

“THE JURISPRUDENTIAL VIEW OF THE SOCIETY AND LAW ON MARITAL RAPE”

ADITI BHARDWAJ

PART-I

Historically it has been the duty of the wife of provide for all the needs of the husband. Men who “rape” their wife have been exempted from punishment by the law and society¹. Marital rape found its name in the legal premises with Sir Mathew Hale’s judgement who was the English chief judge. Sir hale laid down the field for marital rape stating that “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 up herself in this kind unto her husband, which she cannot retract”². As this judgement came from the English system it quickly spread into the English colonies and came to be known as the “Hale Doctrine”. After this Blackstone developed the “unities theory” in which he stated in Consistent with the Hale doctrine that man and wife become one entity when married and that “the legal existence of the wife is suspended during marriage”³. This doctrine at the outstate states that woman is the property of man and there can be no rape committed against the property of oneself. Suspending the rights of the woman against any violence committed by her husband let alone rape. Marriage as defined in any religions is an important institution for not only two people but for the society itself, but does it give right to a husband to force himself upon his wife. There are many theories reading the topic of marital rape. Most writers adapt the feminist theory. In feminist theory two main prospects are being defined “Patriarchal terrorism” and “license to rape,” to refer to the social control of Women by men. “Patriarchal terrorism,”⁵ as defined by Johnson (1995), refers to the methodical use of violence by men in an endless effort to control women. This theory suggests that the control that men show over their wives is a big stone while proving marital rape. The two concepts are related to each other as patriarchal terrorism leads to the licensing to rape. As defined by Finkelhor and Yllo (1988) there are two types of social coercion physical and non-physical: Physical coercion may include beating and harassing while non-physical may include reminding of wify-duties and threatening to hurt someone including himself. In contemporary

¹ Russell, D. (1990). *Rape in marriage*. Bloomington: Indiana University Press

² Hale, M. (1736). *Historia placitorum coronae: The history of the pleas of the crown*. London: Gyles, Woodward, and Davis.

³ Blackstone, W. (1765). *Commentaries on the law of England*. Oxford: Clarendon Press.

India marital rape exists only as a social violence but has no place in the legal arena. In the case *Nimesbbhai Bharatbbhai Desai vs State Of Gujarat* honourable justice J.B.Pariwala defined marital rape as “Marital rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife Where she is abused physically and sexually”⁴. Even though the courts around India accept the fact that marital rape does exist they are not able to make correct interpretation for the same. Section 375 of Indian penal code deals with rape and gives exceptions to the rape committed by a man but the fact that it does not highlight marriage in any provision is highlighting the fact that India does not treat it as a rape itself. According to the latest National Health and Family Survey (NFHS-4) for 2015-16, 5.4% women have experienced marital rape, under this category⁵. So according to the government marital rape does exist but laws for it does not. But we have gone far ahead let’s dive into the origin of mankind and sexually. The most famous and influential political theory of modern times is found in the writing of social contract theories⁶. These are theories that have explained the origin of our thinking and growth as humans. The story of the social contract is treated as an account of the creation of the public sphere of civil freedom⁷. The point we have to discuss is that women are not even individual when considered when we talk about the state then how should expect laws to made and respected. In natural condition ‘all men are born free’ and are equal to each other; they’re ‘individuals’, women are not party to the original contract through which men through which men transform their natural freedom into the security of civil freedom⁸. The intersection is at the idea that, in Locke'-s famous formulation, 'every Man has a Property in his own Person'; all individuals are owners, everyone owns the property in their capacities and attributes⁹. The house-father appears in the sacred books as lord of the wife, who owes him reverence and obedience; yet she is not reduced to patriarchal slavery¹⁰. The last line is added because she has the right over children; that means the woman is again reduced meagre reproduction machine and if they refuse to do so they are reminded of their wify duties. The constitution of state is such that women do not get the space to get rights. A German scholar declares that among all the races of antiquity "the constitution of the family was the basis and Prototype of the

⁴ *Nimesbbhai Bharatbbhai Desai vs State Of Gujarat*. R/CR.MA/26957/2017

⁵ Johnson, M. P. (1995). Patriarchal terrorism and common couple violence: Two forms of violence against women. *Journal of Marriage and the Family*, 57, 283–294

⁶ Pateman, C. (1988). *The sexual contract* (p. 1).

⁷ Pateman, C. (1988). *The sexual contract* (p. 3).

