

CRITICAL ANALYSIS OF MARITAL RAPE EXEMPTION IN INDIA

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ABSTRACT

Marital rape is not a husband's privilege but a violent act and an injustice that must be criminalized.² Marital rape is essentially the sexual intercourse between husband and wife without the consent of wife. It becomes more traumatizing for the victim because of the relationship victim has with the accused i.e. husband, who has the primary duty to take care of his wife and respect her dignity but instead he considers marriage as a license to rape. Owing to the lack of laws and ample social stigmas the wife is forced to bear with marital rape and suffer silently. It is an irony in India that law provides minimum imprisonment of seven years for the offence of rape but no such punishment has till date been provided for marital rape except where the wife is below the age of 18 years. Rather it provides for an explicit exemption for the husband.³ Does it mean that husband has an unconditional and unqualified sexual access to his wife aged over 18 years? Out of 179 countries surveyed, 52 have amended their legislation to explicitly make marital rape a criminal offence which includes countries like Canada, Australia, South Africa, China, Nepal and Bhutan.⁴ In India the victim has recourse under Indian Penal code, 1960⁵ along with The Protection of Women from Domestic Violence Act, 2005⁶ and The Hindu Marriage Act, 1955⁷ but the husband can be punished only upto three years and that too for the offence of cruelty as till date marital rape is not considered at par with rape. The research paper would deal with the aftermath of marital rape and moral dilemma faced by the wife, why it needs to be criminalized, repercussion of its criminalization and judicial & political view on it. It will also talk about constitutional validity of marital rape exemption under the existing laws. It is need of the hour that law should recognize marital rape as an offence because 'Rape is rape irrespective of the relationship that exists between victim and the accused.'

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² Gujarat High Court in RCM No. 26957 of 2017

³ Exception to Section 375, IPC, 1860

⁴ UN Women Report 2011

⁵ Section 498-A

⁶ Section 3 read with Section 12

⁷ Section 13(1)(a)

INTRODUCTION

The status of women in Indian society has been subjected to many great changes over last few decades. Changes, one must accept, were not easy. From losing their own identity after marriage to getting their equal rights, their journey has been eventful. In ancient times, woman was considered to be a part of her man and that's why her identity used to be submerged with that of her husband. But with the time, societal view towards woman either married or unmarried has drastically changed. We can say, at least on the face of it, that they are now getting equal rights as of their husband. Ground reality however is totally different. According to the National Family Health Survey (NFHS)⁸ the report of which was released by the Union Health Ministry, more than 22% of women have witnessed physical violence from hand of their husband at least once. About 83% revealed that they have been subjected to sexual violence at least once in their married life⁹.

Marriage is defined as a civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society¹⁰. It means that it is the conjunction or union of a man and woman¹¹ agreeing to live together till the time; either of the party commits any breach of trust, or dies in between or due to some notorious behavior provided that such a behavior should destruct the intention of the marriage. But does marriage provides an unconditional ownership of husband over his wife?

According to the same survey marital rape is the most common form of sexual violence reported by married women in India¹². For them, consent of the other party i.e. their wife doesn't matter.

⁸Urvashi Prasad, National Family Health Survey underscores need for serious discussion on marital rape, (March 15, 2018 9:12:07 AM) <https://indianexpress.com/article/gender/national-family-health-survey-underscores-need-for-serious-discussion-on-marital-rape/>

⁹ It shows that women are more subjected to sexual violence.

¹⁰ P RamanthaAiyer, The major Law Mexican 4177 (S SSubramani, 4th ed. 2010)

¹¹ At least from conventional view and prior to the judgment of SC decriminalizing same sex relation/marriage dated September 06, 2018.

¹² Out of total 6,28,900 households which were surveyed about 5.4 % of women accepted that their husband used physical force to have sexual intercourse when did not want to at least once in their married life. The Survey also revealed that nearly 4 % of them reported that their husband forced them with threats or in other ways to perform sexual acts they did not want to.

Law which ought to provide protection to any citizen in such a case is worsening the situation by exempting marital rape as an offence meaning thereby. In order to ascertain the right of the woman, the correctness of the law, it is important to look at each and every relevant aspect of marital rape and the laws governing it (if any).

