



DECODING THE CONUNDRUM OF MARITAL RAPE – AN ANALYSIS OF MARITAL RAPE IN INDIA

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INTRODUCTION

“Our society is like nude makeup, we spend hours painting face just to show we haven’t it at all.”

Nivedita Menon very eloquently captures the plight of our society. In Seeing like a feminist she intrinsically highlight everything wrong with our society. The majority lies with how we treat women. Even though they constitute almost half of our population still they are made to be subject to various discriminations and atrocities. For millenniums women in this country has been radically forced to live as second-degree citizens. They were constantly subjected to social and economic impediments. Often, they were subjected to draconian laws that not only affected that status of as human, but questioned the whole humanity.

Over the course of last three decades, our country has seen a prodigious shift towards the way of women empowerment and equality. “Henrik Ibsen’s A Doll’s House alluringly explains the paradigm. Helmer tells Nora – First and foremost, you are a wife and mother, to which Nora replies – That I don't believe any more. I believe that first and foremost, I am an individual, just as

much as you are”¹. This dialogue forces a very quintessential to focus upon the question of equality. The times have drastically changed in regard of the status of women. Earlier who were considered as the chore-maker of household are now considered as the aspiring leaders of today.

However, the sad truth that still remains even in the 21st century is that crimes against women still remains to be one of the most fundamental problem in any society. Amidst this sexual harassment is one of the most vial form of predicament in our country. To evaluate the same, this article shall focus on the conundrum of martial rape, and how a better society can be sought for in future. To support this notion, the paper adopts a method of evaluative research of literature available and a perusal of relevant cases adjudicated by the honourable courts of India. For academic purposes, this article shall only deal with the notion of martial rape relating to women.

RAPE

Rape continues to be to the most morally and physically condemned crime in any society because it is an assault on the victim's body, mind and privacy². Rape is not only a crime against women, but also a crime against society as a whole, as it violates the highest basic rights guaranteed by Article 21 of the Constitution³. When the family suffers in this way, it leaves an incurable dent in the structure of the social environment, which eventually leaves an incurable mark on the whole society⁴.

¹ Lahoti J. R. C. *Women’s Empowerment – role of judiciary and legislature*. The Practical Lawyer. (2005).

² State of Punjab v. Gurmit Singh, (1996) 2 SCC 384

³ State of Punjab v. Ramdev Singh, (2004) 1 SCC 421.

⁴ Jugendra Singh v. State of U.P., (2012) 6 SCC 297.



There have been various spotlight issues related to vial rape cases in our country which has fundamentally shook the foundation of our society. Even from the cases of Hatharas to Nirbhaya, the mindset of the society still remains same. The draconian thought of no consent is still ashore in our society, and the systematic power of male only creates a flawed structure which only facilitates such frivolous acts. All of this also boils down to the notion of a no-consequence after the such acts takes place, and sadly this holds true in every corner of the country.

However since the last decade, we have taken upon ourselves to protest for a more robust and a dreaded legal structure. Such an instance was seen after the Nirbhaya Rape case, where the whole country united to protest to demand more rigorous punishments for the violators. In lieu of this amendments became law on April 3, 2013. This provides a harsher conviction sentence under Section 376⁵ of IPC for rapists “including life terms and even the death penalty”⁶ and also more rigorous punishments for acid attacks, stalking, and voyeurism. Also, this amendment brought in the establishment of fast-track courts where swifter justice is sought for, and the most fundamental change also was brought in where the burden of proof changed from the victim to the accused⁷, strengthening the concept of rebuttable presumption in touchstone law.

⁵ The Indian Penal code, 1872 § 376.

⁶ Indrani Bagchi, *The Struggle for Women’s Empowerment in India*, *Current History* 113, no.762 (2014).

⁷ Ibid.

Ingredients of Violence with Rape

Rape is usually associated with extreme violence and torture, and perpetrators are not always dissatisfied with sexual inactivity and libido. Rape can also be triggered by residual aggression in the perpetrators. Residual aggression means that someone gets angry from a person or situation, and that person releases that anger against another unrelated person or a situation. Majoritarily, people tend not to pipe their focus of the aggression on the cause of it, but rather takes it out on any beacon of vent, which a lot of times takes the form of sexual assault.⁸

MARITAL RAPE

Since various history majority of the societies have held the notion that it is justified for men to force their wives to undertake sexual intercourse with them even without their consent. This whole understanding is based upon the perception that once a women marries her husband, she evidently submits her consent for any sexual activities with him. The foundation of this problematic understanding can be earliest seen tracing back to the understanding of Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract”⁹. In Indian Law as well Section 375 of the IPC defines what

⁸ Coon Dennis, *Psychology: A Modular Approach To Mind And Behaviour*, 10th Edition. Thompson Wardsworth-US (2006).

