

AN ANALYSIS OF MARITAL RAPE

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INTRODUCTION

Marital Rape refers to rape committed when the perpetrator is the victim's spouse. The definition of rape remains the same and the essential ingredient to constitute the offense is lack of consent. The burden to prove the lack of consent usually rests on the victim. In some cases, where a minor is involved, it is presumed that consent did not exist as minors are incapable of granting consent as per law. In certain other cases, the consent is presumed to exist i.e. when the perpetrator and victim are married. In such instances, the idea of marital rape becomes anti ethical. At present, fifty-two countries have laws recognizing that marital rape is a crime.¹ In some other jurisdictions including India, marital rape is not a crime. Marital relationship between the perpetrator and the victim prevents the application of laws relating to rape to the offense of marital rape. The reason for not penalizing the offense of marital rape is many folds. The first reason stems from the understanding of wife as subservient to her husband. Women were treated as chattels to their husbands and were not given any rights in marriage. The second reason states that once married, the identity of the woman is merged with that of her husband and the law did not give a woman, personality independent of her husband. With the development of feminism at the post 1970s, these reasons were no longer at the forefront of the advocacy to not criminalize marital rape. The present justification for not criminalizing the marital rape is on the basis of implied consent theory where there is an irrefutable presumption of consent when a man and woman enter institution of marriage. And, criminal law must not interfere in the marital relationship between husband and wife which is a private sphere and no one can penetrate into

This paper, firstly analyses the history of the marital rape in Indian legal system; secondly, it analyses its interplay with the constitution and the concept of alternate remedy;

thirdly, it analyses how marital rape is also turned a blind eye in procedural law and how the argument of Right to Privacy impacts in the criminalization of the marital rape.

DEVELOPMENT OF LAW RELATING TO MARITAL RAPE IN INDIA

The Indian Penal Code in section 375 criminalizes the offense of rape. However, in exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and a wife. Thus, a wife does not have recourse under criminal law if a husband rapes her. The section 375 reads as,

“375. A man is said to commit “rape” if he—

Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, urethra or anus of a woman or makes her to do so with him or any other person; or

Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any[~] of body of such woman or makes her to do so with him or any other person; or

Applies his mouth to the vagina, anus, and urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.—against her will.

Secondly.—without her consent.

Thirdly.—with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—with or without her consent, when she is under eighteen years of age.

Seventhly.—when she is unable to communicate consent.

Explanation 1.—for the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist the act of penetration shall not by reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

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”.

The exception 2 does not state any reason for exclusion of sexual intercourse between a man and his wife from the purview of rape. Since the crux of the focus of the section is ‘consent’, it is possible that an irrefutable presumption of consent operates when the relationship between the perpetrator and the victim is that of marriage. It can also be assumed that the legislative intent to exclude the marriage rape from the purview of section 375 in light of the sanctity the institution of marriage has obtained in our society. Yet, a specific form of marital rape i.e. non-consensual sexual intercourse or sexual activity when the husband and wife are living separately on account of judicial separation otherwise is criminalized under section 376B of the Indian Penal Code. As section 375 is based on presumption of consent, section 376B makes it clear that consent cannot be presumed when the husband and wife are not living together. There has been considerable debate around this proposition and in 172nd Law Commission Reportⁱⁱ, it was contended that when other instances of violence by husband towards wife was criminalized, there was no reason for rape to be shielded from the operation of law. This recommendation was never accepted as it would lead to excessive interference with the institution of marriage. This report sheds light on the interplay between marital rape and the sanctity of marriage.

Later in 2012, a committee constituted under Justice J S Verma advocated for the criminalization of marital rape. The committee published the “Report of the Committee on Amendments to Criminal Law”ⁱⁱⁱ and one of the suggestions given in the committee’s report is the criminalization of marital rape. This suggestion was made by way of twofold recommendations. Firstly, it recommended the deletion of exception clause; Secondly, it

recommended that law must specifically state that marital relationship or any other similar relationship is not a valid defense for the accused or relevant while determining the existence of consent and it should not be considered as a mitigating factor during sentencing. This report stated that the immunity granted in cases of perpetrators being husband of the victim stemmed from an outdated notion of women being property of men and irrevocably consenting to the sexual needs of the husband. Yet, the Criminal Law (Amendment) 2012 did not consider the recommendation of the Verma Committee Report and the position of marital rape remains unchanged. When the Standing Committee^{iv} reviewed the 2012 amendment act by way of public consultation, it was again suggested the deletion of exception-2 to section 375. The Standing Committee refused to entertain the suggestion by stating that “entire family system will be under greater stress and such criminalization would do more injustice. Moreover, there exist sufficient remedies which the family could deal with even under IPS as cruelty u/s 498A”.