Marital Rape – An understanding

Marital rape can be defined as “*Whoever, being the husband, by any kind of force or coercion or threat of force or when the wife is unable to give consent, has sexual intercourse with her is guilty of the offence of marital rape*”

Credit for introducing the term ‘immunity’ in the marriage institution from prosecution of rape should be given to Sir Matthew Hale, an English lawyer and judge. He defines marriage as a legal and thus binding contract. As consent is an essential for any contract, similarly according to him, in case of marriages being a contract, consent of wife is implied which also includes that of body.

He wrote, “*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 had given up herself in this kind unto her husband, which she cannot retract*”

Most of our laws¹³ were enacted under the British Rule including IPC, 1860. It seems that being a former British colony, India adopted the common law system which recognized Hale’s ‘Implied Consent Theory’. Halsbury’s Law of England further substantiates the same stand when it says that:

Conduct by a person (‘A’) which would otherwise be an offence involving abuse of a position of trust against another person (‘B’) is not such an offence it at the time:

1. B is aged 16 or over and A and B are lawfully married to, or are civil partners of, each other; or

¹³ Indian Evidence Act, 1872; C.P.C, 1908; Indian Contract Act, 1872

2. Immediately before the position of trust arose, a sexual relationship existed between A and B¹⁴

However situation now seems to be completely different in England itself. It was held in *R v R*¹⁵ by the House of Lords that though it was believed that the consent of wife for sexual intercourse is implied when she enters into the marriage but the same can be unilaterally withdrawn. The same was re-affirmed in *R v J*¹⁶ when the court held that she (wife) is capable of unilaterally withdrawing her consent for sexual intercourse and it was also observed that if such is the position, the concept of marital immunity cannot be said to exist anymore. Thus, in United Kingdom itself, marital rape has been criminalized much earlier i.e. in 1991. But India, has till now failed to incorporate any changes.

A survey suggests that 79% of Indian men believed that it is their marital right to have sex.¹⁷ For them, consent of the partner doesn't matter at all. Discussion about marital rape in India started in the year 2004 with the case of *Sakshi v Union of India*¹⁸ and it goes on to the case of *RIT Foundation v Union of India*¹⁹ (Delhi HC) but failed to arrive at any conclusion. Union of India supports decriminalization of marital rape as it believes that otherwise, it will destabilize the institution of marriage.

Aftermath of Marital Rape

The woman is raped by a person whom she places trust on, who is bound to protect her rather than use her as a property, this shakes her to the very core. The dread of having to face it and still have to silently suffer through it is an unbearable thought that affects the psyche of the women. This self-enforced silence has a very detrimental effect on the emotional, psychological and mental stability of women. Because of the orthodox beliefs of our Indian society, the woman has minimal or no support from her family members or friends, sometimes even the mention of this is shunned of or laughed about as an act by husband of deep and intense love. The insensitivity

¹⁴Halsbury's Laws of England, Criminal Law, Evidence and Procedure 170 (4th Ed. 2006)

¹⁵ 1 All ER 747 (1991)

¹⁶ 1 All ER 759 (1991)

¹⁷ India Today, 16th December 2013, p. 57

¹⁸ AIR 2004 SC 3566 (India)

¹⁹ Writ Petition (Civil) No. 284/2015

of the people for her pain and suffering, results in an emotional and mental breakdown. A rape victim gets relief, the accused is given harsh punishment and is condemned in the society whereas in marital rape she is stuck with the rapist for her entire life, she has to go through the trauma of seeing him every day, bearing with the abuse, and if she objects, then she is condemned by her husband and the society as well. Some women are able to muster the courage to come out and object this heinous crime and report their painful story²⁰.

Studies worldwide have revealed that physical effects of marital rape includes severe vaginal injuries, bruising, lacerations and soreness. In cases where rape is followed by physical violence than the woman may have to face gynecological consequences, miscarriages, bladder infections, infertility.²¹ It also has a deleterious effect on her mental health and well-being. Most common aftermath of this is the woman loses the sense of self, as her very basic right of bodily autonomy and integrity is not acknowledged. It leads to depression, anxiety, fear, eating disorders, losing self-respect and in extreme cases suicidal tendency.²²

It is challenging to obtain correct data on marital rape as woman are hesitant to report it because of family loyalty, protecting the sacrosanct of marriage, defending husband and family's reputation, economic dependency and thus future of her children but most essentially because she knows that even if she complains it will have no effect on the criminal (i.e. husband) and he will continue to do the same as there is no law providing for punishment.

