

Marital Rape: Does Consent Matter?

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Introduction

“Rape is rape irrespective of whether it is committed within or outside marriage”

Marriage in Indian society is considered to be a sacred institution; it is the very foundation of a stable family and a civilized society.¹ However it is not so true in real. It carries with it various crime like sexual assault, dowry, bride burning and other forms of brutality in the household. Marital rape is one such brutality.² Marital Rape refers to a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused³ The Indian Penal Code in Section 375 defines rape as “sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud at a time of when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 16 years of age with the exception of sexual intercourse by a man with his own wife, the wife not being under fifteen years of age”. The Indian law acknowledges rape if it is committed by a stranger but at the same time if it is committed by a husband, no legal remedy is available for victims. Advancing well into the timeline, the most humiliating and debilitating fact is that marital rape is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.⁴ This article is an attempt to highlight the need of criminalizing marital rape in India. This article also discusses the cases of different countries who have criminalized marital rape. The sustaining factors of marital rape are also discussed because of which many countries are unable to criminalize it.

¹ Prof Kusum, Family Law I, Published by Lexis Nexis (3rd Edition, 2003)

² Berger R.K *Wife Rape: Understanding the response of the survivors and service providers*, Thousand Oaks, CA: Sage (1996).

³ http://indialawjournal.com/volume2/issue_2/article_by_priyanka.html

⁴ http://indialawjournal.com/volume2/issue_2/article_by_priyanka.html

History

A time when laws began to surface to define what shall be tolerated by the society and what shall be considered as acceptable behavior, some actions of people got overlooked due to some concepts which was heavily abused during that time and even now hasn't been put to rest completely in some of the places across the world. The idea during that time was that a woman gives irrevocable consent to her husband to satisfy his sexual pleasure anytime he wants, this concept played a major role in exemption of marital rape from rape laws. This came from the idea that once a woman is married, she becomes one with the husband, since raping oneself cannot be considered a crime, marital rape can never be considered as a crime.

It was understood that husband has complete and absolute control over his wife, control over her sexuality was just one of the aspects of his control in many different affairs. Women were considered to be the properties of their wife and husband, rape as a crime was depicted as a property crime against a father or husband not as a crime against the woman's right to self-determination.

The legal doctrine of coverture was another component for the legalization of marital rape at that time. According to this doctrine, by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage.

Sir Matthew Hale's statement "The 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 up herself in this kind unto her husband, which she cannot retract" published after his death, found its way into the common law system which made it more difficult to criminalize marital rape. This was one of the most ridiculous view taking away the basic rights of a person when she gets married. The hypocrisy lied within the structure of legality where, rape of an unmarried woman would be considered as a crime but the same woman would lose the right to raise her voice against her husband who had intercourse with her without her consent. The astonishing substance about this paradox was that the husband could never be seen as a rapist, but some other man would be called a rapist if he committed the same crime.

Role of Consent

A woman is raised within an environment which makes her feel protected by law and accepted by the society, but when she is shoved in the real society she comes to know about the discrimination between a married woman and an unmarried woman on the ground of basic consent. Unmarried women are supposed to have a free will and has every right to be a separate entity all together, but after her marriage, somehow she is deprived of her basic human rights and the right to take up the issue of how she was violated in her marriage. The double standard of the legal system in some countries has created a void in the minds of married women that maybe consent doesn't actually matters, even if it did there would be no one to protect them.

In most of the cases, cultural barrier is the most harmful factor for the occurrence of such crimes. This even becomes more complicated with an additional factor of coercion. The cultural beliefs would implant an idea in the minds of married women which led them to think that she is not in any position to refuse sex to her husband⁵, so the main reason of absence of consent was the way the women were brainwashed and this led to the inclination of the thought process in the minds of the husband that they could treat them as they want and whenever they want.

Marital rape at that time had blurred definitions but with the pressure of the second wave feminism, the fog upon the offence started to disperse. Consent plays a role on various levels in the case of marital rape, there can be different kinds of forceful sex upon a wife and the degree of consent would differ in such situations.

