

MARITAL RAPE

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“It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union.... Men, their rights and nothing more; women, their rights and nothing less.”

- Susan B. Anthony

“One is not born, but rather becomes, a woman.”

- Simone de Beauvoir

These empowering quotes may seem to speak volumes about the status of women in the world but the surface reality still evokes dampening sentiments in relation to the plight of married females. In this article, I have attempted to give an insight into the concept of marital rape and arguments in support of making it an offence under the penal laws.

Marital rape is rape within a marriage, where consent to sexual intercourse is not given. According to Wikipedia, which defines it rather succinctly, “Marital rape, also known as spousal rape, is non-consensual sex in which the perpetrator is the victim’s spouse. As such, it is a form of partner rape, of domestic violence, and of sexual abuse. Once widely condoned or ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalised. Still, in many countries, spousal rape either remains legal, or is illegal but widely tolerated and accepted as a spouse’s prerogative.”

In the same breath, it is pertinent to note that, though, rape by a stranger has been penalised in statute books, rape by a spouse has its boundaries blurred. Marital rape, usually, is an offshoot of an abusive, dysfunctional or failed marriage and more often than not has a long shelf-life.

According to the UN Population Fund, more than two-thirds of married women in India, aged 15 to 49, have been beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five has forced their wives or partner to have sex.

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The root of the generic term “rape” can be traced from the latin term “Raptus”, which literally means “to seize” and in Roman law, it was used to imply violent theft, in relation to both property and person. Since, historically, a woman was also considered a property, rape was synonymous with abduction and a woman’s abduction or sexual molestation, was merely the theft of a woman against the consent of her guardian or those who had lawful custody of her person. The injury, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries. Such was the appalling status of women. Not surprisingly, thus, married women were never the subject of rape laws. A legal immunity was bestowed upon husband in respect of his wife, sprouting solely and wholly by virtue of the marital cord.

The seeds of struggle to recognise rape as an offence were sown in the 19th century by the women’s rights movement. This movement was unique in the sense that, in that era, where even the mention of sex or sexuality in public was considered a taboo, this movement gave a determined and unwavering start to give women an equal voice in the matters of sexual activity, thereby controlling their body and fertility. At a time where women had no access to effective contraception, and where back alley abortions resulted often in the loss of maternal lives, this was a landmark stance to take. The movement gained impetus in the 1960s to criminalise marital rape, and with the spread and recognition of human rights around the globe, the right of a woman to consent to sexual intercourse even within a marriage, culminated in the December 1993 Declaration on the Elimination of Violence Against Women by the United Nations High Commissioner For Human Rights which states, “Increasing criminalisation of spousal rape is part of a worldwide reclassification of sexual crimes “from offenses against morality, the family, good customs, honour, or chastity... to offenses against liberty, self-determination, or physical integrity.”

Presently, more than hundred countries across the world have made marital rape, an offence against the fairer sex.

Shifting the focus from world to the domestic front, marital rape is not something that is yet discussed publicly in India. The existing social fabric requires that, a women, after her marriage, is not supposed to contemplate sexual autonomy. This harkens back to the patriarchal society

that governs much of India, where ‘virginity’, ‘chastity’ and ‘purity’ are concepts that are crucial to a family’s ‘honour.’

Despite amendments, law commission reports and new legislations, a bird's eye view of the protective options a married woman has, reveals that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

Section 375 of the Indian Penal Code, 1860, (post 2013-Criminal Law Amendment), in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds is said to be committed only if the wife is less than 12 years of age, but if she is between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

Isn't it ambiguous and devoid of logic? When the consenting legal age for marriage is 18, can the same law provide for the legal age of protecting from sexual abuse, only to those up to the age of 16? Beyond the age of 16, would the women be considered remediless?

To remove the statutory lacunae and to extend the legal cover, a Bill to amend the existing rape laws was passed by the Lok Sabha in April 2013. This replaced the Ordinance that was promulgated in February 2013.

By virtue of the Criminal Law Amendment, 2013, a number of changes were introduced in the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. These changes are based on the recommendations of the Justice Verma Committee Report of 2013. However, one of the Committee's key recommendations - that marital rape be criminalised, was not accepted by the cabinet.

In order to exclude marital rape from the ambit of law, three traditional justifications continue to be put forward.

The first justification was provided by Sir Matthew Hale (1609-1676), the former chief justice of England. The theory of Hale presumed that once a woman is married, the consent to sexual intercourse is automatically assumed in favour of the husband, which she cannot revoke.