International Scenario

On the international level, 52 countries have criminalized marital rape.²³ Australia was the first country to criminalize it in 1960s. US criminalized marital rape in 1993 in all the states. But in US only 17 states consider marital rape at par with rape. Nepal was the latest country to criminalize marital rape in the year 2012.

²⁰ India marital rape victims' lonely battle for justice (26 May 2015) <https://www.bbc.com/news/world-asia-india-32810834>

²¹ Marital Rape - Myth, Reality and Need for Criminalization by Saurabh Mishra & Sarvesh Singh, (2003) PL WebJour 12

²² Thornhill, R. & Thornhill, N., The Evolution of Psychological Pain, in Sociology and Social Science, Edn., Bell, R. & Bell, N. (Texas Tech University Press, 1989)

²³ UN Women Report 2011

It is important to note that the advocates for decriminalization of marital rape often argue that the same has been covered under PWDV Act, the act which finds its roots from The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1989. The Act was enacted in order to compliance with the General Recommendation No. XII of CEDAW. Article 2 of the CEDAW defines violence against woman and it includes 'marital rape'. G.R. XII of CEDAW directs the state parties to enact laws in order to protect women against any kind of violence. Both provisions if read together make sense and obliges the state parties to protect women from marital rape as well, which can happen only by criminalizing it. Government of India had partially followed the Convention and enacted the PWDV Act only in accordance with G.R. They have not considered the definition given in Art 2 of CEDAW which cannot be justified on any ground.

Marital Rape vis-à-vis Laws in India

The provisions which give punishment to the accused in such cases are as follows:

Indian Penal Code, 1860

If the woman is a victim of Marital Rape then she can seek punitive relief under Section 354 of IPC which is for outraging modesty of woman, it entails a punishment of up to 2 years. In *Ramkripal v State of M.P.*²⁴ the Supreme Court held that essence of modesty of a woman is her sex. In this section any person can be held guilty for outraging modesty of any woman, even if she is the wife. Justice J.D. Pardiwala²⁵ held that "highly affectionate acts of the husband not liked by the wife, and against the public morality comes under the ambit of this section" If we can include marital rape under this section and not create a separate law than why not include rape also in this and hence do away with the separate provision of Rape. Is this possible, is the degree of intensity of offence of rape at par with outraging of modesty. The separate provision for rape and much higher punishment for it shows that we consider Rape distinct, and an offence of much higher intensity than outraging of modesty.

²⁴ AIR 2007 (Cr.) SC 370 (India)

²⁵ *Nimeshbhai Bharatbhai Desai v. State of Gujarat* (R/Criminal Misc. Application No. 26957 Of 2017)

In most of the cases of Marital Rape, woman at present seek recourse to Section 498 A of IPC which punishes husband and his relatives for act of cruelty. For the purpose of this section, cruelty is the willful conduct which drives the woman to commit suicide and cause grave danger to life, limb or health. The complainant has to conclusively establish that beating and harassment in question was with a view to force her to commit suicide²⁶. Hence the woman can seek relief under this section only if the abuse is grave. This provision would not cover only sexual violence, blackmail, coercion by husband, forcing wife to fulfill his sexual desires.

Protection of Women from Domestic Violence Act, 2005

The Domestic Violence Act, 2005 (DVA) has also been a disappointment. This act provides only for civil remedies. It condemns only grievous and life threatening sexual abuse in marriage.

The forcible inclusion of marital rape in other provisions and keeping its exemption intact in section 375 i.e. its non-recognition by the law gives message to the society that it is acceptable to rape one's wife, that this offence is not serious. The same man if rapes a 20 year old woman would be punished with a minimum 7 year punishment which could go to the extent of even death penalty in some cases, but if the woman is his wife than he can go scot free. A law criminalizing marital rape warns the society that if it is performed, it would result in stringent punishment to the accused. The husbands then can't take marriage as a license to rape. Only recognition of this offence along with punishment would act as deterrence.

