



A STEP TOWARDS CRIMINALIZING MARITAL RAPE

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INTRODUCTION

Marital rape (or **spousal rape**) is the act of sexual intercourse with one's spouse without the spouse's consent. It is a form of domestic violence and sexual abuse. Although, historically, sexual intercourse within marriage was regarded as a right of spouses, engaging in the act without the spouse's consent is now widely recognized by law and society as a wrong and as a crime. It is recognized as rape by many societies around the world, repudiated by international conventions, and increasingly criminalized. Still, in many countries, marital rape either remains outside the criminal law, or is illegal but widely tolerated. Laws are rarely being enforced, due to factors ranging from reluctance of authorities to pursue the crime, to lack of public knowledge that sexual intercourse in marriage without consent is illegal. Marital rape is more widely experienced by women, though not exclusively. Most countries criminalized marital rape from the late 20th century onward—very few legal systems allowed for the prosecution of rape within marriage before the 1970s. Criminalization has occurred through various ways, including removal of statutory exemptions from the definitions of rape, judicial decisions, explicit legislative reference in statutory law preventing the use of marriage as a defense. Advancing well into the timeline, marital rape is not an offence in India. Despite amendments, law

commissions and new legislations, one of the most humiliating and debilitating acts 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.

Position in India - Legislative Apathy to Marital Rape

So far as Indian law on marital rape is concerned, it can be said that the criminal law takes a very narrow approach in addressing the issue, and marital rape is more often viewed as a form of noncriminal domestic violence in India, and not generally as a distinct sexual offence in all cases. The Indian Penal Code (IPC), 1860 recognizes marital rape to a limited extent in Section 375, the exception to which states that “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.” This age has been now proposed to be raised to 16 years which ironically still remains below the legal age for marriage in India.

Whatsoever, it is to be noted that the Penal Code in India makes a man guilty of raping his minor wife and not otherwise. Section 376 of IPC provides punishment for rape. The only situation other than this where a man can be held guilty of raping his wife is contemplated in Section 376-A which makes any form of sexual intercourse between a judicially separated couple without the consent of the wife punishable with imprisonment for a term which may extend to two years as well as with fine. It therefore follows that any married women in India not below the above specified age and not living



apart from her husband has no power to punish her husband for the degrading and inhumane sexual torture meted towards her; she can at best seek divorce from him on the ground of cruelty or have recourse to Section 498-A of IPC dealing with cruelty, provided she can prove the fact of 'perverse sexual conduct by the husband', which often appears to be something too difficult to establish or correctly interpret. Is excessive demand for sex perverse? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.

Surprisingly, like the legislature, the Judiciary in India which has otherwise been playing a proactive role in securing social justice in India has not been that sensitive enough in cases of marital rape as it should have been and has not been very effective in alleviating the miseries of married victims. In recent cases of *Bodhisattva Gautam v. Shubra Chakraborty*¹ and *Sakshi v. Union of India*² the Supreme Court failed to recognise marital rape as a separate criminal offence and refused to criminalize the same.

It is hence pathetic to note that in a country which casts a fundamental duty upon citizens to denounce derogatory practices against women and where every person is assured of protection of his life and personal liberty³, wherein right to life is interpreted to denote right to live with human dignity, women are left in a deplorable condition to without the right of representation or the right to redress grievances against their

wrongdoer just because they happen to be their husbands.

Status of Criminalization Of Marital Rape across the Globe with special reference to India

The wife's role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. Atleast the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being "good wives", to quietly serve and not wash dirty linen in public, even counseling remains inaccessible. The wife's role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. Atleast the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being "good wives", to quietly serve and not wash dirty linen in public, even counseling remains inaccessible.

Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law

1(1996) 1S.C.C. 490.

2 A.I.R 2004 S.C. 3566

3 Article 21 of the Constitution of India



Commission has preferred to adhere to its earlier opinion of non-recognition of “rape within the bonds of marriage” as such a provision may amount to excessive interference with the marital relationship.

A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and hence, condone such behaviour.

The 172nd Law Commission report had made the following recommendations for substantial change in the law with regard to rape.

1. ‘Rape’ should be replaced by the term ‘sexual assault’.
2. ‘Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the light of Sakshi v. Union of India and Others [2004 (5) SCC 518], ‘sexual assault on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.

5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

India takes first step towards criminalizing marital rape. Supreme Court and various High Courts had Observed the growing misuse of section 498A (harassment caused to a married woman by her husband and in laws). Citing the Justice J S Verma Committee Report on ‘Amendments to Criminal Law’ , it said it was recommended that the exception to marital rape be removed , but it also pointed out that it is also important that legal prohibition on marital rape is accompanied by changes in the attitude of the prosecutors, police officers and those in society generally.

