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MARITAL RAPE AND NECROPHILIA: THE TWO SHADES OF GREY IN LAW

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ABSTRACT

We classify things as right or wrong for every situation, as if life can so easily be painted in black or white, when it is in shades of grey. While there exists a grey area in every field, two such areas in law that raise ambiguity and makes us question our own beliefs are Marital rape and Necrophilia. Both remain independent legal issues with one thing in common that keeps them intertwined-rape. This article is an attempt to briefly cover on these two co-existing issues in the field of law along with possible legislations that could be used to address them in India. While this article is being written by a woman, these issues will be covered from the perceptive of both sexes to keep the article just and be dealt with sensibility rather than sensitivity. We'll look at the concept of marital rape and Necrophilia independently before dwelling into them jointly.

Keywords: Reformative; Fresh; Reflective; Well-searched; Professional.

MARITAL RAPE

Marital rape is understood as rape committed by legally wedded spouse, or, during marriage. This can be committed by both a wife or a husband.

While rape is considered a criminal offense universally (as to whether rape is committed upon legally wedded spouse is a criminal offence or not), when considered between a married couple. Even if it was considered as an offense between husband and a wife, will it be treated with same gravity or would the act of marriage act as a conclusive defense to brush it off? To understand this, let's look at who can commit the offense of rape, the definition of marriage and consent.

As per legal definition, rape is defined as a forceful penetration of the penis to any extent, into the vagina, mouth, urethra, or anus of a woman/inserts any object or any part of his body other than the penis into the vagina, urethra or anus of a woman or makes her do so with him or any other

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person². Law defines rape as an act of penetration. Thus, rape can be committed by both a man and a woman on each other.

Marriage is the sacred union between two people as witnessed by history. It opens doors to a lifelong of companionship, love, care, understanding, respect, shared responsibilities, friendship, pleasure etc.

Consent is the willingness of an individual to participate in an activity.

The Indian law doesn't identify the concept of Marital rape because it believes rape cannot occur in the relationship of marriage. Logically, when forced penetration occurs, it is rape, thus; when the same forced applies in the relationship of marriage, it is a marital rape. When a husband and wife have coitus, the concept of consent is blurred due to marriage. This is commonly misinterpreted as any married couple indulging in sexual intercourse due to mutual consent for shared love and pleasure.

However, that may not always be the case. There can always exist a possibility where the husband or wife may not want to indulge into intimacy at the same time as the other. At such times, using force directly amounts to marital rape by the husband or wife.

Then why is it that the courts deny the concept of marital rape? This could possibly be because it is believed that marriage leads to irrevocable consent to sex³. In India, the Gujarat High Court in *Nimeshbhai Bharatbhai Desai v. State of Gujarat* (2018) noted that, “The current legal position is that, by marriage, a woman gives ‘irrevocable consent’ to her husband to have sex with her any time he demands it.” However, the Supreme Court criticized this notion stating that, “It’s time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”

The courts have earlier argued that, “Criminalizing marital rape would disrupt the institution of marriage⁴.” Additionally, the Hindu Marriage Act, 1955, section 12(1)(a) gives ground to nullifying

² Section 63, *Bhartiya Nyaya Sanhita*, 2023

³ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018, HC

⁴ *Union of India, Counter-Affidavit in WP(C) No. 1022/2019, SC*, October 2024

marriage (annulment) on the ground of lack of or no sexual intercourse or an alternative ground for divorce under “cruelty” in section 13(1) (ia)⁵. This makes sex under marriage an obligation for the partner to fulfill marital expectations and thus rape in marriage an acceptance rather than an offense. The Delhi High Court, in the split verdict of RTI Foundation v. UOI (2022), stated that, “There are multiple legislations existing for the protection of women outside of marriage which are largely being misused by them as it is such as the Domestic Violence Act, 2005, a civil remedy to protect victims of marital rape⁶. However, criminalizing marital rape would be an invitation to misuse the law further into the relationship of marriage compromising familial dynamics and multigenerational nature of Indian families.”

