

MARITAL RAPE IN INDIA: DOORS WIDE SHUT

Parul Asthana²³⁰

INTRODUCTION

Dictionary defines marriage to be a formal union of a man and woman by which they become husband and wife.

Rape means to seize and take away by force. The same with evolution in time came to be understood in a modern sense of 'sexual violation'.

Out of these two definitions arises another term called 'marital rape' or 'spousal rape' i.e forced sex in the relationship of marriage but this definition has become complicated because forced sex may not be considered to constitute a criminal behavior.

As recently in 1958, Encyclopedia Britannica's definition of rape stated "A husband cannot commit rape on his wife unless she is legally separated from him".²³¹ Legal definitions thus permit a marital rape exemption which does not allow a husband to be criminalized for forcing his wife into a sexual intercourse with him without the wife's will, coerced sex thus is not a crime in marriage.²³² There are several reasons and justifications given in this context supporting the marital rape exemption which shall be discussed later in detail by way of this paper.

When rape as a criminal conduct revolves around the element of 'consent' then why should there arise any need to give any sort of exemption on the basis of relationship held by the wrongdoer and the victim? In this regard it can be said that legal statutes give a male dominated view of family behavior.²³³ Would it then be wrong to call marriage a 'gendered' institution which gives husbands full control not only on the woman they are married to but also on the rights she holds to safeguard herself?

Domestic relationships are majorly strained by involvement of physical violence and rape, both these in an extreme form show traits of aggression, dominance and physical strength which our culture tends to value generally for men.²³⁴ As women are becoming independent and are moving away from their traditional roles in the domestic sphere, tension between opposite sex seems to escalate more. Marital homes no longer hold the

²³⁰ 3rd year BA LLB(Hons.) student, Institute of Law Nirma University

²³¹ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford law Review, pp. 677-709 (vol. 48).

²³² Irene Hanson Frieze, *Investigating the Causes and Consequences of Marital Rape*, The University of Chicago Press, Women and Violence, pp. 532-553 (vol. 8).

²³³ Richard J Gelles, *Power, Sex and Violence: The Case of Marital Rape*, National Council of Family Relations, Family Coordinator (vol. 26).

²³⁴ *Supra* note 2.

dignity more precisely the privacy rights of females in place. Hence the marital bedroom stands as a questionable arena for state intervention.²³⁵

In early times rape did not constitute criminal behavior. Historically early Judeo-Christian tenets established rape as a legitimate means of acquiring wives.²³⁶

There have been a number of legal theorists who have advocated a male's right to have access to his wife whenever and in whatever manner he desires. Lord Mathew Hale Chief Justice of England in Seventeenth century stood by the same opinion when he shockingly proclaimed "The Husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife had given up herself in this kind unto the husband, which she cannot retract."²³⁷

According to this proclamation a wife gives an irrevocable consent while contracting for marriage, she remains bound by it all her life and hence a wife cannot be raped by her husband because she had consented to it by way of her marriage.

Over and above different theories which try to justify a wrong, there also lies a long historical chain of assumptions perpetuated in the name of culture which prevents such acts from being criminalized. Marriage as an institution of family relations is considered to be of extreme sanctity, forced intercourse in marriage is assumed to be a woman's matrimonial duty. John Stuart Mill observed that "A woman is a slave to her master husband -he can claim from her and enforce the lowest degradation of a human being, which of being made the instrument of an animal function contrary to her inclinations".²³⁸

It is also assumed that domestic marital relations constitute a private space which should remain private in all sense beyond the realm of state control.

DISCUSSION

Justifications given to Marital Rape Exemption

Irrevocable consent Argument: The notion that there is an implied consent of wife by way of their mutual matrimonial consent shields men from being criminally prosecuted. It is considered that a woman has consented

²³⁵ *Supra* note 1.

²³⁶ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford law Review, pp. 677-709 (vol. 48).

²³⁷ *Ibid.*

²³⁸ *Ibid.*

to her marriage and hence has consented to any form of sexual intercourse within marriage which cannot be taken away.²³⁹

Blanket consent to sexual intimacy is assumed to be provided by the wife at all times in a marital relationship. Marital rape exemption is thus nothing but a license to rape. Even if a husband is forcing sexual intercourse on his wife, he is committing no wrong because he is acquiring only that which he otherwise has a right to obtain by way of the contract he had entered into.

The very purpose of marriage as a fundamental institution of every family is to have support and care, obtain satisfaction of sexual needs for procreation and to have financial mental assistance. By holding a husband responsible for raping his own wife, one basic purpose of marriage would be defeated.²⁴⁰

Blackstone's Common Law Unity Doctrine: Unity argument states that husband and wife after marriage unite into a single entity. It is assumed that a woman's identity after marriage submerges into that of her husband but the husband's individuality still remains and husband holds the joint ownership of such assumption. Lawrence Friedman states this concisely saying "Essentially, husband and wife were one flesh, but the man remains the owner of that flesh".²⁴¹

Since husband and wife unite into one after marriage, it then looks like a legal oxymoron to criminalize a husband for raping his own self.

