

UNION OF TWO TO BREACH OF TRUST: A SOCIO-LEGAL ANALYSIS FOR RECOGNITION OF MARITAL RAPE IN INDIA**Pankaj Singh, Shubham Mishra and Ayush Kumar Singh**

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Stating that family relationships are predominant in a women's life would not be so astonishing. From emphasizing masculine control over women's sexuality to concentrating on the familial relationships developing gender differences, these issues centralized on women's subordination have proven to be highly contentious in contemporary India. Rape in a marriage is one of the sordid issues to be discussed. When a husband forces himself upon his wife with the elements of sexual abuse, coercion, and forceful consummation, these activities qualify as Marital Rape.

The societal corrigendum in India stands fit as stated by Sir Mathew Hale, "but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by the matrimonial consent and contract the wife has given up herself in this kind unto her husband which she cannot retract" (History of the Pleas of the Crown, 1736) as the most significant issue to address the matter of consideration and legislation for Marital rape. In more than 50 countries, including the United States, Britain, South Africa, and Nepal, legislations criminalize marital rape. Why does an activity qualifying as rape under Section 375 (IPC, 1860) stands as an 'exemption clause' without any reason being stated? Is it fair enough to absence the people of their righteousness? Despite the fact that Article 21 of India's Constitution provides the right to life and personal liberty, the legal structure discriminates against women who have been raped by their own husbands. Will India acknowledge marital rape as a legal crime or refuse to accept it?

This paper seeks to provide a Qualitative analysis of the legal framework with observations of the status of women in contemporary India for backing the need for a legislative framework that not only answers the question of non-consensual sexual relationships in a marriage but also penalizes women as a cognizable offense. The paper argues for legislation that cuts the strings of marriage standing at the podium of defense of rape. Rape by another name would still be rape.

Keywords: criminal law, personal liberty, marriage, legislation(s), recognition.

1. INTRODUCTION: STATUS OF WOMEN IN SOCIETY

Denis Diderot was very poetic and said, "When you write about women, you need to dip the pen into the rainbow and dry the page with the powder of butterfly wings"ⁱ This initiates me to talk about this sensitive topic.

Nowhere in history were women treated equally. Like status was never given to men and women. The type of status issued by society to the women describes the nature of its culture and standards. Swami Vivekananda rightly said, "That country and that nation which did not respect women have never become great nor will ever in future"ⁱⁱ

Women's status signifies the level of progress of one nation. In the past and contemporary society, women's delicacy and weakness have been raised. Are women exceptionally delicate and weak? They are considered vulnerable and not allowed to carry heavyweights, deep mining, etc. In some sections of the society like Sub-Saharan Africa, it was contrary. Husbands here used to travel on horseback while their wives used to walk on foot. Women used to bear the entire burden on their heads. Earlier in India, women used to enjoy equal status, but it started declining with Puranas and Dharmashastras, and it continued throughout the medieval period. Manu said, "Women must be carefully guarded at all stages in their lives."ⁱⁱⁱ This view represents the thinking of the society of that time. Females were considered weak and were also considered to be dependent on males. In

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childhood, she is the duty of her father to be protected by him; when she grows up and marries, this duty is passed on to her husband, he becomes the caretaker; After a certain age, when woman becomes old, she is dependent on her son as she is not expected to be independent.

Sexism is a concept that shows women's status and has been followed since the past to this contemporary world. There are various inequalities in every society; one of them is Sexism which Richard Schaefer explains as "Sexism is the ideology that one sex is superior to the other. The term is generally used to refer to male prejudice and discrimination against women."iv

It isn't always expressed publicly or openly, but it is done undeclared. Sexists objectify women, and they don't believe in treating women equally with respect and honor; for them, women are just objects of sex. When this ideology arises, it is not shocking to say that "It is legal for marriage to nullify rape." This problem is growing more and more acute in India. Male domination has been one of the causes of marital rape.

