

A CRITICAL STUDY OF MARITAL RAPE IN INDIA

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Abstract

Rape refers to sexual intercourse with someone irrespective of their gender without their consent. It is an extremely derogatory, inhumane and horrific act. There is no shortage of adjectives to describe this kind of action. This offence of rape destroys a person's self-respect, self-esteem and violates their dignity. The act of rape can be carried out through coercion, force, by a person of authority on someone who is incapable of giving consent. When we talk about India per se, the country has advanced both in its ideologies and perceptions over many decades regarding the act of rape which is even punishable by law, but the issue of marital rape is still very much prevalent in the society with being referred to as a social stigma which has not been touched by the law yet. Rape is a phenomenon that is agonizing for the woman at the heart of marriage. A woman has to silently struggle through it and face this heinous act within the walls of her matrimonial home, which negatively affects her conscious and wellbeing be it psychological, mental, or physical. When the term rape comes to the mind, one rarely associates it with rape in a matrimonial home. People tend to believe that a husband can never rape his wife, that there is an implied consent of woman and this is all under the conjugal rights of the husband.

Keywords: Rape, respect, dignity, coercion, social stigma, consent, matrimonial home, conjugal rights

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Introduction

Rape is a situation where a “Man” commits an offence against a Woman and such offence involves a sexual violation. The offence Rape involves using of force against the woman and having sexual intercourse. Such an act is a clear violation of the individual autonomy and privacy of the woman. Under Indian Constitution it is, therefore, a clear violation of Article 21 which is one of the most cherished Fundamental Right under Indian Constitution. Rape is described as one of the most heinous crimes around the whole world as it involves not only violation rather also the violation of Woman’s dignity and sanctity. It is considered as scar on human race as such a violation against Woman is surely a stigma upon the human race.

Similarly, “Marital Rape” is a condition where a Husband uses force against the will of his Wife in order to have sexual intercourse. This situation also implies violation of individual autonomy of the Wife but still in many countries marital rape has not been made punishable. The reason behind such leniency is the marriage in many societies has been considered as the pious institution and it is believed that if such an act is been made punishable then the sanctity of institution of marriage itself will be in danger. In countries like India, where the whole society tends towards protection of such an institution and always prefers to avoid breakdown of marriage it is very much likely that situations like marital rape could not be accepted as offence, so easily. In countries, where there is a diversified culture prevailing all along the country it is found to be impracticable to make situation of “Marital Rape” to be an offence. And if it is done then the institution of marriage would be at risk of breaking down. Also there is a theory of “implied consent” prevailing which provides that there is a implied consent to have sexual intercourse with each other among husband and wife. But the issue lies with use of “force” and “against the will of wife”, these two elements could not be justified and so the legality of such an act would always be questioned.

Woman being the vulnerable class has always got the sense of protection of sexual sanctity and even the society has the policy of conserving the sexual sanctity and dignity of women. Any violation of women’s sexual sanctity & dignity is manifestly found to be against equity, justice and good conscience. It was held in *K.S. Puttaswamy(retd.) vs. Union of India*² that

² (2017) AIR 2017 SC 4161

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right to privacy lies at the core of Article 21 and it is related to individual autonomy of every person and individual autonomy includes individuals dignity and sanctity. So in cases where there is a violation of sexual sanctity and individual autonomy there is a clear breach of Article 21 of the Indian Constitution. From the above facts it may be concluded that cases of marital rape would certainly include the case of violation of Article 21.

With the perusal of facts and circumstances prevailing in the society, it is very much evident that there is clearly conflict between Constitutional morality and social morality. On one side there is violation of individual autonomy affecting the way of life of a woman and on the other side society needs to protect the institution of marriage so that situation of vagrancy and destitution does not arises.