⁸ Patemen C. (1988). *The sexual contract* (p.6).

⁹ Patemen C. (1988). *The sexual contract* (p.13).

¹⁰ Howard, G. (1904). *A History of matrimonial institutions, chiefly in England and the United States, with an introductory analysis of the literature and the theories of primitive marriage and the family*, by George Elliott Howard, .. (p. 25). Chicago: Callaghan.

constitution of the state. The same theory is clearly set forth and the process of political expansion carefully described by Plato and also by Aristotle¹¹. If is able to defeat a woman in the state of nature and form a little body politic or a 'family', and if that 'family' is able to defend itself and grow, the conquered woman is subsumed under the status of 'servant'¹². Marriage is what Pufendorf calls 'an unequal league in which the wife owes the husband obedience and, in return, he protects her'¹³. So the story might run that, at first, women are able to ensure that sexual relations are consensual. When a woman becomes a mother and decides to raise her child, her position changes; she is put at a slight disadvantage against men, since now she has her infant to defend too. A man is then able to defeat the woman he had initially to treat with as an equal (so he obtains a 'family' (Pateman, 1988)¹⁴.women have no part in original contract, but they are not left behind in the state of nature- that would defeat the purpose of sexual contract. Women are in cooperated into a sphere that both is not in civil society. The private sphere is a part of the civil society and is not in civil society¹⁵. This is how equality was taken from women. The other problem is that women are not accepted in the public sphere that is why there problems are not heard. Men have historically dominated the political arena and therefore the law making process due to concepts such as "separate spheres," in which men dominated the political and public realms of life while women were restricted to the family and private spheres¹⁶. Locke who is considered as one the greatest philosophers states about women that 'it naturally falls to the man's share to govern over their 'common interest and property'¹⁷. This bounds the last right; the right to protest.

PART-II

Marital rape is more damaging than the rape where the abuser(s) and the victim is not connected emotionally to the abuser. Suffering at the hands of a spouse, who is usually a source of trust and care, produces feelings of betrayal, disillusionment, and isolation in the woman¹⁸. People who define marriage as a promise of sexual relationships often forget that sexual relationships are not the sole purpose of a marriage but when is power is misused it affects the whole marriage

¹¹ Plato, *Laws*, Book III, 680, 681; Jowett, *Dialogues*, IV, 209; *Aristotle, Politics*, Book I, 2 ff.: Jowett, I, 2 ff. These are followed by Cicero, *De Officiis*, I, 17

¹²Pateman, C. (1988). *The sexual contract* (p. 52)

¹³N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley, University of California Press, 1978), p. 9-10

¹⁷ Pateman, C. (1988). *The sexual contract* (p. 49)

¹⁵ Pateman, C. (1988). *The sexual contract*

¹⁶ Bennis, J. A., & Resick, P. A. (2003). *Marital rape: History, research, and practice. Trauma, Violence, and Abuse*, 4-246

¹⁷ Pateman, C. (1988). *The sexual contract*

¹⁸ Dobash, R., Finkelhor, D. and Yllo, K. (1986). License to Rape: Sexual Abuse of Wives. *Contemporary Sociology*, 15(4), pp.126 (supra note 1).

institution and not just the woman. The society is what creates the law but after the law is created, law is what governs the society. The law, in essence, refuses to acknowledge these women. The rationale is that if a husband is unable to legally rape his wife (within the definition of a law that includes a spousal exemption), marital rape cannot exist. Such a policy is contrary to modern attitudes toward marriage¹⁹. If we are talking about equality to be fair to everyone it would be wrong to come to a conclusion before listening to the arguments of the other side.

CULTURAL DOMINATION

Every person who lives in India is ruled by one culture or another in their daily lives which is often reflected in law. While the constraining power of legality is central to modern Western traditions, in India it is moral authority which is at the core of the rule of law²⁰. Marriage in India is kept as a sacred institution, criminalizing marital rape would mean intruding into the private sphere. The cultural value placed on the sanctity of marriage advances the argument that criminalizing marital rape would destroy the institution of marriage²¹. With this thought the private sphere again becomes unaccusable by the state, hence out of its hands. But this very idea has been demolished in by the supreme court of India. The Court further elaborated that if divorce and judicial separation are not seen as destroying the institution of marriage, the concept of marital rape certainly does not have the potential of destroying the institution of marriage²². The sanctity of marriage in India is still kept on the shoulders of sexual relations. Hence makes it the duty of the woman to involve in sexual relations with her husband.