1. Forceful Sex: This is a type of marital rape in which the husband uses only enough force required to break her right to consent by using different methods such as Coercion, Application of Force.
2. Battering Rape: In this particular scenario the husband doesn't only force himself upon the wife but also beats her during, before or after the rape.
3. Unusual Methods for sex: In this type the husband tortures the wife to derive his sexual pleasure and uses perverse methods to fulfill his fantasies which the wife may not have

⁵ Finkelhor & Yllo, 1985

consented to, he may even record her in that vulnerable condition which is in every way a violation of her body.⁶

In all of the above situation consent has been thrown away like it never really mattered. Once a woman is married does it really mean that she has to fulfill every type of sexual desire that the husband had once fantasized to perform? Consent is explicitly communicated, Reversible, And Mutual agreement, a husband doesn't have any right to destroy her if she doesn't give consent. A wife gets permanently scarred by the deeds of the person whom she thinks so highly of but somehow the justice providers cannot comprehend that a married woman can be as psychologically disturbed as any woman after such incidents, sometimes the wife doesn't even survive after intimate partner violence, the disregard of consent in the eyes of the law because they think that nothing is wrong with "just having sex with your husband when you don't want to."

It's the will of a wife or any woman in that context to choose her own sexual preferences, person to couple with and also the time and moment when she desires to have intercourse. Being strong due to biological factors doesn't give any man the power of god to have his way with whoever he wants. Marriage is a union between two people to be partners in a relationship, this means that both the entities are separate in nature and by law, consent matters when it comes to any sort of decision. Depriving a married woman of basic dignity by forcing her to have sex in a sacred thing as marriage is the utmost beastly thing one can do, she might as well be compared to animals who speak but can never be understood enough to be able to stop the atrocities being committed on their kind. If consent is not given the utmost value even after the developed society we live in, then what's the point of being developed when the people in marriage are hell bent upon behaving like caveman and doing whatever they want without any fear of the law and society. In some of the countries the law has been actually able to give consent the throne it deserves but even now in many countries marital rape is nothing but a laughable matter, because according to them marital rape cannot be committed. Even after 70 years of independence our country fails to acknowledge the married woman as free from the slavery of their spouse. Consent should be of utmost priority and it should be understood that no married woman is a chattel of the husband and the purpose of

⁶ Bergen, 1999

marriage is to feel complete, it doesn't make them one, the law should be able to distinguish two different entities and give them the same pedestal to stand upon in the eyes of the law.

Complications faced in criminalizing Marital Rape

1. **Lack of Knowledge:** Many women don't know that they actually have the right to prosecute their better half for such crimes, they don't know that their consent actually matters before her husband can make even the most subtle sexual move.
2. **No legal protection:** A husband is given free pass by the legal statues in many countries where marital rape has not yet been termed as a crime, so as long as the protectors don't take the step to protect the married women from getting violated, this monstrosity will never stop.
3. **Cultural and social factors:** The crown for the legality of marital rape is worn by the people who have set wrong standards about marriage and give their daughters away in marriage as a property of the husband. They never take the daughter seriously even when she tries to complain about her situation. Orthodox mindsets are giving rise to the uncivilized behavior one portrays as a man.
4. **Purpose of arranged marriage:** Marriages are still arranged for the purpose of procreation, or extending family due to which women don't get the dignity. Also society gives different roles to man and woman, so as a wife a woman is expected to be submissive, docile and sacrifice her happiness for her family. So many women believe submitting to their husband's will is their duty and in fulfilling all these duties rights of women are suppressed by society. Due to these factors our community doesn't take marital rape as a crime and often the cases go unreported.

