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MARITAL RAPE - NEED FOR ITS CRIMINALISATION IN INDIA

Manasvita Tejsi* and Mridull Thaplu**

Abstract

Matrimony is a sacred bond that ties two people, and two families, together. However, if this matrimony is without consent or the people involved in the marriage are not content, then it can turn sour. Our society is inclined towards a patriarchal system from the ancient times of hunting and gathering. So, it comes as a nature for men to display emotions of dominance. Looking around the globe, law and order has a huge role in prescribing and limiting standards for human conduct. Under the Indian Penal Code, 1860, the laws have been made and appropriate punishment for the same have been provided. Neverthess, what most of the people fail to comprehend is that these laws were made by the British a long time ago. At that time, Marital Rape was not considered a crime which can be one of the reasons why it was exempted under the penal laws. This research paper substantiates and focuses solely on evolution of the rights for women; mainly the effects of Marital Rape; and the reasons how it is in violation of the Constitution of India.

Keywords: - Marital, Rape, Woman, Section 375, Dowry, Harassment, Legality, Domestic Violence, Wife

INTRODUCTION

For a long time, people believed that a woman's duty in her married life is to look after her husband, bear children, take care of household matters, cook and provide emotional and sexual needs to her husband. This was first noted in Manusmriti which is considered to be an ancient legal text and has been used to formulate the Hindu Law.

imaṃ hi sarvavarṇānāṃ paśyanto dharmamuttamam |
yatante rakṣituṃ bhāryāṃ bhartāro durbalā api ||[1]

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1 GANGANATHA JHA, MANUSMRITI WITH THE COMMENTARY OF MEDHATITHI 9.6 (Vol. 2,

The same text states that it is the duty of a man to protect his wife, even if he is physically weak. This kind of stigma has been created by the society itself and men assume the role of dominance, sometimes taking it too far. The women were not given the status similar to that of their male counterparts and, before marriage, were considered the property of their fathers, and after their marriage, were considered the chattel of their husbands.[2] The father could wed off his daughter to whomsoever he deemed fit. The woman had to provide her husband with an offspring for continuation of the family line. If her husband could not provide her with an offspring, she had to get impregnated by her brother-in-law.[3] This made the woman believe that being sexually available to her husband and providing progenies was a necessity and her duty; she could never decline her husband's wishes.[4] Manusmriti contained all the laws and principles which were in the earliest days followed by the people of the subcontinent irrespective of their caste, creed or sex.

Women were considered to be the slave of man and the ill practices like Sati and child marriages were prevalent in the country but the situation in the country changed after the movement of Raja Ram Mohan Roy. Even Mahatma Gandhi took a great initiative to improve the social conditions of the women because it was the first time in the Indian Independence Struggle that women participated in the same and were at par with their male counterparts. The outcome of these very movements was a Constitution which gave equality to the women and almost all the rights that are given to the men; be it Right to Vote or Right to contest elections. Post-Independence, there were improvements and advancements in almost all the fields and focus on the life being given to woman could be made better. They were rather discriminated on the basis of their gender. The women have always fought for their rights and this was one of the main reasons why the status of women and men was equated in the Indian Constitution. There were many legislative reforms taken after the independence of the country to strengthen women and improve their status in the country so that no discrimination takes place with them. With the introduction of a Constitution, women have been granted equal social as well as political rights to that of men.

Women have been given the freedom and all the support from the constitution so that they can help in shaping the future of the country. The recent example of *Mangalyaan* is worth quoting because the whole team in the same consisted mostly of female scientists. Even though women have achieved great heights and are striving in almost all the fields whether it is education, law enforcement agencies or science and technology, there are many areas where our country lags behind.

University of Calcutta, 1920).

2 *Id.* at 9.3.

3 *Supra* note 1, at 9.59.

4 *Id.* at 5.154.

Marital Rape

Marital rape in layman's terms can be explained as a person having sexual intercourse with their spouse without their consent.

According to Section 375 of the Indian Penal Code –

> *"Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim."*[5]

However, there is an exception provided which says that if non-consensual sexual intercourse takes place between a married couple, in that case, it will not amount to rape[6]. Domestic violence refers to the violent or aggressive behaviour within the home which involves the violent abuse of a spouse or partner[7] which takes place with a woman because the husband in all the circumstances is powerful and most males comprehend that marriage gives them the right to have sexual intercourse with the wife at any point of time whether she is willing or not. This is the face of a patriarchal society; this act is detrimental to the institution of marriage. IPC, 1860 provides for rape and punishment for rape under section 375 and 376, respectively.

