



MARITAL RAPE: LIFTING THE VEIL OF SACRED INSTITUTION

*By Chaithanya B Ampadi
From National University of Advanced
Legal Studies (NUALS)*

Under the veil of the sacrosanctity conferred to the institution of marriage, centuries has passed down in denial of a basic right to women, the denial to criminalise marital rape. Marital rape or spousal rape is the act in which one of the spouse indulges in sexual intercourse with the other spouse without consent. The act is same as what we term as rape. The definition of rape remains

the same, the only distinguishing factor is the relation that the perpetrator has with the victim. In this era when gender equality strives to find its purpose, our country is highly reluctant to recognize marital rape as a crime. As per the present notions that our legislation and judiciary hold, marriage in itself is a form of consent to sex and thus marital rape becomes antithetical. The county impetuously stuck on the age old beliefs, cultures and a highly irrational set of justifications, have in its various judgments and legislations, denied the criminalisation of marital rape and on the contrary have provided an exemption clause for the same. The perpetrators relation to the victim being considered as a sufficient ground will not consider it as a crime even when marital rape exist as a most common and repugnant tool of masochism in the Indian society. The honourable Supreme Court of India has defined raped as “deathless harm and the gravest crime against human dignity”². This same judiciary, the legislation, and the society blinded by the veil of institution of marriage and cultural values thereby attached have ignored the same crime done to a “married” woman. These social ideologies date back to the time when women were considered merely as a property of their husband, and the husband was vested with complete rights over her. In the wake of women rights and equality, the denial of autonomy over their body to a married women, lays against the principles of equality. The paradox is at its peak when the Court agrees that “no positive

¹Section 375 in The Indian Penal Code

[375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

² Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490, ¶8-10.



act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act³, but at the same time refuses to criminalise marital rape.

Rape laws in the country though have undergone tremendous changes in the wake of heart breaking incidents, it has however remained one step short in recognizing the rights of a married woman. Rape as defined in section 375 of IPC⁴, expansively defines the term “rape” in legal parlance. The crux of the section is based on the notion of consent. In the exception 2 to this section, the application of this section in cases of non-consensual sexual intercourse between husband and wife where wife is above the age of 15⁵ has been excluded. Irony leaves a scar when section 376 B of IPC criminalizes non-consensual sex if the partners are living separate. The contrast between section 376 B and the exception 2 of section 375 has been justified on the frivolous argument that living together gives the presumption of consent to have sexual intercourse and that the institution of marriage comes with a pre-requisite of consenting to sexual intercourse. The larger picture protruded by such an argument is that in India “marriage is a license to rape”. What the society, the government and the judiciary have deliberately failed to notice is that marriage whether considered a sacrament or contract can in no way supersede the rights and

liberties of an individual guaranteed by the Constitution. Non consensual sex is rape irrespective of whether it is performed under the institution of marriage or not. Personal laws or the institution of marriage cannot be weighed on a higher scale than that of the basic fundamental and human rights secured through the Constitution and natural law. The right under Article 14 is not absolute and the legislation has been conferred with the power to treat different persons differently if circumstances justifies it. However there is no such justification that can be provided for discriminating a married and an unmarried woman with respect to the control over their body. Denial of sexual autonomy to a married woman is in itself a direct violation of Article 14⁶ and Article 21⁷ of the Constitution of India. This distinction between a married and an unmarried woman, with respect to their right over their body and dignity, so created by the existing laws in India is in no way warranted but is instead a portrayal of the age old cultural beliefs and customs that our country has clinged to, defeating the very notion of gender justice and equality. Women in India were always considered to be subservient to male. Marriage has mostly contributed to adding more mishaps to this downtrodden life of women. Marriage was and is construed as shackles binding women to the four walls of the house.

³*T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356.

⁴*Id.*, at 1.

⁵Exception to Section 375 of the Indian Penal Code, 1860.

⁶ Article 14 of the Constitution of India.

14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁷Article 21 in the Constitution of India, 1949.



