MARITAL RAPE: LEGAL ISSUES AND THE NEED TO CRIMINALIZE IT

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INTRODUCTION

Section 375 of Indian Penal Code defines rape as “sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud at a time of when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 16 years of age with the exception of sexual intercourse by a man with his own wife, the wife not being under fifteen years of age”.\(^2\) Indian law acknowledges a rape if it is committed by a stranger but at the same time if it is committed by a husband, no legal remedy is available for victims. This article is an attempt to highlight the need of criminalizing marital rape in India. This article also discusses the cases of different countries who have criminalized marital rape. Later the sustaining factors of marital rape are also discussed because of which many countries are unable to criminalize it.

MARITAL RAPE:- INDIAN SCENARIO

In a patriarchal society like India where marriage is considered as a license to sex and is so sacrosanct that criminalizing marital rape is not even easy for Indian judiciary. In a recent case Supreme Court has rejected a plea filed by a woman working in a MNC to criminalize marital rape, who was raped by her husband, saying the law can’t be changed for a single person.\(^3\) In another case, Shree Kumar and Anr. Vs Pearly Karun Kerla High court said that “An offence under Section 376-A will be attracted only when sexual intercourse is conducted by a man with his wife who is living separately from him under a decree of separation or under any custom or usage without her consent. It is not the case of the de facto complainant that there was a decree

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2 Indian Penal Code, 1860, Section 375.
of separation or they were residing together under any custom or usage. On the other hand it is her case that she voluntarily joined her husband, the first petitioner, and they have been staying for two days together in his house as husband and wife. In such circumstances even if she is subjected to sexual intercourse as alleged no offence under Section 376-A will be attracted. Hence registration of the crime under Section 376-A is misconceived”. In 2012, after the gang rape of 23 year old paramedical student in Delhi, safety of women was again questioned in India. So to curb the crimes against women Justice Verma Committee was formed to recommend amendments in present laws. The committee held that rape is not merely a crime of passion but also an expression of power. The Committee recommended that the exception to marital rape should be removed and marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant. In India, women are merely considered as property and an object upon which men can show their power, exemption given to marital law increases the number of crimes against women. It can’t be denied that the position given to marriage in Indian society is restricting Indian judiciary to criminalize marital rape. It is believed that when a woman gives her consent to marriage, she impliedly consent to sex due to which her consent doesn’t matter after marriage. In spite of the fact that marital rape infringes the fundamental right of women to live with dignity enshrined under Article 21 of Indian Constitution it is not criminalized in India. Apart from this it not only affects a woman physically but also psychologically. And even women don’t talk about the violence suffered by them due to societal pressure and taboo. This is the reason that most of the cases of marital rapes are not reported.

Another important point is section 375 exempts a man for raping his wife if is she is above 15 year though the legal age of marriage for girls is 18 years. The irony is that such marriages are voidable but rape committed by a husband has no remedy in the eyes of law.

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All these contentions prove the gravity of the problem and the need to criminalize marital rape in India.

**COUNTRIES WHERE MARITAL LAW IS CRIMINALIZED**

In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence Against Women.\(^6\) This establishes marital rape as a human rights violation. This is not fully recognized by all UN member States. In 1997, UNICEF reported that just 17 States criminalized marital rape. In 2003, UNIFEM reported that more than 50 states did so.\(^7\) Countries like Poland (1932), Czechoslovakia (1950), Soviet Union (1960) were first to criminalize marital rape.

**U.S.A**

In 50 states of U.S.A marital rape is criminalized. According to 17 century English jurist, Sir Matthew Hale stated the position of common law that a husband can’t be committed of rape of her wife as by marrying, she gives her consent to sex. Later in the case of R V R this view was overturned.” In case of Oregon v Rideout for the first time in modern American history, a man faced trial for raping his wife. A national public discussion of the issue followed questioning whether a man had an absolute sexual right to his spouse's--or cohabitant's--body.\(^8\) But on 27 December 1978 the jury acquitted John Rideout. Although John was acquitted, the publicity his trial afforded Oregon's law made many feel, as one newspaper editorial put it, that "an end to the common-law notion that rape is permissible in marriage is long overdue.

A society that considers it a crime for a man to beat his wife should certainly consider it a crime for him to assault her sexually.\(^9\) In the case of People Vs Liberta it was finally decided that there

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\(^6\) Report of the Secretary-General, In-depth study on all forms of violence against women, United Nations, UN Doc A/61/122/Add.1, 6 July 2006.

\(^7\) Report of the Secretary-General, In-depth study on all forms of violence against women, United Nations, UN Doc A/61/122/Add.1, 6 July 2006.


would be no difference between marital and non-marital rape. Though all the 50 states have criminalized marital law but still exemptions are still provided in many state laws.

**Some European Countries**-Belgium was one of the countries who criminalized marital rape very early. In 1979 Brussels Court of Appeal stated that husbands have right to sex with their wives but he can’t use violence to claim it. Therefore in 1989 definition of rape was widened and marital rape was treated same as rape. Finland outlawed marital rape in 1954.

10 The case of Finland was in limelight because Finland is a country where women have equal rights and opportunities.

Germany criminalized marital rape in 1997. Before 1997 definition of rape was ”Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years’ imprisonment”. Then in 1997 there were changes made to definition and marital rape was outlawed in Germany.

**England And Wales**- In the case of R V R the appellate committee of the House Of Lords held that “the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law”. The court also stated that “We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim”.