Property Rights argument: Traditionally women were considered to be a property of their father before marriage and that of their husbands after marriage. This objectification of women made them a valuable asset subjected to trade. A woman's virginity was traded for economic and social gains. With such notions existing in the society husbands were exempted from raping their wives because by doing so they were not infringing anybody's property rights but were in fact acting upon their own property, hence no cause of action arose.

No/Less harm argument: It is said that non-consensual sex with husband is anyway better than non-consensual sex with a stranger, it is less damaging to a woman.²⁴² Though the wife may be subjected to lowest levels of human indignity by her husband yet this is considered less in comparison to those women who suffer the same from

²³⁹ *Supra* note 6.

²⁴⁰ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

²⁴¹ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford Law Review, pp. 677-70 (vol. 48).

²⁴² Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

strangers. Married couples anyway have sexual intercourse hence there seems no harm even if husband indulges into forceful sexual intercourse. This is said to be a part of the give and take of a loving relationship.²⁴³

Any act to be criminalized must be a grossly harmful act, here no such harm appears and hence no criminalization takes place.

Marriage Preservation Theory: Marriage is considered to be a very important institution of the society and conjugal obligations are to be fulfilled by both the parties to the marriage. It is assumed that prosecuting husband for rape charges against his wife undermines the sanctity of marriage relationship.²⁴⁴

Also such acts may act as hindrance to reconciliation of families facing marital differences. Legal system appear to be more concerned about reconciling families, this gives a scope of Marital Rape exemption even if such exemption includes force or threat.

Privacy Argument: Prosecuting husbands for marital rape would unnecessarily infringe marital privacy; there lies no need of state intervention in intimate family relationships.

Probability of Misuse argument: Some people maintain that there are chances of the law against marital rape being misused. There can be chances of husband's being subjected to false charges by their wives for the fulfillment of motives such as obtaining more suitable property settlement after divorce.

Same stand was taken by a college educated businessman when he was asked about his opinion on marital rape exemption-"I think too many women use sex as a weapon already. Why give them another round for their arsenal? Since a woman's ultimate weapon is sex; a man's ultimate weapon has to be his strength".²⁴⁵

Difficulty to Prove Argument: Legal scholars opine that such acts if criminalized would become too difficult to be proved because it talks about sexual intercourse in marriage which is a matter of a private space shared by two individuals. Since husband and wife anyway indulge into sexual intercourse within marriage, the consent of wife becomes problematic to establish.

Reasoning for Criminalization of Marital Rape:

Only some will be persuaded by the justifications given to Marital Rape Exemption. In today's reality women are becoming independent and gaining heights. They are no more a property for someone else, in fact they themselves

²⁴³ *Ibid.*

²⁴⁴ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

²⁴⁵ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford law Review, pp. 677-709 (vol. 48).

hold property, enter into legally binding contracts. Husband-wife "unity"²⁴⁶ is no more existing in the real world. Only people with great disabilities of a cognitive mind would agree to any such 'Unity theory'.

If it is considered that a woman is under contractual obligation to provide her husband with whatever he desires and if one concedes that a woman agrees to make herself sexually accessible at all times to her husband, it must then be asked what the proper remedy is for breach?²⁴⁷

Usually the remedy for breach of contractual obligations is to compensate for damages. Also it's a set rule that no specific performance can be claimed of contracts based on personal skills or personal services. Why is then a marriage contract an exception to such rule?

Presumption for deciding on these questions must be against forced performance of wife's contractual obligation.²⁴⁸

Contracts are framed out of a general rule of "Parties Autonomy"²⁴⁹ by which the parties are at liberty to decide the terms and conditions of the contract which will bind them and give rise to certain rights and duties.

However some of the terms of marital contract arguably the most important of them, are not negotiable by the parties even though the general rule in contract law is that the parties are masters of their agreement.²⁵⁰

It is wrong to say that less harm is caused to the woman suffering from marital rape or that the harm caused is not sufficient enough to criminalize such behavior. A person can be harmed in the lowest sense when his or her interests are set back.²⁵¹

To have one's condition deteriorate and worsen further is a harm enough to infringe someone's rights. Such arguments fail to acknowledge the gravity of non-consensual sexual intercourse in a marital relation. Nothing seems to be more traumatic to a woman than the societal rejection she faces because of being a "bad woman"²⁵².

²⁴⁶ The single entity of husband and wife after marriage.

²⁴⁷ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

²⁴⁸ *Ibid.*

²⁴⁹ Parties to the contract are at liberty to decide the terms and conditions of the contract, they can make the contract according to their own will.

²⁵⁰ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

²⁵¹ *Ibid.*

²⁵² A woman who does not fulfill her marital obligations and is not able to make up to the expectations of her husband.

It must not be ignored that spousal sexual abuse is rape accompanied with domestic violence.²⁵³ Tolerating such disgraceful behavior and living with a threat of their life being in danger is no answer to the abuse faced by women living in their matrimonial homes.