As per S.375 IPC, a man is said to commit rape of a woman when he has sexual intercourse with her against her will, without consent, when she has a fear of death, getting hurt, she believes that with her consent when the man knows that he is not her husband, and her consent is given as she believes that he is another man to whom she is or believes to be lawfully married to, she is intoxicated or is of unsound mind, is under the age of 16 with or without consent.³ As per S.376 IPC, any person accused of committing rape is punished with imprisonment of not less than 7 years, that may extend to life or for a term stretching upto 10 years and shall also be liable to fine unless the victim is his own wife, and is not under 15 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.⁴ But, the biggest drawback of these sections is its exception that sexual intercourse with wife by her husband, where wife is not under age of 15 is not considered as rape.⁵ Rape of wife during judicial separation was criminalized as per amendment of IPC.

By not criminalizing marital rape, law is providing a security blanket over men. Due to this, men tend objectify women and consider them as their property. Many women due to family pressure, social strain, and fear of getting kicked out of home or becoming financially unstable, do not report this offence and also due to the fact there is not a properly established

³ Indian Penal Code, Section 375

⁴ Indian Penal Code, Section 376

⁵ Indian Penal Code, Exception to Section 375

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law to punish the prosecutrix. Marital rape is considered as a form of domestic violence as per Protection of Women from Domestic Violence Act, 2005.⁶ The patriarchal society governing Indian communities has regarded women as properties of men. This framework of ideology has conditioned our legislators to overrule the abuse of marital rape by protecting men giving the reason of the marriage right and that females are merely a tool for their better half's sexual gratification without their consent.

Violation of Fundamental Rights

According to *Article 14 of The Constitution of India*, state cannot deny any person equality before the law or equal protection of laws within the territory of India.⁷ Article 14 permits reasonable classification but prohibits class legislation. The exception of Article 375 of the IPC is clearly violative of Article 14 as it discriminates married women from non-married. It is unfair to prosecute men who raped their wives during judicial separation but not men who rape their wives. This classification is arbitrary, and it is not based on some intelligible differentia which is distinguishing married women from those who are not. There is no nexus between basis of such kind of classification and the object of which is sought to be achieved that is to punish the rapists. Due to this, it can be conferred that rape of a married woman is considered less of a crime than stranger raping a woman. This exception provides a free pass to husbands to have sexual intercourse without consent as they know that there is no law to punish them. It is quite illogical that a man would only be punished if he rapes his wife if she is below the age of 18 but would not be convicted if he rapes his wife who is above the age of 18. In the case of *Independent Thought V. Union of India and Anr*,⁸ the age under exception 2 of S.375 IPC was changed to 18 years from 15 years within the purview of Article 14, 15, 21 of Constitution of India.

According to *Article 21 of The Constitution of India*, no one shall be deprived of life and personal liberty except according to the procedure established by law.⁹ The sexual intercourse with wife without her consent violated her right to privacy. In case of Justice *K.S.*

⁶ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (iii)

⁷ Constitution of India, Article 14

⁸ (2017) 10 SCC 800

⁹ Constitution of India, Article 21

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*Puttaswamy V. Union of India*¹⁰, right to privacy was declared as a fundamental right within the purview of Article 21. The Supreme Court held that right to privacy includes decisional privacy reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations.¹¹ Also, the woman's right to life gets violated when she is denied justice because there is no law to protect her and punish the perpetrator. In case of *Shri Bodhisattwa Gautam V. Miss Subhra Chakraborty*¹², it was stated by the court that crime of rape is a human rights violation which encroaches upon the fundamental right of right to life under Article 21. In case of *Saretha V. T Venkata Subbaih*¹³, it was held that non-consensual sexual intercourse with a woman by her husband would violate her right to privacy similarly in a way when state enforced sexual intercourse between husband and wife is a violation of right to privacy. In case of *Suchita Srivastava V. Chandigarh Administration*¹⁴, it was held that right to make choices about sexual activity is very much within the scope of rights to personal liberty, privacy, dignity, and bodily integrity under Article 21.

The forceful sexual intercourse would cause severe injuries to the body of woman which might result in sexually transmitted diseases. This violates the woman's right to have a good health which is a part of right to life. Just as a woman has a right to life which is absolute in nature, so she should have the autonomy over her body. This non decriminalization of rape violates Article 14 and 21 of women as it is not just, fair and reasonable. The present law is anti-women because it robs them of any legal ambit to complain about something as heinous as rape. If there are various judgments where courts state that this heinous offence is a crime so why do married women have to be excluded out of this. The offence of rape must be considered as rape, it should not matter whether the woman is married or not. Marriage does not provide husband with a license to have sexual intercourse with his wife against her will. The law must be equal to all irrespective of their age or matrimonial status. Is it not violation of a woman's fundamental rights when her husband can be exonerated of raping her simply because there is no law to prosecute him?

