

Marital Rape in the Indian Society

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ABSTRACT

It appears that, from the moment of human interaction and language, and its implicit category making of social divisions, women have always been associated with the private, and men with the public. Due to the state's reluctance to interfere in the private sphere, violence in the home goes unchecked. The genesis of the issue of marital rape is deeply embedded in the public-private dichotomy. Marital rape is a prevalent form of intimate violence that involves a conscious process of intimidation and assertion of a man's superiority over women, thus leading to women's oppression. Despite the Justice Verma committee, which was constituted to reform anti-rape laws, unequivocally stating that the relationship between the victim/survivor and the accused is irrelevant to the act of sexual assault, the government of the day continued to believe that a law intruding into one's private space would severely threaten the institution of marriage. This idea is reflected in the traditional construction of the role of the wife as submissive, docile and that of a homemaker whose duty is to fulfill the man's need for sexual pleasure.

It is indeed a matter of great concern if, in this day and age, the discourse around the act of physical intimacy is based not on the idea of mutual consent but on subjugation and oppression. This paper thus seeks to explain why this patriarchal based doctrine of marital rape should be criminalized and how the Indian culture should no longer be used as an excuse to treat women as mere subversive chattels.

MARITAL RAPE

"Rape is horrible. But it is not horrible for all the reasons that have been drilled into the heads of Indian women. It is horrible because you are violated, you are scared, someone else takes control of your body and hurts you most intimately. It is not horrible because you lose your "virtue." It is not horrible because your father and your brother are dishonored. I reject the notion that my virtue is located in my vagina, just as I reject the notion that men's brains are in their genitals. If we take honor out of the equation, rape will still be horrible, but it will be a personal and not a societal horror. We will be able to give women who have been assaulted what they truly need: not a load of rubbish about how they should feel guilty or ashamed, but empathy for going through a terrible trauma."¹

Rape is traumatic, irrespective of the relationship between the perpetrator and the victim. The Indian judiciary has refused to bring marital rape under the canopy of crime. Rape laws in India continue to dismiss women's agency over their bodies, thus unintentionally propagating the

¹ Abdulali Sohaila. "I was wounded; My honour wasn't." *New York Times*, January 7, 2013

idea that women are still the property of their fathers, and husbands, and hold no individual autonomy. By seeking disguise under the argument of protecting the sacred institution of marriage, the Indian judiciary is actually protecting the traditional privileges being held by men in marriage. Every effort to cloak it as something else only underscores how ugly it really is. An individual's right not to be raped cannot be held hostage to an imposed conception of marriage. This paper is an attempt to expose the discrimination, shortcomings, and fallacies of the criminal justice system in India regarding marital rape. It seeks to establish reasons to eliminate the disparity in which rape survivors are treated and provide arguments necessitating criminalization of marital rape.

HISTORICAL BACKGROUND

Section 375 of the Indian Penal Code that defines rape, contains within it an exception- Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.² The history of this exemption can be traced back to the principle of 'implied consent' by Sir Matthew Hale which appears in his *History of the Pleas of the Crown* (1736) — “But 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.”³

During the Victorian era, men were considered to be the governing sex. Women, on the other hand, were dominated by their sexuality and were expected to fall silently into the social mold crafted by men. The unmarried women represented their fathers' property, and rape laws historically sought for single women to maintain their chastity so that their fathers could sell them into marriage. Married women then came to represent their husbands' sexual property, but both married and unmarried women needed protection from the perpetrator of sexual violence who threatened to steal her from her lawful owner. After a woman married, she came under the complete supervision of her husband: thus, through marriage, husband and wife became one person. The wife's rights, her property, and even her identity almost ceased to exist (Perkin, 73). Back in the 19th century, laws related to rape reflected the relationship of domination and subordination between the sexes. The law did not protect the women's bodily integrity but guarded the men's sexual right. Back then, the very concept of marital rape lay outside this dual purpose of rape law. Justice was administered according to a male view of a woman's rights, and how she ought to behave.⁴

² Section 375, Indian Penal Code, 1860.

³ Hale, Matthew. *The history of the pleas of the crown*. London: The original manuscripts by Sollom Emlyn, 1736.

⁴ Braddon, Mary Elizabeth. *Aurora Floyd*. Oxford: Oxford University press, 1863.

It was during this colonial era that the Indian Penal Code was drafted by the First Law Commission, chaired by Thomas Macaulay in 1835, and Lord Macaulay followed the same common law principle of not recognizing marital rape as an instance of rape.

In Britain, marital rape was not recognized as an offence, until 1991, when in the case of *R v R*, Lord Lane abolishing the legal fiction of a marital rape exemption, stating:

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

The idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law.

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment.

We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.⁵

However, the Indian judiciary and the legislators have chosen to retain this exception and has not given Hale's principle the burial it deserves. The reasons to retain this exception has been discussed further.

VIOLATION OF RIGHTS

By according a married woman's right to human dignity less value and protection than that of an unmarried woman, we are in a clear violation of the rights laid down by the international conventions to which India is a signatory, as well as the fundamental rights guaranteed by the Constitution of India.