Marital Rape: Indian Perspective

Marital Rape in India hasn't been criminalized yet because of the lack of legal development in this scenario. The burden of proof in a case of marital rape lies upon the victim, it is very difficult to prove that the offence ever took place. A severe crime such as rape is going unnoticed under the radar of legal authorities even with the proper legal statues of rape in existence with surveys

showing dark figures of up to 91.6% going unreported.⁷ A complex crime such as marital rape is bound to go unnoticed because of the lack of reports and the difficulty of proving such crime in the court of justice. In India marital rape exists *de facto* but not *de jure*. In *Bodhisattwa Gautam v. Subhra Chakraborty*⁸, 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.⁹ In a patriarchal society like India where marriage is considered as a license to sex and is so sacrosanct that criminalizing marital rape is not even easy for Indian judiciary.

To curb the crimes against women Justice Verma Committee was formed to recommend amendments in present laws. The committee held that rape is not merely a crime of passion but also an expression of power. The Committee recommended that the exception to marital rape should be removed and marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.¹⁰ In India women are merely considered as property and an object upon which men can show their power, exemption given to marital law increases the number of crimes against women.

It can’t be denied that the position given to marriage in Indian society is restricting Indian judiciary to criminalize marital rape. It is believed that when a woman gives her consent to marriage, she impliedly consent to sex due to which her consent doesn’t matter after marriage. In spite of the fact that marital rape infringes the fundamental right of women to live with dignity enshrined under Article 21 of Indian Constitution it is not criminalized in India. Apart from this it not only affects a woman physically but also psychologically. And even women don’t talk about the violence suffered by them due to societal pressure and taboo. This is the reason that most of the cases of marital rapes are not reported. Another important point is section 375 exempts a man for raping his wife if she is above 15 year though the legal age of marriage for girls is 18 years. The irony

⁷ ITALIAN NATIONAL STATISTIC INSTITUTE (ISTAT) SURVEY ON VIOLENCE AGAINST WOMEN, 2006". unwomen.org. UN WOMEN.

⁸ *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490

⁹ Tandon, N. & Oberoi, N., *Marital Rape — A Question of Redefinition*, Lawyer’s Collective, March 2000, p. 24.

¹⁰ Justice Verma Committee, 2012.

is that such marriages are voidable but rape committed by a husband has no remedy in the eyes of law.

Judicial Stand

Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court in *Queen Empress vs. Haree Mythee*¹¹, observed that in case of married women, the law of rape does not apply between husband and wife after the age of 15; even if the wife is over the age of 15, the husband has no right to disregard her physical safety, for instance, if the circumstances be such that intercourse is likely to cause death. In the present case, the husband was convicted under section 338, Indian Penal Code, for rupturing the vagina of his eleven-year old wife, causing hemorrhage leading to her death. In *Emperor vs. Shahu Mehrab*¹², the husband caused the death of his minor-wife by rash or negligent act of sexual intercourse and thus was convicted under section 304A of Indian Penal Code. In *Saretha vs. T. Venkata Subbaih*¹³, the Andhra Pradesh High Court held: “There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person” If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman’s right to privacy is equally violated in case of non-consensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association.¹⁴

The Supreme Court, in *State of Maharashtra vs. Madhukar Narayan Mandikar*¹⁵, had referred to the right of privacy over one’s body. Here, it was decided that a prostitute had the right to refuse sexual intercourse. It is astonishing that all stranger rapes have been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby envisaging the right to withhold consent and refuse sexual intercourse.

¹¹ [(1891) ILR 18 Cal. 49].

¹² [AIR 1917 Sind 42].

¹³ [AIR 1983 AP 356].

¹⁴ *Ibid.*

¹⁵ AIR 1991 SC 207.

In *Sree Kumar vs. Pearly Karun*¹⁶, the wife alleged that she was subjected to sexual intercourse by her husband against her will and consent during the stay with the husband. The judiciary seems to hold an idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist. Rather than, making the wife worships the husband's every whim, especially sexual, it is supposed to thrive, mutual respect and trust. This ongoing crime is a huge violation of fundamental right of freedom of married women as well as the right to their body.