Furthermore, marital rape victims are not only more likely to be murdered or to be ill-treated by their husbands but also to murder their husband's in self- defense.²⁵⁴ Hence such behavior not only injects criminals in the society in fact also reproduces them.

In response to the argument that prosecution for marital rape threatens to undermine marriage, there are other offences in marriage too for which the law allows prosecution like adultery, battery etc. Presumably those prosecutions also threaten to undermine marriage.²⁵⁵

If those prosecutions are considered not to undermine marriage relationships then why is prosecution against marital rape considered to do so? The relationship (as whole) is being valued more than the wife (one of its parts), such claims may not appeal to those who value individual autonomy.²⁵⁶

To think that the marriage could still survive by way of reconciliation even after such harsh abusive behavior being inflicted on one part is being irrationally optimistic.

Law is meant not only to stop wrong being done on people but also to prevent such harm from being caused. Its time when law should even get into private spaces of people to prevent such harm from being caused. The law does and should intervene and intrude when one spouse assaults in any way, batters or kills the other.²⁵⁷

It is assumed that marital rape is hard to be proved but should that in anyway be a criteria for not criminalizing a wrongful behavior. There are two important questions in this regard: What acts can be criminalized? And what evidences can be produced to prove such criminal behavior? The answer to the second question must not affect the answer to the first one.

There are other offences too which have very few witnesses, offences where consent of the parties is in question, offences which occur in private spaces- If they can be criminalized, why not marital rape?

²⁵³ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford law Review, pp. 677-709 (vol. 48).

²⁵⁴ *Ibid.*

²⁵⁵ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

Because spousal rape also includes instances of domestic violence in various forms of cruelty, it has wrongly been put forth as a subset to domestic violence laws. Only in some percentage of abusive marriages, rape also had a role to play. Thus locating spousal rape within the domestic violence context is both over and under inclusive: It includes marriages in which rape plays a minor role, while ignores marriages in which rape as opposed to non-sexual battering is the crucial problem.²⁵⁸

FINDINGS

Status of Marital Rape in India

The UN population Fund states that more than 2/3rd of married women in India, aged between fifteen to forty-nine have been beaten, raped or forced to provide sex.²⁵⁹ Indian laws do not protect a woman from any offence called marital rape; it is legally non-existing. Despite so much of debate, conscious discussions on the matter and so much of cruelty accompanying sexual violence one of the most humiliating acts is not a crime in India. In (2005) a total of 6,787 cases were recorded of women being murdered by their husbands or their husband's families.²⁶⁰ Yet there exists no law on this matter, a woman has to protect herself on her own.

Section 375 of the IPC expressly states in its exception clause-“sexual intercourse by a man with his own wife, the wife not being under 15yrs of age is not rape.”²⁶¹ The scope of this section needs to be widened. The 172nd law commission report in one of its recommendations said that marital rape: explanation (2) of section 375 should be defeated, thus marital rape should be termed an offence.²⁶²

Traditionally Indian culture has taken women to be submissive and has wanted them to be a homemaker.

Even civil provisions take a very narrow view of sexual violence against women. Domestic Violence Act, 2005 also kept marital rape out of its purview. It disregards sexual abuse only if it threatens life or is capable of causing grievous hurt, it has nothing to do with the freedom or want of a woman.

Provisions of divorce under Hindu marriage Act, 1955 includes rape as one of the grounds available to women for claiming divorce from husbands, but only when such rape was committed by the husband on some other woman and not on his wife.

²⁵⁸ Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal rape and Reconceptualizing its Prosecution*, Stanford law Review, pp. 677-709 (vol. 48).

²⁵⁹ Priyanka Rath, *Marital Rape and the Indian Legal Scenario*, India Law Journal (2007).

²⁶⁰ *Ibid.*

²⁶¹ Indian Penal Code 1860, Universal law Publishing Company (ed. 2014).

²⁶² Priyanka Rath, *Marital Rape and the Indian Legal Scenario*, India Law Journal (2007).

Thus the doors of Indian legal system for marital rape victims appear to be wide shut. This is the precise reason of less number of cases being reported in this respect despite a large number of women actually suffering such abuse.

CONCLUSION

Women are that half of the society's population which give rise to the other half, they should in all circumstances be protected from any kind of abusive behavior even if it comes from their known ones

Rape centers around the question of consensus only and it should be judged only on this basis no matter if it occurs in a marital relationship or outside the marital relationship. There should not lie any distinction between rape and marital rape.

Why should the law presume that there will be sex in marriage, let alone that it will be at the discretion of the husband, why not make the opposite presumption- that there will be no sex unless and until it is agreed by both the parties to the marriage.²⁶³

I find no valid justification in viewing non-consensual sex between married couples to be different from that of non-consensual sex between strangers. Nobody has a right to force his will upon any other person.

Law by exempting such criminal acts expressly for no good reason provides these offenders with an upper hand, it should rather aim at bringing the right change in the society.

The Law BRIGADE

²⁶³ Keith Burges- Jackson, *Wife Rape*, University of Illinois Press, Public Affairs Quarterly, pp. 1-22 (vol. 12).