MARRIAGE IS CONSENT.

The evergreen argument against the criminalization of marital rape is that marriage itself is implied consent to enter into sexual relations. Esteemed people in law like Sir Matthew Hale and Blackstone have defended marital rape to extend that they believe a woman to be cartel of her husband. This immunity was revoked in England and Wales in 1991, when Lord Keith communicated on behalf of the Court that modern marriage is a partnership of equals and the wife is no longer considered the subservient chattel of the husband²³. This implies the simple theory that woman is a human being who has her own circle of privacy and liberty which can't

¹⁹ Kaganas & Murray, *Rape in Marriage-Conjugal Right or Criminal Wrong?* 1983 ACTA JURIDICA 125, 127 (1983).

²⁰ Lingat (op. cit., 1973)

²¹ Independent Thought, 382 SCC at 57; Singh, supra note 51; Samarjit Pattnaik, et al., The Viewpoint: The law on Criminalisation of Marital Rape, BAR & BENCH (Dec. 27, 2017), <https://barandbench.com/viewpoint-criminalisation-marital-rape/> [<https://perma.cc/4BPCV44K>]. See generally Law Commission Of India, 172nd Report On Review Of Rape Laws (2000).

²² Independent Thought, 382 SCC at 57

²³ Independent Thought, 382 SCC at 45

be interjected even by her husband. Nonetheless, the argument that marriage implies consent is still used today in India to justify the marital rape exemption in the penal code as seen by the Law Commission of India's 172nd Report on Review of Rape Laws of 2000²⁴.

MISUSE BY WIVES

The most important and more connected argument to all as human beings is misuse of law. An example of such a situation is section 498A of the Indian Penal Code. Over the years, Section 498A has acquired the reputation of being the "most abused law in the history of Indian jurisprudence"²⁵. The Defenders of the marital rape exception purport that repealing the exception will allow wives to misuse the law and bring rape charges against their husbands to settle scores in unrelated quarrels²⁶. Contrary evidence is provided by the National Family Health Survey, which revealed that two out of every five women in India are victims of physical, sexual or emotional domestic violence²⁷. The point being that misuse of law can't be an excuse of not criminalizing a thing that is bugging the society. Giving this argument that criminalization of marital rape would lead to misuse literally means that we are prioritizing the future protection of men over the present abuse of women.

PART-III

In this part we shall analyse the why the state should make marital rape a criminal offence and what other solutions could arise for this situation. One of the biggest reason that marital rape should be punishable under Indian Penal Code is that it is in contravention with the constitution itself. Article 14 of the Constitution of India is an equal protection clause that guarantees equality before the law and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth²⁸. Article 15(3) allows the State to make special provisions for women and children²⁹. Article 21 of the Constitution establishes protection of life and personal liberty³⁰. With these articles we see that the state has powered itself to make laws against marital rape but won't make

²⁴ Law Commission Of India, *172nd Report On Review Of Rape Laws* (2000); Nigam, supra note 22, at 13.

²⁵ BBC News. (2020). *The woman who fights for men's rights*. [online] Available at: <https://www.bbc.com/news/world-asia-india-38647822> [Accessed 20 Jan. 2020].

²⁶ Mandal, supra note 22, at 257; see Nigam, supra note 22, at 1

²⁷ *Women to the Supreme Court: "We Are Not Liars," Protest Against Dilution of § 498A*, Invisible Lawyer (July 31, 2017), <http://www.lawyerscollective.org/the-invisiblelawyer/women-supreme-court-not-liars> [<https://perma.cc/57B2-T5CF>]; *Ministry Of Health And Family Welfare - Government Of India, Gender Equality And Women's Empowerment In India 95-96 (2009)*, available at http://rchiips.org/nfhs/a_subject_report_gender_for_website.pdf [<https://perma.cc/3T7F-T7LC>]; NIGAM, supra note 22, at 10.

²⁸ India Const., art. 14.

²⁹ India Const., art. 15(3); Independent Thought, 382 SCC at 4, 33, 114 (Supreme Court argues that the distinction between married and unmarried girl children violates the ethos of Article 15(3)).

