation of the victim’s right to life and dignity under Article 21 of the Constitution<sup>15</sup>. Also, the Apex Court has held that every woman was entitled to sexual privacy and such privacy must be

---

<sup>12</sup> Available at <<http://www.thehindu.com/opinion/op-ed/when-even-rape-is-legal/article7298898.ece>> last visited on 27<sup>th</sup> October, 2017.

<sup>13</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

<sup>14</sup> *Independent Thought v. Union of India*, 2017 SCCOnLine SC 1222.

<sup>15</sup> *Bodhisattwa Gautam versus Subhra Chakraborty (1995)*

free of violations<sup>16</sup>. Despite these principles, the judiciary has refused to include marital relations in rape adjudication and has not recognised that marital rape exists and that its exemption from Section 375 is violative of constitutional rights.

Justice J.B. Pardiwala of the Gujarat High Court observed in case of *Nimeshbhai Bharatbhaidesai v State of Gujarat*:-

“A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”

The United Nations has recommended India make it criminal for a man to rape his wife<sup>17</sup>. In 2012, the Justice Verma Committee had observed<sup>18</sup>:

“Rape or sexual assault is not a crime of passion but an expression of power and subordination. No relation, including marriage, supplements an irrevocable consent of sexual activity”.

The Verma committee had, however, recommended that marital rape should be made an offence irrespective of the age of the wife. This shows the legislature’s failure to appreciate the growing menace of this crime wherein the victim has to suffer on a daily basis,” it observed<sup>19</sup>.

Therefore, marital rape is such an evil which is an offence in itself and it not only hampers society but also majorly affects women’s right to human dignity. Many countries have made it a crime for a husband to force his wife to have sex in recent years. Malaysia changed its laws to

---

<sup>16</sup>*State of Maharashtra versus Madhkar Narayan (1991)*

<sup>17</sup>The wall street journal, Modi Government’s Reasons Why Marital Rape Is Not a Crime By Preetika Rana Apr 30, 2015.

<sup>18</sup>Marital Rape, and Not Its Criminalisation-Debases Society, By Samparna Tripathy on 05/09/2017.

<sup>19</sup> Scroll in.-Saturday, October 28th 2017, <https://scroll.in/latest/806899/india-has-failed-to-even-recognise-the-social-evil-of-marital-rape-says-centre-appointed-panel>

that effect in 2007<sup>20</sup>, Turkey in 2005<sup>22</sup>; and Bolivia in 2013<sup>23</sup>. The United States began criminalizing marital rape in 1970s and most European countries in the 1990s<sup>24</sup>. So there is a dire need to recognize it as an evil of society and hence then be criminalized in India as well.

### **WOMEN'S STATUS- RIGHTS, CHALLENGES & REMEDIES**

It is well recognized that violence against women represents a breach of women's fundamental human rights<sup>25</sup>. Marital rape violates jus cogens norms such as the prohibition against torture, as well as fundamental human rights such as the right to life, liberty, and security of person, equal protection under the law, and nondiscrimination. It further violates rights critical to the autonomy and well-being of an individual such as the right to health and to equality within the family<sup>26</sup>. The U.N. has consistently declared that violence against women impairs or nullifies women's human rights and their exercise of "fundamental freedoms" whether this violence occurs in public or in private life<sup>27</sup>.

#### **Constitutional Rights & Challenges**

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."<sup>28</sup> However, the varying needs of different classes require different treatment. This gives rise to the need for legislative classification. The exception 2 of Section 375, IPC, pertaining to marital rape is one such classification between married and unmarried women. In order to pass the test for permissible classification- 1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and 2) the differentia must have a rational nexus to the object sought to be achieved by the statute in question. The abovementioned

---

<sup>20</sup>MP Teresa Kok, Mixed reaction to marital rape reform, Sassy MP, September 15, 2007.

<sup>21</sup>AP, "Malaysian jailed for marital rape," Sydney Morning Herald, August 6, 2009.

<sup>22</sup> Anti-Discrimination Committee Takes Up Situation of Women in Turkey, UN Information Service, 21 January 2005.

<sup>23</sup>Robinson, Jessica (March 21, 2013). "New Law Mandates Harsh Penalties and Broad Services to Address Violence Against Woman in Bolivia". Andean Information Network. Retrieved 24 March 2013.

<sup>24</sup>The wall street journal, Modi Government's Reasons Why Marital Rape Is Not a Crime  
By Preetika Rana, 30/04/2015.

<sup>25</sup>Human Rights Council Res. 23325, U.N. Doc. A/HRC/RES/23/25 (June 25, 2013).

<sup>26</sup> General Recommendation 19, Supra note 27, art. 7.

<sup>27</sup>DEVAW, supra note 26, pmb., arts. 1, 4(c) (emphasis added).

<sup>28</sup>INDIA CONST. art 14.

classification made in the case of marital rape fails to fulfil both of these conditions. The object of Section 375 is to punish the perpetrator and secure justice for the victim. However, this differentiation pushes a large section of victim women, that is, married women who are victims of rape, in a legal vacuum. In addition to that, it offers protection to a certain kind of offenders, that is, husbands. Further, this classification limits the scope of Section 375 and hence, has no reasonable nexus with the object sought to be achieved.

According to Article 21, “no person shall be deprived of his life or personal liberty except according to the procedure established by the law.”<sup>29</sup>In *K.S. Puttaswamy v. Union of India*<sup>30</sup> the Supreme Court held that “the crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.”<sup>31</sup> This implies that every human being has full autonomy over his or her body. This includes the right to self-determination with regard to a person's body. Marital rape, which is essentially a forced sexual intercourse, violates a woman's right to self-determination with regard to her own body. The sanctity of this right is such that it cannot be compromised even on the marital bed. In *State of Maharashtra v. Madhukar Narayan Gardikar*<sup>32</sup>, the Supreme Court held that “even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes.”<sup>33</sup> Thus, the marital rape exception is ultra vires to the Constitution as it is violative of Article 14 and 21.