Judicial Viewpoint

In the recent years the courts have been more progressive and have taken a strong stance for protecting woman from sexual violence, exploitation and ensuring that her dignity is preserved.

In *T. Sareetha v. VenkataSubbaiah*²⁷ Justice Choudhary observed that restitution of conjugal rights is constitutionally void and violative of bodily integrity of the woman and using her as a vehicle for procreation. In *State of Maharashtra v. Madhkar Narayan*²⁸, the court held that sexual privacy of woman is of utmost importance and cannot be compromised at any cost. In the case of

²⁶Ratanlal&Dheerajlal, The Indian Penal Code 1022 (33rd Ed, V R Manohar, 2010)

²⁷ AIR 1983 AP 356 (India)

²⁸ AIR 1991 SC 207 (India)

NimeshbhaiBharatbhai Desai v State of Gujarat²⁹ , Justice Pardiwala observed that marital rape as unacceptable and supported the criminalization of this offence as a necessary step to teach society that dehumanizing treatment of women would not be tolerated and “Marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized,”

In a petition filed by RIT Foundation³⁰ alongwith All India Democratic Women’s Association and a marital rape victim, the Acting Chief Justice Gita Mittal and Justice C. Hari Shankar of Delhi HC asserted that “Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party,”However the apex court has not taken a strong stand in protecting the woman from sexual violence at the hands of their husbands as in a recent case the Supreme Court refused to entertain a woman’s plea to declare marital rape a criminal offence, saying law can’t be changed for a single person. ³¹

Supreme Court in the case of Independent Thought v Union of India³² has increased the age of the exemption of marital rape from 15 years to 18. It therefore means that forceful sex with the wife aged less than 18 years is now considered as rape. But is this verdict of Supreme Court really going to serve the purpose? Is this what as a socialistic country we want? The original exemption of Section 375 provides that sexual intercourse by a man with his wife, wife not being under the age of 15 will not be considered as rape. Thus, if wife aged above 18 years is the victim of such a grievous offence, she will not have any recourse under rape laws. This exemption thus classified women into two groups i.e. where wife is aged between 15 and 18 and other is when wife is aged above 18.

Indian Majority Act considers any person below the age of 18 years as a child. India has special protection act for protecting children from any kind of sexual offence i.e. The Protection of Children from Sexual Offences Act, 2012 (POCSO). Section 2(d) of the act is in concurrence

²⁹ R/Criminal Misc.Application No. 26957 Of 2017

³⁰ Writ Petition (Civil) No. 284/2015

³¹BhadraSinha, SC rejects plea to make marital rape a criminal offence (Feb.18,2015 10:44 PM), <http://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html>.

³²(W.P. (c) No. 382 of 2013)

with Indian Majority Act and defines for the purpose of the act the child as one who is below 18 years of age. Section 3 defines 'penetrative sexual assault' which is in further concurrence with the definition of 'rape' as given in Section 375 of IPC. Section 5(n) provides for penetrative sexual assault within the marriage institution. It reads as

'Whoever being a relative of a child through blood or adoption or marriage or guardianship....commits penetrative assault on such child'

The word 'marriage' here means that act is considering a wife aged less than 18 years as a child. When the act provides for relations arising out of marriage, therefore it impliedly considers marital status of a child. As such, in its implication the act is equally applicable on a wife aged below 18 years.

What it means is that, if the wife is between 15 and 18 years of age, and if she is assaulted by her husband sexually, being that assault a penetrative one, has a recourse under POCSO Act, 2012 under section 5(n) read with section 4 which provides for punishment for such penetrative sexual assault which is not less than seven year. It also implies that even if the original exemption stands, it will not have any effect for a wife aged 15 to 18 because she would have recourse under other act which is a special one and was enacted much later than IPC. It is a settled law that special provision or act will always prevail over general provision or act. The objective of POCSO is to protect children from sexual offences; it is in the interest of the child to let the POCSO prevail over IPC. Also, nowhere in the relevant sections of both the acts, any overriding clause was mentioned. Hence, it can be said that Supreme Court in the case has just resolved the conflict of difference in age in the acts³³ and no material difference was made.

