

MARITAL RAPE: A DECRIMINALIZED CRIME

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ABSTRACT

Recent tragic events have often led to the citizens raising questions over the various aspects of law and how these aspects are facilitating the addressing of crimes, such as that of rape, at the ground level to ensure justice. With rise in the awareness levels amongst the citizens, the issue of marital rape was also raised, as it remains highly unaddressed in the country despite the continued increment of the crime level. This has sparked various debates throughout the country as to why the status of such acts still remains non-criminalised in the sovereign nation. However, the debate is not only limited to the contemporary scenario but also demands inspirations to be drawn from an allrounder perspective to adequately address the need for the amendment or in other words the reformation of the system that deals with this crime. Therefore, in this paper the author primarily addresses what is rape and marital rape both in layman terminology as well legal terminology in India. Further it tries to review its impact and status from various perspectives, i.e. historical, social, political and legal, to address the issue; how its decriminalisation is being tackled by the society and how this can be further enhanced for a greater step towards a welfare society.

Keywords: Rape, Marital Rape, IPC, History of Marital Rape, Society & Marital Rape, Government of India, The Women and the Child Ministry, Criminal Law (Amendment Act) 2013, Domestic Violence Act 2005, Law Commission, Supreme Court, Constitution of India.

INTRODUCTION

Rape is defined as an “unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception”ⁱ.

In the past decade, time and again the citizens have witnessed several rape cases that have shook the entire nation. While the revelation of such cases has led to noteworthy metamorphoses in the rape laws of India, at the same time, they have also broached awareness amongst the citizens to bring up several other bone of contentions, pertaining to rape, that are often eschewed.

In India the legal definition of rape is propounded under Section 375 of the Indian Penal Code (hereinafter referred to as the IPC). This section lays down 6 circumstantial descriptions, and having sexual intercourse under these state of affairs by a man, with a woman, would account for the act of rapeⁱⁱ. IPC, the Criminal Procedure Code (1973)ⁱⁱⁱ and the Indian Evidence Act (1872)^{iv} are some of the laws in India that consist the provisions for rape. However, within Section 375 of the IPC, exception number 2^v talks about marital rape, a manifestation of crime that has persevered but still remains unaddressed in the country. This calls for the need to cognize as to why this law still remains non-existent in our sovereign nation and why a change needs to be brought for the same.

Therefore, to start off, it is essential to understand the quintessence of this law by discerning it from a historical perspective which shall further facilitate in the understanding as to why laws against marital rape are ‘needed’ to be instigated in the country.

HISTORICAL PERSPECTIVE

The impede in the legalisation of marital rape, in most parts of the world, can be attributed to the insight that ‘men are superior to women’. As a concomitant of this, the issue of marital rape victims was ignored not just legally but culturally as well, for a very long time. However,

eventually the movement against Marital rape and its criminalisation started in the United States.

The first ever documented statement on marital rape can be traced back to 1736 by Sir Mathew Hale (in *the History of the pleas of the Crown*), who commented that ‘a husband can never be held guilty of rape due to a mutual matrimonial consent, that cannot be retracted, by virtue of marriage being a contract’^{vi}. It was quotidian for the people to conjecture the husband and wife as a single entity after marriage. Thus, taking away all the individual identity/rights of the women, which now rested with the husband^{vii}. The implication of this was that the ‘husband enjoyed a substantial right over his wife’s personhood’. Consequently, legal authorities became highly antipathetic towards enforcing any civil or criminal charges in case of marital relations^{viii}. Ergo, women were considered as a property of the men and the ideology of sexual relations being private in nature further corroborated the ignorance of the concept of marital rape within the social and legal realm. This notion, of the ‘right-less’ status of the wife, was substantially challenged when in the early 19th century the importance of individual rights was realised, which eventually started gaining more and more value^{ix}. However, the social status granted to marriage, gave it a privileged status as a result of which it enjoyed privileges above the law as well.