Marriage is a form of social bonding between both the spouses and everything in this institution needs to have the consent of both; Justice Ahmad in the case of *Bodhisattwa Gautam v. Subhra Chakraborty* said that this *"cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crises"*[8].

Marital Rape is a crime in almost all the countries of the world wherein they have either made amendments to the existing law or added a new law for the same. Marital Rape has been criminalised in around 150 countries of the world wherein countries have brought amendments in their law for criminalising marital rape. In the United States, marital rape is a crime in all the 50 states whereas in the United Kingdom the maximum legal penalty for marital rape is life imprisonment. In countries like the United Kingdom[9], Fiji it was criminalised due to decision delivered by courts, in some countries like Brunei[10] the offence

5 Section 375, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

6 Exception to Section 375, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

7 Section 3, The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

8 *Bodhisattwa Gautam v. Subhra Chakraborty,* (1996) 1 S.C.C. 490 (India).

9 *R. v. R,* [1992] 1 AC 599 (UK).

10 Section 375, Brunei's Penal Code.

is explicitly criminalised. In some countries like Bangladesh, India[11] the law for marital rape does not exist because women are considered the property of the husband and the state does not interfere in the institution of marriage.

Many legislations have been passed in the country to check violence towards the woman such as dowry, domestic violence or cruelty but amongst them is marital rape that has not yet been criminalized in the country. Marital Rape is inhumane and the woman knows that she has to live her whole life with the perpetrator which has a substandard physical and mental effect on her. It is a very under-reported crime in the country because most of these women know that going to the authorities will be futile as there are no laws for marital rape; they can also face social boycott.

In the 21st century, when society is well aware of their rights and needs, laws need to be amended. Indian Penal Code, 1860 provides that having sexual intercourse with a wife who is under 15 years of age, is a crime. However, there existed a loophole in this situation, According to the Prohibition of Child Marriage Act, 2006, In India, *child marriage* is only voidable and not void which means that it is not immediately illegal[12]. The minor party, when attains the age of major, can file for divorce within one year of attaining majority otherwise, the marriage is considered legal. But there existed a lacuna in the law under which there was no provision for men asking for consent with their wife aged 15-18 years, and this provided a window for husbands to have sexual intercourse with their wives till they reach the age of majority.

The Hon'ble Supreme Court in the case *Independent Thought v. Union of India*[13] raised the age of consent for marital sexual intercourse in the case of a minor wife to 18 years which was earlier 15 years for the Exception because it was violative of Fundamental Rights as well as provisions of the POCSO act of the minor wife thus amounting to discrimination between minor girls on their marital status. Though the Hon'ble bench did not comment anything on the issue of Marital Rape in a case where the age of wife is above 18 years and added that the issue presented before the court was only regarding the marital rape of a girl who is below 18 years of age and it should not be observed in any way for that of above 18 years. The court did not comment on the issue of "marital rape" where the victim is an adult wife, thus the main lacuna in the law still exists in the country.

However, Under the Protection of Women from Domestic Violence Act, 2005, the definition of domestic violence is given under Section 3(a) which says that *"harms or*

11 *Supra* note 6.

12 Section 3(a), The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

13 *Independent Thought v. Union of India,* (2017) 10 S.C.C. 800.

injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse".[14] Sexual abuse mentioned under this definition includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman[15], which in turn gives a chance to wives to initiate legal proceedings. The drawback of this act is that it is more civil in nature than criminal. It does not provide for a period of imprisonment. Rather it provides for compensation, monetary gain, restraining and protective orders.

Effects of Marital Rape

Marital Rape leaves scars in the life of a woman; they include physical, psychological and mental health issues which hurt the emotional as well as the physical wellbeing of the women in the long run. This section is widely bifurcated into psychological and health issues that a woman may encounter during or after rape.

Psychological Effects

Women who have had encounters relating to Marital rape have had cases of depression, PTSD, fear, self-esteem issues, rape trauma syndrome and also being sexually unstable, unavailable or dysfunctional.[16] As soon as a woman is married, she is expected to fulfil her husband's sexual desire. The first time any female must have experienced this, it must come as a shock to her that such a thing might be required without her consent. Any occurrences after that must seem dreadful but numb to her but she knows there is no use denying or not obeying her partner. The woman feels her family name will be tarnished. So, she feels this pressure to maintain her family's name.

