

MARITAL RAPE IN INDIA: A FEMINIST SOCIO – LEGAL CRITIQUE

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Abstract: *Of all the evils for which man has made himself responsible, none is so degrading, so shocking or so brutal as his abuse of the better half of humanity; the female sex - Mahatma Gandhi*

The relationship between Adam and Eve as man and wife has existed since time in memorial and so has the institution of marriage. The role of man and wife in marriage has predominantly been dominated by gender roles of man and woman as historically created and accepted by the society- man dominating the woman; the man going out to work to rear the family and the women staying back at home looking after family. With time we have seen commendable changes, in the gender roles or gender stereotypes as we call it. Women have been accepted as individual having the same rights and obligations as a man both in law and in society. Though we have come a long way from where we started we still have a long way to go. We cannot close our eyes to what happens around us. One such locked closet is marital rape. Also known as conjugal rape it is a rape caused to a wife by her husband. Backed by several theories marital rape is a cruel and abhorrent act and violates the Fundamental and Human rights of a woman. Marital Rape in India is not a criminal offence per se. There exists a critical need to bring about substantial changes, rather bring about a specific and clear law having deterrent effects. The aim and objective of this research paper is to critically examine this existing legal and regulatory framework on marital rape in India. The Research Methodology followed shall be predominantly Non-Empirical, essentially theoretical in nature.

Keywords: Indian Penal Code, 1860, Marital Rape, Feminism, Violence against Women.

Introduction *Of all the evils for which man has made himself responsible, none is so degrading, so shocking or so brutal as his abuse of the better half of humanity; the female sex*¹.

The relationship between Adam and Eve as man and wife has existed since time in memorial and so has the institution of marriage. The role of man and wife in marriage has predominantly been dominated by gender roles of man and woman as historically created and accepted by the society- man dominating the woman; the man going out to work to rear the family and the women staying back at home looking after family. With time we have seen commendable changes, in the gender roles or gender stereotypes as we call it. Women have been accepted as individual having the same rights and obligations as a man both in law and in society. Though we have come a long way from where we started we still have a long way to go. We cannot close our eyes to all that is happening around us. Yes violence against women exists. The UN Declaration on the Elimination of Violence against Women states that "violence against women is a manifestation of historically unequal power relations between men and women" and that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". "Violence against women can fit into several broad categories. These include violence carried out by "individuals" as well as "states". Some of the forms of violence perpetrated by individuals are rape; domestic violence; sexual harassment; coercive use of contraceptives; female infanticide; prenatal sex selection; obstetric violence and mob violence; as well as harmful customary or traditional practices such as honor killings, dowry violence, female genital mutilation, marriage by abduction and forced marriage. Some forms of violence are perpetrated or condoned by the state such as war rape; sexual violence and sexual slavery during conflict; forced sterilization; forced abortion; violence by the police and authoritative personnel; stoning and flogging. Many forms of violence against woman, such as trafficking in women and forced prostitution are often perpetrated by organized criminal networks"². The above in form and content covers most acts that can be broadly classified as an act of violence against women. While we acknowledge some forms we like to remain silent especially on those forms which happen within the four walls of our homes. Marital rape is one such dark secret.

Marriage requires that partners treat each other with mutual respect and dignity. The concept of matrimonial rape has existed since the inception of the institution of marriage hidden in locked closets. However, neither in

the past nor in the present have such laws been formed which prosecute a married man for forcing her wife to have sex with him. In India, marital rape is not considered to be an offence. Marital rape exists de facto however not criminalized. A married woman in India has absolutely no laws to protect her against this horrendous act per se and in most cases subject to interpretation by the courts.

What is Marital Rape?

The word rape has been derived from the Latin term raptus that refers to the act by one man of damaging or destroying the property of another man. The word property here primarily refers to wife or daughter of another man.³ Marital rape, also known as conjugal rape is rape caused to a wife by her husband. It includes use of threat or force by the husband against the wife to compel her into sexual intercourse. The concept finds its roots on the legal principle of coverture which refers to the wife being covered by the spouse once married, such that she is now his property.

Marital rape may be majorly following two categories; Sexual coercion by non-physical means and Sexual coercion by physical means. The first form involves social and emotional coercion by which the wife is compelled to enter into sexual intercourse by reminding her of her duties as a wife. The most commonly used non-physical techniques include making false promises, to end the marital relationship, lies, not threatening conforming to the victim's protests to stop.⁴ The second form also known as Forced sex involves the use of physical force to enter into sexual intercourse with an unwilling woman. It includes in form Battering Rape, Force Only Rape and Obsessive Rape.

