

AMOGHVARTA

ISSN : 2583-3189



Marital Rape

ORIGINAL ARTICLE



Author

Dr. Priya Rao

SoS Law

Pt. Ravishankar University
Raipur, Chhattisgarh, INDIA

Abstract

We now live in a world that is evolving with every blink of our eyes. The world may be changing but most beliefs are not. This paper touches the depth of the most sensitive issue of women's development in the shadow of increasing violence against women, especially 'marital rape'. In view of increasing crimes against women, there is a continuous discussion about laws dealing with crimes against women. The term 'Marital rape' means is without the consent of wife unwanted sexual intercourse by her husband and is often achieved by force, threat of force, or physical violence. It violates the right to dignity of married women and is a non-consensual act of sexual perversion by a man on his wife where she is physically, sexually and mentally abused. This paper examines whether this right can be exercised by force or whether the right to sexual intercourse is dependent only on the wife's consent. Social practices and legal codes in India, mutually enforce

the denial of women's sexual agency and bodily integrity, which is central to women's human rights.

Key Words

Women, Marital, Rape, Sex, Violence.

Introduction

Rape is rape. Marital rape is the most common and abhorrent form of male violence in Indian society, it is hidden behind the curtain of mind but mutually accepted by social practices and legal codes in India. Denying female sexual agency and her integrity, which is at the top of women's human rights. Marital rape is a violent act motivated by a husband's desire to have control and power over his wife. It is a lack of sexual self-determination. It is a man's fantasy and a woman's nightmare, all the hatred, contempt and oppression towards women in our society concentrated into one violent act.

Rape is rape, be it marital rape but unfortunately the law does not consider marital rape as a crime. Even if this happens, there is always a cloud of legal uncertainty over its punishment. The patriarchal system governing Indian families has always treated women as mere objects of their husbands or guardians. Rape was therefore considered theft of women and wrong against the husband or guardian. This dogma has influenced our legislatures to deny the crime of spousal rape by shielding the marital rights of the husband and thereby tacitly accepting that women are mere objects with no will of their own. The perception towards sexual satisfaction of her husband has weakened women's right to equality and justice.

Rape is not just an attack against women, but a violation of a person's fundamental right to life and personal liberty. No amount of relationship between the victim and the perpetrator changes this. Therefore it is not logical that sexual intercourse with the wife occurs in the veil of the bond of marriage. The social stigma attached to spousal rape is a hidden voice of women against her husband, who uses his dominant position to violate her trust and personal integrity. It has been shown that marital rape is more worrying as it damages both way: physical and psychological. Mere protection of institutional security should not be detrimental to the making of laws for the fundamental protection of women, which includes the right to live with dignity, security and integrity.

Therefore, it is the need of the hour that the legal system recognizes rape within marriage as a crime. Women themselves must overcome this and fight for their justice. They should refuse to accept the tag of being the weaker always.

An attempt has been made to highlight the discrimination, shortcomings and needs for stronger legal protection for women under other types of domestic crimes against women. Thus, marital rape is a form of partner rape, domestic violence and sexual abuse. Once widely ignored by law, spousal rape is now frowned upon in international conventions and increasingly criminalized. Yet, in many countries, spousal rape is either justified or outlawed, but is widely accepted as a husband's prerogative.

Meaning and Concept

'Marital rape' occurs in all types of marriages, regardless of age, social class, race or place. The term 'marital rape' refers to unwanted intercourse by a man with his wife by force, threat of force or physical assault or when she is not capable of giving consent. The term 'unwanted sexual intercourse' includes all forms of penetration (whether oral, vaginal or anal) carried out against her will or without her consent. In marital rape both physical and sexual violence are there and also women are beaten and raped by their husbands. Most of the victims are often fall under this.

Generally, husband uses force to coerce his wife. Some time the assault involves physical abuse.

Pornography is often involved in sadistic forms of rape.

Historical Background

The concept of marital rape was not known in history, most men consented to force their wives to have sex. Even the concept of a woman being physically and mentally vulnerable was not prevalent. Often it shows that there was a direct relationship between law, property and rape. If a woman was kidnapped and molested, even in a violent manner, the crime was not against her but a theft of a woman against a consenting body, but it is against those who have the legal power of her as guardian. The harm was considered a wrong against her father or husband.

*"The ancient patriarchs who came together to write their early covenants had used the rape of woman to consolidate their male power, so could they have viewed rape as a crime of man against woman? Women were wholly owned subsidiaries, not as independent beings. Rape could not be conceived of as a matter of the woman's consent or refusal, nor could the definition acceptable to men be based on a man's understanding of a woman's right to bodily integrity."*¹ In broad terms, the laws on rape arose out of the protection of 'masculine pride' in the exclusive possession of a sexual object. It is not surprising, therefore, that married women raped at the hands of their partners and never became the subject of rape laws. In fact, the law gave the husband a blanket exemption for respect for his wife on the basis of the marital relationship only. It stated the husband's unquestionable right to have sexual intercourse with his wife and the duty to obey him. The right to freedom of choice in the marital relationship and the husband's duty to respect that right were completely covered up by discriminatory laws. As Sir Matthew Hale had emphasized-
*"The husband cannot be held guilty of rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife had given up herself unto her husband which she cannot retract."*²

Finally, in the 1970s women activists in the US raised their voices for the abolition of the marital rape exemption clause and the extension of the guarantee of equal protection to women.

