

Chapter 5
***Marital Rape –
An Issue To Transgress The Boundaries Of Private
Domain***

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Abstract

“I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist.”

— Philippa Gregory, The Red Queen

Sexual intercourse between the spouse's sans consent amounts to marital rape which is considered to be a discrimination against women as per the convention on the elimination of all forms of discrimination against women and declaration on the elimination of violence against women 1993. Marital rape is being criminalized in many countries, however in India it still continues to be a great menace to women as the Indian Penal Code exempts unwilling sexual intercourse between spouses above fifteen years from Section 375's definition of "rape". The Constitution of India guarantees right to life and right to privacy to all individuals in India where marital rape would amount to infringement of the fundamental rights. Various International and National conventions and acts are being introduced and amended for criminalization of marital rape. In a patriarchal society and a male chauvinistic society, the women are always considered as machines to produce babies. The National Family Health Survey stated that 31% of married women have been subjugated to physical, sexual violence at the hands of their spouse.

Lawyers and various NGO's have filled petitions to protect the safety of the women and have toiled to make marital rape a criminal offence. The United Nations has directed all the State Parties to take appropriate measures to eliminate discrimination against women and ensure that they are not deprived of any rights. In UK the sexual assaults are dealt

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under the Sexual Offences Act, 2003 and USA spousal rape is criminalized and hence there is a need for a specified law for criminalizing the sexual assaults against women in India.

Introduction

Sexual intercourse between the spouse's sans consent amounts to marital rape. It is one of the worst domestic violence against women. Women nowadays face coercion within their relationship. It causes serious health and mental problems. Nearly 36 countries do not criminalize the marital rape. India is also one of these 36 countries which do not criminalize marital rape.

*Maheshbhai Bharathi desi v. St of Gujarat*³¹

The HC of Gujarat defined the term marital rape in this particular case. Marital Rape Refers to unwanted intercourse by a man with his wife obtained by force threat of force or physical violence or when she is unable to give consent .it is a non- consensual act of violent perversion by a husband against wife where she where she is abused physically and sexually.

The three kinds of marital rape:

Battering rape: In this case the women experience mental and physical violence where the men want to and coerces with his wife for sexual intercourse against her will.

Force only rape: Here the man uses the necessary force to coerce with his wife.

Obsessive rape: These assaults involve torture and pervasive sexual acts and mostly involve physical violence.

It creates a long-term impact on the victim. The victims are abused either verbally or physically which will psychologically affect them. Marital rape is not only a serious violence against women it is also violation of a person's personal freedom and liberty. Rape is being criminalized however marital rape is excluded which causes a great menace to the womanhood who suffer various kinds of torture at the households.

When God created man and woman, he was thinking, 'Who shall I give the power to, to give birth to the next human being?' And God chose woman. And this is the big evidence that women are powerful

-Malala Yousafzai

³¹ Criminal Misc. Application Nos. 26957, 24342 of 2017 and R/Special Criminal Application No. 7083 of 2017

The ability to give birth to a child is given and is gifted to women. However, it cannot be forced to be done against the will or consent of the women. No person can be forced to have sexual intercourse with their partners. Though a non-criminalized offence it is high time that we all support women for all the tears and the cruelty they have undergone by their opposite partners. Ravishing women is the worst crime that every man could do on this earth. Most of the cases are not established as marital rape is never considered as serious as the other rape committed by a stranger. They are mostly not reported because of fear of husband the family reputation and the societal pressure.

But now there is a need to recognize the need for a new legislation to criminalize the marital rape to protect the modesty of women and to stop outraging the dignity of women.

Human Rights and Marital Rape

Human rights are standards of human behavior that are protected regularly as an inherent and a natural right. Any deprivation of such human rights is an offence. It is inherent right of all the human beings regardless of the sex, religion, caste, etc. It includes right to life and freedom without any discrimination. Protection of the rights of women is an important aspect of human right. According to Jeremy Bentham the function of law is to liberate the individual from any kind of deprivation of freedom and human rights. According to him “the end of the legislation is the greatest happiness of the greatest number”³²

Crime has effect both on the victim and the society. The marital rape has various effects on human rights both directly as well as indirectly i.e., the fundamental right for a healthy living is affected because the women undergo various reproductive health issues and also miscarriage, stillbirth, pre-term delivery and low birth weight babies. Women may suffer isolation, inability to work, loss of wages, lack of participation in regular activities and limited ability to care for themselves and their children³³.

It is a basic morality that every husband and his family should treat a woman as a human being. She should be permitted to enjoy the basic human rights.

Social and Interpersonal intimidation

Marriage is one of the essential institutions of society. And it is considered to be important for the procreation of children. But a question arises if that would give a husband the liberty to torture his wife. However sexual intercourse between the husband and wife is an integral part of a marriage and is considered to be one of the chief aims and objects of the marriage.