¹⁰ (2017) AIR 2017 SC 4161

¹¹ Ibid

¹² 1996 AIR 922

¹³ AIR 1983 AP 356

¹⁴ AIR 2010 SC 235

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Human Rights Violation and Stance of UN

In countries like United States of America, Australia, New Zealand, Israel, Ireland, South Africa, Ghana, Nepal, Turkey, Canada, United Kingdom and others, have criminalized marital rape as it violated a woman's basic human right. Every human is entitled to human rights irrespective of gender, place of birth, nationality, marital or religious status and much more without any discrimination. Marital rape violates a woman's human rights, and the husband abuses human rights as there is no law to prosecute him. It is responsibility of the government of each country to prevent these rights of women from getting violated. Marriage does not mean an implied consent to sexual relation. Basic human rights must come above understanding of family. This discrimination against women goes against the principle of equality who suffer through such atrocious circumstances.¹⁵

The United Nations has consistently declared that violence against women impairs or nullifies their human rights and fundamental rights whether the violence occurs in private or public life.¹⁶ As per Article 1 of Convention against Torture, the offence of marital rape fulfils all the elements of it as it is an act of infliction of severe pain and suffering, for a prohibited purpose that includes coercion, intimidation, or discrimination and is acquiesced to or condoned by a state actor.¹⁷ Also as per CEDAW, gender based violence is form of discrimination inhibiting women's ability to enjoy rights and freedom on a basis of equality with men.¹⁸ If marital rape is recognized as a crime by United Nations and across several countries, then why should India be an exception. India is a signatory to many of these conventions, then it is the duty of it to abide by these conventions.

Remedies Available

Under S.3(d)(2) of the Protection of Women from Domestic Violence Act, which protects women from domestic violence, 2005, though it doesn't explicitly mention marital rape, a woman victim of it under this act can approach the court to get a judicial separation.¹⁹ The negative aspect of it is that she cannot seek divorce on the said ground but can only receive

¹⁵ The United Nations Conventions on the Elimination of Discrimination

¹⁶ Declaration on The Elimination of Violence Against Women

¹⁷ Convention Against Torture, Article 1

¹⁸ Convention On The Elimination Of All Forms Of Discrimination Against Women, Recommendation 19

¹⁹ The Protection of Women from Domestic Violence Act, 2005, Section 3

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compensation for injury suffered. Under S.376(b) IPC, a husband who performed sexual intercourse against woman's will after being granted a judicial separation or divorce is liable to be punished with imprisonment of not less than two years which can extend upto seven years.²⁰ Under S.498A IPC, man can be punished by being imprisoned which may extend upto three years along with fine due the trauma be it mental or physical being inflicted upon the woman.²¹ Again, this section does not explicitly mention marital rape. These punishments are quite negligible as compared to the punishment provided for rape by a stranger. Also, as per Hindu laws, cruelty, sodomy, bestiality are considered as grounds for divorce, however, marital rape is not a ground to seek divorce. If these former offences by a husband are recognized as a crime, then why latter one can't be considered as a crime.

Arguments against Criminalization

India is one of the remaining 36 countries where marital rape is not a crime. Almost every country has declared it as a crime. Though being a progressive country, due to various circumstances and obstacles in the way, India is unable to show progress towards this particular issue. These include domination by patriarchal society subduing rights of women, a community where family and marriage are given a lot of importance even if it violates rights of people, archaic laws from the colonial ages and much more. Be it courts or government, many argue that it is not possible to criminalize marital rape as it is assumed that once married, there is an implied consent by women to engage in sexual activities with her husband and a good Indian wife has a duty to forever give consent. Sir Matthew Hale stated that husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.²² Former chief Justice of India Dipak Mishra stated that marital rape should not be made an offence as it will create absolute anarchy in families and our country is sustaining itself because of family platform which upholds family values.²³ One argument is that if marital rape is criminalized, it would increase the number of cases and