Effects of Marital Rape

Besides the myth which has been prevailed that rape by one's partner can't have serious consequences, findings indicate that marital rape can involve serious injuries to the women who suffer it. Prima facie the physical effects by marital rape to the private parts are bruising from torn muscles, vomiting, lacerations, and fatigue from this type of torture. Women who are beaten and raped by husbands who are estranged may suffer other adverse effects including knife wounds with black wounded eyes, bloody and broken noses, broken bones that has sustained during sexual violence. Mostly the effects on women about gynecological of marital rape include infertility, miscarriage, bladder infections, stillbirth and the possible contagious to sexually transmitted diseases like HIV.³

Females, who are raped by their spouse or partners are also likely to suffer serious psychological consequences. Anxiety, shock, intense fear, depression, suicidal thoughts, and post-traumatic stress are some of the short-term effects of marital rape. Whereas the long-term effects also include, sleep problems, depression, disordered eating problems establishing trusting relationships, and elevating negative feelings and self-doubt about herself. The psychological effects of this marital rape are likely to be long-lasting.⁴

Situation in India

Under the Protection of Women from Domestic Violence Act, 2005 in India it is only a civil offence i.e. the existence of marital rape is as de facto but not de jure. While in other countries either the legislature has declared marital rape as a crime or at some countries the judicature has played an active role in recognising marital rape as a crime, however, in India the judiciary seems to be working at cross purposes. In *Bodhisattva Gautama v. Subhra Chakravarti*⁵ the Supreme Court held that rape is an offence against basic human rights and violates the most cherished of fundamental rights of the victim.

That is, the right to life enshrined under Article 21 negates this very declaration by not recognising marital rape as a crime⁶, while there has been some progress in Indian law with regard to violence, it is mainly confined to physical as well as mental abuse. Women who are above 18 years experience this type of sexual assault by their husbands and also want to challenge it are currently denied state protection because of the general exemption in Section 375 of the Indian Penal Code, 1860 which talks about the age limit for a women to file for marital rape against her husband. The foundation of this exemption can be traced back to statements made by Sir Matthew Hale, C.J. in 17th century England wrote: "A husband cannot be guilty of rape committed against his lawful wife, because by their mutual marital consent contract, the wife has given herself to the husband, which she cannot withdraw".⁷

This is well established norm in the society that once marriage takes place between a man and woman, a woman does not have the right to refuse to have sexual intercourse with her husband. This allows husbands absolute ownership over sexual access to their wives which is direct violation of the basic principles of human rights and provides husbands with a silenced license to rape their wives.⁸

The only two groups of married women who fall within the purview of the rape law under Indian Penal Code 1860:

- Those who are under 15 year of age.
- Those who are separated from their husband.
 - i. Rigorous imprisonment for a term of ten years or more is given for the rape of a girl under 12 years of age,
 - ii. The rape of a girl under 15 years of age may attract a lesser punishment if the rapist is married to the victim.

Some progress towards criminalising domestic violence against wives was made in 1983 when Section 376A was added to the Indian Penal Code, 1860, which criminalised the rape of a judicially separated wife. This was an amendment based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India.⁹

However, the Committee rejected the argument that marriage is a license to rape. Thus now a husband can be convicted and jailed for up to 2 years if, firstly, he has sex with his wife. Second, without her consent and thirdly, she is living separately from him, whether under decree or under any custom in use. However, this is only piecemeal legislation and we need Parliament to do much more with regard to the issue of marital rape. When the Commission advocated for including sex by a man with his minor wife as an offence in the legislation it was seen as a ray of hope by the Joint Committee which had reviewed the proposal. It was argued that a husband cannot be convicted of raping his wife, no matter what her age. Sex is also a part of the package when a man marries a woman.

Bhartiya Nyay Sanhita 2023

In Indian Penal Code, 1860 the 'Marital rape' term has neither been inserted since enactment and nor inserted through amendment. Only under section 376 exception it was provided that under fifteen years of age a husband rapes his wife then it comes under Marital rape but not otherwise.

In BNS 2023 Under section 63 (BNS)- Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

The new code just modified the age criteria from fifteen to eighteen years and not covered the women of any age.

Various women's organisations and the National Commission for Women (NCW) have been demanding the removal of the exception clause given under Section 375 of the Indian Penal Code which states that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." However, the Task Force on Women and Children, constituted by the Department of Women and Child Development, Government of India, took the view that there should be a wider debate on the issue. The mandate of the Task Force was to revise all existing laws and schemes relating to women. Of the four recommendations made by the Task Force regarding rape under the IPC, the most important one relates to the definition of rape. It took the position that the definition of rape should be expanded to include all forms of sexual abuse

According to the recommendation, the Law Commission's proposed definition of "sexual harassment" can be adopted in place of the existing definition of rape in Section 375 of the Indian Penal Code because "it is comprehensive, detailed and acceptable". However, like the Law Commission, the task force also refused to recommend the inclusion of marital rape in the new definition. So far, the law in India is totally inadequate in providing supportive mechanisms for women to exercise bodily integrity and sexual autonomy. Thus, the entire legal system relating to rape is a mess, full of contradictions.