LEGISLATIONS

1. The Indian Penal Code⁷: Section 375 of the IPC excludes non-consensual sexual intercourse by a husband with his wife aged above 18 from definition of rape. It explicitly protects women from offenses under sections of sexual harassment, outraging modesty of a woman, rape etc.
2. Protection of Children from Sexual Offenses Act⁸: This Act provides an exception to the previous legislation by protecting minor girls (below age 18) from marital rape⁹.
3. The Hindu Marriage Act: Section 13(1) (ia) of the Hindu Marriage Act, grounds for divorce, cruelty, provides for a wide definition covering emotional, mental, and physical cruelty under which marital rape can be interpreted. While a divorce may be granted on this ground, the husband won't face any criminal charges for an equally heinous offense of rape.

⁵ Hindu Marriage Act, 1955

⁶ RTI Foundation v. UOI, 2022

⁷ The Indian Penal Code, 1860

⁸ Protection of Children from Sexual Offenses, 2012

⁹ Independent Thought v. UOI, 2017

4. Protection of Women from Sexual Offenses in Workplace Act¹⁰: Also known as the POSH Act, this legislation protects women and children from sexual exploitation in places of work.
5. The Immoral Traffic (Prevention) Act¹¹: was enacted to prevent trafficking and sexual exploitation of women for commercial purposes in India.
6. Dowry Prohibition Act¹²: prohibits giving, taking, or demanding for dowry in connection to marriage.
7. Indecent Representation of Women (Prohibition) Act¹³: prohibits indecent representation of women through advertisements, publications, writings, paintings, figures or in any other manner to safeguard the dignity of women in society.
8. Bhartiya Nyaya Sanhita¹⁴: replacing the IPC, covers offenses against women in various sections such as outraging a woman's modesty, voyeurism etc.
9. National Commission for Women Act¹⁵: established to review for safeguards, address grievances, policies etc. for women.
10. The Domestic Violence Act¹⁶: provides for protection and redressals to women subjected to violence, emotional, mental, physical, sexual, economic abuse, or exploitation etc.

While there exist multiple legislations to protect women from various offenses, it is important to understand that these legislations fail to address the issue of marital rape. These acts were made due to the hike in criminal rates against women. Additionally, while there are end number of laws for protection of women from offenses, men don't have the same legal remedy. It remains true that women misuse the stringent laws made for their protection against men and this should be strictly regulated by enforcement authorities. However, certain population of women misusing the law, should not become a legal defense to not make a legislation to deal with marital rape at all. This is not necessary only for the protection of women but men as well.

¹⁰ Protection of Women from Sexual Offenses at Workplace (Prevention, Protection and Redressal) Act, 2013

¹¹ The Immoral Traffic (Prevention) Act, 1956

¹² The Dowry Prohibition Act, 1961

¹³ The Indecent Representation of Women (Prohibition) Act, 1986

¹⁴ The Bhartiya Nyaya Sanhita, 2024

¹⁵ National Commission for Women Act, 1990

¹⁶ Protection of Women from Domestic Violence Act, 2005

There exist alternative legislations such as the Domestic Violence Act to protect women in marriages, however they fall short in addressing the issue completely. This is because the act only provides for civil remedies, not recognizing marital rape as a criminal offense when rape is a classic case of crime. This means that the offenders don't get imprisoned or face criminal charges and pay only compensation for the offense of rape. Additionally, Section 3 of the DV Act includes sexual offenses that are only of grievous hurt or life threatening in nature. This means that victims of non-violent or manipulative marital rape situations are out of the scope of even civil remedies. What use are these many legislations for women if they can't do any good to prevent one of the most prevalent offenses today- marital rape. It is as good as not having any legislations to protect bodily autonomy for men.

Not recognizing marital rape as a criminal offense acts as the first step to normalize rape in a particular situation. This would give a free way to the offenders to commit rape on their spouses and get away with it without any criminal repercussions while giving them the opportunity to misuse the situation too. This could tarnish the institution of marriage as well.

SOLUTION

Marriage is supposed to be a holy sacrament. Both men and women must feel safe in their marital relationship. The first step is acceptance. The law must accept marital rape to be a criminal offense for both men and women. The nature of something as heinous as rape must not change due to the circumstance of marriage. Secondly, remains the issue of proving consent behind closed doors between a couple. Once the courts figure a way to pave through this issue, a balanced legislation must be drafted that regulates the act strictly to prevent marital rape, protect the law being misused and ultimately the institution of marriage.