In December 1993, the United Nations High Commissioner for Human Rights adopted the Declaration on the Elimination of Violence against Women establishing marital rape as a human rights violation. Article 1 of CEDAW, to which India is a signatory, has defined discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic,

⁵ *R v. R* (1991), Criminal Law- Appellate court (House of Lords 1991).

social, cultural, civil or any other field.”. States that are parties to the CEDAW Convention are suggested to adopt the principles of the CEDAW Committee’s General Recommendation 19 on Violence against Women. They thereby have directly undertaken obligations of “due diligence” to combat violence against women.⁶

Exception 2 of Section 375 of the IPC grants legitimacy to sexual violence committed against married women and is therefore inconsistent with Article 1 of CEDAW. The member states are not obligated to follow these recommendations, but it reflects our conformity with the international standards.

The exemption of marital rape as a crime also violates Article 14 (equal protection under law), and 21 (right to life with dignity) of the Indian constitution. Article 14 of the Constitution of India provides for equality before the law and equal protection of the laws within the territory of India.⁷ The two requisites of a valid classification have been repeatedly emphasized by the Supreme Court of India in several cases. The requisites are as follows: The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and the differentia must have a rational nexus to the object sought to be achieved by the legislation.⁸ The exemption withdraws the protection of Section 375 of the IPC from a married woman on the basis of her marital status. It is done to protect the traditional views of the family, but this exemption promotes the idea of wives being the property of their husbands, and rape laws still protecting the chastity of a woman’s body rather than safeguarding the basic fundamental rights available to the individuals. The exemption is grounded in an assumption that a wife gives an irrevocable consent to a sexual relationship with her husband at the time of the marriage. Such an assumption is wrong, irrational and not based on an intelligible differentia. Married women, exactly like men and unmarried women need the protection of the law in their private spheres. The actions of those in authority have conflicted with the constitutional theory under which citizens of India are entitled to equality.

Article 21 of the Constitution of India provides for the right to live with human dignity.⁹

The apex court, in *Prahlad v State of Haryana*, had stated that: “It has to be borne in mind

⁶ United Nations General Assembly. *Convention on the Elimination of all Forms of Discrimination against Woman*. New York: UN Department of public information, 1981.

⁷ Art. 14, Constitution of India, 1950.

⁸ *THE STATE OF WEST BENGAL v. ANWAR ALI SARKARHABIB* (1952), Constitutional Law-Appellate court (High Court of West Bengal 1952)

⁹ Art. 21, Constitution of India, 1950.

that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality.”¹⁰

The Justice Verma committee, which was constituted in 2013, to suggest amendments to criminal law, was of the opinion that any form of violence or assault, sexual or otherwise, on women is a violation of the fundamental right to live with dignity, as guaranteed by Article 21 of the Constitution of India. They were also in agreement with the view expressed that substantive due process in State action is mandatory to ensure the right to live with dignity. However, the issue before them was not simply the redrafting of existing laws but also the need to reassert and reaffirm that the State has primary obligations under the Constitution to secure fundamental rights of its citizens. The fundamental rights of women include safety and bodily integrity. The said rights, in turn, include secure spaces where they can exercise autonomy and freewill.¹¹

By considering marital rape, an exception to the offence of rape, the state is failing in fulfilling its obligations and thus violating the most basic right available to an individual.

APPROACH OF THE JUDICIARY

In *Bodhisattwa Gautam v. Subhra Chakraborty*, the Supreme court held:

“Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”¹²

However, this attitude towards rape changes when the perpetrator is the husband of the victim. The courts look at the relationship between the perpetrator, and the victim, and not at the time and context of the sexual act at issue. The private sphere is not to protect the privacy of the woman, but the privacy of the man — carving out an exclusive, secluded sphere for domestic interests is simply to preserve the man’s use of unrestrained power. (Mackinnon 1989). Judicial activism is common in India, but when cases of marital rape need to be considered, the courts almost always take a step back. The reason for exemption of marital rape as an offence lies in the public-private dichotomy. Due to the state’s unwillingness to interfere in private matters, violence

¹⁰ PRAHLAD AND ANOTHER v. STATE OF HARYANA (2011), Criminal Law- Appellate court (High Court of Punjab and Haryana 2011)

¹¹ India. Parliament. *Justice Verma Committee Report on Amendments to Criminal Law*. Washington: India: PRS Legislative Research, 2013.

¹² SHRI BODHISATTWA GAUTAM v. MISS SUBHRA CHAKRABORTY (1996), Criminal Law- Appellate court (Supreme Court of India 1996).

in the home goes unchecked. This reluctance has been reflected by the Indian Judiciary on several occasions.