⁹ Hale, Matthew, *History of the Pleas of the Crown*, p. 629. 1736, London Professional Books (1972).



constitutes as an act of rape. However, via this article I would like to highlight the importance of criminalising marital rape in our country. There exists numerous reasons why marital rape should be criminalised, some of them are:

i. Distortion of sanctity of marriage

If a man has sexual intercourse with his wife without her explicit consent, it directly distorted the sacred sanctity of matrimony between the couple. After once, the man has violated the consent of her wife, there exists no option of going back to the notion of sacrosanct in the marriage. It not only disgraces the choice of the woman but also violates the trust of the marriage. This understanding was also given by the High Court of Gujarat, in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹⁰, where the court stipulated that “*non-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage*”.

ii. Consent is Important

Even in a marriage, both the wife and the husband still continue to live their lives as individuals. The importance of consent has been stressed upon various legislations and judgements of courts throughout India. A relationship such as a marriage must value the consent of their significant other as it not only functions on the foundation of the whole institution but also ventures as a need for every individual. Thus the whole notion of marriage being equivalent to consent is

merely an archaic inference that existed, and in developing such as the 21st centuries the society must move ahead from this and find equitable grounds for every sect of humans.

iii. Change in Culture & Traditions

Even from the folklore 'Mahabharat', Yudhishtira bet his better half in a round of 'chauras' against Duryodhana. From antiquated occasions, women have always been generalized and have been treated as a mere chattel of their husbands. In relationships, the parting with of the lady is called 'kanyadaan' by the dad to the spouse. These words only indicate who the society used to perceive women to be of lower status in the society. A young women is often considered to be unfamiliar to her relatives and is accepted to be possessed by her better half. However the truth of current generation is that the times have changed completely. Perception of the whole society has evolved and in this modern day of equality, such obnoxious traditions are needed to be abandoned. Old customs like this ought to be coherently derelict and it must be perceived that in this time, women have rights and a just place in the society which can't be externalized. The social worldview ought to be empowered. This would help in development or expulsion of old customs which appear to be superfluous.

iv. Mental Repercussions

An act of rape is rape, and no means of getaway must be provided to the perpetrator. An act of rape in any parlances brings along a criminal liability, for which if proved the accused must be dealt with the most harsh punishment's available because when a

¹⁰ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2017 SCC OnLine Guj 1386



women gets sexually abused it not only attacks their physical body but also attacks their mental sanity. It essentially violates their whole way of life, and tarnishes their own image in their eyes. It also affects how the society perceives the victim, and their identity for the rest of the life is subdued to that of a victim. Now giving a criminal liable of such heinous crime to slip away merely because of obnoxious traditions showcases the shambolic society we currently reside in.

MARTIAL RAPE AND MINORS

Section 375¹¹ of the Indian Penal Code (IPC) exception 2 provides that sex with a wife under the age of 15 is rape, however the problem arises when this section is read with Section 3¹² of Protection of Children from Sexual Offences Act (POCSO), 2012. POCSO Act stipulates that any kind of penetrative sexual activity with a minor would be considered as rape of the minor. POCSO also further classifies a minor to be under the age of 18 in accordance with Article 3¹³ of the Majority Act, 1875. Therefore because of this a problem arose in the law of the country where one law stipulated that sexual intercourse with wife under the age of 15 shall be constituted as rape while the other said under the age of 18 shall be constituted as rape. This conflict was resolved by the honourable Supreme Court in the case of Independent Thought v. Union of India, 2018. In this judgement, the honourable court ruled that martial rape is possible and shall be charged with the same gradience of rape if the wife is less than 18 years, making her incapable of giving consent. Justice Lokur observed that :

“I am clearly of the opinion that Exception 2 of Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:-

- (i) it is arbitrary, capricious, whimsical and violative of the rights of a girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;
- (ii) it is discriminatory and violative of Article 14 of the Constitution of India and;
- (iii) it is inconsistent with the provisions of POSCO, which must prevail.”

The court in this case categorically held that *a rapist cannot be converted into non-rapist merely because of his marriage with the victim*. Thus, the honourable apex court has restored a clarity in what the law provides for as in a method to achieve justice and to curtail the incidents of martial rape with minors.

CONCLUSION

To summarise, in present day India the resistance of society against marital rape is more noticeable than any other time in recent memory. Since the 1970s, the society has taken up the beaton for vouching for fundamental basic freedom and the self-assurance of every citizen. However, still the society remains drenched in archaic traditions of considering marriage equivalent to consent. To contrary the idea of individuality also exists in a marriage must be sougled for, and the importance of no must be conclusive enough in any relation. The only way to restore justice in this helm is by criminalising Marital Rape

¹¹ The Indian Penal code, 1872 § 375.

¹² Protection of Children from Sexual Offences, 2012 § 3.

¹³ The Majority Act, 1875 Art. 3.



and passing of a robust legislation which places it equivalent to that of rape only.

Awareness of this criminalising would need to be made to accomplish the pinnacle of equity. Different associations have been working since years towards attaining the same however yet the society still doesn't carry the consideration of the legal executive to how grave the issue as of now is, if no enormous decisions are sought for. Various studies show that approximately 70% of women have encountered physical or potentially sexual viciousness from their partner in the course of their life¹⁴. This conflicts with the very thing our ancestors battled for – equitable privileges. Article 14¹⁵ and Article 21¹⁶ of the Indian Constitution discusses balance and opportunity of life and freedom. India needs to take a choice on the advancement of marital rape as in a land where goddesses are adored and venerated, India can unquestionably not stand to remain quiet on this issue any further. Doing as such would be a gross injustice to equity.

¹⁴ World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council (2013).

<http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>

¹⁵ Constitution of India, 1949 Art. 14.

¹⁶ Constitution of India, 1949 Art. 21.