NECROPHILIA

Necrophilia refers to sexual attraction to a corpse leading to sexual acts. In simple and brutal words, it refers to raping the dead. This could be due to attraction post death, or due to a psychological disorder. Thus, this like marital rape, can be performed by both men and women. A man can rape another man or women's corpse via penis or any other object or a women can penetrate another women or man's corpse via an extended object such as a rod.

The concept of Necrophilia is more vague than marital rape since victims subjected to rape are already dead, making the allegation of rape with the corpse more challenging to report. The courts do not recognize rape post death as a criminal offense of rape, instead view it as necrophilia because rape as per definition by law can only occur between two people who are alive¹⁷. The Karnataka High Court in case of Rangaraju @ Vajapeyi v. State of Karnataka quoted that, “Sexual intercourse with a corpse does not constitute to rape under Indian Law, as rape in section 375 of the IPC can only occur between two living individuals.” The court further said that, “A dead body is not considered as a ‘person’ under the relevant sections under the IPC; thus, the act committed on a corpse cannot be prosecuted for rape instead such acts are classified as necrophilia which is not recognized as an offense under the Indian law.” This judgment was recently upheld by the Supreme Court as of February 2025, affirming Karnataka High Court’s decision to not recognize necrophilia as an offense and that rape or natural offenses cannot be invoked against a deceased person.

Additionally, it is believed that necrophilia is more of a psychological condition arising from fear of rejection, desire for non-resisting partner, separation anxieties etc. Under section 84 of the IPC, insanity applies only if at the time of the act the person was incapable of knowing the nature of the act¹⁸. This gives an opportunity to classify necrophilia under insanity or unsound behavior. Under section 22 of the BNS, if a person guilty of an act is proven to be insane or unsound then they may be acquitted of criminal responsibility if they meet the requirements of the given section. Meaning, even if a person is proven guilty of raping a corpse, the offender may not necessarily be punished. Instead, be detained for counselling or mental treatment.

The fact that a human cannot be safe even post death from sexual crimes against their body is horrifying, irrelevant of the sanity of the predator. The court not recognizing a dead individual as a person raises questions of morality. Should the dead not be treated equally as the living? Does a corpse become so mere that it lacks any integrity and dignity?

While there are no legislations for the dead, there can be amendments made in the existing laws.

¹⁷ Rangaraju @ Vajapeyi v. State of Karnataka, 2023

¹⁸ The Indian Penal Code 1860

LEGISLATIONS & SOLUTIONS

1. The Indian Penal Code: Section 375 of IPC defines rape to occur between two living people only. This definition can be extended to the dead as well including necrophilia as a criminal offense. Additionally, under section 377 of the IPC, necrophilia can be classified under unnatural sex due to its unnatural nature of sexual attraction and intercourse with a corpse.
2. New Legislations: New legislations can be made only to deal with offenses against corpses. Law has dealt with questions of morality in a similar nature while dealing with cases of abortion. The Medical Termination of Pregnancy Act, permits abortion under certain categories inclusive of rape¹⁹. If the rights of an unborn baby are meaningful, certainly the rights of an individual post death can be valuable as well. The two situations are different but what remains the same is the recognition of an individual who hasn't lived yet v. non-recognition of someone who has. In the end, both are corpses. If the corpse of the unborn are considered in cases of rape for abortion, so should the corpse of the dead in cases of rape in Necrophilia.

If Necrophilia is not accepted as a criminal offense, the offenders rather than raping and murdering the victim, could murder and then rape them, getting the liberty to only be charged for murder and be free from the allegation of rape.

MARITAL RAPE AND NECROPHILIA

Not recognizing rape in a marriage and after death could slowly get it normalized. It is important to understand that it is the same heinous crime in two different situations. Providing no legal provisions for it would continue to keep them swinging in the grey horizon of law which would ultimately provide a free way to offenders to commit acts of such unacceptable nature without having to face any consequences for it.

¹⁹ Medical Termination of Pregnancy Act, 1971

CONCLUSION

While, both marital rape and necrophilia are an ambiguous area in the field of law, not addressing them means being ignorant of two different forms of rapes. It is important to understand that both issues are of the same crime in different modes. Variation of circumstances doesn't change the foundation of the offense. We live in a society that is dynamic and thus constantly changing. Therefore, it is important to ensure that the laws made to regulate with this evolving society must constantly be amended as well. The nature of crimes is evolving and the current laws not being able to address them, let alone not accepting them as an ongoing issue is a huge loophole in the grey area of law.