Rape Trauma Syndrome is the medical term given to the response that survivors have to rape and it is the natural response of a psychologically healthy person to the trauma of rape[17]. This may be immediate or may occur after months or even years. The victims may feel humiliated or degraded. The victims may also feel confused as to why this happened

14 Section 3(a), The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

15 Section 3(d), The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

16 Campbell, R., Dworkin, E. and Cabral, G., *An ecological model of the impact of sexual assault on women's mental health. Trauma, Violence, & Abuse*, PUBMED.GOV (June 10, 2020, 08:15 AM), https://pubmed.ncbi.nlm.nih.gov/19433406/.

17 *Surjibhai Badaji Kalasva v. State of Gujarat*, (2018) 59 (3) G.L.R. 2498.

and how could they not help themselves during the incident. Some victims may also blame themselves for being weak not to stop it or for not wanting sexual intercourse as their husbands want them to[18]. A quintessential psychological aftereffect of rape also is self-blame due to which the victim undergoes Post-Traumatic Stress Disorder because of the feeling of helplessness; not being able to help yourself from being raped and self- blaming their self to justify it.

As this issue is not even looked at as a problem so, victims may feel shame and embarrassment telling anyone about it. They feel that this is a taboo and talking about it with other people will raise eyes and questions. In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*[19], a criminal complaint was filed based on a consensual affair and a questionable finding of rape due to failure to marry. Also, in a hearing for criminalizing marital rape, Hon'ble Delhi High Court in 2018 said that: *"Force is not a pre-condition for rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses unless she indulges in sex with him and she has to do it under threat."*[20] All these situations put mental pressure on the victim and their children if they have any. This can cause the children to have a severe mental breakdown or go into clinical depression. It, therefore, becomes evident that such acts not only destroy a woman and her life but also have severe impacts on the health of the children leading to a whirlpool effect.

Health Issues

Although there is a provision provided in the Protection of Women from Domestic Violence Act, 2005[21], but that accounts for only civil liability for sexual abuse. The psyche behind the violent act can be to show dominance and to instil fear that if they do not get what they desire, they may resort to violence.

Most women suffer from perpetual soreness due to frequent rapes. This eventually leads to having broken ribs, knife wounds, marks on their body due to the assault, black eyes. These are just a few examples of what women may experience. Most victims have reported feeling sore and bleeding from the vaginal tract. Bleeding occurs due to intense rupture of

18 Ann Burgess and Lynda Holmstrom, *Rape Trauma Syndrome*, American Journal of Psychiatry 981-986 (1974).

19 *Supra* note 8.

20 *Delhi HC on marital rape: Marriage doesn't mean wife always ready for physical relations with her husband* THE FINANCIAL EXPRESS (Aug. 05, 2020, 11:45 AM), https://www.financialexpress.com/india-news/delhi-hc-on-marital-rape-marriage-doesnt-mean-wife-always-ready-for-physical-relations-with-her-husband/1248987/.

21 *Supra* note 7.

the vagina.[22] Those forced to have anal sex can report bleeding, pain and irritability. They may feel nausea if are somehow reminded of the incident of abuse. Amidst this unwanted pregnancy can also be caused and this further causes mental and psychological pressure on the victim[23]. This can call for premature motherhood and can seriously impact the infant in question. Infertility can also be caused due to vaginal rupture and this can cause the victim to never have children. This can seriously deteriorate the victim for the future if they would ever actually want to start family planning. They can be scarred for life. This can also drive the victims to take their own life. With the notions revolving around marital rape, and the victim not being able to tell anyone anything about the abuse, the victim may think of suicide as the only option.

Marital Rape Laws in India

Our country has advanced in almost all of the fields and there have been many amendments and new legislations in our country, but till date marital rape is not considered to be an offence in the country. The laws for protecting a woman in the institution of marriage does not exist and the matters related to the same are left to the discretion of the court.

Under Section 375 of the Indian Penal code, has mentioned exception that – *"Sexual intercourse by a man on his own wife, who is above 18 years of age, is not rape"*[24]

Under the Indian Penal Code, the instances where punishment is awarded to the husband under marital rape is as follows:

i. When the age of wife is between 12-15 years, there can be imprisonment up to 2 years or fine or both;[25]

ii. When the age of wife is below 12 years, there must be imprisonment for term which shall not be less than 7 years but can also extend to life and shall also be liable to fine.[26]

iii. When the wife is judicially separated, there can be imprisonment up to 2 years and fine[27]

iv. When the age of wife is above 18 years, the rape is not punishable.[28]

22 *Supra* note 12.