The prevailing patriarchy has overarched to an extent of putting forward a myriad of obsolete, frivolous reasons to not criminalize marital sex. The erroneous justifications for not criminalizing marital rape goes on to the extent of stating that such criminalisation would result in excessive interference with the institution of marriage and encroachment into private space⁸. This idea of private space in marriage stems from the old notion that law can only regulate public affairs and private world was immune to law. However, with the advent of time this is now treated as an obsolete notion.⁹The law has advanced to make reasonable interferences in the private sphere so as to uphold the very purpose of the Indian constitution to provide equality. Enactments like PWDV, section 498A of IPC etc. are examples where the legislators has understood the importance of breaking into the private space to ensure the protection of certain rights. In this background, the question of trespassing the private space becomes highly irrelevant. It is a clear indication that the state itself defines the limits of the personal space according to its perspectives. The vexatious argument of the probability of such a crime being misused against the husbands, is in itself degrading the efficiency of judiciary. However the honourable courts in the country have always ben prudent enough to distinguish between a false allegation and that of a genuine one. The concept of proving beyond reasonable doubt have

always helped in punishing the deserved and sparing the innocent. When the Indian society puts forward the concern of criminalisation of marital rape resulting in the destabilisation of the institution of marriage, the Indian legal system, is paying the cost of denying women the right over their body, the right over sexual autonomy. The denial of sexual autonomy of women is a further violation of their reproductive rights. The question is whether the so called preservation of the institution of marriage is worth such a humungous sacrifice. The institution of marriage is found on the principles of mutual love and respect rather than on sexual intercourse. Submissive sexual adherence to the husband is in no way a part of the institution of marriage. The bond of marriage in no way should be construed as to providing men a right to rape with impunity. Performance of non-consensual sex, wilfully forcing oneself on the other is a violation of the mutual respect that acts as the base of marriage. When the occurrence of such an act in itself destabilises the institution of marriage, criminalisation of such will only result in the stabilisation of the institution, for law has always demanded deterrence from criminal acts and obedience to the law¹⁰.

While the government is busy pondering over the upholding of the institution of marriage, it has turned a blind eye towards the aftermaths that marital rape can cause. It leaves behind a trail of emotional and physical trauma to the victim. The weightage that the society gives to marriage has indeed forced the victims to stay within the marriage even after being brutally “raped” by their husband. The iron curtain

⁸ Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on February 6, 2016). ¶ 3.1.2.1.

⁹ Margaret Thornton, The Public/Private Dichotomy: Gendered and Discriminatory, 18 JOURNAL OF LAW AND SOCIETY 448 (1991).

¹⁰ Austin’s concept of law.



of marriage coerces to shut down the pain and misery of an innocent victim. Rape in itself, doesn't only put the victim through physical trauma but also mental hardship and pain. In cases of marital rape, the victim undergoes physical as well as mental trauma and in addition is forced to live together with the perpetrator. The victim undergoes through traumatic stages, living in fear of repeated sexual assault from the perpetrator, whom the law seeks to protect. The lack of legal framework to support these victims, forces them to live in this trauma forever. It is also seen that young children growing up witnessing such sexual violence being inflicted are seen to have the tendency of inflicting the same to others. It is not just the present generation or the victims that suffer the violence is being transferred to the coming generations, increasing the possibility of increase in such crimes during the coming years.

In a country like India, where there is still a lot of social stigma attached to a rape victim, it is of no wonder that there are only a few reported case of marital rape even when the statistical studies provides a whole different picture. As per the [National Family Health Survey 2005-06](#)¹¹ almost one in ten married women (aged 15-49 years) in India is reported to have been forced to have sex by their husbands against their will. Out of 9% of the women who reported sexual assault, 94% suffered it at the hands of their husbands. Also the report shows that 8.2 % of women between the age group of 15 and 49 have faced sexual violence further the 2011 census shows that there are 230 million married women in this age group. This means that around 19 million

¹¹<http://rchiips.org/NFHS/factsheet.shtml>.

women have faced sexual violence. The data released by the NFHS further shows that husbands were responsible for 6590 incidents per 100000 women. Only 0.6 % cases were reported to the police. The ignorance adhered to this crime have only contributed to the worsening of the condition of married women. The true situation is that marital rape is not an uncommon phenomenon but an under reported one. What lacks is not the recurrent manifestation of the crime but the lack of legal machinery. The insufficiency of law to safe guard the victim coupled with social ignominy attached to rape are the reasons why marital rape in India still remains as an underreported but relevant crime.

Even though the legal framework in India provides for certain sections such as 498A of IPC¹² in favour of married women, it cannot be an excuse for not criminalising marital rape. It is necessary to understand that even though section 498 A of IPC criminalises cruelty against married women, the construction of provision is not strong

¹²Section 498A of the Indian Penal Code.