After almost over a century, with the rise in the movement of feminism, the theory of women being equal to men was advocated. This did not affect the issue of marital rape directly, but it did provide contributions by ensuring certain other legislations that changed the marital status of the women to some extent^x. Laws were introduced, where the wife could resolve her marriage contract; there were modifications in the rape and divorce laws. These laid down the basic framework for the people to think that if matrimonial contract could be resolved, then the consent of sexual intercourse was also revocable^{xi}.

Gradually in 1974, one of the most prominent leaders, Laura X, stepped up for criminalization of marital rape. This movement gained further momentum in 1978, when a husband named John Rideout was prosecuted for marital rape. Though he was acquitted, this trial ensured a heavy impact for further continuation of the movement. People were influenced by the ideology of Laura X to an extent that this movement gained support in places such as New York, Florida, Virginia, etc. This ensured gradual shift of the legal status as a result of which in 1986, the historic, The Federal Sexual Abuse Act was enforced which criminalised marital rape on all

grounds. Further in 1995, all countries at the United Nations Women Conference voted for a resolution that held and recognised that the wives do have the right to refuse sexual demand of the husband^{xii}.

All of this together, led to the triumph of the first movement against marital rape. This historical account, gives us an overview that the two notions, women not being equal to men and privacy under matrimonial contracts, were broadly the main reasons behind the non-criminalization of Marital Rape, the status of which was ultimately changed. However, the question that arises here is that, why is it still not criminalised in India, a country that does believe in equality for all its citizens and also has legislations against violence under matrimonial contract?

MARITAL RAPE & THE LAWS IN INDIA

Marital rape is defined as an unwanted sexual intercourse by a man with his wife, which is obtained by force/threat of force/use of physical violence, when she is unable to give consent. In short, a non-consensual act of violence by a husband against a wife, where she is sexually and physically assaulted^{xiii}. In India, under Section 375 of the IPC, a slight acknowledgement of marital rape is given under exception number 2, which states that “*sexual intercourse by a man with his own wife, the wife, not being under 15 years of age, is not rape*”^{xiv}. Thus, the basic denouement that can be drawn from this provision is that if a man rapes his wife, who is above the age of 15, then it accounts for no crime. The creation of such a distinction merely on the basis of age group, in itself is discriminatory. Where at one hand the law does acknowledge the presence of marital rape as a form of rape, a heinous crime, at the same time it denies to grant justice to victims for the same crime who are above the age of 15 years.

Like it is said that the existence or non-existence of any law have the role of multiple factors behind it, the same shall be applicable in this case too. Thus, it becomes imperative to analyse the status of marital rape in India from a holistic perspective, which shall be done in the following sections.

ROLE OF EXTERNAL FACTORS IN MARITAL RAPE IN INDIA

Role of Society: Denial for Change

The introduction of a new law or the amendment of an already existing one takes place when it is felt that the contemporary issues demand one. One of the major encumbrances behind marital rape not being able to gain the status of a crime is the way the society looks at it. As highlighted in the historical perspective, the mentality of the people has remained stagnant at the fact that women lose their original and individual identity post marriage, thus, making people believe that women have no say in case of marital rape.

While ensuring sanctity of marital relations by not interfering in personal issues, which places marital rape also under it, what people often forget is that marital rape is nothing but an ‘extreme form of sexual assault’ and if domestic violence is recognised as a crime, then why this extreme form of assault is ignored?^{xv}. The NHFS-4 reported that 31%, i.e. nearly 1 out every 3 girls, has been subjected to emotional, physical and sexual violence by their own husbands^{xvi}. Yet, most of the people in the society do not believe in the concept of marital rape. This highlights how women stay silent despite facing atrocities in the name of preserving family honour and social support, and most importantly the fear of losing their economic stability which is given by their husbands, as the husbands will simply abandon them. In addition to this raising voice against abuses such as marital rape would be meaningless as it does not have any law for it, thus further providing no incentives for women to raise their voices and fight against such evils^{xvii}.