Legal Framework on Marital Rape in India: Marital Rape in India is not a criminal offence per se. For years, women's organizations have demanded marital rape be made a criminal offence. In a landmark verdict in case of *Independent Thought v Union of India* and another⁵, the Supreme Court criminalized sexual intercourse by a husband with his wife who is under 18 years of age. The decision applies to all faiths and is expected to act as a deterrent against child marriage, which, though prohibited is practiced in several parts of India. Section 375 of the Indian Penal Code, 1860 which defines the offence of rape, has an exception clause that says intercourse or sexual act by a man with his wife, not below 15 years, is not rape. However, the age of consent is 18 years. The Bench of Justices Madan B Lokur and Deepak Gupta read down this exception arguing that it was inconsistent with other statutes dealing with children such as The Prohibition of Prevention of Child Marriage Act (PCMA), Juvenile Justice Act and The Protection of Children from Sexual Offences (POCSO) Act - all these have fixed the minimum age of the girl child for sexual relations at eighteen. Hence sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the Indian Penal Code, 1860 creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is discriminatory and is definitely not in the interest of the female child. It is also in contradiction to Article 15(3) of the Article 21 of the Constitution and our commitments in international conventions. The exception to Section 375 hence should be understood in a purposive and pro girl child. The judges however made no comments on marital rape of a woman who is 18 years of age. By underlining the right of the under aged wife to choose whether she would have intercourse with her husband or not, the husband is put under risk of potential rape charges by his wife or her scheming family. If right of choice is inferred from the girl bride's continued stay with her husband under the same roof, the insistence on the right to choose becomes meaningless. In a matter pending on marital rape, the High Court had asked the Centre to spell out its stand on the petitions. The Centre on making marital rape a criminal offence has stated on affidavit that it may become an easy tool for harassing the husband and that there can be no lasting evidence in the case of sexual acts between a man and his own. The act of criminalizing marital rape would de-stabilize the institution of marriage.

Theories on Marital Rape: Feminist Legal Critique on Marital Rape in India: Marital rape as understood is not per se an offence in India. The act has always been justified since ancient times on grounds of socio-economic and cultural factors dominating the Indian Society. The patriarchal dominion of women by men, their treatment as chattel adds fuel to fire. The act attacks the basic Fundamental and Human rights and disregards ideas of individuality and consent. The Chief Justice of England, during the 1600s wrote- "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 herself in kind unto the husband, whom she cannot retract."⁶ Not surprisingly, thus, married women were never the subject of rape laws. A few theories in light of marital Rape would fur-

ther bring out the impact and existence of this horrendous act in society. Contract Theory where generally treated as a contract and one of the conditions of such a contract involved the implied consent of the wife to fulfil the sexual needs of the spouse According to this theory, there exists no concept of marital rape because sexual intercourse between spouses is always considered consensual. Where women treated as chattel, the basic presumption was that the husband was the owner of his wife and therefore could not be said to rape his own property. In Marital Unity theory it was believed that once married, the identity of a wife merges with that of her husband and hence, the husband was considered unable to rape himself. It is said that non-marital rape is more serious as compared to marital rape hence not an offence at all. Marital rape, being a crime of personal nature is very difficult to be proved. The criminalization of marital rape is fraught with potential chances of abuse of the law by wives with ulterior motives to cause hardship to their spouse. Several feminists have time and again stated that sex is a tool with which men oppress women in India. Marital rape has often been linked to issues like exploitation, marginalization often understood as an outcome of power play. The act has often questioned on grounds of cruelty and morality and continues to affect lives of married women.

Recommendations and Conclusions: The Justice Verma Committee that was formed in light of the Nirbhaya gang rape case criminalized various sexual offences but the opinion that marital rape should be made illegal was disregarded completely. The United Nations through its Committee on Elimination of Discrimination against Women had brought about the recommendation that India must criminalize marital rape.

This was solely based on the view of the parliamentarians that criminalizing marital rape would bring under stress the institution and sanctity of marriage and would go against the principles of family harmony. Marital Rape is a cruel and abhorrent act. The act is violates the Fundamental and Human Rights of a woman. The worst part of this abhorrent act is the fact that the victim woman is compelled to live with the accused i.e the husband. Sometimes these cases may lead to unwanted pregnancy. A clear disregard to individual consent this act constitutes an act of physical, mental and emotional cruelty often leading to several clinical and physiological disorders, anxiety issues and may lead to depression. There exists a critical need to bring about substantial changes, rather bring about a specific and clear law having deterrent effects. There is a need for sensitization of women in relation to their rights and the remedies available to them. There is an imperative need to criminalize marital rape as an offence under the Indian Penal Code, 1860. This must be done by way of amending Section 375 of the Code, in light of the recommendations given by the Justice Verma Committee. The punishment for marital rape should be the same as provided for rape under Section 376 of the Indian Penal Code, 1860. The husband should not be allowed to take the plea that there was a lack of resistance or passive consent the wife. Marital rape should be included an explicit ground for divorce under all marriage and divorce laws in India. The Court must carefully scrutinize the facts and circumstances of each case to avoid miscarriage of justice. There should be enough awareness created in the society as a whole. Marital rape is an offence that happens within the four walls of our homes. The wars against women rights often get misunderstood in the garb of words like Feminism and Nazi feminism. Women and men were created to coexist in peace and harmony. The war is not to give special rights to any category but to recognize individual existence, rights and dignity and to protect human beings from violence in any form. We are born to exist but to exist being Human is a choice we must make.

References:

1. Mahatma Gandhi
2. Prügl, E "Violence against Women, Gender and International Affairs Class 2013. Lecture" conducted from The Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland. (November 25, 2013)
3. Women and Gender In Medieval Europe: An Encyclopedia, Margaret Schaus, Taylor & Francis, 2006, 695.
4. "You Would If You Loved Me": Toward An Improved Conceptual And Etiological Understanding Of Non-physical Male Sexual Coercion, Sarah DeGue, David DiLillo, Aggression and Violent Behaviour, Elsevier Ltd., 517
5. Civil Original Jurisdiction Writ Petition (Civil) No. 382 of 2013, Supreme Court of India
6. Sir Mathew Hale