32 (Tiwari, 2013, p. 75)

33 <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> last accessed on 15.08.2019

Consummation is one of the important factors of a marriage. The consent of the wife for a sexual intercourse is considered to be inherent on acceptance of marriage. However, it is not correct as it is the fundamental right of women to decide if she should have a sexual intercourse with her intimate partner. The Domestic Violence Act 2005 states that any sexual abuse against women is punishable offence³⁴. The Indian Divorce Act 1921 provides divorce from the husband when any women are sexually abused by her intimate partner. Non consummation of marriage is a ground for divorce. An analysis of cases brought under Section 9 of the Hindu Marriage Act (which is also a patriarchal and barbaric provision) reveals the patriarchal attitude of the judges while adjudicating upon the status of the “holy institution of marriage”³⁵. Marriage can’t be regarded as a license or a permit to rape nor does it give the right to the husband to ill-treat his wife.

The Law Commission in its 172 report stated that interfering in the sexual assault complaint by the wife above the age of 18 years would amount to excessive interference in the marital relationship whereas the Supreme Court of India in plethora of its judgment has stated that character of women is not a good defense in case of marital rape and also stated that the chastity of a women is a factor which does not allow her to allege false complaint of rape and that she being the injured person her mere statement would suffice to convict a man for rape. so now arises a confusion whether marital rape would be punished or if enquiry of the same would amount to excessive interference of the marital relationship.

Elimination of violence against women

The concept of marital rape should be eliminated so that every woman lives a peaceful life. There were various committees like that of the Verma committee which spoke about the criminalization of the marital rape. Only on criminalizing and punishing people would know that marital rape is a grave offence against the women. Women should be courageous to step out and bring their problems and hardships before the appropriate desk or forum for relief.

There are various international law obligations that support criminalization of marital rape. The international laws that are general in nature provide/establish the necessity to uphold right to life, right to equal protection before law and right to human dignity etc.³⁶ and the laws that are specific in nature emphasize the duty of the state to protect women against

³⁴ Section 3 of the Domestic Violence Act, 2005

³⁵ https://www.academia.edu/37659330/Criminalization_of_marital_rape_A_boon_or_a_bane last accessed on 15.08.2019

³⁶ <https://thewire.in/36111/indian-exceptionalism-cannot-be-a-valid-excuse-for-india-not-to-criminalise-marital-rape>

any form of violence, irrespective of who the perpetrator is³⁷. The sec 375 of IPC isolates marital rape from the term rape which expresses the domination of the male chauvinism in the society.

The preamble of the Convention on the Elimination of All Forms of Discrimination against Women states that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity"³⁸. A study conducted by the Joint Women programmed, an NGO found that one out of seven married women had been raped by their husband at least once³⁹. Approximations have quoted that every 6 hours; a young married woman is burnt or beaten to death, or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged between 15 to 49 have been beaten, raped or forced to provide sex. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands' families. 56% of Indian women believed occasional wife-beating to be justified⁴⁰. All these crimes against the women should be eliminated at its commencement or the initial stage to prevent the greater violence against women. Therefore, protection of the same is a mandatory need of the hour.

Marital Rape –infringement of the fundamental rights of the constitution

Article 14 of the Indian Constitution ensures 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"⁴¹. The criminal law denies the criminalization of marital rape which turns out to be an immense violation of the basic fundamental right of every women to life and liberty.

*Burhan Choudhary v. State of Bihar*⁴²

The Supreme Court stated that classification under article 14 of the Constitution would be subject to reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. However, the husband would take up a defense under section 375 of the IPC which exempts the marital rape from being criminalized. However, the effect of both rape and marital rape would be the same for every

37 *The International Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)*, read with general comment no:12

38 <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> last accessed on 17.08.2019

39 Garg, Mukesh (Dr.) and Singla, Nareshlata (Dr.), *Marital Rape Under Indian Law: A Study*, *International Journal in Management and Social Science*, July, 2013

40 Priyanka Rath, *Marital Rape and the Indian legal scenario*, *India Law Journal*, 2007.

Retrieved from: http://indialawjournal.com/volume2/issue_2/article_by_priyanka.html

41 *Indian Constitution art. 14*

42 AIR (1955) SC 191 (India)

woman. Marital rape causes adverse effect on woman and hence it can be said that it affects the fundamental rights of a person.

Article 21 states that no person shall be denied of his life and personal liberty except according to the procedure established by law⁴³. The Article 21 guarantees each and every citizen a Right to a healthy and a decent life without any kind of encroachment from the State or any other party. But sexual intercourse with his wife without her consent amounts to violation of her right to a decent life and infringement of her right to life.