**Australia**-In Australia marital rape was criminalized from late 1970s to early 1990s. Earlier the law of rape in Australia was based on the English common law offense of rape. In late 1970s the discussion was going to criminalize marital law but until 1989 that it was

10 Ministry Of Justice Finland, Ms Tuija Brax at the Regional seminar: Campaign to Combat Violence against Women, including domestic violence.

11 Kunarac, Vukovic and Kovac-Judgement –Part IV, Individual criminal responsibility and superior responsibility: Article 7(1) and Article 7(3) of the Statute(Germany).


criminalized. In 1991, in the case of *R v L*, high court of Australia ruled that exemption provided to marital rape in common law is no longer part of Australian law.

More than 100 countries have criminalized marital rape but there are many more especially third world countries that haven’t criminalized it.

**SUSTAINING FACTORS OF MARITAL RAPE**

1. **Legal Factors**: Government has a direct impact on criminalizing marital rape. Catharine MacKinnon argues that rape laws in patriarchal societies exist to control access to women from a male perspective, not for the reason of protecting women's right so that they can be free to decide whether to engage in sexual intercourse or not. So even state criminalizes marital law but the institutions of state supports it. For instance Unites states criminalized marital rape but it still prevails in some states. So it is very important that state not only criminalize it but also supports the law and implements it.

2. **The purpose for which marriages are arranged**: In countries like India marriages are still arranged for the purpose of procreation, or extending family due to which women don’t get the dignity. Also society gives different roles to man and woman, so as a wife a woman is expected to be submissive, docile and sacrifice her happiness for her family. So many women believe giving sex to their husbands is their duty and in fulfilling all these duties rights of women are suppressed by society. Even though state criminalizes marital rape, due to these factors our community doesn’t take marital rape as a crime and often the cases go unreported.

3. **Religion**: As our society is highly influenced by religion, it plays a very important role in lack of criminalizing marital rape. Most of the religion preaches that sex within marriage is a duty. As most of the Western world is influenced by Christianity, it teaches that pre-marital sex and sexual relations by married person with someone other than spouse (adultery) are sins. As Bible states -:¹⁴

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¹⁴ 1 Cor 7:3-7:5 (2015) , Let the husband render to his wife the - Bible Gateway" ,Bible Gateway. Retrieved.
“...The wife does not have authority over her own body, but the husband does. And likewise the husband does not have authority over his own body, but the wife does. Do not deprive one another except with consent for a time that you may give yourselves to fasting and prayer; and come together again so that Satan does not tempt you because of your lack of self-control.”

Whereas in Hindu religion marriage is considered as very sacrament and pious. Therefore it is beyond the scope of any regulation or any law to criminalize it and hence this sacredness becomes the reason of lack of criminalization of marital rape.

In Islam marriage is considered as a contract. So a man is responsible for providing support to her wife and in return a wife is supposed to be submissive. Due to this contract sex without the consent of a woman is not considered as rape.

HURDLES IN PROSECUTING MARITAL RAPE

Criminalizing marital rape doesn’t ensure the implementation of law. As above mentioned, the law is only going to work when state supports it. So most of the times State criminalizes marital rape but due to reluctance of authorities to prosecute culprits, it’s not implemented in many countries. For instance in Ireland, where marital rape was made illegal in 1990, by 2016 there had been only two persons convicted of marital rape. Lack of public awareness is also responsible for improper implementation of marital rape law, as women don’t even know about their rights due to which they don’t raise their voices against such crimes. Many times people don’t even know that it is illegal as the traditional ideas of marriage are deeply embedded in people’s mind. For instance a report by Amnesty International has showed that although marital rape is criminalized in Hungary, in a public opinion poll of 1,200 people conducted in the year 2006, 62% people did not know that marital rape was a crime, 41% of men and around 56% of women thought that it was not illegal in Hungarian law, and almost 12% people did not know about it whereas in Hong Kong, in the year 2003,16 months after the criminalization of marital rape in Hong Kong law, a survey showed that 40% of women did not know it was criminalized.

CONCLUSION

For the development of any nation it is indispensable to provide equal rights to women and prevent any form of violence against women not only by the strangers but also by their husbands. The time has come to differentiate between violence and duties. It is high time that marital rape and non-marital rape should be treated in same way. As marital rape law is highly influenced by different societies and cultures especially patriarchal society, legislators should make sure that they should make laws without getting affected and pressurized by these factors. After all marital rape is a kind of violence which infringes the basic human rights of women and their right to live with dignity. It is important to understand for the legislators that marital rape is kind of a violence which terribly affects the physical, emotional and psychological health of a woman. There is a research which has shown than that marital rape is more traumatizing and damaging to physical and psychological health than the rape by strangers. Because when a woman is raped by a stranger she can get rid of the rapist but when she is raped by her husband she doesn’t have any choice, as divorce is also a stigma in many societies. The researchers Finkelhor and Yllö remarked in their 1985 metropolitan Boston area study that:

"When a woman is raped by a stranger, she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist".\(^{16}\)

And all these things become more frightening when legal remedy is denied to a woman and legal system of a country denies acknowledging it as a crime. Apart from criminalizing marital rape, it is also very important to implement the law and prosecute the culprits. Without implementation there would be no use of having law. As discussed above there are many countries where marital rape is illegal but only on papers. And this is not possible without changing societal society. In order for marital rape law to be successfully implemented, the factors which sustain marital rape should be seen abusive by society. Both society and law makers play an equal role in enforcing the law. So awareness of society is also very important. Therefore law makers should make sure that people change their perspective towards this brutal crime against woman. Therefore marital rape must be criminalized and implemented in all the countries.