### **Breach of International Obligations**

India has ratified Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and Universal Declaration of Human Rights (UDHR). “Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>34</sup> Also, Article 7 of UDHR holds that, “All are equal before the law and are entitled

---

<sup>29</sup>INDIA CONST. art 21.

<sup>30</sup>*K.S. Puttaswamy v. Union of India*, 2017 SCC OnLine SC 996.

<sup>31</sup>*Id.*

<sup>32</sup>*State of Maharashtra v. Madhukar Narayan Gardikar*,

<sup>33</sup>*Id.*

<sup>34</sup>Convention on the Elimination of All Forms of Discrimination against Women. Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>35</sup> Thus, continuing to provide legal immunity to marital rape also goes against the international obligations of India.

### **Remedies available**

The only remedy available to the victim in cases of marital rape is to resort to other laws such as The Protection of Women from Domestic Violence Act, 2005 (DVA Act) and Section 498A, IPC. These laws address only some aspects of marital rape and fail to justify the gravity of the offence. Marital rape, which is essentially a type of rape, must be covered under rape laws only to ensure justice to the victim and adequate punishment for the perpetrator. Section 3 of the DVA Act defines domestic violence. “(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.”<sup>36</sup> It further explains the meaning of sexual abuse as “any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.”<sup>37</sup> However, the outraged woman can only claim civil remedies for sexual abuse through this Act. The remedy available is not proportionate to the physical and mental trauma that marital rape entails.

Another recourse which is available to the victim is Section 498A<sup>38</sup> or 354 IPC<sup>39</sup>. Although these sections address the question of marital rape to some extent but are insufficient and very less with respect to the punishment awarded as per the magnitude of the offence.

### **THE LEGAL DILEMMA**

In a country where perjury and contempt of court are not taken seriously, false allegations fly thick and fast. If a law comes up against marital rape, it would be misused. It is based on an

---

<sup>35</sup>Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810 at 71 (1948).

<sup>36</sup>The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005(India).

<sup>37</sup>*Ibid.*

<sup>38</sup>498A. Husband or relative of husband of a woman subjecting her to cruelty—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

<sup>39</sup>354-Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty<sup>1</sup>, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

overwhelming feeling that vengeful wives are waiting for an opportunity to send their husbands to jail.

But Marital rape itself is a reality we cannot ignore. According to the UN Population Fund, two-thirds of married women in India in the 15-49 age-group have been beaten, raped or forced to provide sex by their husbands. The exaggerated possibility of misuse cannot take away from the real crime and injustice faced by lakhs of married women in the country.

One of the main reasons given by the Centre for not recognizing marital rape as a criminal offence in India was determining the value of evidence. *“The question is what evidences the courts will rely upon in such circumstances as there can be no lasting evidence in case of sexual acts between a man and his wife,”* reads the affidavit submitted by the Centre in the Delhi High Court.

### **What about evidence?**

A crime cannot be ignored on a mere assertion that it is difficult to prove. If a woman is victim to marital rape, it would mean that she isn't raped once but there will be a history of sexual abuse, and this can be proved by forensic evidence. There will be evidence of physical violence in forced rape. Even if medical examination is inconclusive, it still cannot be used as an argument against criminalizing the act as there are other methods to prove it – witness testimony, the wife recording her husband's admission of guilt via electronic communication.

Marital rape cases will present a different scenario, unlike other rape cases which could be single incidents. Marital rape will not happen in isolation, there will be a history of violence and physical abuse and will fit into the larger picture of domestic violence. It is relevant to mention here that even workplace sexual harassment is often difficult to prove, but we have still have laws against it.

Yes, there is some difficulty in the criminal jurisprudence here, but we have to develop it. And at least, in cases where there is enough proof for proving marital rape, the law will help punish the husbands. In 2015, a woman moved the apex court on the plea that she was raped and assaulted by her husband. She was also hospitalized due to her injuries; however, her husband was never prosecuted, and the case was dismissed because our law does not consider rape by a spouse a

penal offence. It is a distressing reality that an abuse faced by women across the nation is not recognized by the Indian law<sup>40</sup>.

### **CONCLUSION & RECOMMENDATIONS**

It is not just the woman, who suffers, but the society as a whole degrades, the marital union gets debased from such an offence. The crime, behind the closed doors being prevalent in modern times receives little public, scholarly and legal attention and is still not recognized despite the fact that it is the most degrading form of violence against a married woman.

Therefore, I would like to conclude by making following recommendations:-

- “Marital Rape” should be recognized as an offence under Indian Penal code.
- The criminal jurisprudence should be developed by observing international and other European countries legislations which have criminalized marital rape.
- The media should also take an initiative of making people aware about their rights and must start some activities like “KNOW YOUR LEGAL RIGHTS”campaigning which must be interesting, appealing and educative, so that people finds interest and also by performing certain quiz, debate competitions, etc.
- Marital rape should be considered as the ground for divorce under all personal laws.
- The departments dealing with the Women Welfare, Legal Aid Centre’s and NGO’s must primarily take the cognizance of the cases and should be given the LOCUS STANDI to plead on behalf of the victims and address and accord them with necessary help, guidance, etc.

---

<sup>40</sup>The Logical Indian, “Marital Rape Laws Will Be Misused By Women” Is A Flawed Argument; Here’s How The Accused Can Be Punished by Pooja Chaudhary, 01.09.17