²⁰ Indian Penal Code, Section 376(b)

²¹ Indian Penal Code, Section 498(a)

²² 1 Hale, *Pleas of the Crown*, at p. 629 Matthew Hale, *Historia Placitorum Coronæ* (1st American ed, 1847, vol 1)

²³ <https://timesofindia.indiatimes.com/city/bengaluru/no-need-to-make-marital-rape-an-offence-ex-cji-dipak-misra/articleshow/68785604.cms>

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courts would be overburdened. It is argued that women will misuse law if criminalized. The Supreme Court didn't entertain a woman's plea to declare it a criminal offence stating that it wasn't possible to order a change in law for one person.²⁴ But the truth is it is not just one person, there are many, but they tend not to report these offences because of family pressure, social stigma etc. Sure there may be some women who will misuse this law but it does not mean that the law should not exist at all. A mere possibility of false cases does not mean that the courts or government should turn a blind eye on those cases which are not. Also as per UNFPA report, more than 2/3 of married Indian women in India between ages of 15 to 49 were forced to provide sex.²⁵ People argue that that there is no point in criminalizing it as it becomes hard to gather evidence in cases of marital rape as it is something that woman is subjected to usually for a long period not just once or twice.

Suggestions

Regarding the issue of overburdening the judiciary, more judges could be appointed to solve this issue. As there is a low literacy rate in India, and many women do not even understand this issue, it becomes important to teach them about this kind of atrocity. Gender bias laws should be made gender neutral as no race is superior to another. Self-defenses could be taught to women so that they could protect themselves from these perpetrators. Also, it shall not be presumed that after marriage the wife gives an implied consent to her husband to have sexual intercourse. Rape kit test can be performed on willing women to get evidence that they were raped which would reduce number of false cases to a certain extent. Instead of just granting judicial separation to spouses on basis of marital rape, divorce should also be granted under each personal law. Also the relationship of marriage should not constitute as a valid defense in court. The exception to S. 375 IPC should be declared as invalid as it is against the fundamental rights of a person. Marital rape is not different from rape by a stranger; hence, it must be given same importance. People must be made aware that this is not Victorian era where patriarchal society functions, but our country is a democratic one where everyone has equal rights. Also victims of marital rape must be provided with mental support by the

²⁴<https://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html>

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government. Also, punishment for all perpetrators in this matter should be made the same irrespective of the victim's age, gender, religion or marital status.

Conclusion

Woman has always been worshipped in countries like India. From Vedic times to present day, woman has found immense respect and place of worship in our society. But the reality is somewhere different from the philosophical viewpoint. With the passage of time crime against woman has increased across the whole and Indian society is one of them. Crimes against Woman are prevalent in all so called cultured societies. In the patriarchal era, women have always been considered as the vulnerable class.

In India also women are considered as vulnerable class, so the State has a sense of protection for them against the prevailing crimes against them. Indian Constitution is a welfare constitution and is continuously at work for the welfare and upliftment of the society. Since the women are vulnerable class Indian Constitution itself provides for certain provisions which provide special protection to such vulnerable class. Indian Constitution supports for Positive discrimination for vulnerable class and upliftment of under privileged classes.

Marital Rape is one such situation which needs to be looked into as it has not been accepted as crime in our society but includes breach of individual autonomy and ultimately violation of Article 21. Marital rape is a situation which includes violence and attack upon sexual sanctity. But since it is an act between husband and wife it cannot be questioned as an offence at once. As once it is accepted as crime it would be difficult to protection the institution of marriage in many cases which may in result in vagrancy and destitution of wives and children. In countries like India it is not easy to declare such an act as an offence as the reasons are many which lead to such an act like illiteracy, patriarchal society, cultural issues etc. There are many certain issues which would be left unanswered if like false cases etc. Also many advocate theory of implied consent for not declaring marital as an offence but here also elements like force and against her will cannot be justified.

