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REALITY AND NEED FOR CRIMINALIZATION OF MARITAL RAPE : DOES THE RIGHT OF HUSBAND OVERSHADOW THAT OF WIFE?

Abstract:

Historically, the term rape is derived from 'raptus' which implies violent theft, applied to both property and person. Thereby, a woman's abduction or sexual molestation, merely used to be the theft of a woman against the consent of her guardian or those with legal power over her. The injury was, therefore, against her father or husband, women being wholly owned subsidiaries. Marriages in India are considered as a sacrament. Matrimony binds the wife to her husband in such a way that she is duty-bound to submit to his wishes. Marital rape refers to intercourse that a husband has with his wife against her will. In India, this concept is rejected by the law, because it is believed that a woman who has married a man has impliedly consented to having sexual relations with him. Unless a woman is below the age of 15, she cannot be "raped" by her husband. As a consequence, it is not a crime to force your wife into sexual intimacy. Statistics indicate that marital rape and related offences (such as domestic violence) are highly prevalent in India. The patriarchal tones of the Indian society are also to be blamed, because husbands consider it a matter of right to demand intercourse from their wives. This paper attempts to highlight the plight of married women in India and advocates the criminalization of marital rape in India. The paper draws strength from the fact that more than 50 countries have already held marital rape as a heinous crime. It attempts to look at the state of affairs in some of those countries and compare them with India. Moreover, it does so in the light of the societal conditions prevalent in India, which tend to give men a dominant position over women in all walks of life, from boardroom to the bedroom. Rape, in any form, is a humiliating, degrading and violent act and not merely an outdated concept of penile/vaginal penetration. Restricting the understanding of rape acknowledges that these husbands treat rape as merely sexual intercourse and not violence and hence, condone such behaviour. Instead of making the wife worship husband's whims, especially sexual, while considering marital relations as practically sacrosanct, it needs to thrive on mutual trust and respect. The Indian law, therefore, needs to evolve with the time and recognize the right of its women to say NO.

Keywords:

Marital rape, patriarchal, India, criminalize, domestic violence, right of married women

Introduction

Historically, the term rape is derived from '*raptus*' which implies violent theft, applied to both property and person. Thereby, a woman's abduction or sexual molestation, merely used to be the theft of a woman against the consent of her guardian or those with legal power over her. The injury was, therefore, against her father or husband, women being wholly owned subsidiaries. But what if, the husband, whose property a woman is considered to be, himself violates her dignity and honour? Marriages in India are considered as a sacrament. Matrimony binds the wife to her husband in such a way that she is duty-bound to submit to his wishes. Marital rape refers to intercourse that a husband has with his wife against her will. In India, this concept is rejected by the law, because it is believed that a woman who has married a man has impliedly consented to having sexual relations with him. Marital rape may be by the use of force, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.

Unless a woman is below the age of 15, she cannot be "raped" by her husband according to Indian law. As a consequence, it is not a crime to force your wife into sexual intimacy. Statistics indicate that marital rape and related offences (such as domestic violence) are highly prevalent in India. The patriarchal tones of the Indian society are also to be blamed, because husbands consider it a matter of right to demand intercourse from their wives.

Traditionally, the wife's role has been conceived as submissive, docile and that of a homemaker. In a marriage, sex has been treated as obligatory as well as a taboo; at least an open discussion about it has always been. Hence, the awareness remains dismal. Economic independence, a dream for many Indian women, is still an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being "good wives", to quietly serve and not wash dirty linen in public, even counseling remains inaccessible.¹

Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Social practices and legal codes in India mutually enforce the denial of women's sexual agency and bodily integrity, which lie at the heart of women's human rights. The law, however, does not treat marital rape as a crime. . women themselves must break free of societal shackles and fight for justice. They must refuse to comply with the standards applied to them as the weaker sex.

This paper attempts to highlight the plight of married women in India and advocates the criminalization of marital rape in India. The paper draws strength from the fact that more than 50 countries have already held marital rape as a heinous crime. It attempts to look at the state of affairs in some of those countries and compare them with India. Moreover, it

¹ Priyanka Rath, *Marital Rape and the Indian Legal Scenario*, Indian Law Journal (2007).

does so in the light of the societal conditions prevalent in India, which tend to give men a dominant position over women in all walks of life, from the boardroom to the bedroom. Rape, in any form, is a humiliating, degrading and violent act and not merely an outdated concept of penile/vaginal penetration. Restricting the understanding of rape acknowledges that these husbands treat rape as merely sexual intercourse and not violence and hence, condone such behaviour. Instead of making the wife worship husband's whims, especially sexual, while considering marital relations as practically sacrosanct, it needs to thrive on mutual trust and respect. The Indian law, therefore, needs to evolve with the time and recognize the right of its women to say NO.