23 Sarkar J., *Mental Health Assessment of Rape Offenders*, 55(3) Indian J Psychiatry 235243 (2013).

24 *Supra* note 6.

25 Section 376(1), The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

26 *Ibid.*

27 Section 376A, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

28 *Supra* note 6.

Hence, we can conclude that once a female crosses the age of 18 thereafter as a wife, she has no legal protection if she is sexually harassed by her husband which is also a direct attack on her human rights. It is very shocking because the Constitution has set 18 years as the legal age for marriage whereas the law will protect only those females from sexual abuse which are below 18 years of age and beyond this age limit there exists no remedy for the women.

Thus, it is depicted that the law which is meant for the safety of the victims, is not able to protect those who are victimised and have gone through the trauma of marital rape because according to the obsolete law, marriage in itself has given the consent to have intercourse at any point of time after the marriage and the consent of the female is not needed. Violence takes place with a woman due to which she has to submit herself to sexual activity and further on, she gets hurt physically as well as emotionally. Our judiciary, as well as the legislature, is still silent on the very fact that "*Is marriage a license to rape"?*

The Report of 42nd Law Commission[29] talks about the removal of exception of Section 375 from the IPC because it is discriminatory towards women and is not in accordance to the law. Even the Report of 172nd Law Commission[30] was in favour of removing the exception to Section 375 thereby making marital rape a criminal offence but more than 10 years have passed and no action has been taken on the same issue.

Constitution of India on Marital Rape

This law which seemingly permits marital rape can be challenged on several grounds some of which are enumerated herein. According to the Indian Constitution, all the laws which are passed by the legislature should follow the basic structure doctrine of the Constitution. If any law is in contravention of this, it can be declared as unconstitutional by the Courts. Any law or provision, if made, in favour of marital rape it would have to be in consonance with the basic doctrine of the Constitution.

Article 14

Article 14 of the Indian Constitution[31] guarantees the Fundamental right of equality before the law and equal protection of the laws within the territory of India. However, criminal law is still silent on the discrimination that is faced by the victims of marital rape. The

29 Law Commission of India, *42nd Report on Indian Penal Code, 1860* (June, 1971).

30 Law Commission of India, *172nd Report on Review of Rape Laws* (January, 1998).

31 INDIA CONST. art. 14.

Exception to Section 375 of IPC is a discriminatory law for the married women because there is a new stratum of women created by this law who will not get protection from the law if they face sexual harassment from their husbands which does not fulfil intelligible differentia because it is arbitrary, artificial and evasive.

Section 375 does not include rape which is done by a husband to his wife. Protecting a person from the ambit of Section 375 of the IPC based on the marital status is discriminatory and it violates the Article 14 of the Indian Constitution. Rape or marital rape is one and the same thing and the only difference is that the victim is married in the latter case, and everything else is similar to what is in the rape. It is, in turn, difficult for a married woman because she has to live her whole life with the perpetrator and they are dependent on their husband. In the real sense, this exception encourages the husbands to commit forced sexual intercourse because they know that the same is not punishable under the law. Hence, marital rape is in clear violation to Article 14 of the Indian Constitution because equal protection is not available to the female victims and it does not pass the twin test laid down in Article 14 of the Constitution in terms of intelligible differentia and reasonable nexus.

Article 21

Article 21 of the Indian Constitution says that:

> *"[N]o person shall be deprived of his life or personal liberty except according to a procedure established by law."*[32]

In the case of *Kharak Singh v. State of Uttar Pradesh*[33], the Hon'ble Supreme Court held that *"[b]y the term "life" as here used something more is meant than mere animal existence"* There have been many cases where the Supreme Court has interpreted this article and given a whole new shape to it. Under Article 21, there are many rights which are given to the citizens which include the right to health, dignity, safe environment, sexual privacy, human dignity, among others. In the case of State of *Karnataka v. Krishnappa*[34] , the Hon'ble Supreme Court held that *"[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.",* it further held that rape in itself is a serious blow to the self-esteem and dignity of the victim and it degrades her, leaving behind a traumatic experience.