"Women, Ananda, are hot-tempered; Women Ananda, are jealous; Women, Ananda, are envious; Women, Ananda, are stupid" and "crying is the power of the child; anger is the power of women"vthis was the reply given by Buddha when his follower, Ananda, asked him that why women are not treated on par with men in public life? This shows that inequality and discrimination are being defined; people are viewed as despicable deeds for present-day women. The dominance of male supremacy has been a continuous process.

Though legislation has been made to achieve gender neutrality, socially, practicing this is an excellent task. So is the concept of marital rape. *"Marital rape is when a husband forces himself upon his wife with the elements of sexual abuse, coercion and forceful consummation, these activities qualify to the same."*

It is not easy to bring up the mindset among the people that a husband can also rape his wife; it is not just the permission given through marriage but it is taking the shape of consummation without the wife's consent leading to marital rape.

Now, we will look upon an insight into the History of The Pleas of the Crown, which will bring the societal corrigendum for non-recognition of marital rape into the frame.

2. INSIGHT TO THE HISTORY OF THE PLEAS OF THE CROWN

*"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract."*vi The capacity of the populous society of the nation, which keeps itself into the belief that a man under a practice of marriage with a woman cannot be held guilty of the offense of rape that has derived its roots from the seed of matrimonial consent. Matrimonial consent has become so unspecific that it has grown to attack the modesty of a woman. The justification for the activity amounting to rape is to put it under the garb of criminal assault on a woman. In comparison, the ideology that the wife has given up herself to her husband gains the man control over her sexuality and establishes a permanent, irrevocable consent to the sexual relationship. This whole concept turns out to be such that the activity based on which we weigh an offense is committed or not won't be so in case of rape for the only reason that there is an established institution of marriage beneath this, no guilt will be shown as an offense of rape.

Sir Mathew Hale also admits the same in his writings, but the guilt won't be lawfully established even if by all means the activity is qualifying to rape. Stating, "But the husband cannot be guilty of a rape committed by himself upon his lawful wife..."vii this signifies that the activity, even if it is under the ambit of definition of rape, won't establish the guilt of the male, being the husband of the woman.

3. MARRIAGES IN INDIA

Marriage is a social institution that has a biological foundation. This social institution has existed in our society for a long time, immemorial. It is a permanent element of our social system; it would not be incorrect to say that we can't think of life without marriage in India. It is obligatory and unavoidable in Indian society to marry. C.B.

Mamoria commented, "We are much-marrying people. We marry early, and we marry in large number."viii This rightly shows the importance of marriage in the Indian context. Moreover in reference to the writings of Anderson and Parker, "Marriage is the sanctioning by a society of a durable bond between one or more males and one or more females established to permit sexual intercourse for the implied purpose of the parenthood."ix This permit of sexual intercourse must not be under any oppression or force, and both the male and female must give free consent. Mainly there are two types of marriages, (i) Hindu Marriages (ii) Muslim Marriages

Hindu Marriages, a Sacrament. Hindu Marriages have always looked up to an immaterial aspect. It is a matter of religious duty and not a contract. According to Hindu religion, marriage, i.e., Vivaha Sanskara, is a sacred ritual that is neither a 'social contract' nor a 'licensing for sex life.'

Muslim Marriages are universally discouraged celibacy. Here also, it was a compulsion to marry. Muslim Marriages were called 'nikah'; it is a secular bond rather than a religious sacrament. S.C. Sarkar [1948] stated that "marriage among Muslims is not a sacrament but purely a civil contract."xIn both Marriages, consummation was taken into consideration. In Hindus, sexual pleasure or *Rati (kama)* was one of the primary outcomes, and In Muslims, there was a contract for the legalization of sexual intercourse after marriage.

Now, we will look upon the history of the marital rape exception in our codified laws and the views of the government regarding criminalizing marital rape to establish the necessity of doing so.

