MARITAL RAPE: MARRIAGE IS NOT CONSENT

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Abstract

Equal rights, equal importance or equal opportunities this is what we call gender equality. Both men and women are pillars of humanity, but women have always been subjected to humiliation. The dignity of women is always hampered by men, rape is one of the appropriate example of violation of dignity of women by men. Marital rape is a crime undefined in India, is one of the most debatable and controvertible issue. In a country where development is determined by the progress of its women, how come there is no law or no legislation against such violent and brutal crime. If state can make laws for domestic violence then why can’t it make laws for such a heinous crime? There is a need for protection of women against their husband who is the perpetrator and the woman is the silent victim. What can be more painful for a woman and violative of her self respect and dignity if an offence like marital rape takes place within her marital relationship? Lack of laws and social stigma present in our society is one of the primary reason why offence like marital rape is not criminalized and not seen as offence. There is an instant need of criminalisation of marital rape in India via proper legislative approach and gender sensitivity should be created among the people. Thus, ultimately this paper focuses on the plight of the married women who are subjugated in this trap and its high time that one thing need to be taken into consideration, that non consensual sex with wife must be considered as rape.

Keywords : Marital Rape, Gender sensitivity, India, society

Introduction

Stop telling Yourself You Can Fix Him.

He’s been this way for a long, long time

And he doesn’t intend to change.

Don’t be a sacrificial lamb on the alter of this rage.

Don’t play the martyr to his hate.

You can never save someone by letting them destroy you.

That is not love, its relational suicide.

Save you’re self instead.

Get out while there’s still time.

John Mark Green

Marriage is a sacred union of man and woman that accords status to them as husband and wife. The origin, concept and purpose of marriage can be very well traced out in the religious books. According to the

Veda, marital bond is a union between a masculine and feminine entity with commitment to attain dharma (righteous way of living), artha (possession), kama (physical and other desires) and moksha (the liberation) in unison. A good and successful marriage is an effort of both husband and wife. Marriage is a sacred bond, but what if husband is humiliating the dignity and self respect of his wife by doing rape. It doesn’t mean that it gives husband the license to rape his own wife under the veil of law. So many wives have been victim of marital rape. Marital rape is a bitter truth behind the iron curtain of marriage. It doesn’t give right to control over the sexuality of the wife. It is a kind of abuse on day to day basis. So many wives got victimized due to marital rape since years and so many husbands have turned into legal rapist from lover. In India where husbands are given the status of god by their wives it doesn’t mean they have no right to say no. A woman need to have all right to find justice if her husband rapes her within the ambit of marriage. In such kind of situation there should be no immunity for the husband. Wife too has full marital autonomy. All the major democracies around the world has criminalized marital rape. Marital rape is a breach of trust and confidence. A wide range of Gender based violence is taking place in the family like domestic violence, sexual abuse of female children, battering and even marital rape. These are kind of Gender violence which ends up in causing physical as well as psychological pain to women.

An Understanding of marital rape

Rape can be defined in its simplest term, as ‘the ravishment of woman’ without her consent, by force, fear or fraud, or as “the carnal knowledge of a women by force against her will”. ‘Rape’ has been extracted from its generic term “Raptus” which means violent theft applied upon both property and person in Roman Culture or an act done by one man which damages or destroys the property of another man. Marital rape or Spousal rape can be defined as an act which includes unwanted sexual intercourse, that is with one’s partner(spouse) without the consent of the other partner. This kind of unwanted intercourse by a man upon his wife is obtained by force and physical violence or when the wife is unable to give consent. The victims of marital rape usually don't realize that they have been raped as they are under this wrong impression of that partners do don't rape each other. However, this is totally false and sexual acts without consent even among intimate partners will constitute the offence of rape. Marital Rape in


4 Margaret Schaus, Women and gender in medieval Europe: An Encyclopedia, 695( Routledge revival,2006)
which women are subjected to extreme level of violence and undue influence also shows grave human rights violation. Violence can be generally conceptualized in terms of physical force or a behaviour that inflicts injury on a person or to a property. These kind of sexual violence happening against women too has its various determinants such as:

- Control of women’s sexual behaviour.
- Women as an object of physical pleasure.
- Unequal power relation present in the society.

**Types of marital rape—**

- Battering rape – This is a kind of marital rape which involves the use of force and aggression against the wife. The women experience both physical and sexual violence during sexual assault. The beating may also occur before the sexual assault so as to compel her into sexual intercourse.

- Force only rape – In this kind of marital rape, the husband usually does not necessarily batter the wife, but also uses much force which is necessary to enter into sexual intercourse with the unwilling wife.