Constitutional validity

Every law in India to come in force needs to be in concurrence with the Constitutional provisions. Therefore it needs to be proved that marital rape exemption is not violating any fundamental right or otherwise, it would not stand in the eyes of law.

³³ As in IPC, the age for marital rape exemption was 15 years but in POCSO, the age provided to attract the provisions of the act is 18 years.

Article 14

Art 14 provides for equality before law and it also permits the legislative classification. It was held by the Supreme Court that in order to pass the test of a permissible classification, two conditions must be fulfilled, namely,

1. That the classification must be founded on an intelligible differentia which distinguishes the persons or things that are grouped together under it from others left out of that group, and
2. That the differentia must have a rational relation to the object sought to be achieved by the statute in question³⁴.

In other words, the classification can be there on any base which may include geographical, or according to objects, but any of such classification should not be in contravention with the object of the statute, under which such classifications are made.

Now it is important to check the present classification on these above mentioned two grounds.

It was identified that the most important function of the State is to discharge its duty as a guardian of law and order. It is the duty of state to punish all the persons causing any kind of hurt to other party. In short, it is the duty of the state to maintain the law and order and to prevent other from causing any type of harm to it.³⁵

From the above statement it can be inferred that the aim of criminal law like any other law is to curb the criminal activities and acts going throughout the domestic territory. Hence, the classification if any created by law should be in concurrence with objective sought by the legislation i.e. to protect the law, order, prevent crimes and violation of any of the right of any of the citizen.

Exemption to section 375 clearly implies that the legislation has classified women into two categories those who are married and those who are not.

³⁴ Ram Krishna Dalima v Justice S.R. Tendolkar AIR 1958 SC 538 (India)

³⁵Ratanlal and Dhirajlal, The Indian Penal Code V (33rd Ed., 2014)

It while creating two groups of women, one being married and one being not, clearly states that no married women or to say 'wife' will have any recourse under rape laws if she has been raped by her husband. The point here is while classifying women in such a category doesn't it violates Art 14 of the Constitution of India. Does this classification is based on intelligible differentia?

There is a very minor line of difference between a rape and a marital rape. The only difference is the relationship between the accused and the victim. Husband is the accused in the case of marital rape while it is not the case with rape. Thus, to say in other words, legislation has classified the offence only on the basis of the relationship of the accused with the victim, husband being the accused.

Is such type of classification is going to help in fulfilling the objective of the criminal laws especially when it comes to rape laws which were initially enacted to protect the interest and the dignity of the women. Does it mean that women under rape laws include only unmarried women?

What common in both the cases i.e. rape and marital rape is that woman is the victim and a man is an accused. Both suffer same mental trauma and physical injury whether she is unmarried or not. Law guarantees equal protection of laws and right to life and personal liberty to both. The question now is whether the fact that she is married is so important and relevant that it exhausts each and every remedy available under the rape laws for the women? The answer is obvious no. Marriage is not such a relevant factor that it leaves a woman to such a state where she has no recourse for any wrong to which she is subjected to. When she has no recourse at least to say at par with rape, it would definitely going to encourage such offenders.

Also, in case of rape, several other special protective provisions of Cr.P.C become activated. Provisions like compensation to rape victims by the State under Section 357 A, 357 C which provides for responsibility on hospitals to provide free first-aid and medical treatment and other provisions become active only in case of rape victims. As law does not consider marital rape as a 'rape' under same rape laws, the above protective provisions are not available for a marital rape survival. It is inappropriate to say that marital rape victim doesn't need all these protections.

How her marital status does affects her each and every right which, if she had not been married, would have been entitled for.

No rational base can be found out from such classification. It is thus, not in nexus with the main objective of the legislation. As human being in Kantian terms we all have equal worth and in Dworkin's words are entitled to equal respect and concerns.³⁶ But this exemption is differentiating between two people who are similar to each other except that one is married and one is not.

It was also held that no law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised.³⁷ Such classification also fails on this point. Having established that none of the conditions is fulfilled, the classification of women on the basis of their marital status has to be declared arbitrary and thus invalid and unconstitutional

Article 21

We all have the right to life and personal liberty by the virtue of Art 21 of the Constitution. SC in a case³⁸ held "*It is the fundamental right of everyone in this country....to live with human dignity, free from exploitation.*" This statement implies that everyone has a right to live with dignity. State is again under a duty to protect the same with respect to each and every person whether natural or artificial.