The theory of a wife being an ancillary to the husband has been imposed to an extent that the victims are unable to recognise themselves as the victims at the first place which further leads to them not being able to come out as well^{xviii}. As a result of all this, they continue tolerating the violence and assault under the banner of marriage being a form of ‘sacrament’ that needs to be preserved.

The reason highlighted for marital rape not being criminalised historically is something which is upheld in today’s India. Setting an age bar, that too below 15 when the legal age of getting married is 18 itself, highlights as to how not just the society but even the authorities don’t want to take the requisite action. Marriage is a form of contract that must be preserved but at the

same time it should be ensured that such preservation is done to an extent where no one is suppressed and doesn't face any form violence. Especially, the society needs to not ignore the presence of this evil in their very own surroundings and further help the victims to take a stand.

Politics and Marital Rape: Leadership or Ignorance?

The role of politics in any form of governance or administration is often seen as an obstruction in terms of accomplishment of the aspired goals. Here, the role of politics can be attributed as the role of the government or the leaders/representatives at the national level, that are in charge for laws to come into existence in the country. So, are the leaders actually an obstruction in the process of marital rape being criminalised?

In one of the recent cases, the union government expressed its stance by stating that criminalisation of marital rape would destabilise the institution of marriage and will actually provide more grounds for the wives to 'harass' their husbands^{xix}. It is the common notion of the government that criminalisation of Marital Rape will deeply harm the 'family structure' and that there must be no law against marital rape as marriage is a 'sacrament'. Besides this, the government also stated its belief, that even if criminalised no cases shall be reported against it^{xx}.

The Women and the Child Ministry held that the criminalisation of marital rape is something that won't be applicable in the Indian scenario, despite the fact that the National Health and Family Survey (NFHS-4) 2015-16, showed that 5.4% of the women do face marital rape. It must also be noted, that even this figure will be far from the real picture as people do not disclose easily about such acts^{xxi}.

The leaders claim that criminalisation would be nothing but 'blindly following the western culture' as India is unique and has its own set of problems^{xxii}. When surveys are depicting high rates of marital rape, when the public is raising its voice against the provisions for marital rape, then why is marital rape perceived as a threat? Or is it an attempt to not disclose the reality of the Indian society, where it is commonly believed that the stability of marriage is dependent on a woman opening her mouth against unjust acts of her husband?^{xxiii}

Time and again the country witnessed news with regards to misuse of laws, that are created to provide protection or remedy to its citizens, with regards to crime. However, that doesn't take

away the fact that justice is still provided to the ones who actually need it. If the reason behind marital rape not being criminalised is that it will be used to harass the husbands, then the fact that it may also be used by thousands to seek justice shouldn't be ignored. If non-criminalisation of marital rape is occurring to prevent the destabilisation of the family structure, then letting a family structure exist with such inhumane activities within itself, is in turn destabilising the entire social structure of the country.

Legal Aspects with Regards to Marital Rape

Marital rape and provisions with regards to it do find their existence in various statutes, laws or reports. However, the manner in which these laws have addressed this issue is often criticised. Thus, they call for analysis as to how the issue is being addressed and if required then how should it be changed.

IPC AND CRIMINAL LAW (AMENDMENT ACT) 2013

As stated, earlier exception under Section 375 stated that any sexual intercourse, where the wife is not less than 15 years of age, will not be considered as rape^{xxiv}. Simultaneously under Section 376 that prescribes punishments for the offence of rape, in clause 1 states that a man won't be punished for rape until his wife is below 12 years of age in which case, he shall be punished for term which may extend only to 'two years or with fine or both'^{xxv}.