- Obsessive/Sadistic rape – This is a form of marital rape which involves the use of force sexual assault complied with perverse act against the wife. It involves a kind of sexual sadistic pleasure enjoyed by the husband.

**Historical perspective:**

Historically many cultures have considered Marital rape as a sin, different religious text has very well traced out the rights of women in marital bonds before any code of law was formed in any country.

**Concept under Hinduism**

It is stated in *Mitakshara* about the unlawful coming together of a man and a woman for sexual enjoyment which is called *sangrahana*. It says that Sinful *sangrahana* is of three kinds which are brought about by deception, desire or force.

The first kind (which is rape) takes place when intercourse happens in a isolated place against the will of a woman, or with a woman who is of unsound mind, intoxicated or is under a fallacy or who she raises a cry.

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7 Janet A. Sigal, *Violence Against Girls And Women: International Perspectives*, 137 (ABC-CLIO, 2013)

8 *When Bedroom is The Crime Scene: Contextualizing Intimate Partner Rape*, ProQuest, 2018


The first is characterized by smiling at a woman, winking at her, touching her ornaments or clothes. The second one can be characterized by the delivering of things such as flowers, incense, food, clothes and indulging in private talks. The third is characterized by way of his action such as by lying on the same bed, kissing or embracing her. Strisangrahan by force (which is rape) is very much included under sahasa as stated by madananatna.

**Concept under Islam**

"Another of His signs is that He created spouses from among yourselves for you to live with in tranquility. He ordained love and kindness between you. There truly are signs in this for those who reflect"\(^1\)

Allah has described marital bonds as a relationship of mercy, kindness and love. Allah commands men to deal with their wives in an righteous way. Any kind of harm or violence be it verbal or psychological such as abuse or rape are completely unacceptable in such a relationship. The Qur’an describes this relationship as compassion and love and also to seek solace in each other.

The Quran is very much conscious and sensitive towards woman’s rights, welfare their individuality. This is why non consensual sex in marital bonds is subjected to what is called in modern day jurisprudence as ‘marital rape’. Thus in the light of Quranic value system, it must be prohibited and sanctioned.

The Qur'an describes ‘man and his wife as libas (apparel, garment) for each other’.\(^2\) Therefore it implies that marital bonds is much more than fulfilling a natural instinct like hunger or thirst. It conveys much more higher end, and a marital contract which is a mode of protection, comfort and adornment for each other; this is what an apparel or garment is meant for. Thus Qur’an has beautifully explained this relationship by describing husband and wife as each other’s libas.

**Marital Rape and laws in India**

In India laws regarding rape continues to be of patriarchal mindset, considering women to be the property of men and therefore she has no autonomy or agency over her body. Marital rape has been criminalized in many countries and is documented as a desecration of human rights. Although various countries in the world have taken such progressive

\(^1\)The Qur'an 30:21

\(^2\)The Qur'an 21:87
steps, India is among one of those countries where marital rape is still not a criminal offence and it is left untouched by the legislature.

Section 375 of Indian Penal Code defines the Offense of Rape and its various instances, followed by two exceptions, in this issue only exception 2 plays the vital role, as it says —*Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.*

This section dealing with rape clearly describes scope which states that the offence of rape is only committed within matrimonial bonds when the wife’s age is under fifteen years, this means there is no immunity or legal protection given to wife when she crosses the age of fifteen. It is a kind of satire on Indian legal administrative, which states that the legal age for marriage is eighteen and the very protection should be granted only up to sixteen who faces sexual assault! There is no answer to this as the legislature and judiciary is as always silent to this.

Under Protection of Women from Domestic Violence Act, 2005 if a women had undergone marital rape, she can approach to the court and obtain judicial separation from her husband. But as the act didn’t identified marital rape as a crime the passing of the much awaited act of Protection of Women from Domestic violence Act, 2005 didn’t gave much relief to the suffering and pain of the women. Under section 13 of the Hindu Marriage Act 1955, it has clearly provided the grounds for divorce which includes cruelty both physically and mentally. Rather than defining it in a proper way, it is applied in the terms of human conduct to behavioral relation towards marital duties and obligations. Under section 498A of the Indian Penal Code the word cruelty is defined. To bring the case within the ambit of this section, the degree of cruelty must be causing serious harm and pain to the wife, both mentally and physically.

**Constitution of India and the Marital Exemption To Rape**

The Constitution is the law of the land and the very heart and soul of the nation. According to the constitution any law passed which is inconsistent with the principles enshrined in the constitution will be ultra virus and unconstitutional. The Indian Constitution lays down and guarantees the right to *equality, freedom, liberty a life of dignity* to its citizens irrespective of what gender race or sex the citizen belongs to. Then why the married women facing rape by her husband are not able to live a life of dignity and choice? Does the marital exemption to rape fulfills the principles laid down in Article 14 and Article 21 of the Indian Constitution?