4. HISTORY OF MARITAL RAPE EXCEPTION IN INDIAN LEGISLATION

Section 375 of the Indian Penal Code, 1860 criminalizes the offense of rape. It defines sexual penetration and sexual intercourse in the ambit of the definition of rape. The exception of this section excludes sexual acts between a husband and wife. Thus the wife has no legal resort in case if husband rapes her. Section 375 in furtherance of Criminal Law (Amendment) Bill explains and defines the offence of rape along with an exception which calls off the mere possibility of rape by a husband with his own wife.xi

The exception mentioned above 2 (exception clause) of Section 375 of IPC does not state any reason or explanation regarding the exclusion of sexual intercourse between a man and his wife. Since the definition in this section is moreover focused on consent, it is; therefore, an inference that marriage justifies it to be an implied consent for sexual activity between the victim (wife) and her husband and thereof backs the exception clause. However, another inference can also be drawn that this exclusion was made following the sanctity of the institution of marriage in Indian society.

Furthermore, a Specific form of marital rape is criminalized under the legal framework, i.e., sexual intercourse between husband and wife living separately on Judicial Separation or Otherwise. Section 376B of IPC explains and penalizes the same. Interpreting the same it can be observed that under a situation of Judicial Separation Marriage is not dissolved and is yet conserving itself.

In addition, Consent is a presumed concept in Section 375, IPC, as the exception describes it. But that's not the case with the section mentioned above as husband and wife are not living together, which further concludes another inference that living together is implied consent for sexual intercourse between a husband and wife. This opens up as a matter of concern for analysis and debates in the legislature.

This concern took a highlight with the 42nd Law Commission Report.xiiSince the legislative framework sought many amendments, its present importance was limited to the observations made by the commission on Marital Rape. The report made two crucial suggestions regarding legislation for marital rape. First, it suggested that in instances of judicial separation of husband and wife, the exception clause must not apply. The reasoning for this stated that "in such a case, the marriage subsists, and if the husband has sexual intercourse with her against her will or consent, he cannot be charged with the offense of rape. This does not appear to be right".xiii

However, it fails to elaborate more over the reasons as to why it doesn't appear to be "right", which gives an impression that there isn't any implied consent when "husband" and "wife" are not living together. The second

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suggestion was regarding acts of sexual intercourse without the consent of females aged between twelve to Fifteen.^{xiv} It suggested that punishment for such offenses should be put into a separate section, not rape.^{xv}

Furthermore, the Law Commission again looked upon the validity of exception clause in its 172nd report.^{xvi} It was argued that the all forms and instances of violence by husband with his wife are criminalized,^{xvii} therefore there is absolutely no concrete stance or reason so as to not to criminalise the offence of rape in a marriage; But the Law Commission rejected this argument. It opined that it might be an excessive interference with the institution of marriage.^{xviii} This report shows the clear disagreement of the commission over the issue of criminalization of marital rape for sole reasons of an expected social disruption it may cause.

The J.S. Verma Report issued in 2012 included recommendations for declaring marital rape an offense.^{xix} The committee offered two important recommendations: first, the exemption clause should be removed.^{xx} The second recommendation was that the legislation explicitly say that a married or other comparable connection is not a legal defence for the accused or important in establishing whether or not consent existed. It was not to be taken into account as a mitigating factor in sentence.^{xxi}

To broaden the definition of rape, the Criminal Law Amendment Bill of 2012 substituted the word 'rape' with 'sexual assault,' however there was no provision for the criminalization of marital rape.^{xxii} In its 167th report, the Parliamentary Standing Committee on Home Affairs examined the Amendment bill and held public consultations.^{xxiii} It was suggested that section 375 be changed to remove the exception clause.^{xxiv} The committee, however, rejected this advice, claiming that doing so would put the "entire family structure under greater stress, and the committee may perhaps be inflicting more injustice,"^{xxv} and that adequate remedies already existed. In 2015, in response to a Bill submitted by a Member of Parliament to criminalise marital rape, the Ministry of Home Affairs issued a statement in which It was considered that the international definition of marital rape could not be applied appropriately in the Indian context. The societal idea of treating marriage as a sacrament was reasoned.^{xxvi}

Judiciary has also maintained a similar attitude towards the criminalization of marital rape. There have been instances where the court avoided the question over the exception clause of marital rape,^{xxvii} dismissed petitions for striking down the exception clause, or used the exception clause to avoid answering the question of marital rape.^{xxviii}

We shall examine the exception clause in light of constitutional law, in addition to the government's views and arguments and analysis through numerous law commission reports, in order to establish whether marital rape should be criminalised.