Again in 2015, this argument was reiterated by the Ministry of Home Affairs as a reply to a bill proposed by a Member of Parliament which aimed at criminalizing marital rape^v. The press release stated that “the concept of marital rape, as understood internationally, cannot be applied in Indian context because of the mindset to treat marriage as sacrament”.

This attitude towards criminalization of marital rape is not restricted to legislature alone and extended to judiciary. Although in no cases the constitutionality of exception 2 to section 375 was expressly upheld, there have been instances when the courts have simply avoided the question and dismissed petitions to strike down this exception^{vi}.

LAW RELATING TO MARITAL RAPE IN OTHER COUNTRIES

In the US, until 1993, the general rule was that a husband could not be convicted of the offence of raping his wife as he is entitled to have sexual intercourse with this wife which is implied under the contract of marriage. After 1993. Marital rape became an offence in all fifty States at least under one section of the sexual offences code. However, only a less number of States have abolished the marital rape exemption in its entirety while it remains in some portion in rest of the States. That is to say, in most of the American States, resistance requirement still applies. In 20 States and the District of Columbia, the husbands are not granted any exemption from rape prosecution. In the remaining 30 States, there are still some exemptions given to the

husband. For instance, when the wife is vulnerable and is legally unable to give consent, the husband is exempt from rape prosecution. The existence of some spousal exemptions in the majority of States indicates that rape in marriage is still treated as a lesser crime than other forms of rape. Most importantly, the existence of any spousal exemption also shows an acceptance of archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex^{vii}.

In England, earlier as a general rule, a man could not have been held guilty as a principal of rape upon his wife as wife cannot retract the consent to sexual intercourse which is a part of contract of marriage. The Sexual Offences Act, 1956 defined unlawful sexual intercourse as an illicit intercourse outside the bond of marriage. This position was changed in 1991 when the House of Lords in *R v. R*^{viii} held that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common law fiction which no longer represents the position of wife in present day society and so it should no longer be applied. In this case, husband was convicted for raping his wife as a result of forced intercourse with her while they were staying apart under a decree of judicial separation. Justice Byrne reasoned that in such circumstances, the wife's consent to sexual intercourse can be said to have been revoked. This case also left it open for interpretation as to whether consent can be said to have been revoked only when there is a decree of separation or when the husband and wife are separated de-facto. Corresponding amendment to the statutory law was made through section 147 of the Criminal Justice and Public Order Act, 1994 and this judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*^{ix}.

In New Zealand, the marital rape exemption was abolished in 1985 when the present section 128 to the Crimes Act, 1961 was enacted. The Section provided that a person can be convicted of a sexual offense in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred. Further, the fact that the parties are married or have been in continuing relationship will not warrant a reduction in sentence. There is now no distinction in principle to be drawn between sexual violation in marriage and outside marriage^x.

Some other countries include Mexico which made domestic violence punishable by law. If convicted, marital rapist could be imprisoned for 16 years. In Sri Lanka, recent amendments to the Penal Code recognize marital rape but only with regard to judicially separated partners and there exists a great reluctance to pass judgment on rape in the context of partners who are actually living together. Certain countries have taken a stronger stance with respect to marital rape. For instance, The Government of Cyprus, in its contribution to Special Rapporteur, reports that its law on the Prevention of Violence in the Family and Protection of Victims 1993 clarifies that “rape is rape irrespective of whether it is committed within or outside marriage”.^{xi}

THE EXCEPTION CLAUSE AND THE CONSTITUTION

The Judiciary, by its series of decisions in cases involving marriage, has created two views with respect to the fundamental rights and marriage. Firstly, there is a creation of an impenetrable sphere known as ‘marital sphere’ where the constitutional law has no application. That is to say, though rape is considered to be a violation of fundamental rights of the women, the same can neither be redressed nor enforced as it comes within the marital sphere. Traditionally, it was believed that law could not regulate certain private affairs of the family. However, this was now understood to be a misplaced notion of the role of law^{xii}. Frances Olsen in the ‘Feminist Critique’^{xiii} argues that the notion of private space creates an area where those who are harmed do not have recourse under law. When the Domestic Violence Act 2005 and section 498A of Indian Penal Code provides various civil and criminal remedies to women who are victims of violence in marital sphere, it can logically be inferred that section 375 can also be judged on the basis of constitutional law.