Significance of Study

In a country like India, where sexual intimacy is still considered as a taboo, not to be talked about in the open, and where wives are subjected to the service of their husband and his family, married women find it very difficult to live a life on their own terms. Mostly, men don't consider the fact that their wife may have an opinion on things or may want to say NO. And more often than not, if a woman tries to resist her husband, it results in domestic violence and marital rape.

This study is significant because the voices of all these women need to be heard. They have been facing brutal treatment at the hands of those they trust for many years now. This cannot be controlled through lectures on moral science and stressing merely on equality of women. A stronger, bolder step needs to be taken.

This study attempts at highlighting the causes, issues and the extent of the marital rape scenario in India, while suggesting some of the stronger ways to control it. Among other things, it suggests the criminalization of marital rape in the same manner as rape by a stranger.

The Institution of Marriage and Status of a Married Woman

Institution of marriage gives permission to a male and a female to live together under customary and statutory law. It is a special bond shared between two souls, who tie the wedding knot after promising to be companions for a lifetime. It is the physical, mental and spiritual unison of two souls. When a male marries with a female, it means man is duty bound to give due respect to the dignity of wife. Now question arises whether marriage gives right to the husband to have sex with his wife forcefully or in other words, is marriage takes away the right of a lady to refuse to have sex with her husband. It is a debatable question in India in present scenario.²

² Garg Mukesh, *Marital Rape under Indian Law: A Study*, International Journal in Management and Social Science (June 2013).

Is a wife a lesser citizen than her husband?

The law of India vows to treat man and woman as equals, as proclaimed by the Constitution of India. It also vows to protect the dignity and integrity of every woman. Legally, therefore, a married woman also has the same rights and freedoms as an unmarried woman, or a man. But is this true in reality?

In medieval times, the wife was considered as the husband's property. No separate rights for women were recognized. Even after coming out of that phase, till the early 20th century, man and wife were considered a single entity in the eyes of law. No spouse could bring an action against the other, or could even testify against the other, in a Court of law. But with the changing times, the position has changed. Husband and wife can no longer be considered a single entity, nor is a wife the property of her husband. Revolutionary changes in the Indian Penal Code, such as punishment for dowry deaths, cruelty towards wife in marital home, etc. have attempted at cementing this position that a husband may no longer do as he chooses with his wife.

Marriage generates confidence in wife that husband will provide safety and respect her dignity and when he commits unwanted/forcefully intercourse with his wife, it breaks this confidence and breaches the trust of the wife. In such circumstances, what is the need of providing immunity to the husband from committing rape with his own wife?

This immunity has now been withdrawn in most of the major jurisdictions around the globe. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband.' Article 2 of the Declaration of the Elimination of Violence against Women³ includes marital rape explicitly in the definition of violence against women.⁵ Indian criminal law also demands changes and inclusion of marital rape in section 375 of Indian Penal Code. In the present scenario in India husband and wife both are having separate legal entity. Women in India are not only giving their major assistance in home but also outside the home. Marital rape breaches her trust on her husband.

Why is Marital Rape not considered a crime?

Marital rape does not come within the definition of rape in India. Marital rape exemptions in India were adopted from the English common law exemption, first articulated in 1736 by English Chief Justice Matthew Hale in History of the Pleas of Crown. He wrote, "*The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their*

³UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: <http://www.refworld.org/docid/3b00f25d2c.html> [accessed 16 September 2015].

mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.”⁴

This matrimonial Consent Theory was justified by common law assumptions that upon marriage, a wife became the property of her husband or that the spouses became one entity. A wife was considered to have given her husband perpetual consent by marrying him, and hence rape in marriage was not recognized at all.

The marital rape exemption gained further support when Blackstone put forth the Unities Theory, which viewed the husband and wife as becoming one on marriage. In Blackstone's Commentary on the Laws of England (1765), he wrote, “Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband. If a wife is injured, she cannot take action without her husband's concurrence.”

The Separate Spheres theory further eradicated women's civil identity. Under this theory, men were considered to inhabit the political/ public sphere whereas women were relegated to the family/private sphere. Because women were already considered the property of their husbands, there were no laws to restrain male power within the private realm. As a result, husbands were free to abuse their wives with little fear of penalization.