It was held by SC that "*.....This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse to participate in sexual activity....*"³⁹. This embarks that state is ought not to differentiate between the rights of married and unmarried women. Right to life and liberty i.e. right to live with dignity impliedly contains in itself a right to say no. Marriage doesn't mean that woman has given up or surrendered her right to say no. Husband by the marriage doesn't become an owner of the body of the wife and wife has a right to say no i.e. to refuse for participating in sexual intercourse.

³⁶ R. Dworkin, Taking Rights Seriously (1977) 223

³⁷ Anuj Garg & Ors. v. Kotlwal Association of India and Ors. (2008) 3 SCC 1 (India)

³⁸ Bandhua Mukti Morcha v Union of India AIR 1984 SC 802 (India)

³⁹ Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1 (India)

Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens⁴⁰. Their honor and dignity cannot be touched or violated⁴¹. Having said this it can be said that providing no recourse to a victim of such a heinous crime where the accused is the person, whom she trusted most, is a violation of Art 21. This exemption means that woman once married, surrenders her right to say no and Art 21 which cannot be true at all.

Article 13

IPC was enacted in 1860. From then only, this exemption continues to be there in IPC. Constitution was framed in the year 1949 and was implemented or to say came in force in 1950. Art 13(1) provides that any pre-existing law will be considered null and void to the extent it violates any fundamental right. Having proved that fundamental rights contained under Art 14 and 21 are violated by this exemption, there is no doubt as to why not this exemption deserves to be declared void by virtue of Art 13(2) and stands to be deleted from the IPC. But it is a settled law that such provisions become void only after the court holds them inconsistent with the fundamental rights. So long as the courts do not hold them to be so, they shall continue to remain in force.⁴² Now, it is upon the SC to take into the consideration the above grounds which clearly show that this exemption is violating fundamental rights as contained in part III and to declare it (exemption) void.

Committee Reports

It was first in the case of Sakshi⁴³ when SC had asked the Law Commission to prepare their report and thus to recommend a stand on the violence against women in India. Law commission of India in its 172nd Report expressly said that they are not recommending deleting the marital rape exemption because it may amount to excessive interference with the marital relationship.

After almost 8 years of the 172nd Law Commission Report, Government of India formed Justice Verma Committee to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against

⁴⁰Francis Coralie Mullin v Administrator, Union Territory of Delhi and Ors. (1981) 1 SCC 608 (India)

⁴¹BodhisattwaGautam v SubhraChakarborty, AIR 1996 SC 922 (India)

⁴² John Vallamattan v. Union of India (2003) 6 SCC 611 (India)

⁴³Sakshi v Union of India AIR 2004 SC 3566 (India)

women. It had recommended⁴⁴ that the exception to marital rape should be removed i.e. IPC should not differentiate between rape within marriage and outside marriage. According to the committee, marriage should not be considered as an irrevocable consent to sexual acts.

To quote in other words, the relationship of the victim and accused according to them is not relevant at all. As in the institution of marriage there exist almost full chances that both husband and wife have had sexual intercourse. But consent to sexual intercourse for once, doesn't mean that the consent is perpetual. Element of consent should always be there in any sexual intercourse. Accordingly they also recommended that the previous sexual experience of the victim should not be relied upon for determining the consent or quality of consent given by the victim.

Challenges in criminalization of marital rape

The Union Cabinet Minister for women and child development Maneka Gandhi has stated that India like other western countries is not ready for the criminalization of marital rape because of factors like education, illiteracy and poverty. Haribhai Parathibhai Chaudhary, Minister of State for Coal and Mine, expressed a similar view and added that the "concept of marital rape does not apply in India, as marriage is treated sacred here". He blamed "social customs and values, religious beliefs and mindset" of the people which acts as a barrier for us to consider marital rape as a crime.⁴⁵

By making these statements, our esteemed ministers mean that the ideals of liberty, freedom of choice, bodily integrity is not applicable in the Indian context. Government has to take a stand and it has to provide a progressive path, to bring in laws to legislate and take the society forward. This excuse can be given for every progressive legislation and this is no reason for the government to not make laws. Do we need to evolve a consensus on issues or does the law has to be ahead of social prejudices? 'Marital Rape will be a perceived threat to the sacrosanct institution of marriage', by saying this you imply that the institution of marriage is above than

⁴⁴ But the recommendations made by the committee concerning marital rape were not implemented.