³⁰ India Const., art. 21.

them the reasoning can be seen in various parts of Part I of this paper. Articles like equality before law does not only mean equal treatment but also equal protection which makes the state obliged to make laws against marital rape that is if they consider women as citizens who need protection. Additionally, the Supreme Court of India has interpreted Article 21 to encompass the right to good health under the right to life³¹. It is no surprise that rape causes not only physical effects on the victim but also mental effects that could last a lifetime. Under Independent Thought, where the Court struck down the marital rape exception for child brides, they also conceded that the traumatic consequences of rape affect adult victims as well³². To summarise the above the state has the power, the judiciary has understood the need and the law allows it to be done but still there is no near law coming against marital law. It is now not only a matter of social rights but fundamental rights that are not being fulfilled, for which the state came into existence. India has ratified the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)³³. Discrimination against women has been defined to include gender-based violence including acts that inflict physical, mental, or sexual harm³⁴. The words sexual harm is as wide as including sexual harm from the husband himself. While it remains no secret that every state has some particular domestic requirements that needs to be fulfilled by law. States consider that the translation of international commands into domestic legal standards is part and parcel of their sovereignty and are unwilling to surrender it to international control³⁵. Even though it is clear that the state does not have to bow to every international obligation but. It is clear that however effect is to be given domestically to treaty obligations, a State cannot invoke its internal law as justification for a failure to perform³⁶. Hence we can see that the that it’s not only the constitutional duty of the state to rub off the exception of marital rape from Indian Penal Code but also an international obligation to do so. Marital rape is not only an attack on the sexual freedom of woman but also

³¹ *CESC Ltd. v. Subhash Chandra*, (1992) SCR (India); Gupta & Gupta, supra note 110, at 28.

³² Independent Thought, 382 SCC at 43.

³³ Independent Thought, 382 SCC at 25-26; Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, in *Nat’l Human Rights Commission, India, A Handbook On International Human Rights Convention* 22-25 (2012), available at

http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf

[<https://perma.cc/A4VW-ZXQU>] [hereinafter *A Handbook On International Human Rights*]

³⁴ CEDAW, supra note 124, art. 1. CEDAW General Recommendation No. 19 (11th session, 1992), art. 6.

³⁵ Mendez, M. (2020). *The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts*. [online] Oxfordscholarship.com. Available at:

https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199606610.001.0001/acprof-9780199606610-chapter-2#ref_acprof-9780199606610-note-42 [Accessed 22 Jan. 2020].

³⁶ Treaties.un.org. (2020). *Article 27*. [online] Available at:

<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [Accessed 22 Jan. 2020].

to the right that is enshrined in our constitution namely the right to life. Specific guarantees to the right to life can be found in the ICCPT¹³⁵ and the UDHR. The combat of marital rape will start with the establishment of law and then after that the society shall follow. The first step being criminalization of marital law in the Indian penal code. The Code should affirmatively define marital rape as a criminal offense, which would also effectively prevent marriage from being used as a defence to rape claims³⁷. Law is made to punish and detect amoral and anti-social behaviour by allowing the exemption of marital rape in rape laws the law itself is putting it into the category of acceptable social behaviour. The next step being that if a lady does complain about marital rape the executive and the judiciary handle it sensitively. Gender-sensitive training needs to be mandated and provided to ensure proper treatment of victims and witnesses as well as efficient investigations and case-filings³⁸. Furthermore, the hostility portrayed by the judiciary in previous marital violence cases where the bench has consistently underplayed the seriousness of marital rape also needs to be challenged³⁹. Providing guidelines and introduction of a more gender diverse state shall help this situation. Lastly the whole stigma around the question of marital rape should be removed. The society needs to evolve from the thinking that marriage is determined by sexual relations only and hence the man has the right to it. Sexual relations are as much a part marital relations as trust and a feeling of security is. Another stigma that the society is the pressure of making marriages work which makes the complaining of not only marital rape but the other domestic violence that affects all the genders. Along with educating girls on their rights, it is imperative to involve and educate men and boys in the effort to combat marital rape as well as the overarching goal of attaining gender equality in India⁴⁰. Education is the only way in which the society can land in a better place.

³⁷ Randall & Venkatesh, supra note 118, at 194; WORLD HEALTH ORG., *Understanding And Addressing Violence Against Women*, supra note 118, at 7.

³⁸ Ram Kishor Deora & Mukul Krishna Vyas, *Marital Rape – A Blot on Socio-Legal Machinery*, 2 HUM. RTS. INT’L RES. J. 27, 31-32 (2014). Randall & Venkatesh, supra note 155, at 195-96.

³⁹ Mandal, supra note 22, at 257

⁴⁰ U.N. Population Fund, *A Year of Renewal* 28 (2014).