Many cultural factors also come in play when creating the mindset that rape in marriage is not a crime. Religious doctrine has been used to support the belief of “wifely duty.” Among other required tasks falling under the circle of wifely duty, sexually satisfying one's husband has been included. A second conclusion that has been drawn from the traditional interpretation of religious doctrine is that it is the husband's duty to protect the family's morality because of his inherent moral superiority over women. As a result, if an abusive husband interpreted his wife's behavior as immoral or suggestive of impropriety, then the use of physical and sexual force within the marriage was sanctioned as a means to an end in protecting the family's morality.⁵

As commentators have noted, both the antiquated notion of male supremacy in marriage and the various policy arguments advanced in support of the marital rape exemption cannot be accepted in contemporary Indian society.

Marital Rape: A Play of Power and Tool of Oppression?

It is a universal fact that the male species is stronger than the female. And yet, the male always feels the need to assert this physically. Generally, a man's wife is where the wrath due to all his frustrations is targeted. In many reported cases, husbands have committed

⁴ Hale Matthew J, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, R.H. Small (1736) at pg. 628.

⁵ Yllö, K., & LeClerc, D. In A. L. Horton & J. A. Williamson (Eds.), *Abuse and religion: When praying isn't enough* (pp. 49-57). Lexington, MA: Lexington Books, (1988)

sexual and physical violence with their wives after troubles in the workplace, financial losses or family issues or even after trivial banter with her. Lots of drunken beating and sexual assault cases are also seen every year. All of this is indicative of the fact that husbands still treat wives as a lesser being, and feel the need to assert their dominion over them. This 'show of power' usually leads to rape or domestic violence.

Causes of Marital Rape: Why do husbands rape their wives?

Psychologists record many reasons which may lead a husband to rape his wife. Most of them relate to male mentality and societal status of man and wife.

Firstly, since time immemorial, the structure of the society has given man the role of an Alpha, and the only significance of a woman was bringing new life into this world. Men were even allowed liberties like multiple sexual partners, and concepts like 'chastity' and 'virginity' have never existed for them. The setup of the society, thus, has given men the power to believe that they are meant to dominate their partners.

Secondly, specifically in India, the society still considers a woman as a lesser being. They may have equal rights as their husband on paper, but the right to live a life of their own will, and more importantly, the right to say NO, are not part of those. This also gives the husband the confidence to do whatever he wishes. Whatever breaks this confidence is seen as challenging his authority, and his aggression is manifested in the form of violence and forced intimacy on his own wife.

Research shows that violent men are most likely to perpetrate violence in response to their own sexual jealousy and possessiveness; their demands for domestic services; and in order to demonstrate male authority. Some men also believe that intercourse is another type of domestic service that they can demand. Violent men will also typically justify or ignore their behaviour by:

- Minimising the violence
- Justifying the behaviour to themselves and blaming the victim.
- Denying the violence happened or refusing to talk about it and expecting the victim to just "move on".

The societal structure and the predefined gender roles in society have a large part to play in shaping the mentality of our male population. Generally, sexual frustration is the primary factor that drives them to rape their wives, but psychological and economic factors cannot be ignored while analyzing the causes of marital rape.

Marital rape: A Part of Larger Continuum of Violence against Women

Physical, sexual and psychological violence strikes women in epidemic proportions worldwide. It crosses every social and economic class, every religion, race and ethnicity.

From domestic abuse to rape as a weapon of war, violence against women is a gross violation of their human rights.

The United Nations defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."⁶

Women face gender based violence in the following arenas of society:

- Violence within the Home: battery, sexual abuse, female genital mutilation, marital rape, dowry-related violence, infanticide, foeticide, incest, non-spousal violence like a son's violence against his mother and violence related to exploitation and deprivation of freedom.
- Violence Against Women within the General Community: rape, sexual assault, sexual harassment and intimidation in school or work, forced treatments and abusive medication, the exploitation and commercialization of women's bodies.
- Violence Against Women Perpetrated by the State: social exclusion, prioritizing custom or tradition over the respect of fundamental freedom, religious fundamentalism, gender based violence as a weapon of war/armed conflict (sexual slavery, hostage taking and forced pregnancy).

It seems that marital rape is only a part of the larger continuum of violence against women, because it is not only wives who face oppression from their husbands. The number of stranger rape cases, acid attacks, eve-teasing, female infanticide and foeticide instances, forced prostitution and illegal trafficking- are all part of the same domain of violence against the female population, and marital rape is a subset of the same.

