

Marital Rape in The Indian Legal Scenario

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***Abstract---** Despite the increased recognition in India of various penal laws, in the past two to three decades, the Marital Rape has generated. A special law on marital rape is needed in India, which should also be accepted in this particular matter with international norms. Women have been given the right to fight for safety, but her own husband, whom she married with utter conviction, seeks to harm and torment her by having a powerful sex without her permission that eventually spoils. Unfortunately, in the context of the irrevocability of consent to matrimonial cohabitation, the husbands commit sexual violence. Society and legislature do not even consider such sexual violence by the husbands, which significantly impairs the status of women in society and maintains the status quo of the subjugated position of women in the family as well as in society.*

***Index Terms---** Marital rape, IPC, Society, Legislature.*

I. INTRODUCTION

VIOLENCE IS a process of violence to claim one's will over another to prove or feel a sense of control. Defined in plain terms" Violence "is destruction, suffering or death which is deliberately inflicted for the attainment of a political purpose. Violence is a means to demonstrate power, authority or superiority in the societal structure. In essence, violence is the use or threat of use of force or coercion to establish domination and can be expressed at the individual level, between classes/communities or at the level of the state. Sexual violence is one of the most severe and powerful forms of control in a male-dominated society that simultaneously damages and restricts the lives of women and promotes individual and collective resistance among women, thereby maintaining the status quo of gender inequality, subjugating women and manipulating them. Sexual violence defines the intentional use of sex as a tool for exercising control over and inflicting pain and humiliation on another human being. Sexual violence can be described as any physical or psychological violence perpetrated through sexual means or aimed at sex. Sexual violence involves both physical and psychological assaults aimed at the sexual property of an individual. Sexual violence does not necessarily include direct physical contact between perpetrator and victim; threats, humiliation, and intimidation may all be considered sexually violent.

Sexual violence is a complex political phenomenon deeply ingrained in the socio-cultural environment. Sexual violence is one of the most extreme and effective forms of control in a male-dominated society that, at the same time, damages and constrains women's lives and encourages individual and collective resistance among women, thereby maintaining gender inequality status, subjugation. Family violence is usually concealed under private sphere conceptions of intimacy, as the assumption that family dignity should be maintained at all costs prevents many women from seeking external help. Generally speaking, the law and criminal justice system does not recognize sexual violence in the family as a separate crime, so such cases are rarely prosecuted and women have no choice but to suffer in silence. Violence is

at its worst when it occurs within the family and leads to the most serious impact and consequences when performed by a person whom the victim trusts and is in a love-affection relationship. Particularly in Indian society great sanctity is attached to marriage and the husband is supposed to be the wife's protector. When the same person becomes the perpetrator of sexual violence against the woman and community and the legal system does not even understand the nature of such brutality, the victims' pain and suffering remain beyond comprehension in the terms.¹

II. THE CONCEPT OF MARITAL RAPE

Rape must be recognized as the most serious kind of sexual violence against women—an extreme form that exists in the context of sexual violence that utterly negates women's human rights. Rape comes from sexist values and beliefs, and is not just an issue that affects individual women. This is a social and political problem which is directly linked to power imbalances between men and women. Rape is an act of aggression and violence in which her self-determination is denied to the survivor. As understood by most legal systems, the definition of rape does not go beyond the boundaries of a patriarchal value system, represents old conceptions of chastity, purity, marital relations and emphasizes the fear of female sexuality. In most countries, the legal definition of rape is limited to unconsensual or forced vaginal penetrations and exempts a particular class of males-husbands who cannot be charged with their own wives' rape.

III. THE DEFINITION

Marital rape can be described as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) that is obtained by force, threat of force or if the wife does not consent. One of the very unusual consequences of the limited and restricted definition of rape is that it cannot be committed against a particular set of women. Therefore, the consequence of this loophole is that abusive and unwanted sex does not actually constitute rape but is unlawful sex, i.e. sexual assault by a man who has no legal rights over a woman. In other words, violence in a lawful sexual intercourse is permissible in the eyes of law, but sexual intercourse with a woman, who is not property of one, is not permissible.

