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THE CONUNDRUM OF CRIMINALIZING MARITAL RAPE

~ *Divya Chauhan*

INTRODUCTION

"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." - David Finkelhor and Kersti Yllo

One of society's universal institutions is marriage. Dr. S. Radhakrishnan states that "Marriage is not mere convention but an implicit condition of human society...It is an adjustment between the biological purposes of nature and the sociological purposes of man...It is an institution, a device for the expression and development of love."¹ It is among the most intricate and profound aspects of human interactions. One of the most secure partnerships in which a man and a woman are socially permitted to have children, signifying the right to engage in sexual activity.² In order to keep things simple, this article's scope is limited to male-female marriages. While a marriage of this kind permits a man and a woman to cohabit in accordance with both custom and legal requirements, it also fosters a culture of violence, dysfunction, and obligation ignorance. There is disagreement about whether marriage grants a husband the right to forcefully have sex with his wife, or whether a woman's freedom to refuse sexual relations with her husband is forfeited.³ The focus of this study is the problem of rape that occurs within marriages.

For a very long time, it was thought that a woman's responsibilities as a married woman were to care for her husband, have children, manage the home, cook, and satisfy her husband's emotional and sexual demands. According to the same concept, a man must defend his wife even if he is physically frail. It is men who take on the role of domination, sometimes going too far, and it is society itself that has created this kind of stigma. Women were not accorded the same status as men; prior to marriage, they were regarded as their father's property, and upon marriage, they were regarded as their husbands' chattel. Whom the father saw proper to marry off his daughter was up to him. To guarantee offspring and the continuance of the family line, the

¹ C.N Shankar Rao, *Sociology of Indian Society* 101 (S. Chand & Company, 2012).

² Vapsoft 'Meaning of Indian Marriages' (Vapsoft Blog, 10 Dec 2011) < <http://vapsoft.org/meaning-of-indian-marriage/> accessed 6 June, 2024

³ Bhavish Gupta and Meenu Gupta, 'Marital Rape:- Current Legal Framework in India and the Need for Change' [2013] 1(1) GJLS 16, 19 accessed 27 August 2016

woman had to give her husband sexual relations, consent or not. This led to the woman's belief that she had to fulfill her responsibility to be her husband's sexual partner at all times and that she could never say no to him.⁴

In a society where men predominate, sexual violence is one of the most extreme and effective forms of control. It harms and limits women's lives while also inspiring individual and group resistance among women, upholding the status quo of gender inequality, women's subjugation, and their control. The intentional use of sex as a weapon to assert dominance over and to cause suffering and shame to another human being is referred to as sexual violence. Sexual violence is ubiquitous and can take many different forms. It can be found in all kinds of institutions, including the family, which is the fundamental unit of human society.⁵

THE CONCEPT OF MARITAL RAPE

From the Latin "rapio," which means "to seize," comes the term "rape." Forcible seizure is what rape literally entails. As "ravishment of a woman without her consent, by force, by fear, or fraud" or "the carnal knowledge of a woman by force against her will," to use common language, are its meanings. Stated differently, sexual assault constitutes a violent infringement on a woman's privacy and should be condemned by any means.⁶ It is imperative to recognize that rape is the most severe form of sexual violence against women. It is an extreme manifestation within the continuum of sexual violence that entirely disregards women's fundamental rights. Rape is a problem that affects more than just the victim; it is a result of sexist attitudes and ideas. It's a political and social issue that has a direct bearing on power disparities between men and women. The act of rape is violent and aggressive, depriving the victim of her right to self-determination.⁷

Any unwelcome sexual contact (oral, vaginal, or anal) that is achieved by coercion, threats of coercion, or in the absence of the wife's permission is considered marital rape. It is a kind of both sexual and domestic abuse. Because the husband is always in a position of power and most men understand that marriage gives them the right to have sex with their wives whenever they want, whether or not they want to, domestic violence refers to violent or aggressive behavior that occurs within the home and involves the violent abuse of a spouse or partner.⁸

⁴ Mridull Thaplu, "Marital Rape: - Need for Its Criminalisation In India",

https://www.researchgate.net/publication/348049701_MARITAL_RAPE_-_NEED_FOR_ITS_CRIMINALISATION_IN_INDIA
(Last visited on March 21, 2022)

⁵ Shaurya Dutt, Saurav Kataria & Aman Agrawal, "The Slant of Marital Rape in India", Pem Acclaims (Vol. 8, January 2020)

⁶ Phul Singh v. State of Haryana, AIR 1980 SC 249.

⁷ Pem Acclaims, *supra* note 5.