Mostly western countries have criminalized marital rape . The Centre said it does not necessarily mean India should also follow them blindly because this country has its own unique problem due to various factors like literacy, lack of financial empowerment of the majority of females , mindset of the



society , vast diversity, poverty , etc. and these should be considered carefully before criminalizing marital rape .

Need of Reforming the Stagnant Laws in India – High Time to Change

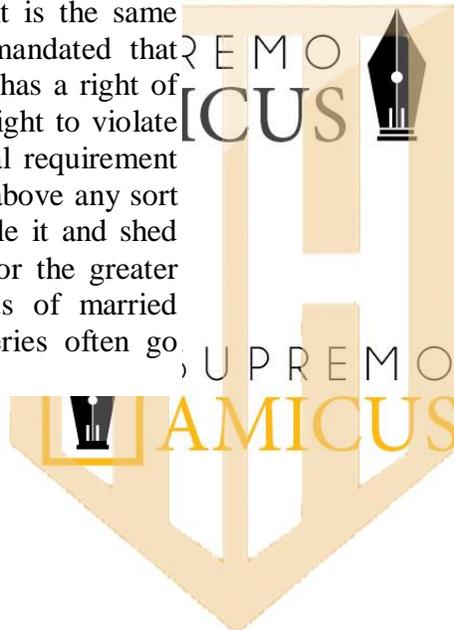
In a country like India, where women have remained a subject of discrimination and persecution for ages and the low socio-economic status accorded to them through structural factors makes them remain a ever vulnerable class, a refreshing change in the attitude of lawmakers is a dire necessity to assure a woman of her right to dignity, her right to a self identity within the bonds of marriage, for marriage is not the tool of depriving a woman of her basic human rights and fundamental freedoms. The recent deliberation made by the law makers of our country that marital rape ought not to be criminalized for it is capable of destroying the sanctity of marriage is entirely erroneous. This is because marriage is a bond of love and trust which forms the basis of its purity and in a marriage where dominance, violence and sadism reigns supreme, the sanctity of marriage is already lost. It is therefore not the sanctity of marriage which is sought to be protected but the perverted offenders who are sheltered under the veil of marital relationship. Also there is need to correctly interpret the implied consent theory which does not preclude a woman to resist at reasonable times from having unwanted sexual intercourse. Sex is a part of marriage no doubt but forced cohabitation is definitely not the sole obligation of a wife to perform as per the whims and fancies of her husband who tends to dominate her physically, emotionally or sexually. The legislators have further opined that criminalization of marital

rape might increase instances of false and fabricated claims against innocent husbands in India. This approach is however untenable, both logically and legally. It is illogical to say that laws should not be made because someone might be at risk of a fabricated claim. If this was so, no law pertaining to the protection of any specific class would have ever been enacted in the country. And legally speaking, when it is already difficult to prove a claim of rape, it would be much tougher to prove a fabricated claim of rape against someone beyond reasonable doubt. Besides, taking into consideration the societal norms of our country, it can be further inferred that accusing one's husband of rape and dragging him into court is one of the least possibilities for an Indian woman to do, who values her family reputation more than her life and worships her husband like deity, and unless she is compelled by unbearable circumstances, no woman would take such stringent action. Weird though it may sound, but this is the stark reality of Indian women who are genuinely an embodiment of tolerance which often leads them to compromise with their liberty and dignity throughout their lives.

The absence of legal provision to this effect would hence add to the misery of women, who would find no assistance or remedy of law even if they dare to stand up against all atrocities, defying the societal and cultural norms. Hence not enacting a law in fear of possibility of fabricated and malicious claims is definitely not the solution. Further, it is high time that the Indian Judiciary should take positive concrete steps in regard for unless women are protected within the bonds of marriage, right to equality



enshrined in Article 14⁴ of the Indian Constitution would have no meaning. Article 21⁵ of the Constitution which guarantees every woman a fundamental right to life and personal liberty, would become a sheer mockery, unless interpreted as to include her right to bodily integrity at all times, irrespective of marital status. The Judiciary being the custodian of fundamental rights of all citizens has an inherent duty to secure justice to the fairer sex ensuring that no man has a license to rape his wife, just because she might be fed and clothed by him through his earnings. The task is not difficult for it is the same institution which has once mandated that even a woman of easy virtue has a right of privacy and no person has a right to violate her person.⁶ The only essential requirement is that the Judiciary is to rise above any sort of prejudice which may cripple it and shed off any patriarchal biasness for the greater cause of justice to thousands of married women in India, whose miseries often go unheard, unwept and unsung.



4. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

5. “ No person shall be deprived of his life and personal liberty except according to the procedure established by law”.

6. State of Maharashtra v. Madhukar N. Mardikar [(1991) 1 S.C.C. 57].