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13 Indian Penal Code, (45 of 1860) Section 375
14 Indian Penal Code (45 of 1860) Section 375, exemption(2)
15 Protection of Women from Domestic Violence Act, 2005 Section 3 Explanation 1(2)
Equal Protection of Law

Article 14 guarantees and provide every citizen a fundamental right of equality before the law and right of equal protection of laws. Section 375 of the Indian Penal Code make a classification in terms of an exemption and does not regard a forceful sexual intercourse within a marriage as a rape. This section only provides immunity to statutory rape and not marital rape. Thus, it is considered that when a women is married she becomes the property of her husband and thus her consent does not matters and is considered as permanent consent to the sexual relationships with her husband.

Right to Life and Personal Liberty

Article 21 clearly defines life is “something more than mere animal existence” as very well traced out in Munn v. Illinois. Marital rape violates right to privacy, right to bodily self-determination and right to good health which forms an essential part of article 21. It also violates the right to live with human dignity. There are also cases in which judgment are given in contradiction to article 21 among them one of the most leading case of Harvinder Kaur v Harmendra Singh stated that “introduction of constitutional law in the home is most inappropriate.” It is like introducing bull in china shop. It will be a ruiner of the marriage institution and all that it stands for, thus resulting in weakening the marital bond. Later this was contradicted in the case of Sareetha v T Venkata Subbaiah, failed to advance the situation. The Supreme Court had also elucidated upon this in the case of Saroj Rani v Sudarshan Kumar Chadha by stating that “the introduction of equality clause within the marriage will destroy the institution of marriage”. With rendering these judgment it left us to ponder upon that are the laws not applicable behind the closed doors? or are they not encroaching the privacy?

Right to Privacy includes the right to be left alone. Any form of force sexual intercourse violates the right to privacy which is very well stated in State of Maharashtra v Madhkar Narayan.

Right to bodily self-determination is based on the view that an individual is the utmost decision maker in matter firmly related with his/her body and welfare. Approval to sex is one of most intimate and personal choice that a woman reserves for herself. There is a concept called body autonomy. No person other than himself have full control over whom or what use their body. It is generally considered as basic human right which a person possesses. That is why one can’t be forced to donate blood, tissue, or any of its organs. It’s like the same that no one can touch you, have sex with you, or use your body in any way without your consent.

16Munn v. Illinois, 94 U.S. 113.
19Saroj Rani v Sudarshan Kumar Chadha, 1984 AIR 1562.
**International Scenario**

Marital rape has been recognized as a crime in various international laws as it is a grave violation of human rights. In United Kingdom many judicial decisions were given such as in *R. v. Graham L*\(^{21}\) and in *R. v. C*\(^{22}\) that a man can be absolutely accused for raping his own wife even though the rape incident took place much earlier and it do not offend section 7 of the European Convention which bars the retrospective of the penal provision. Thus United Kingdom laws have gone judicial innovation and recognized marital rape as a crime.

International Convention on the Elimination of all forms of Discrimination against the women (CEDAW) in combination with General Comment no.12 it is stated that the focus is on state as a obligation towards the protection of women from brutality which include both sexual abuse and the abuse faced by them at home. Marital rape is criminalized in a numerous countries such as UK, Turkey, Canada, USA.\(^{23}\)In 1993, the United Nations’ General Assembly had adopted a Declaration of Elimination of Violence against Women which particularly incorporated marital rape as a crime against women.\(^{24}\) India too is a part of various International committee and is regarded to provide laws and provisions to enshrine basic human rights. Thus India has obligations to provide laws which would protect and safeguard women from marital rape. The ‘United Nations Committee Declaration of Elimination of Violence against Women’ has also recommended India to criminalize marital rape.

**Justice Verma Committee also constituted in 2013 and gave recommendations on marital rape.\(^{25}\)**

- Rape and sexual assault as a offence was not only identified as crimes of desire but also as a manifestation of authority. The act of rape should not be limited to penetration of the vagina, mouth or anus, any non-consensual sex should be included within the definition of rape. The Committee recommended that the marital exception to rape should be deleted as the Indian Penal Code differentiates the rape which takes place within marriage and outside marriage.

- The law need to determine that the marital bonds or other fiduciary relationship between the victim or the perpetrator is not a valid plea for heinous crime like rape and sexual violence.

- The relationship between the accused and the complainant should not to be


\(^{23}\) UK’s Criminal Justice and Public Order Act, 1994 and the Sexual Offences Act, 2003; Article 102, Turkish Penal Code, 2004; Criminal Code of Canada, 1970; In 1993 all states in the United States of America had ended their penal laws to delete the exception to marital rape.