REMEDIES THAT EXISTS IN LAW TO PROVIDE REDRESS TO VICTIMS OF MARITAL RAPE

One of the arguments against the criminalization of the marital rape is the existence of alternate remedy

CRIMINAL LAW

The most relevant provision often cited for viable alternative to actual criminalization of marital rape is section 498A of Indian Penal Code which is introduced to deal specifically

with cases of cruelty against women. But, there is a question as to its adequacy to address the problem. There is a marked difference between the offense of cruelty and rape and so the section 498A would not be equipped to deal with cases rape. Feminist literature has long understood the importance of recognition of rape as a separate crime^{xiv}. It is definitely a form of cruelty. However, this cruelty is distinct from physical and mental violence. It has complex patriarchal and power structures attached to it. This is indicative form the treatment of rape in criminal statutes distinct from grievous hurt or assault. A reform in rape law is a positive indication of betterment of women in the society^{xv}.

The purpose of criminalizing marital rape is not only that the perpetrator can be put in jail but also that the perpetrator should be prosecuted in law for the crime committed. It is unnecessary to boil down the women's rights by finding alternate remedies to seek justice when the actual mechanism is constitutionally mandated. Even though in practice, the victim of marital rape might opt for alternate remedies, it does not have any requirement that marital rape in itself should not be criminalized. Moreover, just because rape is separated from cruelty does not encourage the patriarchal understanding of chastity of women. In the offense of rape, the perpetrator has violated the law and not the victim. The Victim has not contributed in any way to the commission of crime.

Another problem with this alternate remedy is that the threshold for conviction under cruelty is very high and is not enough that the conduct of the accused is willful and offensively unjust to women, but it is also necessary that the degree of intensity of such unjust conduct on the part of accused is likely to drive the victim to commit suicide or cause grave injury or danger to life or health. ^{xvi}. This was said in a case where the husband used to have forced sexual intercourse with his wife and inserted his fingers in her vagina causing severe pains and bleeding which made the victim unconscious. Even in this case, the court did not charge the accused u/s 498A for want of sufficient evidence. Moreover, to be convicted under section 498A, the conduct has to be done repeatedly or over a long period of time. Therefore, it is not possible to convict when the act of forced sexual intercourse is done one or two times. Lastly, the maximum punishment u/s 498A is only three years while the maximum punishment for rape is life imprisonment.

CIVIL LAW

The remedies that exist in civil law hold an uneasy place in discussions centered on gender-based violence. Focusing on civil remedies will only aid the public and private dichotomy since it makes the gendered violence as a matter between the perpetrator and the victim as opposed to acts of violence against state^{xvii}. At the same time, it is reasonable to discard the important civil remedies as it allows the women to do something rather than relying only on criminal justice system i.e. give women agency to choose the recourse and this should help women move outside the private structures. The need for a civil law remedy can be understood from the fact that marriage entails a relationship between two persons and is governed by family law. Hence, it is immensely important to have a corresponding civil remedy while criminalizing certainty act. Having said the importance of civil remedies along with the criminalization of marital rape, question arises as to the efficiency of existing civil remedies under the family law which governs marriage.

CONCLUSION

The debate of marital rape is crucial in establishing substantive equality for married women who are otherwise neglected in public and legal discourse. It is crucial to recognize that this is a major lacuna in criminal law at present, defeating the constitutional provisions that grant equality and autonomy. There have been stiff political, legal and cultural arguments against criminalization of marital rape. Though the legislative intent behind the exception 2 to section 375 is not utterly unreasonable, sufficient consideration must also be given to the other side of arguments which also involves many stakes. It is true that marriage is the basic institution of society and it warrants protection from malafide allegations and complaints. But it is to be noted that not only the marital rape affects the integrity of marriage but also the offense of cruelty which is criminalized. There have been many instances where the provision has been misused to the disadvantage of men and yet, the provision still stands. The reason is the sufficient precautions and guidelines issued by the legislation and judiciary with respect to the complaints u/s 498A. The same strategy can also be followed while criminalizing marital rape so as to achieve a balance between the integrity of marriage and the protection of women's rights. Moreover, the constitutional imperative towards upholding women's rights are also applicable in cases of marital rape and it can no longer be avoided by citing private sphere has reason. The alternate remedies provides act only act as an aid in delivering justice to the offense

of marital rape but it cannot be the justice itself. Hence, criminalization of marital rape with sufficient safeguards protecting the integrity of marriage is the only way to deliver absolute justice to women.

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