Marital Rape: Violation of Fundamental Rights

The exception under Section 375 which permits a man to have sexual intercourse with his wife without her consent is the infringement of Article 14 & 21 of Constitution of India. Article 14 protects a person from discrimination. But the exemption under Section 375 of IPC, 1860 discriminates a wife when it comes to protection from rape. Article 21 provides the fundamental right to live with human dignity.¹⁷

The Constitution under Art.51A (e) states that it is the fundamental duty of every citizen of India to denounce practices that are derogatory to the dignity of woman. Thus the legislative framework should make amendment under Section 375 of IPC and save married woman who face evil of forceful sexual intrusion at the hands of their husband.

The role of the state in a democratic egalitarian society is to protect and promote the rights of its citizens regardless of their sex or social status. The International instruments, the national laws as well as the constitutional laws bind the state to promote the rights of women as citizens regardless of the fact that they are married or not.¹⁸ Marital rape exemptions are unconstitutional. Yet, the state is evading its obligations to promote rights of women citizens on the flimsy ground of 'saving the institution of marriage' for decades. The fundamental rights guaranteed by the constitution are not strictly scrutinized neither these are correctly applied.

¹⁶ <http://indiankanoon.org/doc/486164/>

¹⁷ Anjali Srivastava, Devanshu Jain and Ayan Hazra ,Marital Rape: A legalized sin , Indian Journal of Applied Research, Vol. 3 Issue 2, Dec. 2013.

¹⁸ www.countercurrents.org/nigam030615.html

Conclusion

Consent is paramount, it should be absolute and unadulterated. The stress on the fact that we are not human beings but animals if we don't have a free will, the right to live and our own conscience which allows to make decisions for ourselves keeping in perspective what can be beneficial and what could absolutely destroy us. We as a human race cannot act as the executioner of another innocent being, we have to respect the free will of the person and help them to keep their dignity intact. Just because a man is strong, he cannot act against the will of a woman, if he does so he shall be punished accordingly. The plague we are always trying to protect ourselves from may be residing in the same household we are seeking shelter in. The plague shall not be allowed to grow further, married women should be treated equally in the eyes of law and their consent should be tantamount to the rights of a married woman.

Marital rape is a conscious process of intimidation and assertion of the superiority of men over women.¹⁹ Arguably marital rape is no less an offence than murder, culpable homicide or rape *per se*. It degrades the dignity of a woman and reduces her to a chattel to be used for man's own pleasure and comfort. It reduces a human being to a corpse, living under the constant fear of hurt or injury. Medical evidence proves that marital rape has severe and long-lasting consequences for women. Criminal law cannot turn a deaf ear towards the injustice perpetrated in Indian society against women. It must interfere and impose the stamp of criminality on inhumane acts that occur, irrespective of the fact as to whether such recognition is desirable. It is of utmost necessity that the law declares marital rape to be a penal offence. It is important to protect and respect the dignity of married women to maintain the sanctity of the Constitution.

Ultimately, by ending the "marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse",²⁰ the law can take an important step towards fulfilling its role in confronting marital rape, as such separation is required by equality.

"Marital rape's immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant

¹⁹ Sana Shakil, "Treat marital sexual abuse as rape", Times of India, 5 March 2014.

²⁰ Michelle Anderson, "Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offences by Intimates", in (2003) 54 *Hastings Law Journal* 40.

familial ideology and female sexuality which treats a wife as property and as having no sexual agency or decision making in sexual activity within the marital contract.”²¹ It is clearly a serious form of violence against women and worthy of public and state attention. "When a woman is raped by a stranger, she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist"²². Immediate steps are required, culminating in criminalizing marital rape and changing the underlying cultural assumptions about women in marriage.

Suggestions

The following suggestions are made in the light of the above discussion:

1. Marital rape should be inculcated 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.
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. Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce then the marriage should be allowed to continue since there would be valid consent,
5. Corresponding changes in the matrimonial laws should be made.
6. Counselling should be given to the victims of marital rape.
7. The rights of a married woman should be tantamount to the rights of an unmarried woman.

²¹ Kathrine O'Donovan, *Family Law Matters*, London: Pluto Press, 1993, p. 1.

²² Finkelhor David & Yllö Kersti, *License to Rap*, Holt, Rinehart and Winston, 138(1985).