32 INDIA CONST. art. 21.

33 *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295.

34 *State of Karnataka v. Krishnappa*, (2000) 4 S.C.C. 75 (India).

Right to Healthy and Dignified Life

In the case of *C.E.S.C. Ltd. v. Subhash Chandra*[35], the Hon'ble Supreme Court held that Right to Life also includes the Right to live a healthy and dignified life which is one of the most important things to maintain the individuality of a citizen in the country[36]. The exemption to Section 375 is a violation to the right to the good health of a married woman because marital rape causes emotional, psychological and physical problems to a woman and puts her into depression, moreover in the case of forceful sexual intercourse, there always exists a chance of transmission of STDs to the victim. There are many cases held by the Hon'ble Supreme Court wherein it talks about rape as a crime against the society and also violative of Article 21 of the Indian Constitution[37]. Hence the exemption to Section 375 of IPC is in clear violation to the woman's right to live a healthy and dignified life because sexual intercourse without the consent of the woman challenges her dignity, as well as her health, therefore it violates the very basic structure of Article 21 and is unconstitutional.

Right to Sexual Privacy

There are numerous cases in the Apex Court where it has been held that Right to Privacy is to be protected constitutionally under Article 21.[38] Therefore, any type of forceful sexual act to a woman is a violation of her privacy as it is her body and she has full right to consent to it and protect it. If we talk about sexual privacy the same has been discussed by the Hon'ble Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan*[39] where it was held that "*[e]very woman is entitled to her sexual privacy and the same is not open to for any and every person to violate her privacy"*. However, the exemption of marital rape in the IPC is violative to the right to sexual privacy of a married woman because nobody should force her to have sexual intercourse against her will. Therefore, this exemption is in violation with the Right to Privacy and therefore should be held unconstitutional.

Right to Bodily Integrity

A woman is the owner of her own body and all the decisions regarding her bodily matters are to be taken by her, without the interference of anybody, whether it is having sexual intercourse or not; that is something which is to be decided by a woman and she has the

35 *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 S.C.C. 441 (India).

36 See also *Bandhua Mukti Morcha v. Union of India* (1997) 10 S.C.C. 549, *Francis Coralie v. Union Territory of Delhi,* A.I.R. 1981 S.C. 746.

37 *The Chairman, Railway Board v. Chandrima Das*¸ A.I.R. 2000 S.C. 988 (India).

38 *Govind v. State of Madhya Pradesh*, A.I.R. 1975 S.C. 1378.

39 *State of Maharashtra v. Madhukar Narayan*, A.I.R. 1991 S.C. 207.

right to deny the same and nobody can force her; in the eyes of IPC if a woman denies sexual intercourse and is forced into it, the same is termed as rape but if a married woman is forced into sexual intercourse by her own husband, the same is not rape. Hence, the exemption to Section 375 is a violation of a married woman's right over her own body because marriage does not mean that consent for having sexual intercourse is not needed.

Hence, the exemption to the Marital Rape under Section 375 of the Indian Penal Code is in clear violation of Article 14 & 21 of the Indian Constitution. This exemption does not pass the tests of "just, fair and reasonable law" and the test of reasonable classification because it is not a fair law and is discriminatory towards a married woman and makes a distinction towards them. This exemption is now obsolete and needs not to be present in the IPC, rather India should also take strict measures to guard the rights of the married woman because there is a large portion of women who are victims of marital rape but they do not have a law which can support them; the only remedy available to them is the Section 498A of the IPC and the Domestic Violence Act. The Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mandikar* [40] held that "*A prostitute had the right to refuse sexual intercourse if she is being forced and the same is being done without her will; not withholding the same will amount to Rape.*" This is a vast problem, Indian judiciary in a plethora of cases have criminalised almost all types of rapes but made an exemption to marital rape due to which a large fraction of the females is victimised.

Human Perspective

A majority of people are in favour of not criminalizing marital rape. This creates the face of public opinion and portrays the nation in an incorrigible light. These arguments have gained momentum because most people in India are culturally active and believe that the laws that defined India a thousand years ago are prevalent even today. Moreover, these arguments hold no place in the current times because this exception is discriminatory. Here are some arguments and their rebuttal.