The Criminal Law (Amendment) Act, 2013, which amended section 375, under Section 9 talks of marital rape and the condition for determining marital rape remained the same. However, changes were made with regards to Section 376 where in Section 376(2)(i) states that 'commission of rape on a woman who is under the age of sixteen' shall be punished with imprisonment not less than 7 years and may also be extended to life imprisonment along with fine^{xxvi}.

The question that arises here is that when the legal age of getting married is 18 in India, then why is prescription of punishment limited to 15 or 16 years of age? More importantly, why is marital rape continued to be recognised only when the wife is under 15 years of age?

The most fundamental point to be noted here is that, these amendments themselves outline as to how marital rape is not given recognition at all in the Indian Legal setup. When rape is rape, then why do we have an age group to determine whether rape exists or not?

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005

Chapter 2 of the Act discusses as to what shall be constituted as domestic violence in the Legal domain. Section 3(a) talks about sexual abuse. Simultaneously, the explanation provides a set of acts that shall constitute sexual abuse^{xxvii}. Where at one hand one can claim that this section can include marital rape in the form of sexual abuse or under the broad ambit of domestic violence, however, this section or no other section explicitly categorises marital rape or provides a punishment for same. Thus, again highlighting ignorance of existence of marital rape and also according it the status of a crime.

LAW COMMISSION REPORTS

A) 42ND REPORT

The first step to deal with the issue of marital rape was highlighted in the 42nd law commission report. It primarily presented two view points on the issue at hand. Firstly, that sexual intercourse between a husband and a wife, whether with consent or without, during judicial separation cannot be categorised as rape^{xxviii}. This showed as to how, in the commissions view, the mere living of a husband and wife together, even during, judicial separation, completely denies the possibility of marital rape, whether the intercourse takes place without the consent of the wife. Secondly, in this report the committee also spoke about the exception under Section 375. The report held that sexual intercourse by a husband with a wife aged between twelve to fifteen years of age should be taken out from the section of rape and be placed under some other crime. This suggestion highlighted the commissions reluctance to categorise marital rape as rape, rather, preferred categorising it as a form of sexual comportment^{xxix}.

B) 172ND REPORT

The 172nd report primarily focussed on deliberating over the exception clause^{xxx}. Where at one hand points were raised with regards to the fact that when forms of violence by a husband against his wife are criminalised, then why is rape being left out as a whole? The Law Commission rejected these points on the sole ground that this will further only lead to more interference in the 'marital institution'. Thus, again showcasing how sanctity of marriage is affected by marital rape, in the Indian perception^{xxxi}.

CONSTITUTION OF INDIA

Part III of the Constitution of India guarantees certain Fundamental Rights to its citizens. These fundamental rights are given to the citizens in order to ensure the essentials required to have a basic dignified life and in accordance with Article 13^{xxxii}, any law which is contradicting these fundamental rights shall be declared void. While analysing the situation as to how marital rape and its existence has been ignored in various statutes, there also comes a realisation that this results in violation of the fundamental rights of the wives.

Article 14 of the Indian Constitution guarantees equal treatment to all its citizens in front of the law prohibits any form of discrimination until it is based on reasonable classification. Reasonable classification includes the test of intelligible differentia, wherein differentiation must be created between two groups who share a substantially different position in the society, and rational nexus, where the classification must have an objective sought to be achieved by the respective statute^{xxxiii}. The exception clause with regards to marital rape violates Article 14 of the Indian Constitution.

At one hand where section 375 provides protection to women against the evil act of rape and claims it as an act of violence that disregards an individual's rights, on the other hand it denies the same protection to married women. Thus, the classification primarily ignores the possibility of sexual assault on the basis of marital status^{xxxiv}, which clearly isn't a reasonable classification. The IPC was framed in 1860, during the British era, and at that time the wife was considered inferior to the husband, wherein they both were considered as a single identity dissolving all individual rights of the wife. The exception clause has derived its reasoning from this doctrine^{xxxv} and thus, does not fit in the independent India set up wherein every single citizen is provided with certain set of rights.