⁸ Shivani Singh, "Marital Rape Status in India Section 375 (Exception of IPC): Why Government Should Remove it Immediately?", IJLMH (Vol. 4, 2021)

Article 375 of the Indian Penal Code (IPC) defines rape as any sexual assault that involves non-consensual sexual relations with a woman.⁹ Nevertheless, Section 375's Exception 2 exempts "unwilling sexual relations between a husband and a wife over the age of fifteen from the definition of 'rape'," shielding such actions from legal action. Following the initiation of marital intercourse, a wife is deemed to have given her husband her perpetual agreement to engage in sexual relations.¹⁰

THE PRESENT LEGAL POSITION OF MARITAL RAPE IN INDIA

The exemption to Section 375 of the IPC in Indian law states that a woman's husband's sexual relations with her when she is married and at least fifteen years old does not constitute rape. Prior to the 2013 change to the IPC, the wife may have received a fine or a significantly reduced sentence of up to two years when she was between the ages of 12 and 15. Only in cases where the wife's age was less than twelve did it qualify as rape.

While eliminating this section, the 2013 amendment chose to stick with the previous legal framework and did not acknowledge the concept of marital rape. It would be appropriate to note that the **Justice Verma Committee Report** suggested that the IPC's exemption for marital rape be removed. Indian law is unique in that it upholds the husband's claim to precedence over the wife's, even in situations when the woman is significantly younger than the legal marriage age. It follows legally that forced sexual relations with a minor wife (between the ages of 15 and 18) cannot be considered rape; similarly, forced sexual relations with an adult wife cannot be considered rape inside the marriage.¹¹

Most cases of marital rape are not covered by the law; the only situation in which it does so is when legally separated couples do not live together (Section 376-B, IPC). According to the ruling in the instance of **Hurree Mohun Mythee**¹², a husband's enjoyment of his wife's persona is not unqualified, even if it raises concerns about her safety. This ruling states that the only situations in which a husband's unalienable right to sexual relations may be violated by the law are those in which the woman is in great danger of dying as a result of a bodily ailment or other risk.

Thus, the right of a married woman to her own body and sexuality has not even the slightest degree of protection under Indian law. There is very little chance that the current situation will improve in terms of adult women being recognized as victims of marital rape, and even when it comes to minor wives, those between the ages of 15 and 18, the crime is not taken severely enough.¹³

⁹ Section 375, Indian Penal Code, 1860.

¹⁰ Sarthak Makkar, "Marital-Rape-A-Non-Criminalized-Crime-In-India", Harvard Human Rights Journal, available at: https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/#_ftn2 (Last visited on March 21, 2022)

¹¹ Pem Acclains, *supra* note 5.

¹² Queen Empress v. Hurree Mohun Mythee, (1890) 18 Cal. 49.

¹³ Law Commission of India – 156th Report on The Indian Penal Code, Ministry of Law and Justice, Government of India, 161 (August, 1997). The NCW had recommended that the age limit in the Exception to S-375, IPC be raised from 15 years to 18 years.

Without providing a specific explanation, the Law Commission stated in its 156th Report that it was reluctant to increase the age of brides under the S-375 IPC Exception from 15 to 18.¹⁴ The 172nd Law Commission Report states that the Commission determined it was unnecessary to remove the Section 375 IPC exception because it might have interfered unduly with a married couple's relationship. The Commission did, however, suggest raising the wife's age restriction from the current 15 years to 16 years.

Additionally, the Indian Constitution, which has been reinforced by a number of court rulings, guarantees all citizens the rights to equality¹⁵ (which implies that married and single women are equal), liberty (which allows them to engage in sexual activity or not), and dignity¹⁶ (which is compromised by rape). However, in situations where these rights pertain to married women, these rights are rarely used.

➤ *Harvinder Kaur v. Harmender Singh*¹⁷

The honorable court held that “Introduction of Constitutional law in the home is most inappropriate. It is like introducing bull in China shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate, the introduction of cold principles of Constitutional Law will have effect on weakening of marriage bond.”

CONCLUSION

Marital rape is only one symptom of a larger social problem that involves sexual violence against women. To divide the problem is to maintain and defend areas where violations and abuse occur. Many social, economic, and political illusions about the place of women in Indian society have been strengthened by the lack of criminal legal protection against marital rape. By failing to hold offenders accountable, this gap has allowed marital rape to continue to be invisible while also aiding in the normalisation of this type of sexual abuse. Because of this, a lot of women find it difficult to refer to forced sex in marriage as "rape." Therefore, it is crucial to dismantle the public and private domains and to identify and record violence against women as a social problem. These points cannot be overstated.

India is riddled with contradictions for a nation that prides itself on being progressing. Structural violence against women continues in the social, political, and cultural spheres that shape our national identity, despite the fact that mainstream national movements have been structured around "non-violence." Although the state is guaranteed security by the most advanced defence technology available, the women in the country live in constant worry for their lives and their dignity when living on state land. Deep in our society are the fault lines of gender inequality. Reducing sexual assault against women and relieving them of fear and servitude are

¹⁴ Law Commission of India – 172nd Report on Review of Rape Laws, Ministry of Law and Justice, Government of India, (2000), para 3.1.2.1.

¹⁵ INDIA CONST. art. 14.

¹⁶ INDIA CONST. art. 21.

¹⁷ *Harvinder Kaur v. Hatmender Singh*, AIR 1984 Delhi 66.

unattainable goals until the intricate web of interconnected and complicated issues is thoroughly investigated and tackled.