⁴⁵ Apoorva Mandhani, Delhi High Court refuses to entertain PIL seeking criminalization of Marital Rape (July 12, 2015 6:16 pm) <https://www.livelaw.in/delhi-high-court-refuses-to-entertain-pil-seeking-criminalization-of-marital-rape/>

the basic human right of bodily autonomy and integrity of a woman. Is marital rape a price that woman be prepared to pay to save a marriage. 'Marriage sanctity' comes up: what about the sanctity of consent.

Susceptible to misuse

The argument often given by the advocates of marital rape exemption is that no purpose would be truly achieved even by criminalizing marital rape since it will destabilize the institution of marriage. Wife can drag, in such a case, their husbands to the court for their own benefits and especially in case of bitter marriages and divorces. The same stand was taken by Union of India in the Supreme Court.⁴⁶ However, it should be kept in mind that there are existing laws which are prone to misuse and in fact are being misused. For say, Sec 420 of IPC is often cited when any contract breaks down and is often applied with Sec 138 of Negotiable Instrument Act. Similarly many cases filed under sec 498A of IPC which provides for punishment for cruelty are found to be false. Examples can be taken from Sec 354, Sec 375 itself and the entire PWDV Act. It can be said that any law which is enacted/framed for the benefit of public at large has scope of misused but it is not the ground for not making any law, and not giving justice to the victims of physical, sexual abuse. Neither Sec 420 nor sec 498A among other such sections have been repealed by the legislature. On the other hand, SC has widened the scope of PWDV (Protection of Women from Domestic Violence Act) by interpreting the word 'man' as any person. The intention from such an act was clear that mere the fact that the section or an entire legislation is prone to misuse, is not a ground for not recognizing the act as a crime and giving the criminal the punishment he deserves.

The ground of misuse was rejected by the court in LalitaKumari v Govt. of U.P.⁴⁷

The legislature cannot give the excuse of misuse for not enacting a law as in such a case a real victim will not get justice. Anticipated misuse cannot be a ground for not criminalizing marital rape. Also, both the parties will have to prove their own point and hence, it can't be said that

⁴⁶ Independent Thought v Union of India (Writ Pet. (Civil) 382 of 2017)

⁴⁷ (2014) 2 SCC 1 (India)

woman may misuse it⁴⁸. There will be balance where both the parties will have to prove themselves right.

Implications of Criminalization

The stand taken by the Union of India in the same case was that even if they criminalize marital rape, the same will not going to stop just because of criminalization⁴⁹. This contention cannot be at all accepted because being a socialist state it is the duty of the state to protect the dignity of every individual and to do justice to every citizen. State cannot escape from its liability and that is the reason that whenever any criminal act punishable under IPC takes place it is always the state that prosecutes the accused. Therefore saying that criminalization of marital rape will not have any impact or effect is not well reasoned argument given by the govt.

Difficult to prove

The next challenge in the row is to prove the offence of marital rape. It is often argued that it will become very difficult for the woman to prove that she has been raped by her husband because of the history of sexual relationship with him. But difficulty in not proving an offence is not a bar on the legislature to enact a law or to criminalize the same. There are several offences mentioned in the IPC which too are very difficult to prove⁵⁰ but they still are criminal offences. The same is the case with marital rape. Though on the face of it, it appears that it is difficult to prove marital

⁴⁸ Even in such a case, husband would have a recourse under malicious prosecution under section 211, IPC or even defamation under section 499 of IPC.

⁴⁹ Going by this logic only, other offences such as rape, murder, theft still do take place. They are criminalized but still the numbers speak everything. So, if they are still taking place according to this stand of Union of India the corresponding provisions of rape, murder, theft should also be repealed and they should also be decriminalized.

⁵⁰ 1. Section 354 which provides for outraging the modesty of women. It is very difficult for a woman to prove that her modesty has been outraged by the man being very subjective and depending upon circumstantial evidences. Similarly in such cases it is very difficult for a man to prove himself innocent in the eyes of law since the court has already taken a presumption against him.