Types of marital rape⁷

The following three kinds of marital rape are identified by legal scholars as generally prevalent in the society:

Battering rape: In "*battering rapes*", women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to *make up* and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

⁶Report of World Health Organization on *Violence Against Women*, Fact sheet No. 239, Updated November 2014

⁷ Gosselin, D.K., *Heavy Hands — An Introduction to the Crimes of Domestic Violence* (1st Edn., Prentice-Hall Inc., New Jersey, 2000).

Force-only rape: In what is called “*force-only*” rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.

Obsessive rape: Other women experience what has been labelled “*sadistic*” or “*obsessive*” rape; these assaults involve torture and/or “*perverse*” sexual acts and are often physically violent.

The act of physical suppression or the ‘play of power’ is visible in all these known forms of marital rape.

Psychological and Physical Effects of Marital Rape

Despite the historical myth that rape by one’s partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.⁸

Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.⁹

Legal Position around the globe

Today there are many States that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These States include Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the

⁸ Thornhill, R. & Palmer, C.T., *A Natural History of Rape — Biological Bases of Sexual Coercion* (1st Edn., MIT Press Cambridge Mass., 2000).

⁹ Thornhill, R. & Thornhill, N., *The Evolution of Psychological Pain, in Sociology and Social Science*, Edn., Bell, R. & Bell, N. (Texas Tech University Press, 1989).

United States, and recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand did so in 2007.

In United States researchers estimate that 10% to 14% of married women experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes.¹⁰ Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. In fact, it was not until the 1970s that the society began to acknowledge that rape in marriage could even occur.

Till recently, 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 his wife, which is implied under the contract of marriage.¹¹ In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes.¹² However, it is remarkable that only a minority of the States has abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply.¹³ In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (e.g. she is mentally or physically impaired, unconscious, asleep etc.) and is legally unable to consent, a husband is exempt from prosecution in many of these thirty-three States. 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. Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.

In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, for the wife is in general unable to retract the consent to sexual intercourse, which is a part of the contract of marriage.¹⁴ However, the marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R.*¹⁵ 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 represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made through

¹⁰ National Violence Against Women Survey, NCJ 172837, Washington, DC: US Department of Justice.

¹¹ 65 Am Jur 2d, Rape, § 527.

¹² National Clearinghouse on Marital and Date Rape, 1996.

¹³ Schulhofer, S.J., *Unwanted Sex : The Culture of Intimidation and the Failure of Law* (Harvard University Press, Cambridge, 1998), p. 30.

¹⁴ *Halsbury's Laws of England*, 4th Edn., Vol. 11(1), para 495.

¹⁵ (1991) 4 All ER 481 (HL)

Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*.¹⁶

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.¹⁷ Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence.¹⁸ There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists 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 great reluctance to pass judgment on rape in the context of partners who are actually living together. However, some countries have begun to legislate against marital rape, refusing to accept the marital relationship as a cover for violence in the home. For example, the Government of Cyprus, in its contribution to the Special Rapporteur, reports that its Law on the Prevention of Violence in the Family and Protection of Victims, passed in June 1993, clarifies that "*rape is rape irrespective of whether it is committed within or outside marriage*".

Legal Position in India

In India marital rape exists *de facto* but not *de jure*. While in other countries either the legislature has criminalized marital rape or the judiciary has played an active role in recognizing it as an offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty*¹⁹, the Supreme Court said that "rape is a crime against basic human rights and a violation of the victim's" most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape.²⁰

Only two groups of married women are covered by the rape legislation — those being under 15 years of age²¹ and those who are separated from their husbands.²² Some progress towards criminalizing domestic violence against the wife took place in 1983 when Section 376-A was added in the Indian Penal Code, 1860, which criminalized the rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint

¹⁶ (1996) 21 EHRR 363

¹⁷ Simester, A.P. & Brookbanks, J., *Principles of Criminal Law* (1st Edn., Brookers Ltd., Wellington, 1998), p. 552.

¹⁸ *R. v. D.* (1987) 2 NZLR 272 (CA).

¹⁹ (1996) 1 SCC 490

²⁰ Tandon, N. & Oberoi, N., *Marital Rape — A Question of Redefinition*, Lawyer's Collective, March 2000, p. 24.

²¹ Exception to Section 375 of the Indian Penal Code, 1860.

²² Section 376-A of the Indian Penal Code, 1860.

Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India. The Committee rejected the contention that marriage is a license to rape. Thus, a husband can now be indicted and imprisoned up to 2 years, if firstly, there is a sexual intercourse with his wife, secondly, without her consent and thirdly, she is living separately from him, whether under decree or custom or any usage. However, this is only a piecemeal legislation and much more needs to be done by Parliament as regards the issue of marital rape. When the Law Commission in its 42nd Report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope.²³ The Joint Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age.

Many women's organizations and the National Commission for Women have been demanding the deletion of the exception clause in Section 375 of the Indian Penal Code which states that "*sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape*". However, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there should be wider debate on this issue.²⁴ Of the four recommendations made by the Task Force vis-à-vis rape under the Indian Penal Code, the most significant pertains to the definition of rape. It took the position that the definition of rape ought to be broadened to include all forms of sexual abuse. As per the recommendation, the Law Commission's proposed definition of "*sexual assault*" could be adopted in place of the existing definition of rape in Section 375 IPC as "*it is wide, comprehensive and acceptable*". However, like the Law Commission, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition. As of now, the law in India is wholly inadequate in providing supporting mechanisms for women to exercise bodily integrity and sexual autonomy.

The 172nd Law Commission of India report had made recommendations for substantial change in the law with regard to rape. In relation to marital rape, it was recommended that explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376A was to be deleted.

The much awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. It condones

²³ Law Commission of India, 42nd Report, 1977, Indian Penal Code, para 16.115, p. 277.

²⁴ Report on *Socio-Economic & Educational Background of the Victims of Domestic Violence in India*, Sponsored by Ministry of Women & Child Development, Govt. of India (2009).

sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful.

The possibility of fabricated complaints is an often cited reason for retaining the exemption; however, the danger of false charges is apt to arise in the context of any statutory crime.

Furthermore, the stigma associated with rape discourages marital rape victims in particular from fabricating complaints. Practitioners favoring the exemption also point to the evidentiary problems associated with proving lack of consent, but this difficulty is inherent to all rape prosecutions, not just those of marital rape. Courts have similarly dismissed these legal rationales for the marital rape exemption.²⁵

Defendants of the exemption have also attempted to justify it based on the argument that allowing prosecution of husbands for rape would disrupt or impede reconciliation of troubled marriages. As the Virginia Supreme Court observed, it is hard to imagine how charging a husband with the violent crime of rape can be more disruptive to marriages than the violent act itself.²⁶

Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against “perverse sexual conduct by the husband”. But, where is the standard of measure or interpretation for the courts, of ‘perversion’ or ‘unnatural’, the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn’t consent a sine qua non? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.²⁷

What is the responsibility of the State: to promote a woman’s rights or protect the institution of marriage?

The whole legal system relating to rape is in a mess, replete with paradoxes.

The judicial interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and “right to live with human dignity”²⁸ is within the ambit of this article. Marital rape clearly violates the right to live with dignity of a woman and to that effect, it is submitted, that the exception provided under Section 375 of the Indian Penal Code, 1860 is violative of Article 21 of the Constitution.

More so, Article 14 of the Constitution guarantees the fundamental right that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860 discriminates with a

²⁵ *People v. Stefano*, 467 N.Y.S.2d 506, 515, 121 Misc. 2d 113 (1983).

²⁶ *Weishaupt v. Virginia*, 227 Va. 389, 315 S.E.2d 847 (1984).

²⁷ *Supra* note 1.

²⁸ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

wife when it comes to protection from rape. Thus, it is submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution. Protection of the dignity of women is a fundamental duty under the Constitution,²⁹ casting a duty upon every citizen “to renounce practices derogatory to the dignity of a woman”; it seems that domestic violence and marital rape do not come under the definition of dignity.

The “United Nations Convention on the Elimination of All Forms of Discrimination against Women” (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution entitled “The elimination of violence against women” recommended that marital rape should be criminalized.

The law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age. The Indian Penal Code, 1860 states that it is rape if the girl is not the wife of the man involved and is below 16, even if she consents.³⁰ But if she is a wife, not below 15 and does not consent, it is not rape. Another paradox is that according to the Indian Penal Code, 1860, it is rape if there is a non-consensual intercourse with a wife who is aged between 12 and 15 years. However, the punishment may either be a fine or an imprisonment for a maximum term of 2 years or both³¹, which is quite less in comparison to the punishment provided for rape outside the marriage.

Though the advocates of women’s rights secured a clause in 1983 under which it is unlawful for a man to have sexual intercourse with his separated wife pending divorce, the courts are reluctant to sentence husbands in spite of the law.

Is there a ray of hope?