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In substance, the contract of marriage is a licence to the husband to control her sexual autonomy in return for his “protection”. This “contractual theory” ties in with the second justification for the exemption - “the property theory”. As per this theory, a woman “belongs” to her father before marriage, and is her husband’s property thereafter. Since the owner of the property is empowered to use his property according to his own needs, the question of a husband raping his wife does not arise. The final justification of marital rape exemption is the “unification theory”. According to this theory, the wife forfeits her legal existence on getting married; consequently, her legal and individual identity merges with that of her husband’s. Since the wife is legally non-existent, it is not legally possible for a man to rape his wife.

The above stated three justifications make little noise, especially, in today's scenario. The reason being, the contemporary definitions of consent require a man to obtain the women's unequivocal voluntary consent to participate in the sexual acts. Further, the concept of “irrevocable consent” arose at a time when divorce was virtually impossible. With divorce laws recognising that marriage is itself revocable, it is difficult to justify “irrevocable consent” to sex within marriage contract. Additionally, the notion that a woman is a man's property, and that she does not have an independent legal identity has been decisively and overwhelmingly rejected.

However, the overhaul of the old archaic definitions gave room to the newer justifications for the exemption. These include; first, women will fabricate rape charges; second, a complaint of marital rape breaks the marital relationship; and third, the law provides other remedies which the wife can exercise.

With feminist jurisprudence germinating all over the world, of late, these justifications seem irrational at the very outset. If marital rape exemption is justified on the basis that a wife's complaint cannot often be believed, and consequently, a women raped by her husband is to be treated differently from another women raped by a man who is not her spouse, such differentiation does not have a rational basis and violates Article 14 of the Constitution, which guarantees equal protection of the laws to both the sexes. Further, if fabrication is actually a major concern, then safeguards should be provided against it rather than not criminalising marital rape.

The bond of marriage does not sustain merely on sex and the phobia of frivolous litigation should not be a hurdle in offering protection to those caught in abusive traps, especially in cases where the victims are denigrated to the status of chattel. It is true that when any law is passed, there are always apprehensions that it could be misused, but then that holds solid for every law enacted and passed, and inspite of that, these laws still exist because the positives outweigh the risks of potential misuse.

It is true that marriage presupposes consent; but it is also true that the said consent must be encapsulated within the fabric of an individual's autonomy over his or her body, irrespective of the gender. If non consensual sex is considered a crime out of marriage, the same treatment must be meted out to non consensual sex within a marriage. Eventually, it all boils down to the autonomy over one's body, which is a basic human right, regardless of marital status.

The umbrella protection of section 498-A of the Indian Penal Code, so far catered to counter the menace of cruelty towards women and protected them against "perverse sexual conduct by the husband". But, having said that, is there a parameter or standard of measure or interpretation for the courts, of 'perversion' with regard to the intimate spousal relations? Is excessive demand for sex "perverse"? Isn't consent a sine qua non for indulging in sexual intimacy? Is marriage really a license to rape? These pointers are still unresolved because the judiciary and the legislature have been silent on them.

The recent protection codified in the form of "The Domestic Violence Act, 2005" has also been a disappointment. The Act provides corresponding civil remedies to what the provision of cruelty under section 498-A IPC already gave, while keeping the issue of marital rape in abeyance and in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., ... mental, physical, or sexual. However, it condones sexual abuse in a domestic relationship of marriage or a live-in, if the same is not life threatening or grievously hurtful.

Another relevant provision is Section 122 of the Indian Evidence Act, 1872, which prevents communication during marriage from being

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disclosed in court by the parties. Since, marital rape is not an offence under the Indian penal laws, the evidence is inadmissible, although relevant, unless it is a prosecution for assault, or some related physical or mental abuse under the provision of cruelty. In effect, proving the offence of marital rape beyond reasonable doubt in court, by combining the provisions of the Domestic Violence Act, 2005 and the Indian Penal Code, 1860, will be a nearly an impossible task.

Issues in the marriage arise when it is unquestioningly accepted that a marital relationship is practically sacrosanct. A woman is expected to abide by the whims of the husband, especially sexual, and the marriage is supposed to thrive on mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.

To conclude, the words of **Melinda Gates** seem apposite in today's context-

“A woman with a voice is by definition a strong woman. But the search to find that voice can be remarkably difficult.”