With the perusal of facts and circumstances prevailing in the society, it is very much evident that there is clearly conflict between Constitutional morality and social morality. On one side there is violation of individual autonomy affecting the way of life of a woman and on the other

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side society needs to protect the institution of marriage so that situation of vagrancy and destitution does not arise. So there is always a question to be decided and there is a need to resolve the conflict between the 2 issues.

At the end it can be said that even if marital rape is not declared as a crime, there are certain other remedies in civil laws such as divorce, judicial separation etc. So to protect the sanctity of marriage still there may be some intermediate way can be found. But it is State's duty to continuously work upon such issue and remove such problems from the root. With the passage of time and development of Article 21 it may also be possible that situation may arise and Marital Rape may in India get recognition of an Offence.

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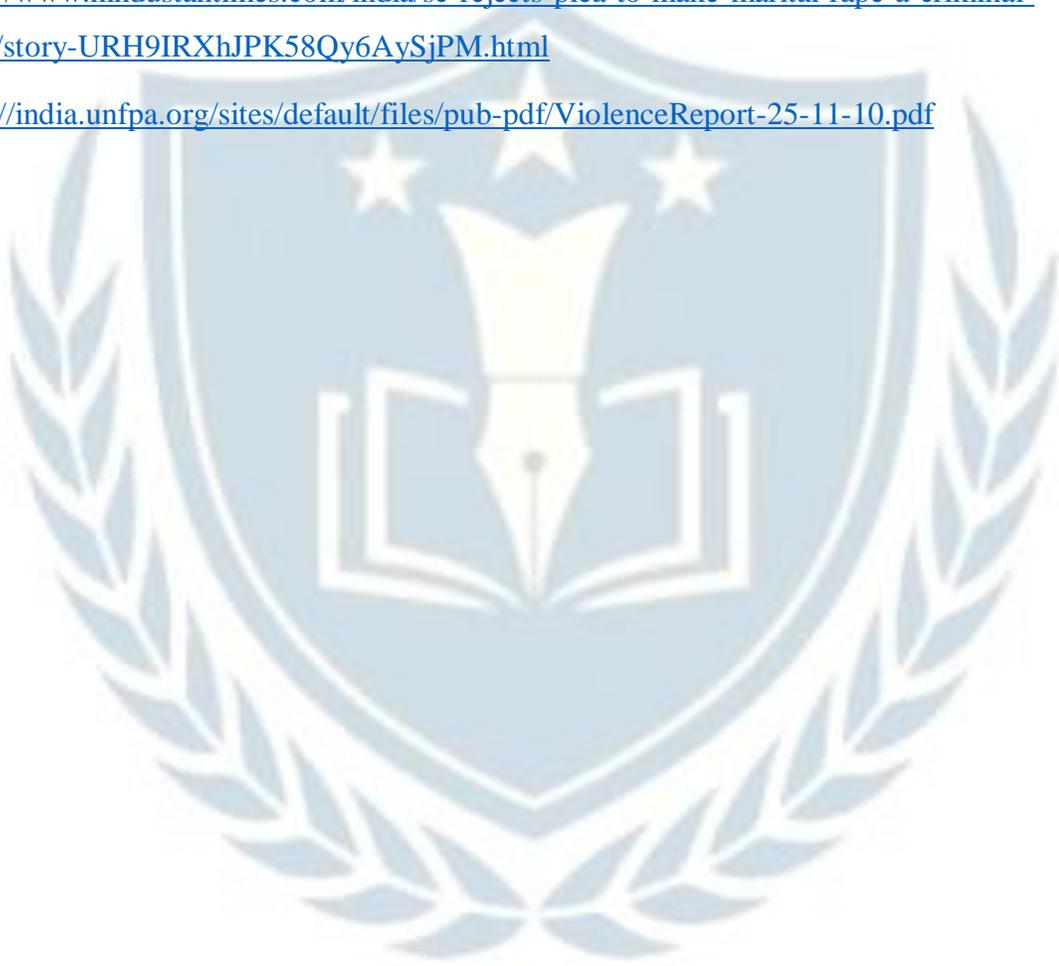
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