Arguments against Criminalisation of Marital Rape

The following are some of the common notions put forward against the idea of criminalisation of marital rape:

- Those who are in administrative control cannot be ordered to have a say in between spouses, because in Indian Society marriage is Sacrosanct & union between two families.
- On proving the marital rape the burden to prove the existence of rape is nearly impossible and as result this will overburden the system.
- Generally, due to vengeance of wives or their family the innocent husbands might get charged unnecessarily.

- In Indian society if a man and woman marries with each other, it is already accepted norm that, there is implied consent to have sexual intercourse.
- If Parliament passes a law that will criminalise marital rape, the sacrosanct and base of society that is marriage will be destroyed in every household.

A closer look at these arguments will make it clear that these are mere imaginary, lame excuses of a male-dominated society that lack any kind of legal substance or moral force. The refutation of the above arguments is not very difficult.

Marital rape is a common but under-reported crime. A study conducted by the United Women's Programme, an NGO, found that one in seven married women had been raped at least once by her husband,¹⁰ They often do not report these rapes because the law does not support them.

Suggestions

- i. The punishment prescribed for rape under Section 376 of the IPC that is rigorous imprisonment not less than ten years or life imprisonment and also fine.
- ii. For marital rape should be the same as that The fact that both the parties are married should not make the sentence lighter.
- iii. It should not be a defence to the charge that the wife did not resist and resist force or did not scream or shout.
- iv. If the charge of marital rape against the husband is proved the wife should have the option of obtaining a decree of divorce.
- v. A case of marital rape may fall under "cruelty" or "rape" as grounds for divorce, it is advisable to clarify the legal position. Seeking divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue the marriage, then the marriage should be allowed to continue.

Conclusion

In a successful marriage, the mixture of trust, love and affection are quintessential. There is no doubt that sexual intercourse is a normal between husband and wife during their marriage but the use of force or violence in sexual intercourse is against the bodily integrity and feelings of the wife concerned. Indeed, a wife can bring a criminal case against her husband for marital relief for criminal assault or injury or forcible sexual intercourse, but marital rape needs to be included in our legal system irrespective of age criteria. The wife must be respected and honoured. The laws are giving complete freedom to the husband with regard to his wife only on the basis of marital relationship which is completely against the basic human rights. If a woman consents to marriage it does not mean that she consents to be raped by her husband. That too is its own entity and the line drawn between rape within marriage and rape outside marriage is outdated and has no relevance in the present times. Now in present it is essential to that marital rape should be criminalized under the IPC. But, In Penal Code only criminalising a conduct in this offence is not enough. Something more needs to be acted upon to in the case judiciary and the police that these institutions should also be sensitized about this offence. Basic Education about this marital rape to the public also is need of the hour, as the real goal regarding criminalising marital rape is acknowledgment of society.

References

1. Miller, Susan Brown (1993) *Against Our Will: Men, Women and Rape*, New York, Fawcett Books, ISBN 9780449908204, p. 18.
2. Marital Rape: Indian Viewpoint : <http://lawandliving.blogspot.in/2009/10/marital-rape-indian-viewpoint.html>, Assess on 03/07/2019.

3. Thornhill, R. and Palmer, C.T., (2000) *A Natural History of Rape- Biological Bases of Sexual Coercion*, (1st ed., 2000).
4. Thornhill, R. and Thornhill, N., (1989) *The Evolution of Psychological Pain*, *Sociology and Social Science*, Edn. Bell, R. & Bell, N., Texas Tech University Press.
5. (1996) 1 SCC 490
6. Tondan, N. & Oberoi, N. (200) *Marital Rape – A Question of Redefinition* Lawyer's Collective, (March 2000), p.24.
7. Hale, (1778) *History of the Pleas of the Crown*, p. 629.
9. Law Commission of India, 42nd Report, 1977, Indian Penal Code, p. 277.
10. United Women Programme www.unwomen.org/en, Assess on 15/03/2024.
11. *Bhartiya Nyay Sanhita 2023*. (Bare Act).
12. *Indian Penal Code 1860*. (Bare Act).
13. *Law Commission of India 42nd Report*. Law commission of India, 1977
14. *Marital Rape: Should it be made an Alternate Grounds for Divorce* . (2019, July 03). from lawTeacher.net: <https://www.lawteacher.net/free-law-essay/family-law/marital-rape-should-it-be-grounds-for-divorce-law-essays.php>, Assess on 20/03/2024.
15. Thornhill, R., & Palmer, C. (2000). *The Natural History of Rape – Biological Bases of Sexual Abuse*, 1st Edition, MIT Press, Cambridge mass.
16. *UN Women*. (n.d.). Retrieved from United Nations Women Programme: <http://www.unwomen.org/en>, Assess on 15/07/2019.

---==00===---