Apart from Article 14, it also held that non criminalisation of Marital Rape violates Article 21 of the Indian Constitution, wherein 'no individual shall be denied of his life and personal liberty except according to the procedure established by law'^{xxxvi}. It is claimed that the exception infringes upon Article 21.

In India, 'the right to live with human dignity' comes within the ambit of this article. This right is guaranteed to prevent the exploitation of a particular section for which the state needs to look out for prevention of violation of fundamental rights of a person^{xxxvii}. This right is one of the

most inherent quality of right to life that recognises the autonomy of an individual^{xxxviii}. The Supreme Court has also highlighted, in the case of *Sakshi vs Union of India*, that rape as a crime violates the right to life as it adversely affects the autonomy and integrity of women^{xxxix}. Rape is nothing but an act against the entire society just to degrade the status of a woman. The Supreme Court has also held that the right to make choices related to sexual activity with regards to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution^{xl}. Therefore, marital rape is nothing but an act of aggressive sexual assault against a wife by her husband, against the notions of basic fundamental rights which are necessary to ensure a basic dignified life to any citizen in the country.

ANALYSIS & CONCLUSION

History has given its own reasons for the end of the legal status of marital rape. While having a closer look at the inspirations drawn, it has primarily identified that every individual is unique and deserves a set of personal/individual rights, that shall not be legally allowed to be infringed upon. Marriage as an institution is a sacrament, a form of pure relation between two people. However, in no way this sacred institution must be allowed to take an individual identity or let the other dominate over the basic rights of an individual. Infringing upon the privacy of the institution of family must be prevented, however in cases where the Right to Life in itself is violated, then it calls for action by the Judiciary in the sovereign nation.

The role of society and politics has been crucial for non-criminalization of marital rape. Where at one hand society has completely denied the existence of rape in the institution of marriage, on the other the political leaders deny the possibility of cases coming up as a whole. The notion of male domination has been absorbed to an extent that raising voice against heinous crimes such as rape, that defy the autonomy a wife is entitled to by virtue of being a citizen, is rather seen as his own right over the wife. However, if crimes won't be reported or if marital rape doesn't exist then why at the first place was sexual assault introduced as a form of domestic violence? Then why do so many surveys highlight the same high levels of existence of marital rape in the Indian households? There is a need to understand that marital rape does exist, a heinous form of violence against the identity of a woman. There is a need to understand that

the concept of consent shouldn't be limited to a particular age, rather consent is one of the most essential rights in itself accorded to every individual. A wife deserves to have the same.

Historically identified reasons are now being exposed in India, where the government has the same claims, that the husband has the right to do anything with his wife, with or without consent, and also that criminalisation of marital rape will be nothing but breaking down of the institution of family. However, what the government needs to understand that the demand for marital rape criminalisation isn't just about westernization rather, it is a demand to restore the autonomy, privacy and integrity of the wife, that is violated by the husbands under the banner of this crime. The NDA government paved way for ban on instant triple talaq to protect the interests of the women, the same government also believes in bringing up a Uniform Civil Code which shall also work towards ensuring equality to all its citizens, irrespective of religion. Therefore, it still remains unclear as to when these provisions are banned/will be introduced to restore fundamental rights over spiritual belief then why is marital rape left as it is?

When the Court and the government claim that there should be no intervention in the marital relations, at the same time it is also essential to focus that the supreme right is the fundamental right that every individual must enjoy in this democracy and if this fundamental right in itself is getting violated then any provision must not have a stand in this country because whether a woman is married or not she has the right to be entitled with the right to give consent. Historical doctrines behind the establishment of a law need to be amended to suit the needs of the nation today. The society needs to realise the existence of such heinous crimes which cannot be denied on the mere existence of a matrimonial status and the government and courts need to understand the basic rights of every woman. Thus, the right to maintain her individual identity by virtue of being a citizen of this nation.

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