5. ANALYZING THE EXCEPTION CLAUSE IN LIGHT OF CONSTITUTIONAL LAW

In *T. Sareetha v. T. Venkata Subbaiah*,^{xxix} the Andhra Pradesh High Court declares the Hindu Marriage Act's Restitution of Conjugal Rights unconstitutional.

The court found that the restoration of Conjugal Rights was unconstitutional because it moved the freedom to choose whether or not to engage in sexual activity from a woman's liberty to the state's obligation. Because it infringes on an individual's autonomy, this would contravene Article 21 of the constitution.^{xxx} Furthermore, the court acknowledged that this clause would harm women and emphasised the importance of women's sexual independence.^{xxxi}

In India, the concept of marriage has developed over time, with changes in the dimensions of women's interactions with their spouses brought about by our existing codified laws. The traditional perspective of women's role in marriage was that they were the husband's property from the beginning.^{xxxii}

Women's status has improved since codification; under all of our statutes, such as the Hindu Marriage Act, the Christian Marriage Act, and the Special Marriage Act, there are no distinctions between the status of a wife and her husband. This demonstrates that our legislation ensures equality of status for both husband and wife, including

the right to property and the right to divorce, affirming women's role as equal partners. In order to consider a sexual relationship in a marriage, permission should be gained for a sexual relationship voluntarily, rather than under duress or for the benefit of a social institution.

Analyzing the constitutionality of codified laws provides us with a clear image of how to frame the model for criminalising marital rape. We began by emphasising why criminalising marital rape is necessary, and then we proceeded to explain why it is necessary. We're going to suggest a model for making marital rape a crime. Since establishing marital rape is the key concern for conviction, we have recommended revisions to sections 375 of the Indian Penal Code and 54 of the Indian Evidence Act.

6. MODEL FOR CRIMINALISATION OF MARITAL RAPE

To begin with, there's little question that simply excluding the exemption clause is insufficient; the law must explicitly state that a marital relationship is not a defence to rape. The J.S. Verma Report also suggests that unusual instances of marital rape be covered. Otherwise, the judiciary may establish a framework for handling such cases.

In Addition, the existence of a marriage does not imply any presumed or implied consent, as advised by the J.S. Verma Report. As a result, there should be no such assumption. As a result, it is proposed that when criminalising marital rape, consent be viewed in both ways, i.e. absence of consent, burden on accused to establish consent or inferred consent, and burden on victim to refutation of consent. There is no need to use force to demonstrate a lack of consent under current legislation. xxxiii Circumstantial evidence is used to determine consent. xxxiv

Because the crime was committed in private, the wife's statement would be the sole evidence. As a result, additional types of evidence, such as a pattern of domestic abuse or cruelty, must be considered. As a result, modifications are being requested under section 54 of the Evidence Act. A new section of the Indian Evidence Act, 1872, should be added to clarify that there should be no presumed consent in the prosecution of rape, even if the accused and victim are married. The Punishment for Rape, which ranges from seven years to life in prison, is not being changed or amended. 376B deals with husband and wife living apart and has a lesser penalty, ranging from two to seven years in jail, indicating a lower bar for the same level of illegal action. It is urged that it be deemed unconstitutional on the grounds of equality before the law under Article 14 of the constitution.

CONCLUSION

No pre-requisite can justify the committed offense of rape *per se*; herein, it's necessary to understand that criminalization and recognition for marital rape are nowhere going to hamper the sanctity of marriage; instead, it will ultimately strengthen the institution of marriage and will keep it out of a felony that an established marital relationship does not give someone control over the sexuality of a woman. In support of the cause, we have carefully examined the sociological and legal arguments for marital rape recognition in India and proposed a model for criminalisation of marital rape, which recommends revisions and provides recommendations for marital rape recognition in the legal system.

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