498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.



enough to include rape within its ambit. To be punished under this section it is necessary that the conduct has to be done repeatedly and over a long period of time¹³. Such an act should also be of such intensity as to drive the victim into committing suicide, or causing grave injury to her life. The insufficiency of the section so as to protect the sexual autonomy of a married women is implied in the decision of the Court, where the honourable Court refused to punish the husband under section 498A in a case where the women bled severely due to insertion of a stick and fingers into the vagina.¹⁴ This calls for the need of criminalizing non-consensual marital sex despite the existing laws for safeguarding the interest of married woman.

In India where the female literacy rate is as low as 65.45%¹⁵, a larger portion living in denial of their rights, unaware of what their rights are, have been greatly jeopardized with the stand of not considering marital sex as a crime. The patriarchal notions coupled with illiteracy have entrenched the notion of legitimisation of such heinous crime even among women. India borrowed this concept of marital exemption from early British law, where women were considered as chattel. However today, women is no more considered as a mere chattel or property. They are being treated as living beings with equal rights and dignity. They are no more assets to husbands. In an effort to treat the women community in par with that of

women, the parental country to this concept itself has declared this theory of implied consent proposed by Hale¹⁶ as a regressive practice and hence abolished the exemption in 1991¹⁷. It is contradictory that even when the country from whom we borrowed this concept has treated it as obsolete, India is not yet ready to do the same. Countries like U.S, England¹⁸, and New Zealand are few countries that have criminalized the same. The Indian judiciary on the other hand have at various instances deliberately chosen to ignore the question of marital rape¹⁹. Various legislative discussions and judicial remarks vaguely touching up on this matter have only responded negatively to the question of criminalisation and instead came up with vehement arguments for non-criminalisation. The report of Justice Verma committee of 2012, appointed after the Delhi gang rape case is an exception to this monotone. The report strongly recommended the criminalisation of marital rape. It primarily suggested the removal of the exception clause and criminalising marital rape. The report also emphasised that rape and sexual violence are not merely crimes of passion but expression

¹³Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.

¹⁴Bomma Ilaiah v. State of Andhra Pradesh, 2003 CrLJ 2439.

¹⁵http://censusindia.gov.in/Census_And_You/literacy_and_level_of_education.aspx.

¹⁶ Hale, History of the Pleas of the Crown 629 (1778).

¹⁷ R v. R, (1992) 94 Cr App R 216.

¹⁸ Section 147 of the Criminal Justice and Public Order Act, 1994.

¹⁹ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC Online Guj 1386. The Gujarat High Court notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same. See also Deya Bhattacharya, 'Marital Rape a Disgraceful Offence': Gujarat HC's Ruling Progressive, But Mere Condemnation of Practice Rings Hollow, Child Marriage, FIRSTPOST (India) November 9, 2017.



of power.²⁰ However, the legislators turned a blind eye towards those recommendations and came up with the infamous Criminal Amendment Act of 2013, with not the slightest trace of such a recommendation. Providing marital exemption in a male dominated country will only add to the self-proclaimed male superiority over women. It is high time to jettison this notion of non-criminalisation of marital rape. The suggestion and criticisms against India's current position doesn't confine itself to the national level. The United Nations has condemned India that refusal to criminalize marital rape is in contravention to the Sustainable Development Goals that India has adopted. The UNDP further went on to say that the question is concerning to consent and not to cultural beliefs.

The discussions on marital rape is a formidable one taking into account the cultural diversity in our country. The Indian legal machinery as it stands now is replete with paradoxes and lacunae. The section 375B should be struck down as unconstitutional since it is in violation of Article 21 and 14 of the Constitution of India. Focus should be on criminalizing the act and not on finding alternate measures. It is also necessary to provide sufficient sentencing for such a crime in order to establish deterrence. Sufficient amendment to the Evidence Act should also be put forward to assist the court in delivering justice. Educating the masses about the crime, enlightening women of their rights and getting away with the stigma of rape also falls in the priority list. Let the laws in our country find purpose in establishing a gender equal platform for its citizen. The

criminalization of marital rape would come as a solace to millions of women out there seeking justice. This would be the ray of light in the otherwise relegated life of married women.

²⁰Justice Verma Committee Report, 2013.