2. Section 499 which talks about defamation. Slander is very difficult to prove because many a times no record is there to say that yes actually defamation was there.

3. Taking example of rape, rape is difficult to prove in many scenarios. Onus is on the accused to prove himself innocent. While defending himself, the accused contends that the sexual act was consensual while the victim will claim otherwise. It depends totally upon the evidences such as testimony of witness (if any), medical examination that court decides whether the accused is innocent or not. In the absence of witnesses it becomes extremely difficult for a victim to prove that she was raped by the accused.

rape but there are enough ways through which it can be proved. First and most important is the medical examination through which it can be proved that she was subjected to sexual assault. Testimony of witnesses like neighbors, wife's friends is the other important factor that needs to be taken into consideration. Section 114A of Indian Evidence Act, 1872 will help the victim of marital rape in the same way in which it helps a rape victim. Consent is always the first and foremost thing to be proven in such cases. Section 114A states that if the sexual intercourse by the accused is proved and the question of consent remains there, on the basis of her evidence, court shall presume that she did not consent. It will create onus on husband to prove that consent of wife was there. The other challenges may come up with the criminalization but they can't be anticipated right now and now all that can be said is just 'let the things come up'. It thus will be the discretion of the court to appreciate the evidence or not, as in the case of rape.

Suggestions

In the light of the above discussion the following suggestion are made:

- To strike down the exception of Marital Rape in Section 375 of IPC and create a specific provision in IPC criminalizing Marital Rape and prescribing the same punishment as provided for rape
- To provide marital rape as an explicit ground for divorce rather than covering it under cruelty because of difference in the intensity of both the offence is very high.
- Awareness has to be spread regarding the implications and impact of marital rape on the life of the victim. When a wife complains to her mother about the marital rape, she usually asks her to tolerate the same as she is married to a man and now the man has full right over her. This is because she (mother) too went through the same abuse and tolerated it. Women in India consider their husband their first priority. They are least concerned about themselves and the same perspective has to be changed in order to make laws more efficient. Not only this, mentality of man has to be changed. He should be made to understand that his wife is not his property. Such change can only be brought by quality upbringing.

- Supreme Court had ordered that there will be no arrest in dowry cases till charges are verified⁵¹. Supreme Court in this sense acknowledged that fact that provisions of dowry section were being misused by the woman. Same protective measures could be taken in case of criminalization of marital rape. It could be directed that no arrest would be there unless the charges are proved and misuse of the marital rape could be reduce to a very great extent.
- Section 114A of Indian Evidence Act, 1872 which was inserted by Act 43 of 1983, should be made applicable to cases that fall under Sec 376(1) of IPC, 1860. It is because, right now presumption under Section 114A is available to cases that fall under Section 376(2), IPC and not to cases that fall under Section 376(1)⁵². In order to make rape law be it existing rape law or marital rape law more efficient, the presumption should be made applicable to entire Section 376.

CONCLUSION

The issue of Marital Rape has been neglected largely and it's time we stop hiding rape behind the iron curtain of marriage. In this research we have understood the concept of marital rape, its origin, the heinous act it is and detriment effect it has on the victim. Fifty-two countries have recognized marital rape as a crime equivalent to rape but Indian politicians continue to cite the poverty, illiteracy of our countrymen, societal and religious beliefs for not criminalizing marital rape. For how long will the women of our country have to tolerate the abuse to not only their body but to their mind and their very essence of self, to see their husbands go punishment free and using marriage as a license to rape? We accept that its criminalization won't totally eradicate this offence at one go, as is true with any crime but its recognition as a crime no less than rape is an essential step forward to make the man realize that he can't escape from the law and just because he is the husband he has the privilege to rape.

⁵¹AmitAnandChodhary, No arrest in dowry cases till charges are verified, says Supreme Court (Jul 28 2017, 14:24 PM) <https://timesofindia.indiatimes.com/india/no-arrest-in-dowry-harassment-case-without-verifying-authenticity-of-complaint-sc/articleshow/59796255.cms>

⁵² 2 M. Monir, Law of Evidence, 2088 (15th ed. ManmohanLalSarin, 2015)