IV. THE IRREVOCABLE CONSENT

The original justification for the marital exemption clause is based on the statement made in 1678 by Sir Matthew Hale that "the husband cannot be guilty of rape committed by himself against his lawful wife because of their mutual consent to marriage and contract which the wife has given up to her husband in this way, which she cannot remove."² The statement's argument was based on the notion of marital equality in common law that husband and wife were one, and that a married man could not be held liable for the breach. In most of the world's countries; husbands claim 'criminal law protection' for breaching their spouses. Wife rape has existed as long as the institution of marriage¹⁰. In words of Lord Mathew Hale, a seventeenth century English jurist:

¹ The Prohibition of Child Marriages Act, 2006, s.3.

² Madan B. Lokur, J in 2017 SCC OnlineSC 1222 [Writ petition (C) no.382 of 2013] at 2.

The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself unto her husband, which she cannot retract.

V. THE INCIDENCE AND CAUSES

One in seven women reported being assaulted by their husbands according to a US Sexual Assault Information Sheet. Rape in marriage is widely unrecognized throughout the world by the legal systems. This legal reticence is the result of the social notion that the wives are their husband's property. More specifically, the perception of wife as the husband's sexual property is the natural legacy of patriarchal society. Besides this, there are economic social structures of society with man as the family's bread-earner, thus, having massive economic control over the family and the woman as the dependent on the bread-earner, having no independent income, the one who is, therefore, left with no alternatives, but to continue even in an abusive marriage.³

Criminal law can be used in most countries for abuse in marriage but not for rape. Although countries such as Australia, New Zealand, and the UK have modified marital rape laws to allow a husband to be punished for assaulting his wife, this is by way of a rare exception and not the rule.

Perhaps the most mystified of abuses committed against women is sexual assault inside marriage. Marital rape is not a contradiction in terms, but rather a form of violence against women that is not unusual, only rarely discussed. In a significant number of marriages, rape is an ongoing issue. Husband sexual assaults are the most common kinds of reported sexual assaults, happening twice as often as a stranger's sexual assault. Diana Russell found in a study she conducted that one in every seven married women reported being raped by the husband. David Finkelhor and KrestiYllo have commented that "the marriage license is a raping license". Several legal arguments in favor of a marital exemption clause have been raised. Second, if this rule is not followed, wives will make false accusations against their husbands in spite of or to receive divorce or settlement of property.⁴

However, wives raped by their husbands are often traumatized in their ability to trust at an even more basic level. We face a betrayal of trust and friendship, in addition to the abuse of their bodies. A woman raped by her husband will live with her attacker, and not just a terrifying recollection of a stranger's assault. Raped wives use many self-deceptions to avoid confronting the reality of an abusive marriage, because the after-natives – isolation, lack of financial security, separation from children, etc., are so frightening. Women experience husband abuse in various ways, e.g. during sexual violence some are beaten or the rape may follow a physically violent episode when the husband wants to "make up" and coerces his wife to have sex against her will. Wife rape does not occur in a vacuum, but it is one of the repercussions of the husband and wife's unequal power relationship. Wife rape is the product of two mainly male, very serious problems-violence and abusive sexuality. Wife rape is a manifestation of a male sexuality focused to conquer and dominate, to prove masculinity that is defined in terms of dominance of strength,

³ Convention on Rights of the Child, Arts 1 and 34

⁴ Hindu Marriage Act, 1955, s.5 (iii), prescribes 18 years and 21 years as the legal age for females and males respectively

competition, control and aggression. A real man is supposed to get what he wants, when he wants in his sexual relations with her, particularly with his wife and more especially.⁵

The husband rapist's composite image shows jealous, oppressive individuals who feel entitled to have sex with their 'stuff' – wife on whom rage, sadness, resentment can be extracted and domination and manipulation can be exerted – all in a legal domain that is allowable. In relationships marked by other forms of violence or dysfunctional circumstances marital rape is most likely to occur. This has led many scholars to conclude that "only one component of domestic violence" is marital rape.

VI. MARITAL RAPE AS PROPERTY CRIME-THE MARXIST EXPLANATION

As the Marxists demonstrate, from the time of its basic creation, the political and legal philosophy has relied on the presumption of the right of individuals to own private property. His second assertion-that men are superior to women and, thus, the legal, social and economic inequalities between the two sexes are justified to be very normal-laid the foundations of a sexist society. Over time possession of the man's private property became very important. It required regulation of reproductive means and goods to ensure the integrity of male lineage and that a man further required regulated sexual access to a woman to ensure their offspring's paternity.⁶ Because ownership is seen as the best form of control, women have been reduced to sexual private property owned by distinct male owners. This is why the total possession of the wife's body and sexuality by husband remains unchallenged and most legal systems do not consider abuse within marriage.