*Chairman, Railway Board & Others v Chandrika Das & Others*⁴⁴

foreign woman, SMTP Hanafi was raped by 4 men belonging to railway department. She was given 10 lakh and Supreme Court in this regard pointed out that rape is not only a crime against the victim individual but it is also a crime against the society at large. Rape disturbs the entire society as well as the victim equally. The Supreme Court has given the liberty regarding intimate relations.

Section 375 of the Indian Penal Code defines a rape and its ingredients however exception 2 to Section 375 exempts unwilling sexual intercourse between a husband and a wife over fifteen years of age from Section 375's definition of "rape" and thus immunizes such acts from prosecution.

Therefore, it is clear from the above stated that Section 375 which exempts marital rape from the definition of rape is an infringement of Articles 14 and 21 of the Constitution.

Need for a State law on marital rape

There is no particular law or provision of a statute that criminalizes marital rape. The IPC also exempts marital rape. The effect or the aftermath of the victim of a marital rape is immeasurable it brings both mental and physical disturbances to a woman. Therefore, there is a need of a separate law for punishing marital rape accused.

"The new ordinance on Criminal Law (Amendment) Ordinance 2013 at long last reforms India's colonial-era laws on sexual violence, but fails to provide crucial human rights protections and redress for victims," said Meenakshi Ganguli, South Asia director at Human Rights Watch. "Indian parliamentarians should insist on a law that deals with these critical issues⁴⁵." Meenakshi Ganguli insisted that there is need for new law or an amendment to protect the rights of women.

⁴³ Article 21 of the constitution of India

⁴⁴ Civil appeal no:639 of 2000 arising out of S.L.L.(C) No:16439 of 1998.

⁴⁵ <https://www.hrw.org/news/2013/02/11/india-reject-new-sexual-violence-ordinance> last accessed on 18.8.2016

In United States researchers estimate that 10% to 14% of married women experience rape in marriage. If we examine the laws in different countries, we see that most countries punish rape within and outside marriage⁴⁶.

Examples of criminalization of marital rape in certain countries:

Australia a person can apply to a judge or magistrate for an order allowing him/her to marry if he/she has reached the age of 16 years⁴⁷.

In the UK, a marriage below the age of 16 years is void⁴⁸.

In New Zealand, a person under 20 years of age but over 16 years old can only marry with parental consent. The age of sexual consent for women is also 16 years⁴⁹.

Hence it is high time that we stand up for a new statute to criminalize marital rape and hence eventually protect the fundamental rights of women.

Conclusion

It is evident from the above article that a woman faces an adverse effect because of marital rape. It infringes the right to life guaranteed by the constitution of India. Hence non-criminalization of marital rape would be a defense for the husband and others who provoke the husband to have a sexual intercourse with his wife without her consent. There is a need of a state law to govern the issue of marital rape. It should be framed in such a way that a woman receives a proper relief. As the future pillars of the society it is our duty to put forward all the socio legal problems before the eyes of the legislature and the society so that proper laws are being framed to tackle all the problems and for protection of the fundamental rights of the human beings.

46 <https://www.lawteacher.net/free-law-essays/family-law/marital-rape.php> last accessed on 17.08.2019

47 *The Australia Marriage Act, 1961 with amendments up to act No. 46 of 2006, Part II*

48 *Marriage Act 1949, Halsbury's Laws of England, 4th Edn. Reissue, Vol.29(3) p.41*

49 *Marriage Act 1955*

Chapter 6

Auxiliary Role Of Human Rights Courts To Accomplish Sustainable Development Goals

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International Laws on Human Rights and Sustainable Development Goals

Idea of Human Rights evolves with international law, through treaties, conventions and other international instruments such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Right (ICCPR), International Conventions on Economic, Social and Cultural Rights (ICESCR) of which India is a signatory. Human Rights have great importance in many parts of democratic world. The implementation of human rights is the major criteria for securing democratic values.

Article 25 of the Universal Declaration of Human Rights (UDHR)⁵¹ emphasizes on the right to an adequate standard of living and article 22 of UDHR guarantees right to social security.⁵² There are various provisions in Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which emphasis on equal rights of women in economic life all. These international instruments related to human rights have to ensure by the government to accomplish first goal of sustainable development goals that is ‘no poverty.’

Article 25 and 28 of UDHR laid down provisions related to right to adequate food⁵³ which is also important to realize for accomplishing second sustainable development goal that is ‘zero hunger.’

Various international instrument guarantees right to life and right to health as well as article 21 of the Constitution of India guarantees every person to live life with dignity and personal

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⁵¹ Available at- <http://hrlibrary.umn.edu/edumat/studyguides/righttohealth.html>

⁵² Booklet on UDHR published by United Nations , P.46, available at-

https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

⁵³ Ibid, p. 52 & p. 58.