State versus *Vikash (2014)* a case from a Special Fast-track Court in Delhi ruled that intercourse between husband and wife, even if forcible, is not rape — “the prosecutrix and accused being legally wedded husband and wife, the prosecutrix being major, the sexual intercourse between the two, even if forcible, is not rape and no culpability can be fastened upon the accused.”¹³

The Delhi High Court in *Harvinder Kaur versus Harmander Singh (1984)* stated that — “Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 have any place. In a sensitive sphere which is at once intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond”.¹⁴

The reluctance of the judiciary to interfere in marital relationship because of its private nature is spurious, considering that the judiciary consistently interferes in marital relationships through other criminal provisions, such as adultery, domestic violence, dowry, and bigamy. In fact, Ratna Kapur and Brenda Cossman’s book, *Subversive Sites* suggests that “[...] this understanding of the family as private, and beyond state intervention has operated to both immunise the oppression of women within this domestic sphere, as well as to obscure the extent to which this private sphere is itself created and protected by state regulation.”¹⁵

This idea of non-interference of the judiciary in marital relationship is patriarchal and misogynistic, that is used to discourage wives to have an identity, to deny them a status which is equal to their husbands, and to disentitle them to an agency which is grounded in consent instead of marriage, thus dismantling the very concept of consent.

THE APPROACH OF THE PARLIAMENT

The 2012 gang-rape of a 23-year-old female paramedical student, aka Nirbhaya triggered nationwide protests and led to the establishment of a judicial committee to suggest ways to amend laws to provide quicker investigation and prosecution of sex offenders.

¹³ STATE v. VIKAS (2014), Criminal Law- Fast track court (Dwarka Court of New Delhi 2014)

¹⁴ HARVINDER KAUR v. HARMANDER SINGH CHOUDHRY (1984), Criminal Law- Appellate court (High Court of Delhi 1984)

¹⁵ Cossman, Brenda. *Subversive Sites: Feminist Engagements with Law in India*. Edited by Kapur Ratna. New York: SAGE Publications, 1996.

The Committee found itself unable to disregard the subjugation of women, which has been occasioned in India on account of the lack of financial independence and security. The committee had observed that even though a government may enjoy popular public will, unless and until its actions are informed by constitutionalism, it will be unable to discharge the obligations towards citizens which are guaranteed under the Constitution. The committee had also observed that rape or sexual assault is not a crime of passion but an expression of power and subordination. No relation, including marriage, supplements an irrevocable consent of sexual activity. It had recommended the renunciation of arcane, misogynist traditions and practices which are completely at variance with the Constitution and suggested the removal of the exception for marital rape, thereby advocating its criminalization.¹⁶

Despite the recommendations, marital rape has not yet been deemed fit to be seen as a crime in India. The judiciary has taken a step back and rules all cases regarding marital rape in the favour of the perpetrator, i.e., the husband, using the reluctance of the legislators as an argument to cloak its unwillingness to interfere with the sanctity of marriage.

While replying to a question on whether or not the government planned to criminalize marital rape, the former Union Minister of Women and Child Development, Maneka Gandhi, had stated- “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament.”

All the factors stated by Gandhi will definitely prove to be a hindrance in the enforceability of the law if the State decides to make marital rape an offence. But difficulty in the implementation of a law does not free the Government of its responsibility to make a much-required law. The Government needs to dismantle patriarchy by making laws that discourage men to impose their inherent supremacy and dismiss the autonomy of women. A man does not have the right to catcall a woman, molest, or assault a woman walking on the streets because that would be blatantly wrong. A man cannot break into the house and force himself upon a woman because that too would be blatantly wrong. But when a husband decides to disregard the will of his wife, and force himself on his wife, whenever he wishes to, for as long as he wishes to, the State decides to turn a deaf ear to the screams of the survivor, because the lawmakers believe that the patriarchal society is still not ready to empower its women. To assert that only the poor, and illiterate

¹⁶ India. Parliament. *Justice Verma Committee Report in Amendments to Criminal Law*. Washington: India: PRS Legislative Research, 2013.

disregard the autonomy of his wife is preposterous, because men who believe that marriage presumes consent, are present in every walk of life.

CONCLUSION: CRIMINALIZATION OF MARITAL RAPE

In the paper, I have tried to establish that rape is atrocious, irrespective of the marital status of the survivor. The judiciary should strike down the exception to Section 375 of the Indian Penal Code, making marital rape a crime in India. It will only be removing the inequality in the law so that the definition of rape covers all cases of non-consensual sexual acts. Indian society has developed, and the status of women has been elevated. However, in a marriage, there is unspoken recognition of division of labour and responsibilities. Wives are still expected to be docile and are taught to make every effort to save their marriage. Consent is presumed at the time of marriage. Husbands are called gods and are supposed to be worshipped. The question that “if we are married, how can it be rape” still resounds in the minds of men, as well as women. Making marital rape a crime will not dismantle patriarchy in a day, but it will be a step in the right direction. The enforcement of the law will be difficult because of the mentality of the people to treat an institution more sacred than the bodily autonomy of an individual. But, the difficulty in the enforcement of the offence shouldn't prevent the judiciary from making marital rape an offence. Making it illegal will help in sensitizing the public of the wrongfulness of the act, and will be conducive to empowering women. It's high time that the consent of a married woman was taken into consideration by law, even if the perpetrator is the husband.