Arguments against Criminalising Marital Rape

The Sanctity of Matrimonial Institution

The first argument regarding not criminalizing marital rape is that it would destroy the sanctity of the marriage and this would furthermore destroy the family. The sacred bond that a husband and a wife share would be broken and the meaning of marriage would be

40 *Ibid.*

lost. Criminalization of marital rape would mean that the state is entering the fine line between home and law which creates a brick wall situation for the judiciary. Providing a legislation for the same would mean that the state is crossing boundaries and going beyond its jurisdiction. Marriage is between two people and any decision encroaching upon this line can be met with opposition and harsh criticism.

Marriage is Consent

Marriage is how two individuals enter into a legal union in their personal capacities. Similarly, people have argued that if these individuals have entered this contract on their volition then the woman has already consented to the marriage. If the marriage is not by her own choice, the parents are responsible for matching the matrimonial relation and that is considered as consent. The tradition of not asking for the woman's consent is widely prevalent. The consent of sexual relationship is thought to be given, to the husband, while consenting to marriage or getting their marriage fixed by their parents. Arranged marriage and forced marriage are two entirely different concepts. Arranged marriage is when both parties are willing to get married upon meeting each other whereas forced marriage is when either one of the parties is not consenting for marriage.

Cultural Boundaries

People have been taught to follow certain traditions, norms and values since they were infants. These values have been etched into one's brains and anything that may go beyond it or does not match the frequency is termed to be taboo. These socio-cultural norms have taught people that it is normal for a man to expect from his wife to fulfil his sexual needs. Culture is what makes a nation.

Pseudo Cases

A large majority of the people have also argued that if legislation is made on marital rape, some wives will use this as a tact to get out of their marriages or to intimidate their partners into doing anything, threatening to use the said legislation. In the case of *Arnesh Kumar v. State of Bihar,* the Supreme Court held that [s]ection 498A is being used as a weapon by disgruntled wives rather than a shield[41]. It would then be the men who would come under the scrutiny of the judiciary every second. This can create a ruckus in judicial proceedings as a plethora of false cases can be filed which will delay the justice of more quintessential cases. India still does not have the means to compensate for all the cases being delayed from years.

41 *Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C. 273.

Pre-existing Legislation

The Protection of Women from Domestic Violence Act, 2005 is said to be the remedy for marital rape. Arguments are made that if this legislation is already in force, there is no need for a separate legislation for the same in the state. Marital rape can be considered under Section 3(a) *"harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse"*.[42] An existing provision has been provided to foresee sexual and verbal abuse at the hands of the husband.

Arguments in Favour of Criminalisation

Sanctity is Distorted

When a man has sexual intercourse with his wife without her consent, the sanctity of matrimony has already been tainted. There is no option of going back and claiming that marital rape can be exempted as it is crossing the boundaries of issues between a man and his wife. Similarly, High Court of Gujarat, in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*[43], held that the "*[n]on-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage"*. The Court while hearing the case observed that marriage does not make the wife a chattel of the husband and it does not give the right to violate the dignity, autonomy and privacy of the woman by coercing her into a sexual act without her free consent. The court added and said that the time has come when we need legislative intervention into the matter so that this serious problem gets solved in the earliest possible time. When the concept of sanctity has been contradicted, this argument becomes ethically flawed.

Consent is Important

The Prohibition of Child Marriage Act, 2006, makes child marriage voidable rather than void[44]. Parents can marry off their minor offspring to anyone and the children cannot take a divorce or an annulment from their spouse until they are not minor anymore i.e. 18 years of age. However, Section 375 of IPC, 1860 prohibits sexual intercourse of a man with wife

42 *Supra* note 12.

43 *Nimeshbhai Bharatbhai Desai v. State of Gujarat,* 2018 SCC OnLine Guj 732.

44 *Supra* note 14.

less than or of 18 years of age.[45] This, however, creates a loophole for those who are above 18 years of age. They have to co-inhabit with someone who may or may not force them into sexual activities against their consent. This is an old tradition that pledges marriage is consent. Being in the 21st century, these archaic laws can be changed according to the advancement of society.

Changing of Culture

Taking the mythology 'Mahabharat', it is believed that Yudhishthira bet his wife in a game of 'chauras' against Duryodhana. From ancient times, women have been objectified and have been treated as a mere chattel. In marriages, the giving away of the bride is called 'kanyadaan' by the father to the husband. A girl is deemed to be foreign to her family members and is believed to be owned by her husband. Old traditions like this should be logically debated upon and it has to be understood that in this era, women have rights and cannot be objectified. The cultural paradigm should be encouraged. This would help in evolution or banishment of old traditions which seem irrelevant.