\(^{24}\) Article 1, Declaration of Elimination of Violence against Women

taken into consideration as relevance to the enquiry whether the complainant consented to the sexual activity.

- The very fact that victim and the perpetrator shares a marital bond and intimate relationship must not be regarded as a mitigating factor for justifying the lower sentence for rape.

**Justifications to Marital Rape Exemption**

**Irrevocable Consent Argument:** According to this, Implied consent of wife by way of their mutual matrimonial consent is always present. Thus there exists no marital rape because sexual intercourse between the partners is always considered consensual.\(^{26}\)

**Blackstone’s Common Law Unity Doctrine:** Husband and wife after marriage unify into a single entity and thus husband holds the joint ownership.

**Marriage Preservation Theory:** From the very early times marriage is considered as a sacrosanct foundation of the society and nuptial obligations are important to be fulfilled by the spouses. Thus concept like marital rape will lead to destabilizing the institution of marriage.

**Privacy Argument:** It is considered that by prosecuting husbands for marital rape will infringe marital privacy.

**Probability of Misuse Argument:** It is considered that the husbands can be subjected to false charges by their wives.

**Plea to Criminalize Marital Rape**

Apart from all the traditional and modern justifications to marital rape exemption, the very fact do not change that a rape is rape whether it happens with married or unmarried women. Married women possesses same rights and full dominances over her body as an unmarried woman has. Women constitutes half of the society’s population which gives rise to other half. Then why women still continues to be victimized by men in the society? The very argument that marriage is the social unit of a family it do not justify the act of greatest brutality. It will be as foolish as saying that if a relative kidnaps you or someone in a family is kidnapped by a relative will not be an act of kidnapping. What does the act of rape has to do with whether it is done by a married man to his wife or an unmarried man to a stranger? How does the violence committed is change. If various legislation's and enactments has been passed regarding violence against women in India like dowry, cruelty, domestic violence and female infanticide then why not marital rape has been passed In the light of *Sakshi v Union of India and others*\(^{27}\), sexual assault on part of the body should be constructed as a rape. It was stated in *Queen Empress v. Haree Mythee*\(^{28}\) that even if the wife is above the

\(^{26}\)Marital Rape And The Laws In India by Ankita Sen available at: https://blog.ipleaders.in/marital-rape-law-india/ (visited July 28,2018)

\(^{27}\)Sakshi v Union of India and others 2004(5) SCC 518.

\(^{28}\)Queen Empress v Haree Mythee (1891) ILR 1.Cal 49
age of 15 years, husband has no right to disdain her bodily security. Marital rape should be criminalized in India as

- **Marital rape exemption in law is taking away the rights of the wives to say “no”**
- **Marriage is an institution which establishes a partnership between the equals**
- **Subjection to extreme level of coercion and violence**
- **Violation of basic human rights**
- **Ultra virus and unconstitutional in accordance to the principles enshrined in the Indian Constitution.**

In 2015, a survey in India has disclosed that one in five men have compelled their wives to have sexual intercourse. More than two-thirds of Indian married women between 15 and 49 years old asserts to have been beaten or forced into sex by their husbands. Around 665 cases have been reported in 2015 in NGOs by women who faced domestic violence and marital rape, but the cases registered with court are very few. The plea is for punishment, the punishment for an act of rape is not granting of divorce as judicial separation. But over here too the provision do not recognize the said offence as rape.

According to article 15 of the Indian Constitution, it is clearly stated that state shall take steps for welfare of women and children. Thus criminalisation of marital rape as in protection and welfare of women should be done.

**Conclusion**

Marital Rape is one of the worst kind of sexual abuse which is taking place in the family. Patriarchal mindset has led to gender discrimination which in result has led the laws to close its eyes in doing justice towards the misery of the abused wives by not recognizing Spousal rape as a crime. The legislature recognizes the rape of a minor wives it in very loud terms and even the Apex Court has delivered landmark judgment but why the major wives have still not been able to gain judicial sympathy and justice in getting Marital rape recognized as a crime by the judiciary. By not criminalizing Marital rape as an crime it is paving an escape hatch for many offenders of sexual violence and the hunt for justice remains unquenched. When a women says “NO”, the word itself is a sentence which needs no elaboration or any kind of justification. When a woman go through Marital rape it is only the woman who suffers, children also faces the impact of it. Law is no static and always need to be much more dynamic and flexible with a change in time and society. So, its high time that Marital rape should be criminalized and our legislature should be reviewed. After all how long women will be facing torture and subjected to victimhood? How long women will be victimized by the men and the society? Does a woman loses her right to give consent after marriage?