India has not stopped talking about sexual violence since 16 December 2012, when a young physiotherapy student was gang-raped and sexually tortured in Delhi, and later died of her injuries. Public anger frothed into the streets, forcing the Congress-led United Progressive Alliance government to appoint a three-member commission headed by Justice J.S. Verma to suggest remedies to combat sexual violence. One of its recommendations was to criminalize marital rape, a suggestion that the government ignored.

²⁹ Article 51-A(e) of the Constitution of India.

³⁰ Section 375(6) of the Indian Penal Code.

³¹ Section 376 of the Indian Penal Code.

Increasingly, men's rights groups have expressed concerns about misuse. Should marital rape be legalized, they say, it will be misused, citing the routine misuse of section 498A of the Indian Penal Code (IPC) that seeks to protect women.

In 2014, additional sessions judge Dr Kamini Lau denied bail to a man accused by his wife of raping her, subjecting her to unnatural sex and also taking her nude photographs. She opined that, "*non recognition of marital rape in India is gross double standard and hypocrisy in law which is central to the subordination and subjugation of women*". What must have helped Lau in this case was that it was covered under some existing laws - like the one for unnatural sex. In February 2015, however, the Supreme Court refused to entertain a woman's plea to declare marital rape a criminal offence saying it wasn't possible to order a change in the law for one person.

However, human rights activists constantly worry that rape by a partner may have more damaging long-term consequences than when the rapist is an outsider.³² When women experience coercion and violence within relationships, it violates their fundamental right to live in safety, security and with dignity. An intimate relationship, particularly marriage, should be a space of mutual trust and respect. The UNFPA study also found that "the propensity to perpetrate and tolerate violence is often determined by childhood experiences of abuse: men and women who experienced childhood discrimination, who have suffered abuse and witnessed gender-based violence in their homes and as children, are far more likely to perpetrate and tolerate violence as adults." Laws alone can't make a difference. It is important to work towards the empowerment of women, politically, socially and economically. We need to start young in engaging with boys and girls in addressing gender stereotypes and redefining notions of masculinity.

Should Marital Rape be penalized the same way as Stranger Rape?

The law does not differentiate between a man and a woman, giving them equal legal status and an equally free will. As a consequence, therefore, it should not distinguish between the rights of a married and an unmarried woman; and between rape by a stranger and rape by a spouse.

A wife should not be considered a lesser citizen in the eyes of law than her husband and as such, the rape laws should be amended to penalize marital rape of women older than 15 years of age.

Suggestions and Opinions

In light of the above discussion following suggestions are made:

³² Banerjee Poulomi, *When no is not an option: Marital rape denies right over her body*, Hindustan Times, May 25 (2015), available at: <http://www.hindustantimes.com/india-news/marital-rape-when-no-is-not-an-option/article1-1350617.aspx> [accessed 12 September 2015].

1. Marital rape should be recognized by Parliament as an offence under the Indian Penal Code.
2. The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code. The fact that the parties are married should not make the sentence lighter.
3. It should not be a defense to the charge that the wife did not fight back and resisted forcefully or screamed and shouted.
4. The wife should have an option of getting a decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under "cruelty" or "rape" as a ground of divorce, it is advisable to have the legal position clarified. Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue with the marriage then the marriage should be allowed to continue.
5. Corresponding changes in the matrimonial laws should be made.
6. Counselling should be given to the victims of marital rape.

The foremost requirement in such a case is the support of the family. The age old societal norms and customs should not hinder the right of any individual to stand up for themselves. A woman, even though married should not shy away from confiding in her parents or even children, mature enough to understand and provide emotional as well as mental support to their aggrieved mother. It is high time that the Indian society frees itself from the shackles of patriarchy and incorporates, in reality, the principle of equality, so beautifully enshrined in its Constitution.

The duty of the state in such cases is not to protect the institution of marriage but to protect the dignity and integrity of a woman who has been abused by her husband.

Conclusion

It is conceded that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law. The immediate need is criminalization of marital rape under the Indian Penal Code. Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable. Mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is also a need to educate the masses about this crime, as the real objective of criminalizing marital rape can only be achieved if the society acknowledges and challenges the prevailing myth that rape by one's spouse is inconsequential.

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination. In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law. The right of the husband does not overshadow that of the wife, and overstepping his boundaries should lead to criminal consequences.

In *Northanger Abbey*, Jane Austen held a mirror to the position of women in eighteenth century England, when she wrote, "Man has the advantage of choice, women only the power of refusal." Married women in twenty-first century India are yet to get that power of refusal when the man in question happens to be her husband.

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