VII. THE LEGISLATIVE DEVELOPMENTS AND THE 'AGE OF CONSENT'

Since IPC's 1860 passed, rape law remained the same for thirty years. The latter reform was due to a number of Bengali cases in which the child wife died as a result of marriage consummation. Of these, Queen Empress v. Haree Mohan Mythee was the most notable. This case tells the pathetic story of Dasee phulmonee, who was 11 years old and 3 months old when she died as a result of rape committed by her husband on her. The medical evidence suggested that Phulmonee had died from bleeding caused by ruptured vagina. In this case, child wife rape was severely condemned, and it was held that the husband had no right to enjoy his wife's person without regard to her safety.

In 1891, Sir Andrew Scoble introduced the Bill which resulted in the 1891.³⁴ Indian Criminal Law (Amendment) Act, which increased the age of consent to 12 years for both marital and extramarital offences. The purpose of the Act was humanitarian, i.e., "to protect women from untimely prostitution and premature cohabitation." Pre-mature cohabitation resulted in immense suffering and sometimes even death to the girl and generally resulted in injury to her health and that of her progeny.

⁵ The Criminal Law (Amendment) Act no. 13 of 2013.

⁶ POCSO, S-5 penalizes the act and provides for a rigorous imprisonment of not less than 10 yrs.

The question of age of consent was not considered as finally settled and in 1927 Hari Singh Gaur again introduced a Bill to raise the age in marital and extramarital cases to 14 and 16 years, respectively. The appointment of the Age of Consent Committee followed, which reviewed the prevailing situation and suggested few amendments.⁷

The Committee was of the opinion that, due to the nature of the offence, the amended law was inadequate, especially in the case of marriage as consummation inevitably involves privacy. The prevalent view among the awakened sections of society was that prohibiting a girl's marriage under a given age would be a better measure than increasing the age of sexual intercourse consent.

The opposing party among these groups thought the legislation was partially pointless because it did not provide protection for girls over the age of 13, who need it because of their tender age. In marital situations, the Committee proposed the use of the word 'marital abuse' rather than rape. A husband may commit the crime of marital adultery in the event of sexual intercourse with his wife below 15 years of age. The Committee recommended that marital abuse be included in Chapter XX of the IPC and Section 375 and Section 376 of the IPC be limited to rape outside the marital relationship.⁸

The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend upto one year or fine or both, where wife was between 12-15 years.

VIII. CONCLUSION

Marital rape is one of the worst kinds of sexual violence that occurs at family level. Because of the essence of the crime and related issues of relationship anonymity, internalization of patriarchal subjugation, and most of the time because of their economic dependence, the victims of women don't come forward with their sufferings. The patriarchal mind set has led the law to close its eyes to the plight misery of the abused wives, and in such cases the law does not even recognize marital rape as an offense leave aside which provides any penalties.

In all forms of marriages marital rape happens regardless of age, social class, race or ethnicity. A very meagre and scanty research data is available on the subject, and the lack of data is a major obstacle to making proper efforts by the government and the legislature to provide an effective legal platform to address the concerns of the traumatized survivor.

Acceptance of any spousal exemption from abuse implies embracing the patriarchal view that wives are their husbands' sexual property and that the marriage contract is a right to coerced sex. By fact, by confining the crime to people who are not married to the perpetrator, rape laws are patriarchal and extend equal protection to a class of persons-married women.

The Supreme Court has very loudly admitted rape of a minor wife and delivered a landmark judgment proposing the statutory formula for making child marriages void ab initio. But the major wives weren't able to win the sympathy

⁷ Presidential assent to the amendment was obtained on April 20, 2017.

⁸ Convention on Rights of the Child, Arts 1 and 34

of the judiciary to get marital rape recognized by the apex court. The narrow and restrictive definition of rape, which allows for the marital exemption make the definition of rape , a hollow statement, which provides escape-route for many perpetrators of sexual violence and the quest for justice remains unquenched.

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