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JURISPRUDENCE BEHIND THE CONCEPT OF MARITAL RAPE

Ayushi Srivastava¹

INTRODUCTION

Rape is defined as sexual intercourse by way of penetration, insertion and manipulation when there is lack of valid consent. Marital rape refers to rape committed when the perpetrator is the victim's husband. Part of the reason why such an issue is not addressed has a lot to do with the social structure. Marriage as an institution is considered sacred and vulnerable. For people opposing criminalization of marital rape, criminalization of marital rape equals disrupting the institution of marriage.

JURISPRUDENTIAL UNDERSTANDING

To understand whether marital rape should be criminalized or not, a probe into the historical, moral, and cultural basis should be done which gives a better picture of where the understanding of marital rape stems from. These theories and conceptions are majorly societal and have been dictating every person's ideas surrounding the concept.

a. SOCIAL CONSTRUCTIONISM THEORY

The social constructionism theory brings in a cultural subjectivity to the roles that we believe in. Humans are social beings and perceive human potential as determined by society. Social constructionism is sensitive to changes generating new forms of practices and behaviors. It relies on human perspective and knowledge that does not exist but is rather constructed by society.

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These constructions with regards to marriage are orchestrated with a patriarchal perspective and are usually shaped as per the interest of people with power in society. When it comes to marriage we fail to recognize the agency of a woman, we consider her a dependent *prima facie* like an underage child or a slave, and could not own property in her own name or control her own earnings, except under very specific circumstances. In the common law system she was termed to be a *feme covert*. This understanding became so staunch that the laws interpreted in this regard considered women to be in subjugation to their husbands after marriage. This interpretation of lack of an agency presumed them to be consenting to any act, overt or covert. Hence the right to sexual violence in marriage was also garnered through the same understanding. It is a fair argument to place that only women cannot be put in the bracket of a victim for acts amounting to marital rape but if we, from a historical social perspective study the condition of both the genders we will realize that men held the positions in power and women were understood to be only care-givers. This understanding has affected the way people conceptualize rape.² Through these lenses, marital rape was considered an offence of a lesser degree as compared to rape. Some even considered that rape in a marriage is not rape at all.

b. DOCTRINE OF COVERTURE

Social constructionism is also supported by the western idea of the doctrine of coverture which exists in the legal fiction that, “*the husband and wife merge their identities upon marriage and become ipso facto one individual in the eyes of law.*”³ The identity of the wife is embraced within the identity of the husband. The doctrine is premised on viewing *women as chattel*, as a property of the dominant male member in the

² Mark A. Small, & Pat A. Tetreault, *Social psychology, ‘marital rape exemptions’, and privacy*, Behavioral Sciences & the Law, 8, 141–149 (1990).

³ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769), chapter 15, Of husband and wife, Lonang Institute.

family.⁴ The understanding that a woman either belongs to the father or to the husband, lacks recognition of any sort of autonomy or agency. The conceptualization of women being treated as property persists due to the assumption that women are always in need of protection and they cannot protect themselves and so the men in the family have to step up as the women are incapable.⁵ Hence, the law of rape emerged for protecting the essential property interests of the dominant male.⁶ Rape laws did not flow from the dignity of the victim but the social value attributed to her sexual status, given that the sexuality was essential property which needed to be defended at any cost. A husband owned the woman and her chastity and for that reason was incapable of raping his own wife.

c. THEORY OF IMPLIED CONSENT

The theory of implied consent brings forward the assertion that marriage is a social contract⁷ in pursuance of which woman willingly submits her autonomy in exchange for protection. This understanding stems from the social constructions that a woman is incapable of protecting herself and hence she is asked to marry and submit her consent. There is an assumed understanding that the wife stands in subjugation in a marital relationship. This goes against the contemporary notion of marriage which entails that a marital

⁴ Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43, Cleveland State Law Review 351, 356-57 (1995); Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law* 48 American Criminal Law Review 1819, 1826 (2011).

⁵ Sarah Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims* 35 Rutgers Law Journal 305, 311 (2003); Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 Michigan Journal of Gender and Law 89, 105 (2015).

⁶ Sandra Ryder and Sheryl Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 John Marshall Law Review 393, 399 (1991).

⁷ Sir Matthew Hale in his *History of the Pleas of the Crown* (1736), "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract," cited in Catharine MacKinnon, *Rape Redefined* 10 Harvard Law and Policy Review 431, 444 (2016).

relationship is a union between equals. The understanding of a matrimonial alliance being premised on the patriarchal notions where the male counterpart is treated superior due to his unique status as provider and protector is flawed. Furthermore, the purpose of the social contract as understood in theory is to protect oneself from third parties, and not from the *determinate superior*.⁸ A social contract provides no escape when the superior himself becomes the oppressor. Such a setting of matrimonial alliance ensures that the wife is completely at the mercy of the husband and loses the greater sense of safety and security.⁹

The implied consent theory treats sexual relations as a fundamental factor in married life ensuring subjugation of women in sexual relations. Through this understanding, it can be said that centrality of a married life lies in sex.¹⁰ This has resulted in debates revolving around sexual autonomy, rather than autonomy in general.¹¹ This implies selective consent where discretion in selection is not of the woman. This emanates from a convenient understanding of the social contract theory.

d. THE SEX-ROLE SOCIALIZATION THEORY

As a result of developmental processes, particular gender roles are solidified over the years through social interactions. Women are usually corrected and asked to adjust in accordance with the men in the family as they are supposed to exert dominance in the family structures. Women are taught to be careful and conscious as it would not please the men in the family otherwise. In a marriage, a wife's role is supposed

⁸ Katherine O'Donovan, *Consent to Marital Rape: Common Law Oxymoron*, 2 Cardozo Women's Law Journal 91, 97-98 (1995).