A Criminal Liability

The Hindu Marriage Act and the Domestic Violence Act provides the women with a means so that they can remove themselves from a threatening situation in turn for a civil liability. People have argued that if there is an existing legislation for domestic violence which is inclusive of 'sexual abuse', then why do the women of India need another legislation. The Protection of Women Domestic Violence Act, 2005, only provides the offenders with civil liability. Moreover, in civil liability, the perpetrator can get away with just providing compensation to the victim. For this crime, the perpetrator needs to be imprisoned. This will set an example for the rest of the society that this crime needs to be recognized and the state will not turn a blind eye to such behaviour.

Conclusion

Justice Krishna Aiyar in the case of *Rafiq v. State of Uttar Pradesh* said that *"A Murderer kills the body but a Rapist kills the soul"*.[46] The State says this is not sacrosanct and it is the sole business between a husband and wife; the state has already made laws relating to marriage e.g. dowry, cheating, cruelty and divorce. It is the firm belief of this paper that there is an immediate need to criminalise marital rape. Adding marital rape to the list would

45 *Supra* note 25.

46 *Rafiq v. State of Uttar Pradesh*, 1980 Cr. L.J. 1344 S.C.

be nothing but a huge success for India towards healthy mental development. The state also said that criminalising marital rape would "destabilize the institution of marriage"[47] and it can be easily used to "harass husbands". When an act has already been done to taint the very sacrosanctity of marriage, how would getting justice for the very same act destabilize the marriage of the two individuals? The marriage has already been destabilized when the spouse tried or did sexually abuse their partner. The second point of 'harassing husbands' can be met with fast-track courts and their speedy trials. Setting up of various other fast-track courts all over the country would help in solving this issue of false cases. Sacrosanctity and harassment of husbands should not be reasons behind not criminalising marital rape. This could be cited as missed justice on the part of the legislature and the judiciary. There has to be a stringent punishment for marital rape. Consent should not be considered as given on the grounds of having a spouse; this is highly subjective. Marital Rape should be added as a ground for divorce which cruelty does not cover as marital rape in itself is not a law in the current scenario of the Indian Justice System.

In 2019, Advocate Anuja Kapur filed a petition in the Supreme Court to make marital rape a ground for divorce; a two-judge bench comprising of Justice S.A. Bobde and Justice B.R. Gavai, asked the petitioner to file for relief in the High Court.[48] When the state itself can be rigid in not taking any steps in furtherance of marital rape, then it can take years to get the act criminalised. There is a need to criminalise the same because these steps are necessary to be taken so that the married woman can also use the law to address their grievances. Marital rape will only be criminalised when the distinction between rape and marital rape is understood.

Sensitisation of marital rape is the need of the hour. As a society, we are tremendously cultural and put traditions on a pedestal. This ceases the need of discussing about taboos. Turning a blind eye towards these taboos will not solve the problem itself; the problem still looms. Marital rape cannot be put in force until the very own citizens of the nation are familiar itself with the same. Even if marital rape becomes a crime, there would have to be a thorough explanation of the said act/statute. Awareness of marital rape would have to be made in order to achieve the zenith of justice. Various organisations have been committed towards the same but until the citizens do not bring the attention of the judiciary to how grave the issue already is, no big steps will be taken. Studies show that 70 per cent of women have experienced physical and/or sexual violence from an intimate partner in their

47 *Nimeshbhai Bharatbhai Desai v. State of Gujarat,* 2018 SCC OnLine Guj 732.

48 *Marital rape as ground for divorce: SC asks petitioner to approach Delhi HC,* BUSINESS STANDARD (Aug. 06, 2020, 02:00 P.M), https://www.business-standard.com/article/news-ani/marital-rape-as-ground-for-divorce-sc-asks-petitioner-to-approach-delhi-hc-119070100334_1.html.

lifetime.[49] This goes against the very thing our forefathers fought for- fundamental rights. Article 14 and Article 21 of the Indian Constitution talks about equality and freedom of life and liberty. India needs to take a decision on the furtherance of marital rape. In a land where goddesses are revered and worshipped, India can certainly not afford to stay silent on this issue any further. Doing so would be a gross miscarriage of justice.

49 World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, *Global and Regional Estimates of Violence against Women,* WORLD HEALTH ORGANISATION (Aug. 06, 2020, 02:30 PM), http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/.