⁹ *Id.*

¹⁰ Sandra Ryder and Sheryl Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 John Marshall Law Review 393, 399 (1991).

¹¹ *Id.*

to be submissive and passively working in the background while the husband's are supposed to be dominating and exerting presence. Marital rape is considered to be an extreme version of sex-role socialization conceptualized as a wifely duty even if it is something that the wife doesn't want. These roles are made to realize through values, beliefs, traditions, customs, and behaviours having been passed down as an obligation from one generation to another. People are made to realize their social roles through simple conversations and gestures. Cases of sexual violence are ignored and women are supposed to adjust somehow. Women are usually told to cover up, dress a particular way quoting that the aggressive tendencies of men cannot be controlled. In a marriage this understanding becomes apparent as any abusive behaviour by the husband is excused for it is the woman who should ignore, adjust, compromise in the name of wifely duties. Sex-role socialization fosters rape-supportive beliefs in both men and women.¹² It makes the men feel entitled to such behaviours whereas women are left to blame their destiny. When women raise their voices, it disrupts the system making everyone feel uncomfortable and is usually brushed off as a personal matter. The collective behaves like a patriarchal monarch.¹³

e. FEMINIST THEORY

Women have been considered to be working in the background all along. Feminist studies of the law have long held that social and economic inequalities of women (and between women) are not simply the outcome of an unruly society that does not respect the rule of law. Instead, they are created, sustained, and enforced by legal structures

¹² M. Monson & J. Langhinrichsen-Rohling, *Sexual and nonsexual marital aggression: Legal considerations, epidemiology, and an integrated typology of perpetrators. Aggression and Violent Behavior*, 3 369–389 (1998).

¹³ Shakti Vahini v. Union of India and others, (2018) 7 SCC 192.

and design.¹⁴ The rape law has historically served to excuse male sexual aggression as desire, while disgracing women for their real or perceived sexuality.¹⁵ The sexuality of a woman is cloistered within her marriage for it is capable of disturbing the patriarchal setup and upsetting the system which works on the convenience of men. Feminists have challenged the myth that rape in a marriage is rare and exceptional. The marital rape exemption¹⁶ under the Indian penal code, 1860 asserts that law was designed to control exclusive sexual access by men over their wives in whichever way suitable to them since consent in such a case does not matter. There is abhorrence to the unrestricted sexual use of a woman's body in a marriage. The abusive marital arrangement at one point becomes nothing but a means to exploit the spouse's body. This understanding irrevocably breaks everything that a marital relationship stands for. There are various protections guaranteed to women in the constitution¹⁷ and various gender specific statutes but the condition more or less has remained the same. The fight against sexual harassment, acid attacks, domestic violence, dowry deaths, and honour killings still continues. It is believed that these issues can be resolved only when the outlook towards women will change since these crimes are tools of dominance that have emerged from a twisted understanding of gender roles which are created and effectively passed on from one generation to another.

CONCLUSION

India being a predominantly patriarchal society has through various inert ways tried to institutionally belittle the role and contribution of women. Non-criminalization of marital rape reeks of misogyny and prejudice. The modern day understanding of marriage is the

¹⁴ MADHU MEHRA, THE RAPE LAW AND CONSTRUCTIONS OF SEXUALITY (2018), at p. 14.

¹⁵ *Id.* at p. 7.

¹⁶ § 375 (exception 2), The Indian Penal Code 1860.

¹⁷ Article 15(3), The Constitution of India, 1950.

relationship of equals where the woman entering into the matrimony does not subjugate herself or give irrevocable consent to sexual intercourse in all circumstances.

Law plays a very important role in bringing about the required transformation which is why both societal morality and constitutional morality should be in sync with each other. The decisions guided by social morality should also be seen through the lenses of constitutional morality since social morality changes from age to age and law accordingly copes up and results in changes taking place. In the same way, this idea that women are chattels is changed by the courts through judicial pronouncements, now a woman is no longer the chattel—antiquated practice labeled her to be. The understanding that marital rape is no rape creates an unreasonable distinction between married and unmarried women based on their marital status. In the latest Delhi High Court judgment of *RIT Foundation vs. Union of India*¹⁸, Hon'ble Mr. Rajiv Sakhder Justice says that the impugned provision of marital rape conveys that, “*forced sex outside marriage is “real sex” and that the same act within marriage is anything else but rape.*”¹⁹ Under these conditions, the protection given to forced sex within marriage destroys the agency of a woman. Important question that needs to be asked is can the social contract of marriage assume consent to criminal acts.

¹⁸ RIT Foundation v. Union of India, writ petition (C) no. 284 of 2015.

¹⁹ *Id.*, para 137.1, page no. 106.